[HIGH COURT OF AUSTRALIA.]

ORR . . . . . APPELLANT;
PLAINTIFF,

AND

THE UNIVERSITY OF TASMANIA . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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MELBOURNE, *May* 20, 21, 22, 23.

Dixon C.J., Williams and Taylor JJ.

Master and Servant—Terms etc. of employment—University and professor—University statute—Council of university able to make appointments on such terms etc. as council shall think fit—Provision that appointment of any person under statute shall determine on 31st December of year in which appointee attains age of sixty-five years—Contract between university and professor providing that appointment might be determined by six months' notice given by either party—Whether power in university summarily to dismiss professor for conduct rendering him unfit for his office.

Clause 1 of Statute VI of the Statutes of the University of Tasmania enables the Council of the University to make appointments on such terms and conditions as it shall think fit. Clause 3 provides that the appointment of any person under the statute shall determine on the 31st day of December in the year in which that person attains the age of sixty-five years.

Held, that the effect of cl. 3 is not to render an appointment incapable of determination prior to the end of the year in which the appointee attains the stated age but to provide that it shall not continue beyond that time.

A professor was engaged by the university under a contract which provided that his appointment might be determined by six months' notice given by either party.

Held, that neither the statute nor the contract prevented the university from dismissing the professor for conduct which rendered him unfit for his office.

Decision of the Supreme Court of Tasmania (*Green* J.), affirmed.

APPEAL from the Supreme Court of Tasmania.

By writ dated 19th March 1956 Sydney Sparkes Orr commenced an action in the Supreme Court of Tasmania against the University of Tasmania claiming the sum of £10,000 damages for breach of contract.

The action came on for hearing before *Green* J. who, in a written judgment delivered on 26th November 1956, ordered that the action be dismissed.

From this decision the plaintiff appealed to the High Court. Further facts and the arguments of counsel appear in the judgment hereunder.

M. J. Ashkanasy Q.C., *W. C. Hodgman* and *W. McAlary*, for the appellant.

R. C. Wright and *M. G. Everett*, for the respondent were not called on.

May 23.

The judgment of the COURT was read by TAYLOR J.

This is an appeal brought by Sydney Sparkes Orr from a judgment given in the Supreme Court of Tasmania by *Green* J. in an action in which he sued the University of Tasmania for a declaration that he is and has been at all times the Professor of Philosophy in that university and, alternatively, for damages for his wrongful dismissal from that office.

We think that there is no serious question raised by the appeal which is not wholly a question of fact. The questions concern the association of the appellant with one, Suzanne Kemp, who, at the material time, was a second-year student in his philosophy class at the university. It was alleged by the defendant university that the appellant had seduced Miss Kemp and that by reason of the circumstances in which this occurred it became entitled to dismiss him summarily. This the university proceeded to do on 16th March 1956. A great deal of evidence was given in the action concerning incidents which occurred during the year 1955 and it is clear that there was abundant evidence upon which the learned trial judge was entitled to find that the substantial allegations made by the defendant university had been proved. This finding was made despite the emphatic denials of the appellant that sexual intercourse had ever taken place between him and Miss Kemp.

Criticisms of the findings made by the learned trial judge were advanced during the hearing of this appeal but we are satisfied that none of them justify the intervention of a court of appeal. The substantial criticisms which were advanced related to the use made by the trial judge of a diary which had been kept by Miss Kemp during 1955 and to the importance attached by the learned trial judge to evidence which became admissible by reason of other issues which were raised by the university and which in the ultimate result were held not to constitute cause for dismissal. The diary

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became admissible in evidence by reason of the provisions of s. 78 of the *Evidence Act* 1910-1952 (Tas.) and it was suggested by counsel for the appellant that the provisions of sub-s. (2) of the following section prevented the learned trial judge from relying upon the contents of the diary in any way as confirmation of Miss Kemp's story. It is true that sub-s. (2) of s. 79 provides that for the purpose of any rule of law or practice requiring evidence to be corroborated a statement rendered admissible as evidence by s. 78 shall not be treated as corroboration but this was not a case in which any rule of law or practice required Miss Kemp's evidence to be corroborated. Moreover, a careful reading of his Honour's reasons makes it quite clear that he did not treat the contents of the diary as corroboration of her evidence ; it was merely one of several factors upon which the judge placed some reliance in deciding, ultimately, that her evidence should be accepted.

The other evidence to which objection was taken related, in the main, to an issue raised by one of the particulars furnished with the statement of defence which alleged that in 1953 and 1954 "the plaintiff consulted his lecturer in the Department of Philosophy, Dr. Milanov, for personal psychological advice and submitted to him notes of a great number of the plaintiff's dreams and he developed a relationship with his said lecturer in which the said lecturer was importuned over a long period for personal psychological advice based on the plaintiff's dreams and other personal information supplied by the plaintiff concerning his (the plaintiff's) paternity associated with Royalty and the paternity of the plaintiff's illegitimate child and his relationship with its mother, as to whom the plaintiff sought to persuade the said lecturer to approve of having them introduced into the plaintiff's family home at Hobart the obtaining of such approval having been the purpose of the plaintiff seeking such advice."

The learned trial judge was of the opinion that the circumstances in which the appellant approached and consulted Dr. Milanov were quite insufficient to justify his dismissal but upon the trial a considerable body of evidence was admitted, including written accounts of the appellant's dreams over a lengthy period. Other evidence was also given concerning his association with a woman who had borne him a child during a period when she and the appellant and his wife were living in the same house. No doubt a great deal of this evidence operated to the prejudice of the appellant but the issue was one which was properly raised and the evidence concerning it was properly admitted and we can see no reason for thinking that the trial judge made any improper use of it.

One important matter which arose for the consideration of the trial judge was whether Miss Kemp was speaking the truth when she alleged that intercourse had taken place between her and the appellant in his own house when his wife was also present in the same house. Miss Kemp's evidence in relation to these incidents was said by counsel for the appellant to be incapable of credence and his comment was that the appellant was greatly prejudiced by the evidence which was given concerning the triangular association which had previously occurred in his own house. No doubt the facts are harmful to the case he made but that is for the sound reason that they enabled the court to see better what the truth is likely to be. For the reasons which we have already given the evidence was properly admissible and no improper use was made of it. But, in any event, the most damaging matters given in evidence in relation to that issue could have been properly put to the appellant in cross-examination. A perusal of his cross-examination in fact satisfies us that his admissions alone must have had equally prejudicial results.

These were, of course, not the only matters to which the learned trial judge adverted before deciding that he should accept Miss Kemp's evidence. As appears from his reasons, he was fully conscious of the fact that he should not, in the circumstances of the case, act upon Miss Kemp's evidence alone and, indeed, it seems clear that he would have refused to do so unless he found, in the circumstances of the case, ample confirmation of her story. In the course of a long and carefully considered judgment his Honour found ample confirmatory matter. One of these matters was particularly damning. We refer to what has been called the Bellerive trip when at night time the appellant drove Miss Kemp to a lonely spot among the sand dunes at the rear of a local beach. This much was admitted by the appellant though he claims that the affair was merely for the purpose of discussing some philosophical problem or problems. No doubt he felt compelled to admit that this expedition took place because when he and Miss Kemp were about to leave the spot a wheel of his car went into a water table and he was obliged to seek the services of a nearby resident to tow his car out of trouble. The indisputable circumstances of the trip to Bellerive are completely inconsistent with the tenor of the appellant's evidence and lend great support to that of Miss Kemp. Another matter of vital importance in the case are the terms of the letter which was written by Miss Kemp to the appellant in January 1956 when she was holidaying at Orford. The letter was produced in court but two replies which had been written by the appellant

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were not. They had been destroyed and there was a sharp conflict as to their contents. Nevertheless, the terms of Miss Kemp's letter are consistent only with her evidence and quite inconsistent with that of the appellant's.

It is unnecessary to refer to the minor criticisms made by counsel for the appellant but whether Miss Kemp's evidence was wholly true or not or wholly accurate or not there is not the slightest reason why his Honour should have doubted Miss Kemp's evidence on the vital matters which arose for his decision. On the contrary there was much to support it and much to destroy the value of that given by the appellant. But on the basis that the validity of the findings of the learned trial judge should be conceded counsel for the appellant contended that the facts as found by the learned trial judge did not constitute legal justification for the appellant's dismissal. With this submission we emphatically disagree. Miss Kemp was a student in the appellant's class, she was eighteen years of age and it is apparent that she was then passing through a period of turbulent eroticism. Moreover there can be little doubt that she was eager to institute an intimate personal relationship with the appellant, but there is not the slightest doubt, upon the facts as found, that the appellant, having observed her feelings, became only too ready to take advantage of them and seduce her. The affair developed under the guise of the discussion of philosophical problems and, within a short period resulted in sexual intercourse taking place between them. Thereafter, it occurred on a number of occasions. We have not the slightest doubt that this conduct on his part unfitted him for the position which he held and that the university was entitled summarily to dismiss him. We can only express our surprise that the contrary should be maintained.

It is necessary to mention only one other matter. It was contended that because of the provisions of Statute VI of the Statutes of the university the appellant occupied an office from which he could not be discharged until the 31st December in the year in which he attained the age of sixty-five years. The evidence shows that he was engaged by the university under a contract which provided that his appointment might be determined by six months' notice given by either party. But the appellant contends that the provisions of cl. 3 of the sixth statute, which provides that the appointment of any person under the statute shall determine on the 31st day of December in the year in which that person attains the age of sixty-five years, vitiates the contractual clause and renders his appointment incapable of determination before that time. This is not the effect of cl. 3; it does not provide that appointments

made in accordance with cl. 1, that is, upon such terms and conditions as the council shall think fit, shall continue for such a period but merely that they shall not extend beyond that period. Nor is there any substance in the contention that the express provision for the determination of the contract upon the specified notice, or in the alternative, that the statutory provision contained in cl. 3, excluded the right of the respondent to dismiss the appellant for good cause. We are satisfied that the defendant university was entitled to terminate the appellant's appointment for conduct which rendered him unfit for his office of professor, that such conduct was properly proved before the learned trial judge and that there is not the slightest reason why this Court should interfere.

Appeal dismissed with costs.

Solicitors for the appellant, *Hodgman & Valentine.*

Solicitors for the respondent, *Simmons, Wolfhagen, Simmons & Walch.*

R. D. B.