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THE CROWN v. HENRICKSON & KNUTSON.

O'Connor J.

Specification 12 cannot be applied to take away from the contractors the right of indemnity which they have at common law under the principle laid down by Lord *Halsbury* L.C. in *Sheffield Corporation* v. *Barclay* (1). I therefore concur in the view at which Mr. Justice *McMillan* arrived and am of opinion that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *The Crown Solicitor.*
Solicitors, for the respondents, *Stone & Burt.*

J. H.

[HIGH COURT OF AUSTRALIA.]

THE ENGLISH AND AUSTRALIAN COPPER CO. LTD. . . . . DEFENDANTS, APPELLANTS;

AND

THOMAS JOHNSON . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 1, 4, 5.

Griffith C.J., Barton and O'Connor JJ.

Master and servant—Wrongful dismissal—Plea of justification—Misconduct of servant—Failure to carry out agreement made by employer with his customer—Duty of trial Judge—Allegation of fraud—Onus of proof.

The plaintiff had been engaged by the defendants to manage their smelting business. The defendants' course of dealing was to purchase metallic ores at a price depending upon the metallic constituents of the ore as ascertained by assay of a sample of the ore. Independent assays were made by the defendants and the sellers of the ore of different portions of the parcel of ore which

(1) (1905) A.C., 392.

it had been agreed to treat as a sample of the whole consignment. Each of the parties then communicated to the other the result of his assay, it being arranged that they should telephone to one another when ready to exchange samples, so that the letters should cross in the post. The price to be paid for the ore was determined by halving the difference between the two assays. In October 1909 the defendants bought a quantity of copper ore from D., of which samples were taken in the usual way. The defendants made an assay on 4th October, showing the copper contents of the ore as 36·24%. On 6th October D. sent his assay to the defendants showing the copper contents as 35·75%. The certificate of this assay reached the plaintiff as defendants' manager on 7th October, before the result of the defendants' assay had been communicated to D. The defendants' assayer, then, with the plaintiff's approval, made out a fresh assay certificate, also dated 4th October, showing the copper contents of the ore as 35·85% instead of 36·24%. This certificate was sent by the plaintiff to D. purporting to be the certificate of an assay made on 4th October. The result was that under the substituted certificate D. received less for his ore than he was entitled to under the agreed course of dealing. These facts being discovered the defendants dismissed the plaintiff from their employment. In an action by the plaintiff for wrongful dismissal, the defendants, by way of justification, pleaded that the plaintiff dishonestly instructed their assayer to make out and supply a certificate which falsely stated the assay of the ore, with the intent and with the effect that the sellers of the ore should and did receive a lesser price for the ore than that to which they were entitled. At the trial the facts above stated were proved or admitted, and the jury found a verdict for the plaintiff.

Held, on appeal, that the plea of justification had been established, and that a verdict should be entered for the defendants.

Decision of the Supreme Court, 6th March 1911, reversed.

APPEAL by the defendants from a judgment of the Supreme Court.

In December 1907 the plaintiff entered into a written agreement with the defendants to take charge of their works at Waratah, Newcastle, and to manage and superintend and carry on the sampling, assaying, purchase and smelting of ore, and refining of copper, in such manner as the directors and manager of the company should direct. The agreement was for five years, at a salary ranging from £600 to £700 per annum, with an allowance for travelling expenses from and to England, where the agreement was made. The agreement provided that, if the plaintiff proved incompetent properly to perform his duties, he might be discharged upon receiving three months notice, or on payment of three months salary.

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The defendants in the course of their business were in the habit of purchasing ore from various mines at a price depending upon the result of assays made of samples of the ore to determine the percentage of its metallic constituents. The ore was delivered at the defendants' works in bags, and an arrangement was made by the defendants with the vendors of the ore by which the contents of several bags were mixed and subdivided until a small portion of the ore remained which was treated as a sample. One portion of this was assayed by the defendants, and another portion by the vendors, while a third portion was kept in case of a dispute arising. When the assays were completed the parties communicated with one another by telephone, and each posted his assay to the other so that the letters should cross in the post. The price payable for the ore depended upon the mean result of the two independent assays unless there was a difference of more than 0·5% between them, in which case other provisions applied.

In October 1909, the defendants purchased a quantity of ore from Dalgety & Co., and a sample of the ore was taken for the purposes of assay in accordance with the above arrangement. The defendants' assayer, Merton, made an assay of portion of this sample on October 4th, the result being entered in the book kept by the defendants for this purpose, and showing 36·24% of copper. Dalgety & Co.'s assay, sent to the defendants and dated 6th October, was 35·75%. After the plaintiff, as the defendants' manager, had received this assay on 7th October, Merton made out a fresh certificate showing the result of his assay as 35·85. This was dated 4th October and sent to Dalgety & Co. as the certificate of an assay made by the defendants on that date. This also was entered in the defendants' book, the previous assay, made on 4th October, being marked "cancelled." The result was that the vendors received a lower price for the ore than they would have received if the certificate sent to them by the defendants had been in accordance with the assay made by Merton on 4th October. It was admitted that after the receipt of Dalgety's assay the plaintiff allowed Merton to alter his certificate, and that it was essential to the defendants' business that there should be accuracy and good faith in dealing

with the defendants' customers in accordance with the arrangement made for exchange of the results of the assays.

In June 1910, the defendants dismissed the plaintiff from their employment, and the plaintiff brought this action for wrongful dismissal. The defendants pleaded justification on various grounds of which the following only is material to this report:—"That the plaintiff wrongfully, improperly and dishonestly instructed Merton, then a servant of the defendant company, to make out and supply a certificate for the assay of certain ore which falsely stated the assay of the said ore with the intent and with the effect that the persons from whom the defendant company had purchased the same should and did receive a lower price for the said ore than that to which they were in fact entitled."

At the trial, before *Cullen* C.J., the question left to the jury was whether, upon the evidence, the defendants were justified in dismissing the plaintiff. The jury found a verdict for the plaintiff as above stated, and the Full Court refused to enter a verdict for the defendants or to grant a new trial.

The defendants now appealed to the High Court from this decision upon the ground that the Chief Justice was in error in directing the jury that if they accepted the plaintiff's version of his conduct as to the sending of an altered certificate to Dalgety & Co., that was not conduct such as would justify dismissal.

Knox K.C., and *Windeyer*, for the appellants. Upon the facts admitted by the plaintiff the defendants were justified in dismissing him from their employment, and the jury should have been so directed at the trial. The defendants' business absolutely depended on the accuracy of their assay certificate, and their good faith in carrying out the arrangement made with their customers for exchange of certificates. The ground of justification is that the plaintiff allowed an assay certificate to be altered to the prejudice of Dalgety & Co. Assuming that Merton was primarily responsible, this was none the less gross dereliction of duty on the part of the plaintiff. The Supreme Court held that it was a question for the jury whether the plaintiff's dismissal was justified. But the jury were not entitled to adopt some fictitious standard of morality. The effect of the finding of the

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jury is that a dishonest action can be done innocently. Upon a plea of justification the question of what is right or wrong is not cognizable by the jury: *Clouston & Co. Ltd.* v. *Corry* (1). Upon the facts admitted by the plaintiff the Chief Justice should have directed the jury that the plea of justification had been established: *Pearce* v. *Foster* (2).

Wise K.C., and *Watt*, for the respondent. The sole question is have the defendants established their plea. They have alleged that the plaintiff put forward a certificate which he knew to be untrue, for the purpose of depriving Dalgety & Co. of money to which they were in fact entitled. The issue on this plea was fraud or no fraud, it was so put to the jury, and the case was conducted upon that basis. The question of fraud was entirely for the jury who have found that issue against the defendants. It is not open to the defendants now to set up a new issue not raised by the pleadings. The proof must correspond strictly with the allegations: *Cussons* v. *Skinner* (3); *Mercer* v. *Whall* (4). No question can be raised as to the direction given to the jury, as the Chief Justice put the case as the parties themselves put it: *Smith* v. *Thomson* (5). If the plaintiff's conduct was due to an honest error of judgment the plea is not proved. The jury have negatived the intent alleged in the plea. [Reference was also made to *Macdonell's Law of Master and Servant*, 2nd ed., p. 183.] If it is now open to the defendants to contend that the plaintiff's conduct, though not fraudulent, justified his dismissal, it is a strong contention to say that if the plaintiff honestly thought that a mistake had been made in the first assay, as the jury must be assumed to have found to be the case, he is liable to dismissal because he attempted to correct the error made by Merton. If the plaintiff honestly believed that the first assay was incorrect he owed a duty to his employers to correct it.

[GRIFFITH C.J. referred to *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (6).]

(1) (1906) A.C., 122.
(2) 17 Q.B.D., 536.
(3) 11 M. & W., 161.
(4) 5 Q.B., 447.
(5) 8 C.B., 44.
(6) 39 Ch. D., 339.

Knox K.C., in reply.

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GRIFFITH C.J. This was an action for wrongful dismissal, in which the plaintiff recovered a verdict with £1,225 damages. The appellants, defendants in the action, carried on the business of smelting at Waratah, near Newcastle, and the plaintiff was engaged as their manager for a term of years. He was dismissed for alleged misconduct. The defendants in their second plea alleged various instances of misconduct, but the only one which was pressed before us, and upon which it is necessary to express an opinion, was set out in these words:—

"The plaintiff wrongfully improperly and dishonestly instructed one H. F. Merton to make out and supply a certificate for the assay of certain ore which falsely stated the assay of the said ore with the intent and with the effect that the persons from whom the defendant company had purchased the same should and did receive a lesser price for the said ore than that to which they were in fact entitled."

It appears from the evidence that the defendants' course of dealing was to buy metallic ore from various mines at prices depending upon the metallic contents of the ore, as ascertained by assay. The method adopted for making the assay was to take —say—every tenth bag of the ore purchased and throw the contents into a heap, and then quarter it, *i.e.*, divide it into four parts. Two of the parts diagonally opposite were then put together and again quartered. This process was repeated until a sufficiently small parcel was obtained and this was treated as a sample. A portion of the sample was taken by the seller and a portion by the defendants, and separate assays were made. Each of the parties then communicated the result of his assay to the other by letter, it being arranged that the letters should be posted so as to cross in the post, to ensure that the assays should be entirely independent. The practice was to communicate by telephone when they were ready to exchange assays. The price to be paid depended upon the mean of the two assays, unless they differed by more than 0·5 per cent., for which case special arrangements were made. In October 1909 the defendants bought a parcel of copper ore from Dalgety & Co., of which

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samples were taken for assay in the usual manner. The defendants made an assay on 4th October, the result being entered in a book which they kept for the purpose. It showed the copper contents of the ore purchased to be 36·24 per cent. On 6th October Dalgety & Co. whose assay had apparently been delayed, sent the result to the defendants, which showed copper contents of 35·75 per cent., a difference in favor of the defendants of ·49 per cent. This certificate did not reach the plaintiff as defendants' manager, until 7th October. When he received it he handed it to the assayer. Shortly afterwards the assayer brought him a fresh certificate, also dated 4th October, showing the copper contents of the ore as 35·85, instead of 36·24 per cent., which was of course materially to the prejudice of the vendors. This fresh certificate was sent by the plaintiff to the vendors as the genuine certificate of the assay made on the 4th October. All these facts were established by the plaintiff's admissions in cross-examination; the arrangement made for exchange of assays, the fact that a fresh certificate dated 4th October was made out on 7th October and substituted for the previous certificate of 4th October, and that the vendors were paid upon the substituted certificate. There was a great conflict of evidence as to the exact circumstances under which this was done. The assayer Merton stated that the plaintiff told him to do it. Plaintiff said that the assayer did it all of his own volition. But it is admitted that the plaintiff knew that it was being done, and that he told the defendants' manager that he had permitted it to be done. The only explanation he offered was this " I knew that Merton altered his certificate because he found that he was high—he told me he was satisfied his result was high and I left it to him. I take it he either made a clerical error or made another assay." There is no evidence to suggest that Merton made another assay, but whether he did or not the second certificate was sent to Dalgety & Co. dated 4th October, with the intention that they should accept it as a true statement of the assay made on 4th October, which it was not. There was conflict of evidence on this and many other points, and it was suggested that the jury must be taken to have accepted the plaintiff's version of the facts on all points. That may be so, but I do not think it is necessarily so in the

particular circumstances of this case, because the jury were not asked to find whether the facts alleged in the plea as I have read them were proved, but to say whether they thought that under the circumstances the defendants were justified in dismissing the plaintiff. I will read a passage from the summing up of the learned Chief Justice at page 104 of the record:—

"Then what kind of conduct will justify a dismissal? It has been laid down in various terms in cases that have occurred before. There is one case which has already been mentioned here, it was decided by the Privy Council in 1905, *Clouston & Co.* v. *Corry* (1), in which it was pointed out that where dismissal is sought to be justified it is for the jury on the facts to say whether the conduct which they find to have been proved justifies this summary dismissal. In that case the Privy Council said 'there is no fixed rule defining the degree of misconduct which will justify dismissal.' Then there is another case, *Pearce* v. *Foster* (2) in which it was said:—'The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him.' Of course that does not lose sight of what was mentioned in the other case as to the degree of misconduct. A man may have been guilty of misconduct but its degree may have been such that you will say it is not just or reasonable that it should be treated as a ground of dismissal."

I pause here to remark that in the case before the Privy Council the misconduct alleged was drunkenness, which of course is a question of degree, and the Privy Council thought it could not be laid down as an abstract proposition that if a servant got drunk his dismissal was justified. But it does not follow that in every case it is for the jury to say whether on the facts as proved or admitted the dismissal was justified. I will refer to two other passages in the summing up of the learned judge (p. 106):—

"It is for you on the material now before you as sworn to in the box to form your own opinion as to which of the matters are serious ones and whether you are satisfied on the evidence that so serious acts of misconduct have been established to your

(1) (1906) A.C., 122.

(2) 17 Q.B.D., 536, at p. 539.

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satisfaction that the defendants were justified in dismissing the plaintiff."

And finally (p. 120):—

"If they took the plaintiff's version it would be comparatively harmless."

The jury therefore were invited to say whether in their opinion the defendants ought to have dismissed the plaintiff under the circumstances proved in the case. The jury evidently acted upon the view suggested (not with approval) by the Court of Appeal in the case of the *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1). In the course of the judgment *Cotton* L.J. remarked:—"It is very true that if an employer was a reasonable man, and found that a servant who had served him faithfully for 8 years, had, in the early time of his employment done an act which was wrongful and which justified his dismissal, probably he might have said: 'This is a man who has been in my employ for years, and he has always behaved himself honestly in the discharge of his duties, except in regard to this one transaction which took place such a long time ago, and, therefore I do not insist upon my legal right.'"

But that is a view which, as the Lord Justice pointed out, had nothing to do with the law. Probably the jury acted upon that view. The question for us is whether the plea has been proved, whether there are proved or admitted facts which, as a matter of law, justify dismissal, and not whether the jury thought the defendants as reasonable men might have excused the plaintiff. I refer again to the words of the plea. The allegation is that the plaintiff had wrongfully, improperly and dishonestly instructed Merton to make out and supply a certificate for the assay of ore which falsely stated the assay of the said ore with the intent and with the effect that the persons from whom the defendant company had purchased the same should and did receive a lesser price than they were entitled to.

The epithets "wrongfully," "improperly" and "dishonestly" may be disregarded, and there is no magic in the word "instructed." Whatever Merton did was done under the supervision and with the approval of the plaintiff, who was his superior

(1) 39 Ch. D., 339, at p. 358.

officer. That is sufficient "instruction." What Merton did was to make out and supply a certificate of the assay of certain ore which falsely stated the metallic constituents of the ore, as ascertained by assay on 4th October. The plaintiff permitted him to make it out on 7th October as a certificate of the result of an assay made on the 4th. Then the plea goes on to say :—"With the intent and with the effect that the persons from whom the defendant company had purchased the same should and did receive a lesser price for the said ore than that to which they were in fact entitled."

That also is proved. The certificate was made out with a view of reducing the price, because it constituted the basis for payment, and the consequence of sending it was that the vendors received a lesser price than they were entitled to. So that the plea is literally proved. It is true that some months afterwards, when all the facts were discovered, the defendants recouped Dalgety & Co. for the amount of which they had been defrauded, which, as it happens, was not a large sum. But that cannot affect the defendants' rights to take advantage of the plaintiff's misconduct.

The question, then, is reduced to one of law. It is for the Court and not for the jury to say whether the defendants were justified in dismissing the plaintiff. The way in which the defendants business was carried on, the trust necessarily imposed by vendors in them as purchasers of their ore to make an honest assay, raised a condition requiring what is sometimes called *uberrima fides*. If it became known to persons dealing with the defendants that their manager connived at the falsifying of assays their reputation would be gone. They could not keep in their employment a manager who had a reputation of that kind. It would be incompatible with the successful carrying on of their business. In law, I think, that was sufficient ground for dismissal. In the judgment from which I have quoted, *Cotton* L.J. went on to point out that (1) "Although a man would ordinarily act in that way, yet, in my opinion, that has no effect on the question whether the act is not of such a character as to justify the employer in dismissing him when he finds it out."

It may be, and I think is, a fact that the plaintiff did not

(1) 39 Ch. D., 339, at p. 331.

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realise the gravity of what he was doing. It is true also that the alteration was made for the benefit of his employers. But it must have become known sooner or later, and would have created a serious loss of confidence in the defendants. I think, therefore, as a matter of law on the admitted facts, that their plea of justification was established.

There were a number of other charges against the plaintiff supported by the defendants' witnesses, but contradicted by the plaintiff, and perhaps not accepted by the jury. Possibly the defendants acted upon all the grounds put together. But this one ground seems to me sufficient. Under these circumstances I am of opinion that the Full Court should have made the rule absolute to enter a verdict for the defendants.

BARTON J. concurred.

O'CONNOR J. I agree and have very little to add. During the course of the argument I was at first impressed with the view put forward by Mr. Wise that the plea which charged the plaintiff with the issue of a false certificate must be read as imputing to him some personal dishonesty—that, as it must be taken that the jury found there was no personal dishonesty and that the act complained of was done simply in the interests of his employers, no legal ground for dismissal had been established. But after consideration I do not think the case can be put in that way. It must be remembered that, in the relations that existed between the defendants as smelters and the persons from whom they bought ore, the utmost good faith was of vital importance. The company had established a course of business the essence of which was that proper independent assays should be made by each party, and that after telephone communications had been exchanged the result of the assays should be communicated by one to the other. It is obvious that the independent assay was the essence of that arrangement. In this case the acts alleged against the plaintiff were proved. He got Dalgety & Co.'s assay. He handed it to Merton. Merton saw from that that his own assay had been too high. He took it away and corrected it. He had either made, and I assume quite innocently, a mis-

take in his original certificate, or had made another assay; and it must be taken on the jury's finding that, with the utmost honesty on the part of Merton and of the plaintiff, the alteration was made in Merton's certificate. It is clear the alteration was made in his certificate after the result of Dalgety & Co.'s assay had been brought to the plaintiff's and to Merton's notice. What followed on that? One could understand, under these circumstances, the whole matter being explained to Dalgety & Co., other samples being assayed or other procedure followed, which would have enabled the assay of this particular lot of ore to have been made again in accordance with the conventional system. Instead of that, the original assay of Merton, without Dalgety & Co.'s knowledge, was corrected on 7th October, and appeared in the company's books as if it had been the original assay made on 4th October. It was upon that assay that calculations were made and the price obtained from Dalgety & Co. It seems to me that under these circumstances the certificate was properly described as a false certificate, and that it was put forward as a true certificate with the intent and effect that the price paid to Dalgety & Co. for the ore was less than it should have been. Under these circumstances, even assuming that all this was directed or permitted by the plaintiff in the interests of his employer, and that he believed that in acting as he did he was doing nothing dishonest, the defendants, in my opinion, were entitled as a matter of law to dismiss him. In considering the conduct of a person placed in a position of trust such as the plaintiff occupied in the defendants' service, one must have regard to the ordinary standards of honesty and morality. It is well known that somewhat loose views of commercial morality do exist in the minds of some people, but a man's conduct must be judged by the rules of commercial honesty which usually obtain among persons carrying on an honest business of that kind. Looking at the matter from that point of view it is evident that what the plaintiff did or permitted amounted to a gross breach of faith with the parties whose ore was to be paid for on the faith of the assay. Under these circumstances the question arises whether the jury are to be the sole judges of the propriety of the dismissal, notwithstanding that the law entitled the defendants to put an end to the plain-

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tiff's service. There are of course many cases in which the question whether the misconduct charged was sufficient to justify dismissal is a matter entirely for the jury; but misconduct may be of such a nature that as a matter of law it justifies the employer in exercising his right of dismissal, and when such an act of misconduct is proved or admitted it is the Judge's duty to direct the jury that they can come legally to one conclusion only, and that they should find accordingly. If in such a case the jury should disregard that direction their verdict could not stand. It seems to me that this is one of those cases, and that there was a legal right on the part of the defendant company to dismiss the plaintiff. That being so His Honor ought to have directed the jury accordingly. As he did not do so the verdict must, in my opinion, be set aside and a verdict entered for the defendants. I am sorry to be obliged to arrive at this conclusion because it is evident that the defendant company suffered no actual damage from the defendant's conduct, and that the thing was done in what he believed to be the interests of the company, and not to serve any interests of his own. Even the company's representative who inquired into the matter evidently attached very little importance to it. These, however, are considerations for the jury, and I am sorry to say this Court has nothing to do with them, and, much as I regret it, I am obliged to concur in the view that the appeal must be allowed and the verdict set aside and judgment entered for the defendants.

Appeal allowed.

Solicitors, for appellants, *H. J. Brown & Mitchell*, Newcastle, by *Makinson & Plunkett.*

Solicitors, for respondent, *Reid & Reid*, Newcastle, by *W. T. Flynn.*

C. E. W.