Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Clouston and Company, Limited, v. *Corry*, *from the Court of Appeal of New Zealand; delivered the* 1*st December* 1905.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD JAMES OF HEREFORD.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Lord James of Hereford.*]

This is an Appeal from a Judgment of the Court of Appeal of New Zealand, directing Judgment to be entered for the Plaintiff (the present Respondent) for 875*l.* and costs.

The material facts of the case appear to be as follows:—

Prior to September 1902 the Plaintiff had carried on business in New Zealand as an agent for the purchase of barley, and as a dealer in farm produce. He also conducted an Insurance office business. The Appellant Company carried on a similar business in the same district.

On 18th September 1902 an agreement was entered into between the Plaintiff and the Defendant Company, whereby the Plaintiff undertook faithfully to serve the Defendant Company for five years as manager of the grain and produce department of the business of the Company. He also undertook to obey all commands and instructions given to him, and to use his best endeavours to bring to the

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Defendants the business agencies and clients of the firm to which he had belonged. In return the Defendants undertook to pay the Plaintiff 500*l.* per annum and a percentage on the profits made on business introduced by him.

The Plaintiff entered upon his duties under this agreement, and continued in the Defendants' service until 17th November 1903, when he was dismissed. It is for this dismissal, alleged to be wrongful, the action was brought.

The Statement of Claim set out the above facts, and contained a claim for 3,000*l.* damages.

The Statement of Defence justified the dismissal of the Plaintiff on the grounds: First, that the Plaintiff had disobeyed the orders of the Directors of the Defendant Company. Secondly, that the Plaintiff had on 9th November 1903 been arrested in the streets of a township called Havelock, on a charge of drunkenness and disorderly conduct, and fined for such offences.

The trial took place in March 1904, before the Chief Justice of the Supreme Court of New Zealand and a jury. In support of the allegations in the Statement of Defence that the Defendants were justified in dismissing the Plaintiff, evidence was given to show that the Plaintiff had, as agent for the Defendants, made purchases of goods contrary to the orders given him by the Directors of the Defendant Company; and secondly, that the Plaintiff had in the month of November 1903 grossly misconducted himself at a place called Havelock and had been convicted by a magistrate of drunkenness.

The first ground of justification was during the argument before their Lordships very properly abandoned by the Counsel for the Appellants (the Defendants), inasmuch as the second ground of defence presented facts of a much more serious character than the first. The

evidence given by the Defendants as to the Plaintiff's drunkenness and the use of foul language at Havelock was very strong and virtually admitted by the Plaintiff. His own account is as follows :—

"I went to Havelock on the 8th November. . . . I "stopped on the night of the 8th at Duggan's Hotel. I "arrived there at 7.30 p.m. I think I was sober when I "arrived, but I am not sure of anything that happened there. "I might have got drunk on the night of the 8th. I do not "remember, but I misconducted myself on the 9th. I "remember Mr. Taylor coming to me on the morning of the "9th. I was not drunk then. He came to me on business. "I told him to go to hell because he had accused me of not "replying, acknowledging the receipt of money he had sent "to me. . . . The receipt of the money had been "acknowledged. . . . ."

Question: "Did you use foul and coarse language in a "public street when there were ladies in the balcony of the "hotel close by?" Answer: "I would not say that I did "not. I think I did go to the sergeant of police to ask him "to compel the publican to give me more drink. I do not "know that I wanted to fight. I do not remember two "gentlemen asking me to desist because there were ladies "on the balcony. I got out of the lock-up at 11 p.m. on the "9th and started drinking again. I think I was mad when I "was in the police court on the 10th. There was a report of "the affair in the 'Pelorus Guardian' of what took place in "the police court. I cannot say whether or not it is inac-"curate. Some of my friends tried to get the paper not to "publish it. (Report put in.) I do not say anything in "extenuation of my conduct, and it was not fit conduct for "any person who held my office. I cannot say how many "times a man can so act."

He also said, "I have commonly been drunk," and it was further alleged that the habitual drunkenness was known to certain officers of the Defendant Company.

In respect of this misconduct, the Plaintiff was charged before and convicted by a magistrate at Havelock, and a report of the proceedings appeared in the Press.

At the conclusion of the evidence the Counsel for the Defendants submitted—

(1) That unless the jury disbelieved the evidence as to the conduct at Havelock they must find a verdict for the Defendants.

(2) That certain purchases admittedly made by the Plaintiff were made in direct violation of the orders given to him by the Board of Directors of the Defendant Company, and that on that ground also the verdict should be entered for the Defendants.

The learned Chief Justice declined to accede to this submission, but leave was reserved to the Full Court to enter a non-suit, or to enter a verdict for the Defendant Company.

The following questions were left to the jury :—

"(1.) Did the Plaintiff disobey the order and direction "of the Defendant Company in the purchase of chaff from "Woodward ?

"(2.) If so, was the Defendant Company justified in "dismissing the Plaintiff ?

"(3.) Was the Defendant Company justified in dismissing "the Plaintiff for his conduct at Havelock on November 9th "and 10th 1903 ?

"(4.) What damages, if any, is the Plaintiff entitled to "recover ?"

To the first of the above questions the jury answered, Yes. To the second and third, No. To the fourth, 875*l*.

After the verdict had been given the learned Chief Justice expressed considerable doubt as to the course he ought to pursue, but in the result allowed the verdict to be entered for the Plaintiff for 875*l*., reserving "full power for the Court to enter a verdict "for the Defendant if it should turn out that "the matter is wholly one of law." The Chief Justice added: "The facts in this case are "not in dispute, and if it is the function of a "Judge to determine that the dismissal was "justifiable, then the Court is to have power to "do so and to enter a verdict for the Defendant, "and also to grant a non-suit if it should be the "opinion of the Court that the Plaintiff's "conduct justified the Defendant in dismissing "him."

The Defendants duly gave notice of motion, pursuant to leave reserved, to enter judgment for them—

(1.) Upon the ground that upon the facts admitted by the Plaintiff the learned Judge ought either to have entered Judgment for the Defendant Company or to have directed the jury to find for them, or to have directed a non-suit.

(2.) Upon the ground that the learned Judge refused to direct the jury as requested by the Defendants' Counsel that if they believed the Defendants' evidence (which was uncontradicted) they must find a verdict for the Defendant Company.

(3.) That the learned Judge misdirected the jury in directing them that the facts being admitted, the question whether such facts justified the dismissal of the Plaintiff was a question for the jury.

(4.) In the alternative, that there should be a new trial on the ground that the verdict was against the weight of evidence.

By consent it was ordered that the motion founded on these notices should be removed into the Court of Appeal for hearing.

The case was argued in the Court of Appeal of New Zealand before the Chief Justice and Williams, Edwards, Denniston, Chapman and Cooper, JJ. The case was very fully considered, and elaborate and learned Judgments were given by the members of the Court. The Chief Justice was of opinion that his direction at the trial was wrong, and that the verdict should have been entered for the Defendants. The other members of the Court were of opinion that the case was rightly submitted by the Chief Justice to the jury, and that the verdict they arrived at was correct, and ought not to be disturbed. From that Judgment the Defendant Company obtained leave to appeal to His Majesty in Council.

Both in the arguments of Counsel and in the elaborate Judgments delivered by the Judges of the Court of Appeal very many cases were referred to. Reliance cannot be placed upon all of them, for very much must depend upon the exact words used in the Judgments given, and summaries composed by the reporters of trials at *Nisi Prius* may not always convey the exact ruling of the presiding Judge. It is difficult also to determine whether the words quoted in the reports represent words of advice or of absolute direction. Still there are cases which can be quoted in support of either side of the question involved, and between some of them it is apparently impossible to avoid a conflict. It seems unnecessary to pass all these cases again in review, but their Lordships have fully considered them, and are aided by them in arriving at the conclusion they now express.

In an action brought to recover damages for alleged wrongful dismissal from service, a defence, which in former days would have been embodied in a plea of justification, is set up. Allegations of misconduct, drunkenness, the use of foul language in public, resulting in conviction, are made, supported by strong evidence virtually admitted by the Plaintiff to be true. And upon such facts the question arises what is the power and the duty of the presiding Judge. Ought he to withdraw the case from the jury and with his own hand enter a verdict for the Defendant, or ought he to leave the case to the jury, asking them if they think the facts proved justified the dismissal of the Plaintiff?

In the present case the tribunal to try all issues of fact was a jury. Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be

misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Certainly when the alleged misconduct consists of drunkenness there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employer's business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts—and is a question of fact. If this be so, the questions raised in the present case had to be tried by the jury.

But in cases where the trial must so take place the presiding Judge has important duties to fulfil. It is for him to say whether there is any evidence to submit to the jury in support of the allegation of justifiable dismissal. If no such evidence has in his opinion been given, he should not submit any issue in respect of such allegations. The Judge may also direct, guide, and assist the jury. He may direct by informing them of the nature of the acts which as a matter of law will justify dismissal. He may guide them by calling their attention to the facts material to the determination of the issues raised, and he may assist them in a manner and to an extent there is no reason to define. There have been Judges—more numerous in the past than in the present—who possessed and exercised the power of addressing a jury in terms of apparent impartiality, and yet of placing

before them views which seldom failed to secure the verdict desired by the Judge to be recorded. Some trace of the exercise of this influence may be found in the following terms in which Sir Frederick Pollock guided the jury in the case of *Horton* v. *McMurtry* (5 H & N. 667, 29 L. J. Exch. 260): "Gentlemen, I believe it is for "you to decide whether this was a proper "ground of dismissal—but if it be a matter "of law . . . my opinion is that it is a good "ground of dismissal." The jury found for the Defendant.

For these reasons their Lordships are of opinion that the learned Chief Justice was correct in submitting the issues of fact to the jury, and that in this respect the judgment given by the majority of the Court of Appeal is also correct. But a further question has to be determined. During the course of the argument before their Lordships no information could be obtained as to the existence of any rules of procedure in New Zealand corresponding to those existing in this country enabling judgment to be entered according to the evident justice of the case. (Order 58, Rule 4, 1875.)

But since the conclusion of the arguments their Lordships have been referred to Rule 5 in the Schedule to the Court of Appeal (New Zealand) Act, 1882, which apparently confers powers substantially identical with those existing in this country.

But as far as their Lordships can gather from the Judgments delivered in the Court of Appeal of New Zealand the point that judgment should be entered for the Defendants by that Court was not submitted to it, and it certainly was not referred to in the Judgments of the learned Judges. And the learned Chief Justice, whilst expressing a strong opinion that the verdict was unsatisfactory, contented himself with saying: "I may further add that if I had

" come to the conclusion that it was a case " for the jury only, then I should have been " of opinion that their verdict was against the " weight of evidence and that a new trial " should be ordered; for I do not think that the " verdict was one twelve reasonable men should " have found."

Under these circumstances, whilst their Lordships are of opinion that the verdict found for the Plaintiff is so unsatisfactory that it ought not to be maintained, yet they refrain from exercising powers apparently not sought to be enforced by the Appellants in the Court below, or from exceeding the views expressed by the learned Chief Justice, and so they have come to the like conclusion, that the proper course to pursue is to direct that a new trial shall take place.

Their Lordships will therefore humbly advise His Majesty that the Judgment of the Court of Appeal should be discharged and this Appeal allowed to the extent of ordering that a new trial shall take place, and that the costs of all the proceedings in the Courts below shall depend upon the result of the new trial. The Respondent will pay to the Appellants their costs of this Appeal.