

15th. December, 1947.

Judge :

The Hon. Mr. Justice A.V. Camilleri, B.Litt., LL.D.
Joseph Williams *contra* Agnes sive Nesa Agius et.

**Acts of Trade — Competence of the Court —
Hiring of Service — Barmaid — Art. 37 of the Code
of Civil Procedure.**

Barmaids are not traders by profession or calling.

The engagement of a barmaid cannot be assumed "per se" as an act of a commercial nature for the person undertaking such service. It is a contract of hiring of service, and as such it is a contract of a civil nature or character.

If the subject of the cause is of a commercial nature for the plaintiff only, the actions arising therefrom shall be triable by the Civil Courts; so that, if the plaintiff is a trader and the defendant is not; and the subject matter is not of a commercial character, the Court competent to take cognisance of the dispute is the Civil Court.

The Court, — On plaintiff's claim against defendants, that they be made to pay him the sum of £18, balance of £20, due to him for the reasons herein stated, as well as that they be made to pay a sum of money which is to be established by assessment by this Court, from the day on which they left without valid grounds their employment with him up to the end of the month on which they left; this following all necessary premises being made and all expedient directions being given, the plaintiff having premised that the said Agnes sive Nesa and Josephine Agius being employed as barmaids, and having asked of plaintiff the amount of £20 as advance money, which sum was paid to them, from which sum they only paid on account £2, a balance of £18 being still overdue, and that the afore mentioned Agnes sive Nesa and Josephine Agius having left their employment and broken their engagement for no valid reasons whatever on their part to justify such action, as will be proved during the hearing of the case; and moreover they so acted against plaintiff's express orders; for which reasons they are to be made to pay him a sum of money which is to be established by assessment to be made by this Court as from the day on which they left without notice up to the-

end of the month on which they left, and for which agreed time they had engaged their services; with costs;

Omissis:

The issue submitted to this Court is whether defendants Agnes and Josephine Agius, who had engaged their services as barmaids in the bar of plaintiff, and Joseph Agius, suited, if deemed necessary, in his capacity as husband of Agnes Agius and head of the "communio societatis matrimonialis", had to be sued in the Commercial Court rather than before this Court, in that their engagement as such, or in the relation of the parties concerned, was to be held as an act of trade or of a commercial nature, or otherwise;

That it is not out of place to premise that in point of fact plaintiff is a trader in the true legal sense of the word, but that defendants are not traders by profession and calling. They may, with some limitations and reservations, be classed as artists, if this word, to the mind of the Court, can be, with due property, said to cover the lowest class of servants in the rungs of that profession, although it would be more proper to class them with a general and wide term known in law as "servants";

That the engagement of a barmaid cannot, by any stretch of the most fertile imagination, be by any means assumed "per se" as an act of a commercial nature for the servant undertaking such service. It is undoubtedly a contract of hiring of service, which falls within the sections of the Civil Statute dealing with the hiring of domestic servants, workmen and other employees, and as such normally a contract of a civil nature or character. In the case in question, however, for plaintiff, who is a trader in the true sense of the law, that engagement for his business cannot be said not to be connected with his trade; but on the other hand, it must be repeated, for defendants that same contract is of a civil character;

That under these circumstances the law provides, in section 37 of the Code of Civil Procedure, that if the matter which forms the subject of the cause is of a commercial nature for the plaintiff only, the actions arising therefrom shall be triable by the Civil Courts;

That before the amendment of article 37 (in the old edition numbered 45), the local case law was divided on this issue, although the principle that the competence of the Court was to be determined only in relation to defendant was already, and so far back as in the year 1859, governing such transactions (vide Appeal, Vol. 1, page 261, "Decesare vs. Camilleri", 13th. July 1859). Be it also said that before the amendment mentioned, the rule prevailing "in subjecta materia" was that all causes related to acts of trade on the part of both contending parties were the only cases subject to the commercial jurisdiction, but if the act was commercial only for one party related to the contention, the party in relation to which the act was non-commercial had the option of suing the other party for whom the act was of a commercial character, before any of the Courts, whether of Civil or Commercial Jurisdiction (vide Appeal Case, Vol. VIII, page 628, in re "De Castro vs. Micallef ne." of the 16th. December 1878). In other words, this "beneficium" of selection, in virtue of the amendment, has been set aside, and the old rule governing the jurisdiction of the several Courts in such cases by the sole consideration of the defendant, or would-be defendant, finally definitely established by law (vide also Vol. XII — 1889, page 166, Civil Hall First Instance, 28th. March 1889, in re "Gauci Forno vs. Imbroll"). Needless to say that this rule applies only in cases where the character of the act varies in relation to the persons concerned;

That section 641 of the Commercial Code, quoted by defendants in support of their contention, is, to say the least, misleading, in that that section concerns acts which "per se" are of a commercial and trading character for both parties, even if one of the parties concerned is not normally engaged in business, and it does not cover acts which are commercial for the one party and of a civil nature for the other;

That the proposed inference of the principles laid down in the two cases in favour of defendants is likewise erroneous, and it can be stated that the fact that defendants in their "nota" of submittals quoted them under that presumption cannot but show clearly how very far off the track of the real

and correct legal principles governing the subject matter they in fact stand;

In view of the foregoing considerations, this Court does not think it necessary or useful to engage in useless discussions as to why these decisions are, more than in favour, adverse to the contention of defendants; suffice it to say that in the long run they hold that the opinion already expressed by this Court, in such contingencies, is correct and sound, as can be seen by a simple reference to the original text;

In view of the foregoing considerations;

This Court;

Disallows the plea of incompetence of this Court, urged by defendants; and consequently affirms its jurisdiction to take cognisance of this case; with costs, on the point raised and determined, against defendants.
