1929.

Present : **Dalton and Akbar JJ.**

GRINGER *v.* THE EASTERN GARAGE, LTD.

439—*D. C. Colombo*, 26,503.

Contract of service—Engagement of services for three years—Sufficient notice—Damages in lieu of notice—Assessment of damage.

The plaintiff was engaged by the defendant (Eastern Garage, Ltd.) on a three-year agreement as general assistant from January 1, 1927. The defendant company by letter dated October 31, 1927, terminated his employment as from November 30, 1927.

Held (in an action to recover damages for wrongful dismissal), that the plaintiff was entitled to claim his salary till the end of June, 1928, in lieu of notice.

In assessing damages any sum of money actually earned during the currency of the period during which he was entitled to be paid must be deducted. It is the duty of the employee to do all that is reasonable to reduce the amount of the damage he suffered.

THIS was an action brought by the plaintiff to recover damages for wrongful dismissal against the Eastern Garage Co., Ltd. The plaintiff had been engaged by the defendant company on a three-year agreement to work as general assistant in the company's work shops from January 1, 1927, upon a salary of Rs. 500 per mensem for the first year, Rs. 550 for the second year, and Rs. 600 for the third year. By letter dated October 31, 1927, the company terminated his employment as from November 30, 1927. The learned District Judge awarded plaintiff the sum of Rs. 5,550 as damages.

H. V. Perera, for defendant, appellant.

H. H. Bartholomeusz (with him *J. R. V. Ferdinands*), for plaintiff, respondent.

July 11, 1929. DALTON J.—

The plaintiff has been awarded the sum of Rs. 5,550 (less Rs. 251·69 due by him to defendant company) as damages for wrongful dismissal. He had been engaged by the company on a three-year agreement to work as general assistant in the company's workshop, from January 1, 1927. The salary agreed upon was Rs. 500 for the first year, Rs. 550 for the second year, and Rs. 600 for the third year. The company by letter dated October 31, 1927, terminated his employment as from November 30, 1927. The agreement is contained in the letters produced and there is no provision for the termination of the employment by notice on either side. It was urged for the company that plaintiff was a monthly paid servant and that his services could be discontinued at a month's notice. Upon the evidence, however, I entirely agree with the trial Judge's finding that plaintiff was definitely engaged upon a three-year agreement. There was no provision in the agreement for the termination of the contract upon any specified notice. His services were dispensed with owing to the re-organization of the staff. The charge in the defence and issues that he was dismissed for incompetence should never have been made, having regard to the evidence led, and it fully deserved the strictures

1 (1927) 29 *N. L. R.* 225.

passed upon it by the trial Judge. It was properly dropped by counsel after plaintiff had given his evidence.

The real question arising upon this appeal is that of the measure of damages. The trial Judge has assessed these damages upon the footing that plaintiff is entitled to be paid by the company what he would have received from them upon the salary agreed upon for the whole term of the three years, less any sum he earned or might earn from December 1, 1927, to December 31, 1929. Upon this basis, he says, the total damages up to December 31, 1929, amount to Rs. 5,550 ; the question of the chances of survival to that date do not seem to enter into these calculations.

If the evidence be examined, it is clear from what plaintiff himself says that at any rate at one time he would have been satisfied with six months' notice. He says he wanted reasonable notice. That he placed at six months. " If he offered me six months' notice it would have been sufficient." This he varied later in his evidence, for after saying again that in the circumstances six months might be reasonable, he adds : " I do not think six months' notice was reasonable " and " if I had been offered six months' notice, I would not have accepted it. At that time I would have considered twelve months' notice reasonable." This again he alters later, possibly realizing that his claim was for Rs. 10,000, and he says : "I would not have considered twelve months' notice sufficient as I had to save up money for two passages for my return home." His witnesses, Messrs. Harding and Burgess, confirm him in the first part of his evidence in the conclusion that reasonable notice in such a case as this would be more like six months than the periods he subsequently mentions. The authorities go to show that in such a case as this what the Court has to decide is what is reasonable notice. That again must depend upon the circumstances of each case. It is true, as set out in the authority cited in course of the argument, *Nixon v. Blaine & Co.*,[1] that the principles of law which regulate the letting of one's services are substantially the same as those which regulate the letting of one's property, while on the question of damages Roman law, Roman-Dutch law, and English law all seem to be agreed. The question of damages is a question of fact, and the damages are the loss that has been actually sustained. Any sum that has been actually earned after dismissal during the currency of the time that he was entitled to be paid must be deducted.

In *Beckham v. Drake and another*,[2] where there was an engagement for a period of seven years between a foreman and the owners of a typefounders business, Erle J. sets out the law on this point in the following terms :—

> " The measure of damages for the breach now in question is obtained by considering what is the usual rate of wages for the employment here contracted for and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place . . . . . and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find other employment."

The immediate question arising in that case for the opinion of the Judges was whether the right of action in respect of the breach of the agreement passed to the assignees of the employee, who had become bankrupt. The opinion of Erle J. set out above is therefore *obiter*. It has however been approved of in *Emmens v. Elderton* [3].

What loss does the evidence show that plaintiff has sustained ? The calculations are set out in detail in the judgment of

[1] (1879) *Buchanan* 217.
[2] (1849) 2 *H. L. C.* 579.
[3] (1852) 4 *H. L. C.* 624 *at p.* 645.

the Court below. Plaintiff left the defendant company's service on November 30. He was not bound in my opinion to accept their offer to stay on any longer on the indefinite terms suggested. He was out of employment from December 1, 1927, to January 16, 1928. For December and half of January he lost Rs. 775. From January 16 to May 31 he obtained work at Rs. 500 a month. During that time, defendant company would have had to pay him Rs. 550 a month. He therefore lost in this time Rs. 225. He could not obtain employment in June and lost Rs. 550. From July 1 he set up business on his own, opening some motor coach works. There were undoubted risks in thus starting his own business, risks which might well be counterbalanced by subsequent success. The plaintiff's job book shows that his venture was not unsuccessful and he had the added advantage of being his own master. I am unable to agree, however, that any deficiency between what he earned in the first months of his new venture and what he would have obtained had he continued as an employee at Rs. 550 can be said to be damages flowing from the breach of contract by the defendant company. He chose no longer to seek employment as before but preferred to start his own business, after a considerable interval of time. I do not think he can recover damages under the circumstances after June 30, 1928. I would also be prepared to hold under the circumstances that a reasonable time for notice expired on June 30. In that case he was entitled to damages in the sum of Rs. 1,550, less the sum of Rs. 251·69 admitted to be due by him to the defendant company.

It has been suggested that other matters may be taken into consideration in estimating damages for breach of contract such as this, but authority is to the contrary. The manner of dismissal, injured feelings, difficulty of finding employment due to the dismissal, cannot be made use of to augment the damages (*Addis v. Gramophone Co., Ltd.*[1]). It is pointed out there that in many cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence which would sustain an action of tort as an alternative remedy to an action of breach of contract, but if a person choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action. Further, in estimating damages, if it be the fault of the employee that he has suffered any loss, that fact must also be taken into consideration (*Brace v. Calder*[2]). This case was approved and followed in South Africa (*Isaacson v. Walsh & Walsh*[3]). It is the duty of the employee to do all that is reasonable to reduce the amount of the damages he suffers.

For the above reasons I have come to the conclusion that the trial Judge was wrong in assessing as part of the damages sustained by plaintiff any loss he incurred in the business he started in July, 1928. He has shown that he is entitled to the sum of Rs. 1,550 less the amount of the claim in reconvention. I would therefore vary the decree by entering judgment for plaintiff for that sum, together with costs as allowed by the trial Judge. The appeal is allowed to that extent.

Under all the circumstances, as the defendant company has only partly succeeded in respect of the appeal each party will pay their own costs of the appeal.

AKBAR J.—

The plaintiff sued the defendant in this case for the sum of Rs. 10,000 as damages by reason of a breach of contract by the defendant to employ the plaintiff as an Assistant Motor Engineer in the defendant's garage for 3 years.

After trial the District Judge delivered judgment awarding the plaintiff by way of damages a sum of Rs. 5,550 less a sum of Rs. 251·69 and costs.

[1] (1909) *A. C.* 488. [2] (1895) 2 *Q. B.* 253.
[3] 20 *S. C.* 569.

The defendant, in his answer, pleaded that the plaintiff was only a monthly-paid servant and that he was entitled to give one month's notice to discontinue plaintiff's services.

The following issues were framed :—

(1) Did the defendant company employ the plaintiff on the agreement set out in paragraph 2 of the plaint or on a monthly basis ?

(2) Did the plaintiff agree to the agreement to terminate the plaintiff's services ?

(3) If so what damages is the plaintiff entitled to ?

(4) Was the defendant entitled to terminate the plaintiff's services by giving him a month's notice ?

(5) If not, what damages is plaintiff entitled to ?

(6) Was the plaintiff unfit to carry out his duties and was he incompetent and unable to co-operate with the other workmen ?

(7) In any event, was the dismissal justified ?

As regards defendant's contention that the plaintiff was engaged on a monthly basis, this is negatived by the letters P 2 and P 3 produced in this case. The terms of the letters show, to my mind, that the plaintiff entered defendant's services on a contract that he was to be employed for 3 years. P 2 as a matter of fact details the salary that the plaintiff was to get, namely, 1st year Rs. 500 per month, 2nd year Rs. 550 per month, and Rs. 600 per month in the 3rd year.

These letters P 2 and P 3 show that there was a complete contract in spite of the fact stated in the letter that the firm " will give you a three years' agreement as discussed ". The obligation to give such an agreement was on the defendant, and, until such an agreement was drawn up, the contract in this case must be governed by the letters P 2 and P 3. As a matter of fact, argument on this point was not pressed by the appellant's counsel.

The plaintiff's story is that on October 31, 1927, he received letter P 4 which is as follows :—" As we are reorganizing our staff and changes are likely to be made, we have to give you notice that under the present conditions your services are not required after the end of November. If we can put any proposals before you during the current month we will do so." It will be seen from issue 6 that the defendant actually raised a plea in his answer that he was justified in dismissing the plaintiff as he was found to be inefficient and incompetent, but this plea was abandoned during the earlier stages of the case. The only substantial issue, in this case, therefore, is the question of damages. What the District Judge purported to do was to reckon up the full salary which the plaintiff was entitled under the contract after his dismissal and then to deduct from that sum (*a*) the amount made by plaintiff during this term when he was employed temporarily at Hutsons for 4 months from January 16, 1928, till May 31, 1928, on a salary of Rs. 500 per month and (*b*) the profits that he made when he started a new business of his own accord on July 1, 1928.

The plaintiff's evidence shows that after he left Hutsons on May 31, being unable to find any employment he started a business of his own known as the Coach Painting Works on July 1, 1928.

I think the basis on which the District Judge awarded the damages is wrong. The contract, no doubt, was for three years and the plaintiff had a cause of action to sue for damages for a breach of this contract. In estimating the damages to which a person is entitled for a breach of a contract of this kind, the rule of law is that a Court must take into account any sum of money which that person has earned or might have earned elsewhere during an interval after his

first dismissal which the Court considers reasonable under the circumstances (see 10 *Halsbury, p.* 624, and the cases cited therein). In a contract of this kind the period which is considered reasonable varies from 6 months to a year or even two years. But in this case the measure of damages can, I think, be easily ascertained, because the plaintiff on his own evidence started a new business on July 1, 1928, which shows that he made no effort to seek an employment similar to the one from which he was dismissed from July 1, 1928. He was therefore in my opinion only entitled to claim damages in respect of the period ending June, 1928. There remains the further question as to the period from which the damages are to be reckoned, whether from November 1 or December 1, 1927. The terms of the notice P 4 show that plaintiff's services were discontinued as from the end of November. Defendant's counsel pleaded that he was offered during November, 1927, employment under the same firm for 3 months longer and that therefore he was not entitled to claim damages in respect of December, 1927, January, and February, 1928, but the evidence proves that the plaintiff, as he lawfully might, declined this offer and preferred to leave defendant's service altogether, treating the contract as at an end owing to a breach on the part of the defendant. I would therefore award the plaintiff damages from December, 1927, to the end of June, 1928, but against this sum must be set off the salary he earned from Hutsons for half of January, 1928, and for February, March, April, and May. The District Judge's reckoning up to the end of June according to this basis was the sum of Rs. 1,550 which I think is the damages to which the plaintiff is entitled.

I would modify the judgment and decree of the District Judge by awarding him Rs. 1,550 less Rs. 251·69 instead of the sum of Rs. 5,550 less the above sum awarded him by the District Judge. I would allow the plaintiff to retain the costs in the lower court which have already been awarded to him by the District Judge. I would, however, make no order as to the costs of this appeal.

Appeal allowed.