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*Feb. 4.

*June 22.

JOHN A. McRAE (DEFENDANT)..... APPELLANT ;

AND

THOMAS T. MARSHALL (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Master and servant—Agreement for service—Arbitrary right of dismissal Exercise of—Forfeiture of property.

By an agreement under seal between M., the inventor of a certain machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements on said machine and assign the same to McR., who in consideration thereof agreed to employ M. for two years to place the patents on the market, paying him a certain sum for salary and expenses and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation.

By one clause of the agreement the employer was to be the absolute judge of the manner in which the employed performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal but to have no claim whatever against his employer.

M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders.

Held, reversing the judgment of the Court of Appeal and of the Divisional Court, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty without notice, and without specifying any particular act calling for such dismissal.

Held, per Ritchie C.J., Fournier, Taschereau and Patterson JJ., that such right of dismissal did not deprive M. of his claim for a share of the profits of the business.

Per Strong and Gwynne JJ., that the share of M. in the profits was only a part of his remuneration for his services which he lost by being dismissed equally as he did his fixed salary.

PRESENT : Sir. W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the decision of the Divisional Court (2) by which judgment for the defendant at the hearing was set aside.

Marshall, the respondent, was the inventor of a crimping machine used in the manufacture of boots and shoes which he had patented in England and the United States as well as in Canada. These patents he had assigned to McRae, and having invented an improvement of the machine an agreement was executed between McRae as party of the first part, and Marshall as party of the second part, which after a covenant by Marshall that he would obtain patents for the said improvements and assign the same to McRae, and do the same with all subsequent improvements he might make, contained the following provisions:—

4. In consideration whereof the party of the first part hereby agrees to employ the party of the second part for the term of two years from the date hereof for the purpose of demonstrating and placing the said patents of invention granted or hereafter to be granted, on the market on the following terms, viz.: The said John A. McRae covenants to pay the said Thomas T. Marshall the sum of $100.00 per month during the said term of two years payable monthly, and in addition to said salary the party of the first part covenants and agrees to pay the actual travelling expenses and board of the party of the second part. And it is further agreed between the parties hereto that the said Thomas T. Marshall shall be entitled to and receive twenty per cent. of the actual net profits that are derived in any way whatsoever from the sale or otherwise of the said patents of invention.

6. That the said John A. McRae shall be absolute judge of what are expenses and what are not, and shall have the exclusive control and management of all matters in connection with the said patents, the party of the second part simply being his agent for the purposes aforesaid.

7. That the said John A. McRae shall in the event of said business not proving a success have the right to cancel this agreement at any time after the expiration of six months from the date hereof, if he shall deem it advisable so to do, by paying the party of the second

(1) 17 Ont. App. R. 139. (2) 16 O. R. 495.

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part all salary which may be due him up to the date of such cancellation and his share of the profits, if any, on the basis aforesaid.

8. That the said Thomas T. Marshall shall devote his whole time and attention to the business of the party of the first part and shall neither directly or indirectly engage in any other business, occupation or employment and that he shall be faithful to the said McRae in all his transactions and dealings.

10. It is further agreed that the party of the first part is to be the absolute judge as to the manner in which the party of the second part performs his duties under this agreement, and shall have the right at any time to dismiss him for incapacity or breach of duty, in which event the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal and shall have no claim whatever against the party of the first part.

The provisions of this agreement were carried out between the parties for two or three months when McRae, wishing to test the crimping machine, gave orders to Marshall to have a certain quantity of leather prepared and the test made on a certain day. At the appointed time the leather was not ready and another day was appointed, but the preparations for the test being still incomplete McRae instructed his solicitor to discharge Marshall from his employment. This action was then brought by Marshall claiming damages for wrongful dismissal and his share of the profits under the agreement.

At the hearing before Mr. Justice Rose judgment was given dismissing the plaintiff's action. This judgment was reversed by the Divisional Court and judgment entered for the plaintiff with substantial damages. The decision of the Divisional Court was affirmed by the Court of Appeal, both courts proceeding on the ground that McRae in dismissing the plaintiff under clause 10 of the agreement could only do so after due notice to the plaintiff and hearing what he had to urge against it. The defendant, McRae, appealed to this court.

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Dalton McCarthy Q. C. for the appellant referred to *The Queen* v. *The Bishop of London* (1).

No counsel appeared on behalf of the respondent.

SIR W. J. RITCHIE C. J.—Sections 5 and 10 of the agreement are as follows:

5 That the said party of the first part shall cause to be kept proper books of account and entries shall be made therein of all such matters, transactions and things as are usually kept and entered in books of account, and all the costs, charges and expenses in connection with the purchase of the said patents of invention by the said McRae and of the obtaining assignments thereof, and all the costs, charges and expenses in connection with the obtaining of further or other patents of invention and any renewal or renewals thereof, and all the costs, charges and expenses in connection with the demonstrating and placing the said patents of invention on the market, including the said salary of the said Marshall, and all losses arising in any way in connection with the said patents shall be a first charge on the profits that may hereafter be derived from the said patents and shall be first deducted before any division of profits shall take place or be made.

10. It is further agreed that the party of the first part is to be the absolute judge as to the manner in which the party of the second part performs his duties under this agreement, and shall have the right at any time to dismiss him for incapacity or breach of duty, in which event, the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal and shall have no claim whatever against the party of the first part.

I can see no reason why a provision of this kind cannot be so framed as to make the approval of the employer quite arbitrary, if it is exercised in good faith and not for the special purpose of defeating the contract.

I cannot very well see how this stipulation could be more strongly drawn. The employer is to have the right at any time of dismissing the employee for incapacity or breach of duty, and the employer is to be the absolute judge as to the manner in which the employee performs his duties under the agreement.

I think the question turns on the word of the con-

(1) 24 Q. B. D. 213.

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tract which appear to me too clear and explicit to be misunderstood, and by them we must be governed. The law which I think should govern this case is very clearly stated in *Stadhard* v. *Lee* (1) as follows:—

Cockburn C. J.:

But we are equally clear that where, from the whole tenor of the agreement, it appears that however unreasonable and oppressive a stipulation or condition may be the one party intended to insist upon and the other to submit to it a court of justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties. It frequently happens in the competition which notoriously exists in the various departments of business that persons anxious to obtain contracts submit to terms which, when they come to be enforced, appear harsh and oppressive. From the stringency of such terms escape is often sought by endeavoring to read the agreement otherwise than according to its plain meaning. But the duty of a court in such cases is to ascertain and give effect to the intention of both parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet, if the terms are clear and unambiguous, the court is bound to give effect to them without stopping to consider how far they may be reasonable or not.

I agree with the trial judge and Chief Justice Hagarty that the defendant was not without apparent reason for availing himself of the power of dismissal, and I also agree with Mr. Justice McLennan who says:

I think the preparation of the tests required by the defendant was within the scope of the plaintiff's duties as defined by the agreement, and that a neglect or refusal by him to prepare those tests would have been a breach of the agreement. It was most important, for the purpose of putting the invention on the market, to be able to show what it could do, and the one hundred pairs of uppers which the defendant desired to have prepared on different kinds of leather would have assisted that object. I think the first thing the parties would have had to do, in endeavoring to demonstrate or sell the invention, would be to show what it could do, and so to have specimens of its work. The defendant had no practical knowledge of the invention, and the inventor was the person he would naturally look to to prepare and supply him with what he required to enable him to display the results of the invention to those engaged in the shoe trade. I think the evidence shows that

(1) 3 B. & S. 364.

plaintiff in reference to this was derelict in his duty and that his dismissal was *bonâ fide*.

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I agree with Hagarty C. J. that the dismissal from the two years' employment by defendant does not involve or affect the plaintiff in his right to an interest in the property mentioned in the agreement; that the words "shall have no claim," should be read as limited by the context to refer to a claim under that clause. I think the contract of hiring is wholly distinct from the respective rights and interests of the parties in the property existing, or to be acquired.

I therefore think the appeal should be allowed.

STRONG J.—I am of opinion that this appeal should be allowed for the reasons stated in the judgment of Mr. Justice Gwynne in which I concur.

FOURNIER J.—I am also of opinion that the appeal should be allowed.

TASCHEREAU J—I would allow this appeal. I agree with the reasons assigned by Hagarty C. J. in the Court of Appeal.

GWYNNE J.—The judgment which is appealed from appears to have proceeded upon the grounds that the respondent was interested in certain property in partnership with the appellant, and that the dismissal of the respondent by the appellant was not authorized by the agreement of the 2nd February, 1886, in the statement of claim mentioned, or if authorized that it amounted to an exclusion of the respondent from the partnership, and that, therefore, to attain such an end the proceeding to dismiss was in the nature of a judicial proceeding which must be pursued in accordance with the principle governing judicial proceedings,

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namely, by giving notice to the respondent of the appellant's intention to exclude him from the partnership and so giving him an opportunity to explain whatever conduct of his constituted the cause of the appellant's proposed exercise of his power of expulsion from the partnership, and to enable the respondent to show cause, as it were, why the power should not be exercised. Whether the authorities upon which the judgment has been rested apply to the circumstances of the present case is the sole point raised by the appeal; it will be necessary, therefore, to review them.

In *Bagg's Case* (1) the judgment was that a burgess or magistrate of a borough cannot be removed from his office for words of contempt addressed to the chief magistrate or his fellow burgesses, nor for any cause not against his duty as a citizen or burgess and against the public good of the city or borough whereof he is a freeman or burgess and against the oath which he took when he was sworn a freeman of the city or borough; and that where a corporation has power to disfranchise a freeman or burgess for sufficient cause they cannot remove him from his freedom without proceeding in a judicial manner and giving him an opportunity to answer the charge preferred against him and made the ground of his removal. In *Rex* v. *Cambridge* (2) the court of the congregation of the University of Cambridge assumed to deprive a graduate of his academical degrees for a contempt alleged to have been offered to the Vice Chancellor's Court, and it not being shown that there was a visitor to whom the party so deprived could appeal it was held that the court of Queen's Bench could interfere by mandamus to compel his restoration; and it was further held that assuming the university to have had power to deprive a graduate of his degrees they could only do so

(1) 11 Co. 93b. (2) 1 Str. 558.

for good cause and after summons of the party, and hearing in a judicial manner the charge upon which the right to remove the accused was exercised. *Const* v. *Harris* (1) simply decided that where the majority of the partners in a firm desired to make a material change in the articles of partnership they must give all the partners notice of the proposed change and of the time when it should be taken into consideration ; that the act of the majority is only the act of all provided all are consulted, and that the majority are acting *bonâ fide* with reference to the particular facts of that case Lord Eldon giving judgment says (2) :—

> For a majority of partners to say, we do not care what one partner may say, we being the majority will do what we please, is, I apprehend, what the court will not allow.

In *Capel* v. *Child* (3) it was held that where a statute gave a bishop power to interfere in a particular manner whenever it should appear to him, either upon affidavit or of his own knowledge, that by reason of the number of churches or chapels belonging to any benefice situate within his diocese, or the distance of such churches from each other, or the distance of the residence of the spiritual person holding the same, that the ecclesiastical duties of such benefice were inadequately performed in consequence of the negligence of the incumbent, that was a judicial power which could only be exercised after giving the incumbent an opportunity of shewing that he was guilty of no negligence, and of trying to satisfy the bishop that his duties were not inadequately performed Lord Lyndhurst there says (4) :—

> Here is a new jurisdiction given, powers given to the Bishop to pronounce a judgment, and according to every principle of law and equity such judgment could not be pronounced, or if pronounced could not for a moment be sustained, unless the party in the first instance had the opportunity of being heard in his defence, which in this case he had not.

(1) 1 Tur. & Russ 496.
(2) P. 525.
(3) 2 C. & J. 558.
(4) P. 577.

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And Bayley J. says (1) :

I know of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property without his having had an opportunity of being heard.

The judgment of the bishop had subjected the vicar of a parish to the payment of £90 per annum to a curate whom the bishop had imposed upon him as a punishment authorized by the statute, to assist in the discharge of the duties of the parish. But in *re Hammersmith rent charge* (2) in the same court differently constituted in 1849, under the Tithe Commutation Act 6 & 7 Wm. 4 c. 71, which enacted that " where the half-yearly payments of rent charge on land shall be in arrear and unpaid for the space of forty days, and there shall be no sufficient distress upon the premises liable to the payment thereof, it shall be lawful for any judge of His Majesty's Courts of record at Westminster, upon an affidavit of the facts, to order a writ to issue to the sheriff requiring him to summon a jury to assess the arrears of rent charge remaining unpaid and to return the inquisition thereupon taken to some one of the Superior Courts," it was held by Pollock C. B. and Alderson and Platt BB. (Parke B. dissenting), that the fact of the writ of the sheriff having issued upon an order made *ex parte* afforded no ground for setting aside the writ and the subsequent proceedings. Parke B. proceeded upon the above language of Bayley J. in *Capel* v. *Child* (3) treating the order for the writ of the sheriff to issue to be equally in the nature of a judgment as was the proceeding in *Capel* v. *Child* (3). Alderson B., however, in his judgment says (4) :

I look upon the question as one only of form and the reasonable construction of the 81st and 82nd sections of this particular Act of Parliament.

(1) P. 579.
(2) 4 Ex. 87.
(3) 2 C. & J. 558.
(4) P. 92.

He then proceeds to put upon them what appeared to him their proper construction, and he adds (1) :

Certainly, the authorities do shew that when the proceeding is in the nature of a final judgment against a party he must in general be summoned and have the opportunity of being heard before the judgment can be properly pronounced against him. But here I cannot treat the issuing of the writ as a judgment, nor do I think that if it issues *ex parte* the party is punished without the opportunity of being heard, for it is no more like a judgment than a writ of *capias* is which after a judge is satisfied of certain facts by affidavit he is to issue against the defendant, and yet there the proceeding which issues *ex parte* deprives him of his liberty.

And referring to *Capel* v. *Child* (2) he says (3) :

Without saying how far if it was *res integra* I should agree to that decision, and accepting it as an authority in a similar case, although it is difficult to understand why the bishop whom the legislature permitted to act on his own knowledge should be required to summon a party any more than a magistrate who is to present a road on his own view should summon the inhabitants before he does it which no one ever dreamed he ought to do : Yet it is clearly put there that the *ex parte* proceeding of the bishop was a judgment on a definite matter by the bishop against the incumbent and Lord Lyndhurst intimates in his judgment [p. 575], that if there could have been a proceeding to cancel the bishop's requisition it might have been different, but there the only subsequent proceedings were for the purpose of carrying into effect the final *ex parte* judgment.

And Pollock C. B. says (4) :

The case of *Capel* v. *Child* (2), it must be admitted, is to some extent in principle and authority against the order. It was, however, upon a different Act of Parliament. It presented none of the inconveniences which the same course of practice would produce if we were to act on that principle in the present case, and the case of *Capel* v. *Child* (2), whatever it may be deemed now, having once been pronounced as the judgment of this court, and being a binding authority upon us sitting here, I can only say, as far as that Act of Parliament goes I shall feel myself bound by it, but not one degree further. I agree with my brother Alderson that if that case had to be re-argued I for one should be disposed to come to a different conclusion.

Blisset v. *Daniel* (5), was a case of partnership. By

(1) P. 95.
(2) 2 C. & J. 558.
(3) P. 94.
(4) P. 100.
(5) 10 Hare 493 ; 18 Jur. 122.

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the articles it was provided that the partners should meet every year within 60 days after the 30th June, and state, settle and finally adjust all the accounts and make a rest and settlement up and home to 30th June, to which end an inventory estimate and valuation of all the joint stock and property was to be taken, and also of the separate account of the partners, so that the true state and condition of the partnership and of the shares of the partners might clearly appear. There were then clauses providing for a partner wishing to retire from the firm or dying, becoming bankrupt or being expelled, under a power in that behalf vested in two thirds of the partners, and in all such cases there was one provision, namely, that the value of the removed partner's share was to be paid to him or his representatives as it stood on the last preceding 30th June. The plaintiff and his partners carried on business on amicable terms until the 26th August, 1850, when one of the partners, who was the managing partner, proposed that his son should be admitted to a share of the management; the plaintiff objected to this on principle whereupon the managing partner declared to the partners other than the plaintiff that he would not continue in the concern together with the plaintiff, and pointed out to them the clause of expulsion. On the 29th August the plaintiff signed the accounts without being made aware of this declaration or of the clause of expulsion which all parties had forgotten. On the evening of the 29th August the plaintiff received a notice duly signed signifying his expulsion from the firm, and the defendants, the remaining partners, proceeded to pay him out at the rate at which his shares stood in the account as signed. No cause was alleged or assigned in the notice or in the answers to the bill. Evidence was gone into by the plaintiff and not attempted to be met by the defendants to show that

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the valuation upon which the estimate of his share rested was purely conventional and did not nearly represent the full market value of the plaintiff's share. Upon a bill to have the notice of expulsion declared void and to have the concern wound up and he plaintiff's real share ascertained by a sale, Sir W. P. Wood V. C. held:

1. That the notice of expulsion need not assign any cause nor be founded on a previous meeting of the company in committee with each other.

2. That the valuation at which the share of a partner expelled without cause assigned and proved should be estimated must be a real valuation and not the conventional valuation in the books; that no means were pointed out for arriving at such a valuation except by sale; that a sale was contrary to the whole scope of the articles of partnership; that there was, therefore, no method of ascertaining the value of the plaintiff's share; and that, therefore, the clause of expulsion could not be acted on.

3. That the power of expulsion was one vested in the two thirds of the partners but to be exercised for the advantage, not of themselves, the expelling partners, still less at the wish or for the benefit of one of their number, but for the benefit of the whole concern, and therefore;

4. That under the circumstances of concealment from the partner intended to be expelled of all intention on the subject until after he had signed the accounts, and Vaughan, the managing partner, having procured the other partners to join in expelling the plaintiff, not upon their own judgment, but under threats of the managing partner to retire from the management and the concern altogether, the power had not been exercised *bonâ fide*.

Sir W. P. Wood, after stating the circumstances

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under which, as appeared in evidence, the notice of expulsion was given, says (1):

It is impossible to uphold that notice. The power was intended for the benefit of all—not that one partner (for in reality all this emanated from Mr. Vaughan), being dissatisfied with the manners and conduct of another should, behind the other's back, suggest and procure—nay, almost by threats, coerce—others of his partners to join him in expelling a partner whom he alone seeks to expel.

And again (2),

Had the defendants made out their case as to uncourteous bearing I could not possibly hold but that this was an act of arbitrary power on the part of the expelling partners at the suggestion of Mr. Vaughan alone—an advantage obtained by him for his own purposes, behind the plaintiff's back, which he cannot be allowed to retain.

This case proceeded upon the clear establishment of a flagrant case of actual *mala fides* in the attempt to exercise a power contained in articles of partnership under circumstances which did not come within the intent with which the power was inserted in the articles, and in two of the partners withholding the exercise of their own judgment as to the propriety of the expulsion of their co-partner, and submitting to the dictation and coercion of a third partner who, for his own private purposes and benefit, and not at all for the benefit of the partnership, conceived the design of getting rid of the plaintiff, against whom he may be said to have entertained a personal grudge, by procuring his expulsion from the firm.

In *Clarke* v. *Hart* (3), it was held that a power in co-adventurers to forfeit the shares of one of their number for non-payment of calls is not necessarily incident to a mining adventure conducted on the cash book principle. This case is an authority that where a power to forfeit the shares of a co-adventurer exists, either by agreement between the parties or by a legally established custom, it is to be treated

(1) 10 Hare 527.
(2) 18 Jur. 127.
(3) 6 H. L. Cas. 633.

as *strictissimi juris* like a power of forfeiture with respect to an estate, and the forms prescribed by the agreement, or established by the custom, to be observed in declaring the forfeiture must be strictly followed.

Lord Chancellor Chelmsford there says (1) :

I am clearly of opinion that supposing the power to have existed it has not been duly exercised and that there has been no proper resolution by which the appellants could declare the shares of the respondent to be forfeited. It is unnecessary to advert to the principle that forfeitures are *strictissimi juris*, and the parties who seek to enforce them must exactly pursue all that is necessary to enable them to exercise this strong power. With regard to this particular case it seems to be admitted, both by the answers and by the evidence on the part of the appellants, that the only proper mode of declaring a forfeiture was by convening a general meeting after the period limited for payment of the calls and the party being in default, that general meeting being necessarily to be preceded by notice to all the adventurers to enable them to attend it, and also, as appears to have been conceded at the bar, by a notice of the intention for which the meeting was convened.

In *Regina* v. *The Archbishop of Canterbury* (2) where a statute gave an appeal to the archbishop from the judgment of a bishop revoking the license of a curate, and the curate appealed from such a judgment of his bishop, it was held that it was not competent for the archbishop to affirm the judgment of the bishop without giving the curate an opportunity of being heard upon his petition of appeal.

Lord Campbell C.J. there (3) says :

The legislature here gives an appeal from the bishop to the archbishop that implies that the appellant is entitled to an opportunity of being heard. The appellant here has not been heard. In his petition he denies almost everything charged against him specifically, and asks the archbishop to appoint a time and place at which he may be heard and adduce evidence on his behalf. Without any communication with him the judge decides against him. That was not a hearing. The

(1) P. 650 (2) 1 El. and El. 545.
(3) P. 548.

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appellant should have had an opportunity of arguing before the archbishop that the bishop's decision was not correct upon the facts.

And Compton J. says :

Where a statute of this kind gives an appeal it gives by implication a right to be heard upon the appeal. Sec. 111 clearly contemplates a judicial inquiry before the archbishop, that is, a further inquiry, not merely one upon the original document set forth in the appeal.

Phillips v. *Foxall* (1) is an authority that on a continuing guarantee for the honesty of a servant if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant chooses to continue him in his employ without the knowledge and consent of the surety express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. What bearing this case has upon the present is not apparent ; wha is relied upon is the language of Blackburn J. who, although he arrived at the same conclusion as the other members of the court, did so upon different grounds from those upon which they proceeded ; still I cannot see any thing in this language of Blackburn J. which can be said to have any bearing upon the present case. At page 680 he says :—

A surety, as soon as his principal makes default, has a right in equity to require the creditor to use for his benefit all his remedies against his debtor, and as a consequence if the creditor has by any act of his deprived the surety of the benefit of any of those remedies the surety is discharged. * * * Now the law gives the master the right to terminate the employment of a servant on the discovery that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects after knowledge of the fraud to continue him in his service he cannot at a subsequent time dismiss him on account of that which he has waived or condoned. This right the master may use for his own protection. If this right to terminate the employment is one of those remedies which the surety has a right to require to have exercised for

(1) L. R. 7 Q. B. 666.

the surety's protection, it seems to follow that by waiving the forfeiture and continuing the employment without consulting the surety the principal has discharged him.

Wood v. *Woad* (1) was the case of a mutual insurance association one of the rules of which was that a committee of the society should have entire control of the funds and affairs of the society, and that if the committee should at any time deem the conduct of any member suspicious, or that such member was for any other reason unworthy of remaining in the society, they should have full power to exclude such member by directing the secretary to give such member notice in writing that the committee had excluded such member from the society, and after the giving of such notice such member should be excluded and have no claim or be responsible for or in respect of any loss or damage happening after such notice; and it was held that this rule did not empower the committee to expel a member upon the alleged ground that his conduct was suspicious or that he was for some reason unworthy of remaining in the society without giving the plaintiff an opportunity of being heard before them in vindication of his conduct and character against the charge, whatever it might be, which was relied upon as ground of expulsion. Kelly C.B. referring to the power of the committee and their duty under the above rule says (2):

> They are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

Fisher v. *Keane* (3) is an authority that the com-

(1) L. R. 9 Ex. 191. (2) P. 196.
(3) 11 Ch. D. 353

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mittee of a club are a quasi-judicial tribunal and bound in proceeding under the rules of the club against a member of the club for alleged misconduct to act according to the ordinary principles of justice, and are not to convict him of an offence warranting his expulsion from the club without giving him due notice of their intention to proceed against him and affording him an opportunity of defending or palliating his conduct; and the court will, at the instance of any member so proceeded against, declare any resolution passed by the committee without previous notice to him, based upon *ex-parte* evidence, and purporting to expel him from the club, to be null and void and will restrain the committee by injunction from interfering by virtue of such a resolution with his rights of membership. Jessel M.R. before whom the case was heard, giving judgment, says:—

In the first place I have to consider what the true construction of the rule is and in the second place I have to consider whether the method adopted by the committee of putting that rule in force was such as according to the rules of conducting judicial or quasi-judicial proceedings ought to have been adopted.

Then after reading the rule and commenting on it he came to the conclusion that its clear grammatical construction was:—

That a member shall not be recommended to resign unless the recommendation is agreed to by two thirds of the committee specially summoned for the purpose.

And as to the second point he says (1):

As I said before it does behoove the committee, who are a judicial or quasi-judicial tribunal, to be very careful before they expose one of their fellow members to such an ordeal. They ought to gravely consider, when proceeding to enforce such a rule as this, whether he has committed any offence at all, and especially whether he has committed such an offence as will warrant their branding him with the name of an expelled member of their club. In the present instance they did nothing of the kind. At

(1) P. 360.

a meeting without notice a, few members only being present, they allowed two other gentlemen behind the back of the plaintiff to make a statement (upon which they acted,) as what he said and did in the billiard room on the night in question.

And he concludes (1) this :

In my opinion a committee acting under such a rule as this are bound to act, as Lord Hatherley said (2), according to the ordinary principles of justice and are not to convict a man of a grave offence which shall warrant his expulsion from the club without fair adequate and sufficient notice and the opportunity of meeting the accusation brought against him. They ought not according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, to blast a man's reputation for ever—perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct.

Steuart v. *Gladstone* (3) was a case where, in articles of co-partnership, there was a provision that if the majority of the partners should at any time desire that any of the partners should retire, and should give him six months notice in writing to that effect, the partnership should as regarded him be dissolved at and from the time mentioned in the notice ; and it was held by Fry J. that the majority had not power to exclude a partner under that provision in the articles without giving him a full opportunity of explaining his conduct but that, upon the evidence in that case, the defendants had given the plaintiff such opportunity. *Labouchere* v. *Earl Wharncliffe* (4) was a case before Jessel, the Master of the Rolls, identical in character with *Fisher* v. *Keane* (5) before the same learned judge, and upon the facts of the case the learned judge held that the committee of the club had acted without full inquiry and without giving the plaintiff notice of any definite charge, that the resolution expelling him was carried without a

(1) P. 362.
(2) In Dean *v.* Bennett 6 Ch. App. 489.
(3) 10 Ch. D. 626.
(4) 13 Ch. D. 346.
(5) 11 Ch. D. 353.

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sufficient majority and that the plaintiff was entitled to the injunction prayed for in his bill. *Dawkins* v. *Antrobus* (1) is a decision of Jessel M.R., affirmed by the Court of Appeal, that where the committee of a club proceeded to expel a member in accordance with the rules of the club the courts have no jurisdiction to interfere with the decision of the members duly assembled, or to inquire whether the decision was reasonable or unreasonable, or to interfere at all unless the decision could be attributed to actual malice and want of good faith.

Gould v. *Webb* (2) was a case in which it was held that, to an action brought by a newspaper correspondent for wrongful dismissal from his employment under a contract with the defendant, pleas averring certain defaults of the plaintiff to fulfil the terms of his contract as justifying the dismissal did not justify a dissolution of the contract. It was a question of pleading arising upon demurrer to pleas in which the right to dismiss the plaintiff from his employment was rested upon the assertion of a legal right founded upon specifically alleged breaches of his contract by the plaintiff, and the judgment which allowed the demurrer simply decided that the acts, default in the fulfilment of which was pleaded as justifying the dismissal, were not acts the performance of which constituted conditions of the contract continuing in existence, that they were mere stipulations the breach of which, although they might give the defendant a cause of action against the plaintiff, did not in point of law justify a dissolution of the contract.

Winstone v. *Linn* (3) was simply a decision that covenants in an indenture of apprenticeship are independent covenants, and consequently that acts of

(1) 17 Ch. D. 615.
(2) 4 E. and B. 933.
(3) 1 B. and C. 460.

misconduct on the part of the apprentice stated in the plea were not an answer to an action brought for breach of covenant by the master to instruct and maintain the apprentice during the term agreed upon by the indenture. Neither of these two last cases, it is obvious, can have any application to the present case.

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Russell v. *Russell* (1) is a decision that where partnership articles between A and B provided that, if the business should not be conducted to the satisfaction of B. he should have power to give notice to A. to determine the partnership, this was a power which was exercisable at B's. sole will and pleasure without any previous notice of intention to exercise the power being given to A. The case is particularly valuable as containing a review by Jessel M.R. of *Blisset* v. *Daniel* (2) and *Wood* v. *Woad*, (3) in which that learned judge, while thoroughly approving of the judgments in those cases, points out, with that judicial precision for which he was remarkable, how very different the facts of these cases were from the facts of the case then before him, in language whch seems to me to furnish a perfect guide in the determination of the question: To what state of facts will the judgment in those cases apply and to what will they not apply? As to *Wood* v. *Woad* (3) he says (4):

Now one must consider what *Wood* v. *Woad* (3) was to show how different it is from this case. *Woad* v. *Wood* (3) was in effect this: there was a rule which allowed a committee of a mutual insurance society to expel a member, and the ground was that if the committee should at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they should have full power to exclude such member. Consequently by excluding him the committee declare to the world, to all his neighbors and friends, and to all the other members of the society in particular, that they "deem" his conduct suspicious, and for some reason

(1) 14 Ch. D. 471.
(2) 10 Hare 493.
(3) L. R. 9 Ex. 191.
(4) P. 478.

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that he is unworthy to remain in the society. By the very act of excluding him they cast a stigma upon him ; then remembering that I have to say a word as to the use of the word " deem." That word has more than one meaning, but one of its meanings is to adjudge or decide. In fact the old word " deemster " or " dempster " was the name for judge—to " deem " at one time meant to decide judicially. Consequently, taking that meaning what they had to do was to " deem " that the member's conduct was suspicious, and such as made him unworthy. That was in fact a decision not merely depending upon opinion but depending on inquiry. No one could suppose it was to be left to the caprice of the members of the committee to stigmatise as dishonorable or dishonest any member of the society. Of course it was not. It was intended that they should be satisfied by something like reasonable evidence that his conduct was unworthy. Therefore, in construing the rule the Court of Exchequer came to the conclusion, and if I may say so I think rightly came to the conclusion, that it was a case in which the committee ought not to have decided until after inquiry. That case therefore has no bearing upon the question as regards the partnership right to give notice to one partner to dissolve. It is a case of a totally different kind.

Then as to *Blisset* v. *Daniel* (1) he says :—

That was a very peculiar case. The case there was this : A majority of the partners consisting of two thirds wished to expel a partner and nothing more, but if they did expel him the other partners had a right to buy up his shares in a particular way by valuation. All the vice chancellor decided was this, that in a case of that kind they had no right to expel merely for the purpose of buying up the shares, and that it was not a fair and *bonâ fide* exercise of the power. He decided that the partners were not to meet together and say, " we should like to have so and so's shares and therefore we will expel him ;" that was a consequence of the expulsion but it was not to be the motive of the expulsion, it was not a *bonâ fide* exercise of the power. Then they alleged that they had grounds of dissatisfaction with the partner, but his reply in effect was, "if you have any ground of dissatisfaction you ought to have given me notice to see if I had anything to answer."

There the vice chancellor was of opinion that even in that limited case, where it was only *inter se* as regards the partners themselves, yet if the reason as far as the other partners were concerned was misconduct they ought to give the partner sought to be expelled an opportunity of explaining his alleged misconduct.

The learned judge then proceeds to compare that case with the one before him and says :—

(1) 10 Hare 493.

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How that case applies to the case of a single partner I do not well understand. In the case of several partners it may well be that it is a thing to be considered, but if it is a single partner it is plain that neither *Blisset* v. *Daniel* (1) nor *Wood* v. *Woad* (2) has any application because the moment you give the power to a single partner in terms which shew that he is to be sole judge for himself, not to acquire a benefit but to dissolve the partnership, then he may exercise that discretion capriciously, and there is no obligation upon him to act as a tribunal or to state the grounds on which he decides for himself.

Then, as to the power vested in the partner in the case before him, he says :

It is plainly a power which puts it entirely within the right of W. A. Russell to say : "I am not satisfied although all the world except myself would be satisfied with such a result." In other words, it is a power which he may exercise at his will and pleasure, capriciously or not capriciously as he thinks fit, and to my mind the cases cited have not any bearing whatever. He need not make any inquiry. He need not call upon the partners for explanation. It is open to him to say "I am not satisfied " and there is an end of it.

Let us now see what are the circumstances of the present case in order to determine whether any, and which, of the above cases apply to and govern it. In the year 1885 the plaintiff, Thomas Fennock Marshall, one George A. Philp and one Alexander W. Thompson were carrying on business together in partnership at Hagersville, in the County of Haldimand, under the name, style and firm of "The Marshall Seamless Boot and Shoe Manufacturing Company," in the carrying on of which business they used a crimping machine for the manufacture of boots and shoes for which, and for certain improvements from time to time made therein by Marshall, letters patent were granted to him by the Dominion of Canada. The three partners were severally possessed of equal shares or interest in the said letters patent. On the 2nd of October, 1885, the defendant met for the first time Marshall and Philp in Winnipeg, in the Province of Manitoba, and was there induced by them to purchase from Philp two-twelfths

(1) 10 Hare 493. (2) L. R. 9 Ex. 191.

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of his share, and from Marshall one-twelfth of his share, in the said patents and patented articles. The deed from Marshall to the defendant, bearing date the 5th of October, 1885, has been produced, and thereby it appears that Marshall assigned and transferred to the defendant, his executors, administrators and assigns a full absolute one-twelfth interest in and share of three several letters patent for the said crimping machine and the improvements made therein (previously recited in the deed of assignment), and all other patents that may have been issued in respect of such improvements, and the inventions and improvements to which the said letters patent refer and in all rights and benefits held and enjoyed by the said Marshall or to which he is or may become entitled under said letters patent or any other or future letters patent that have been or may be issued for improvements in said invention. On the 21 October, 1885, this assignment appears to have been duly registered in the patent office of the Dominion of Canada. On the 30th October the defendant met Marshall by appointment at the city of Hamilton, and then learned that the said partnership so trading as aforesaid under the name, style and firm of "The Marshall seamless boot and shoe manufacturing company," at Hagersville had become insolvent, and that the firm on the 22nd of October had made an assignment of all their estate and effects to one Lamb in trust for the benefit of their creditors. Besides the letters patent for the said crimping machine and the said improvements made therein granted by the Dominion of Canada, the said Marshall had obtained letters patent in the United States for the said crimping machine and the said improvements made therein, and also in Great Britain. The defendant made an offer to the assignee for the whole property and stock in trade of the partnership including the interest and rights of all the partners severally and

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respectively held by them in all the letters patent granted for the said crimping machine and the improvements therein. In order, as it would seem, to give effect to this offer, Marshall and Philp and Mary Jane Thompson executrix of the said Alexander W. Thompson, who had died in the month of August previously, executed a deed bearing date the 28th of November, 1885, whereby, after reciting that on the 22nd October, 1885, Marshall and Philp had made an assignment to Lamb for the benefit of the creditors of the firm, and that doubts had arisen as to whether the interest of Marshal and Philp in the several letters patent set out in a schedule annexed to the deed had passed under the said assignment, and that it had been agreed by and between the several parties to the deed now in recital that Marshall, Philp and Mary Jane Thompson, executrix of the said Alexander W. Thompson deceased, should execute an assignment of all their respective interests in said letters patent to the said Lamb, it was witnessed that the said Marshall, Philp and Mary Jane Thompson, as such executrix, did thereby grant, bargain, sell, assign, transfer and set over all their respective interests in the said letters patent particularly enumerated in said annexed schedule unto the said Lamb, in trust for the creditors of the said Marshall, Philp and Thompson deceased, formerly carrying on business in partnership together under the name and style of "the Marshall seamless boot and shoe manufacturing company." The assignee Lamb, under the authority of this deed, sold, assigned and transferred the whole estate and stock in trade of the said partnership firm, together with said absolute interest in the said letters patent so conveyed to Lamb, unto the defendant who thereupon became the absolute owner thereof for his own benefit, for good, full and valuable consideration paid by him therefor. The letters patent enumerated

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in the schedule annexed to the deed were nine in number, all of them being for the said crimping machine or for improvements therein and thereto made by Marshall, one of which letters patent was granted in Great Britain, four by the Dominion of Canada, and four by the United States of America, of which latter one was issued to the said Alexander W. Thompson deceased. Immediately upon the defendant so acquiring the absolute interest in the said letters patent he employed Marshall to carry on the boot and shoe manufacturing business for him until the 2nd of February, 1886, when Marshall having alleged that he had made some further improvements in the said crimping machine an agreement was executed by and under the hands and seals of Marshall and the defendant whereby after reciting among other things that the defendant was the owner of the said letters patent of invention (a list of which was annexed to the deed) under and by virtue of certain assignments thereof which had been duly registered, and that the said Marshall had made certain improvements in the said patents of invention, and that the defendant had agreed to employ the said Marshall for the purpose of demonstrating and placing the said patents of invention granted, and all such as are hereafter granted, upon the market for the purpose of sale in such manner as the defendant should deem most advantageous, he, the said Marshall, covenanted that he would at the request of the defendant apply and petition for, and take such steps as might be necessary for obtaining, letters patent in all such countries as the defendant should deem advisable, and at the cost, charges and expenses of the defendant, and that he should also, as speedily as might be after the date of the said agreement, apply for said petition or take such steps as might be necessary for obtaining letters patent for the said alleged improvements he had made

in the said crimping machine in all such countries as the defendant might deem advisable, all fees, costs, charges and expenses in connection with the obtaining of such letters patent being borne by the defendant; and that upon such letters patent being granted he would assign them to the defendant; and it was expressly provided that the defendant should have exclusive control and management of all matters in connection with the said patents, and that the said Marshall should be simply the defendant's agent for the purposes aforesaid. And the said Marshall covenanted to devote his whole time and attention to the business of the defendant, and that he should not directly or indirectly engage in any other business, occupation or employment, and that he should be faithful to defendant in all his transactions and dealings, and should from time to time consult him in all matters in any way appertaining to the said patents or any of them. And the defendant by the said deed agreed to employ Marshall for the term of two years from the date of the said deed, for the purpose of demonstrating and placing the said patents of invention granted, or to be granted, on the market on the following terms, namely, $100.00 per month to be paid to the said Marshall during the said term and his actual travelling expenses and board and twenty per cent of the actual net profits that should be derived in any way whatsoever from the sale or otherwise of the said patents of invention. And finally it was agreed by and between the said parties to the said deed that the defendant should be the absolute judge as to the manner in which the plaintiff Marshall should perform his duties under the said agreement, and should have the right at any time to dismiss him for incapacity or breach of duty, and that in such event the plaintiff should only be entitled to be paid his salary up to the time of such

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dismissal, and should have no claim whatever against the defendant.

This deed, as it appears to me, is plainly framed upon the assumption that the defendant, as purchaser of the absolute rights of Marshall, Philp and Thompson in the letters patent already issued for the crimping machine, and for improvements made thereto by Marshall, of which the deed recites that the defendant is the owner, was also entitled to the benefit of the further improvement in the machine alleged by Marshall to have been made by him but not yet patented; and there can, I think, be no doubt that, in point of fact, the defendant was so entitled to this extent and in this sense, that as the improvement was alleged to be in the patented machine, of which the defendant was then the acknowledged owner, the plaintiff adversely to the defendant could have had no enjoyment of letters patent for such improvement. The alleged improvement in the patented machine, of which the defendant was the owner, if patented by Marshall would not have enabled him to make any use of the defendant's patented machine; and as the alleged improvement was in that machine itself such improvement of itself, apart from the machine, would have been useless; and the use of it by Marshall in connection with the defendant's patented machine would have been an infringement of the defendant's rights in the patented machine of which he was the acknowledged owner by assignment from Marshall, so that Marshall could have had no beneficial enjoyment of his newly alleged improvement during the currency of the letters patent assigned to the defendant. *Ex parte Fox* (1). Such being the position of the parties Marshall, by the deed of the 2nd February, 1886, agrees to apply for letters patent for his

(1) 1 Ves. and Bea. 67.

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alleged improvement, not for himself and his own benefit, but for the defendant and simply as his agent, and at his request, and at his costs, charges and expenses, and only in such countries as he shall direct, and the defendant agrees to employ Marshall to devote his whole time and attention in the business of the defendant for the purpose of demonstrating and placing the said patents of invention upon the market, and agrees to pay Marshall certain specified remuneration for the services to be rendered by him, consisting partly of a determined sum per month besides his actual travelling expenses and board and partly of an undetermined sum of 20 per cent. of net profits, such part being conditional upon there being any such profits, but the whole of such payments, both the determined or fixed sum and the conditional, being by way of remuneration only for the services to be rendered by Marshall during the period for which he was to be employed, namely for two years, subject to express provision that the defendant should be the absolute judge of the manner in which the plaintiff should perform the duties of his said employment, and should have the absolute right to dismiss the plaintiff at any time for what the defendant should consider to be in breach of the plaintiff's duty in the rendering the services required of him. This, as it appears to me, is the manifest construction of the contract, and it gave in plain terms an absolute right to the defendant to determine the employment whenever the plaintiff should fail to give the defendant satisfaction as to the manner in which the plaintiff performed the services required of him, without specifying any particular act or default which failed to give satisfaction. To use the language of Jessel M. R. in *Russell* v. *Russell*, (1) which is the only one of the above cases which appears to me to apply to and govern this case:

(1) 14 Ch. D. 481.

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It is open to the defendant to say to the plaintiff I am not satisfied with the manner in which you discharged the duties required of me, and there is an end of it.

In the event of the defendant exercising such his right to dismissal it was expressly agreed that the plaintiff should have no claim for anything whatever save only payment of his salary under the agreement up to the time of such dismissal, and this, in my opinion, determines the plaintiff's claim as well for that portion of the remuneration agreed to be paid to him which was conditional upon there being net profits, as for the fixed sum agreed to be paid monthly. Turning now to the plaintiff's statement of claim we find that he rests his claim for relief:

1st. Upon the allegation that the agreement does not contain the true agreement between the parties, and he states what he alleges was the true agreement, and prays that the deed may be reformed; but in this contention the plaintiff wholly failed. for he admitted that the agreement had been read to him, that he objected to the clause relating to dismissal, but that the defendant said that if he, the plaintiff, would not sign the agreement as it was, he would have nothing more to do with it. He admitted that, upon this, he signed the agreement with full knowledge of the terms of the clause as to dismissal, and although he thought it a very arbitrary clause and that he thought he was wrong in signing it, and although he made no remonstrance against his dismissal, he thirteen months afterwards brings this action in which, without any averment that he has always been ready and willing since the dismissal to render the services he had agreed to render, he complains:

2. That the defendant dismissed him wrongfully and unlawfully, and without any just or sufficient cause; and he claims a right in law to obtain the whole bene-

fit of the employment as if he had continued rendering services to the satisfaction of the defendant during the whole term of the two years.

That the agreement is not one in the nature of a co-partnership interest in the letters patent granted for the crimping machine and for the improvements made therein there can be, in my opinion, no doubt. It was simply a contract of employment of the plaintiff by the defendant to render certain services to the defendant in the business of the latter, for which services the defendant agreed to give to the plaintiff a stated remuneration, partly fixed and determined, partly undetermined and conditional upon there proving to be a net profit accruing from the business, and he agreed that the employment should continue for two years, subject to the condition that the defendant might at any time dismiss the plaintiff if he should fail to perform the services required of him to the defendant's satisfaction, and that upon such dismissal the plaintiff's claim upon the defendant for every part of the remuneration agreed to be paid should cease and determine. This may have been, as the plaintiff admits he thought it was when he signed the contract, an arbitrary clause; with that the court has nothing to do; arbitrary or not arbitrary it is the contract of the parties that it should have effect.

But whatever be the true construction of the contract, *Russell* v. *Russell* (1) and the language of the learned Master of the Rolls there commenting upon *Blisset* v. *Daniel* (2) and *Wood* v. *Woad* (3), is conclusive, in my opinion, that the present case was not at all one in which a judge has any right to inquire whether the defendant had or had not sufficient cause for exercising the power of dismissal, which by the contract was submitted to

(1) 14 Ch. D. 471. (2) 10 Hare 493.
(1) L. R. 9. Ex. 191.

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his sole absolute judgment and discretion; and even if *mala fides* could be a matter to be inquired into and passed upon in a case of dismissal under a contract in the terms in which the present is, none was suggested in the statement of claim, or in point of fact, at all; nor did there appear to be any ground upon which such a charge could be rested. The learned judge who tried the case was of opinion that even if the point was open to him to decide there was no evidence to justify his arriving at the conclusion that the defendant acted otherwise than with the most perfect good faith in exercising the power of dismissal vested in him by the contract. The learned Chief Justice of the Court of Appeal has taken the same view of the evidence, in which, also, I must say that I entirely concur. The appeal therefore must, in my opinion, be allowed with costs, and judgment entered for the defendant in the court below dismissing the plaintiffs' action with costs.

PATTERSON J.—I agree with his lordship the Chief Justice of Ontario that the dismissal of the plaintiff under the tenth clause of the agreement did not work a forfeiture of his interest in any profits that might happen to be made by means of the patents, but that it only cut short the two years' engagement, and that his dismissal without previous notice and without any form of judicial trial was justified by the tenth clause Upon the law bearing on the construction of the power given by the clause I have nothing to add to what has now been said by his lordship the Chief Justice and by my brother Gwynne. The divisional court made an order for an account consequent upon their finding that the dismissal was wrongful. That order ought not now to stand. No case is made for it. I concur with Mr. Justice Osler's remarks on that

subject. The fourth clause of the agreement, as I understand it, gives the plaintiff an interest in potential net profits. Reading the whole agreement I am inclined to the view that only the profits made in the first two years are intended. The order for an account is not so limited, but I take it that a demand for an account before the end of two years,—this action being brought within the two years—is premature. The only part of the plaintiff's judgment which he can plausibly expect to retain, after our decision that his dismissal was warranted by his contract, is the abstract declaration that he has an interest in the profits. But we cannot declare that interest without defining it, and I am not prepared to affirm it to the extent affirmed by the divisional court. The plaintiff has not given us the assistance of any argument in support of his contention. The learned judge who tried the action declined, for reasons that seem to me to be good reasons, to entertain the question, and confined his judgment to the charge of wrongful dismissal. The plaintiff now fails, as he failed at the trial, upon that charge which was his main ground of action, and I think our proper course is simply to restore the judgment given at the trial, which dismissed the action with costs, and to allow the appeal with costs.

Appeal allowed with costs.

Solicitors for appellant : *Walker, Scott & Lees.*

Solicitors for respondent : *Carscallen & Cahill.*