Nixon *vs.* Blaine & Company.

Master and Servant.—Misconduct.—Dismissal.—Wages.

Where the parties stand in the relation of master and servant, the mere fact that insufficient notice of discharge has been given, does not confer on the servant the right of bringing an action against the master for damages for wrongful dismissal, unless such notice has been acted upon, or unless the period fixed by the notice has actually expired.

If, before the expiration of the notice of discharge, a servant grossly misconducts himself in the service and is dismissed, the master may avail himself of such misconduct as a defence to an action brought against him for wages accruing after such misconduct and dismissal; or to an action for damages sustained by the servant by reason of not being employed after such misconduct.

Semble.—*That the master cannot avail himself of his servant's misconduct to evade payment of wages for the period during which he has enjoyed the services of the servant.*

1879.
Nov. 25.
Dec. 2.

Nixon *vs.*
Blaine & Co.

This was an action to recover damages alleged to have been sustained by the plaintiff by reason of his wrongful dismissal from the service of the defendants.

The declaration set forth that in or about the month of January, 1870, it was contracted and agreed between the defendants, who carried on business at Port Elizabeth as general merchants, and the plaintiff, that the plaintiff, who was then a clerk in the service of the defendants, should continue in such service for a period of three years from the 1st January, 1879; and that in consideration of the services to be rendered by the plaintiff in superintending the soft goods department of their business during such three years, the defendants should pay to the plaintiff a salary of £600 per annum; and that in further consideration of the services to be rendered as aforesaid, and of the plaintiff being required from time to time to visit different parts of the Colony in the interests and on behalf of the defendants, they should also pay the travelling expenses incurred by the plaintiff; and that, in further consideration of the services aforesaid, the defendants should allow and pay to the plaintiff a commission

1879.
Nov. 25.
Dec. 2.

Nixon *vs.*
Blaine & Co.

of 2½ per cent. upon the annual increase in the sales of the defendants' goods which might ensue from the services to be rendered by the plaintiff as aforesaid. That upon the terms and under the stipulations as aforesaid, the plaintiff commenced his services, and continued to discharge all his duties in an honest, faithful, and efficient manner, until the 26th March, 1879, when the plaintiff was summarily, and without cause, and in breach of the aforesaid contract, dismissed from the service of the defendants, and deprived of all the emoluments which would of right have accrued to him; by reason whereof an action has accrued to him to demand, first, £1,600, being the balance of the fixed salary which would have accrued and been payable to plaintiff but for such wrongful dismissal; secondly, the sum of £600, being the amount which would have accrued to the plaintiff by reason of the saving of his ordinary household expenses whilst travelling in the service of the defendants and while they were paying his travelling expenses; and, thirdly, the sums of £200 for the first, £300 for the second, and £400 for the third of the aforesaid three years, being the commission at the aforesaid rate of 2½ per cent. which may fairly and reasonably be calculated to have accrued and become due to the plaintiff under the aforesaid agreement upon the increase of the defendants' sales in the department of their business in which the plaintiff's services were to be rendered. That although the plaintiff had tendered and offered to render faithfully, honestly, and efficiently all the services stipulated to be rendered by him, the defendants refused to accept such services, or to pay the aforesaid sums which would be due to the plaintiff in respect thereof. Wherefore the plaintiff prayed judgment.

The defendants pleaded, save as excepted, the general issue. Then specially, that the plaintiff entered their service on the terms that he might be dismissed at any time with a reasonable notice, and not on the terms alleged by him; and that one calendar month before they put an end to the said service they gave the plaintiff, as they lawfully might, one calendar month's notice of their intention to put an end to the said service, and to discharge the plaintiff therefrom. In a further special plea the defendants averred that before the alleged wrongful dismissal, the plaintiff had wilfully misconducted himself by being frequently intoxicated

during business hours, and by rendering himself incompetent to discharge his duties, and had otherwise been guilty of gross misbehaviour; whereupon, and by reason of such misconduct and misbehaviour, the defendants, as they had a right to do, discharged the plaintiff from their service on or about the 15th of April, 1879, which was the breach and grievance complained of. Wherefore they prayed that the plaintiff's claim be dismissed with costs.

The plaintiff's replication joined issue.

From the evidence it appeared that on the 6th of January last, the plaintiff, being then already in the service of the defendants, was engaged by them to take the management and control of the soft goods department of their establishment at Port Elizabeth, at a yearly salary of £600, and in addition, an annual bonus or commission of 2½ per cent. on the increase of the returns of the department over and above the average returns of the three previous years. The plaintiff immediately entered on his duties under his agreement, and continued to perform them until the 26th of March, when he received the following notice from the defendants:—"We find that we cannot continue to avail ourselves of your services with advantage to our business, and therefore give you notice that we shall not require them after the 30th June next, or before, should you wish to leave before that date." In answer to this communication the plaintiff wrote to the defendants informing them that he considered the agreement entered into between them binding morally and legally, and that he would hold them responsible for their notice, and take such steps for enforcing the agreement as he might be advised. A few days after, viz., on the 31st of March, they informed him by letter that as he declined to accept their notice of the 26th, they withdrew their notice, and gave him notice instead to leave one month after that date, that being (so the letter stated) the only notice to which he was legally entitled. He replied by referring them to his previous letter. On the 15th of April they wrote him a third letter, in the following terms:—"It has come to our knowledge that you have within the past few days been in a state of intoxication, and that you have otherwise behaved in a disgusting and unseemly manner while on our premises, and during the hours of business, and we forbid you to re-enter our premises after

1879.
Nov. 25.
Dec. 2.

Nixon *vs.*
Blaine & Co.

this date. We enclose cheque for £217 16*s.* 4*d.*, balance of your salary to the end of this month, at which date you have already had notice to leave." Witnesses were called to shew that the plaintiff had seriously misconducted himself on defendants' premises about the 9th and 10th of April, and that on several occasions between February and April he had been the worse for liquor during business hours. The plaintiff denied that he was intoxicated, but that he was suffering from excitement caused by the treatment he had received from the defendants and persons in their employ; and stated that he was never incapacitated for work. No commission had been paid or tendered to the plaintiff, though the increase of sales in the department, as compared with the sales for the corresponding months of the previous year, would yield a commission of £112 7*s.* The defendants denied that the plaintiff had earned any commission, as the sum had to be calculated on the increased sales for the entire year, and not on those for a portion of the year only. According to the testimony of the defendants, the agreement with the plaintiff was not for three years as alleged by him, but for an indefinite period; consequently they had a right to terminate the contract by giving one month's notice or paying one month's salary, that being the custom prevailing at Port Elizabeth in business engagements of a similar character.

Cole (with him *Buchanan*), for the plaintiff, contended that the custom alleged to exist at Port Elizabeth could not override the law. But even if the custom was a valid one it did not apply here, as there was an absolute agreement for three years. The decision of this Court in the case of *Falconer* vs. *Juta* (*Buch. Reports*, 1879, p. 22) was more in point. Even if the period for the duration of the contract was not named, the hiring was admittedly by the year, and consequently a month's notice of discharge was insufficient. The misconduct alleged was not sufficiently proved to warrant a summary dismissal (*vide Story on Contracts*, tit. Master and Servant).

Upington, A.G. (with him *Innes*), for the defendants, submitted that the plaintiff ought to be considered as a person engaged on trial, and therefore liable to dismissal if he failed to give satisfaction. The defendants denied any fixed period was mentioned for which the engagement was to continue,

and if this was so, under the ordinary English law the hiring would be presumed to be for a year, unless there were something to rebut this presumption, such as an agreement to pay wages by the week or month. In the case of domestic servants a month's notice would be sufficient; but while for a clerk three months' notice might be required, yet this was not an inflexible rule, but was rather regulated by the usage prevailing in the particular employment. At Port Elizabeth the custom or usage was to give one month's notice. The case of *Falconer* vs. *Juta* did not apply here, for in that case there was a distinct contract for three years, and the decision turned upon the construction of the Masters and Servants Act. As to the commission, the amount could only be ascertained on the whole year's sales, and as the plaintiff brought his dismissal on himself by his misconduct before a year had expired, he forfeited all claim to the portion which might have been earned. The misconduct was of such a nature as justified instant dismissal, and in an action of this nature the defendants could justify their acts, even if they had only subsequently found out that such misconduct had existed. (*Taylor on Evidence*, § 145; *Baxter* vs. *Nurse*, and *Holcroft* vs. *Barber*, 1 C. & K. pp. 4, 10; *Ridgway* vs. *The Hungerford Market Co.*, 3 Ad. & El. 171; *Turner* vs. *Robinson*, 6 Car. & Payne, 15.)

Cole, in reply, said the plaintiff was in defendants' employ previously to the contract, consequently there was no necessity to engage him on trial. The cases cited had reference to custom or particular trade and did not affect this suit.

Cur. adv. vult,—

Postea (December 2),—

De Villiers, C.J., in giving judgment, after reciting the facts proved, said:—In the view which I take of this case it will be unnecessary to decide the question whether or not one month's notice was sufficient for a person in the plaintiff's position. In regard to the plea of misconduct, I am satisfied that the plaintiff did on the 9th and 10th days of April so misconduct himself on the defendants' premises as to justify them in then and there discharging him from their service.

1879.
Nov. 25.
Dec. 2.

Nixon *vs.*
Blaine & Co.

The question then arises whether the plaintiff's misconduct after he had received the two previous notices can be relied upon by the defendants as a defence to the present action. The dismissal complained of by the plaintiff took place on the 26th March, and it becomes important to inquire whether, assuming that he was entitled to more than three months' notice, the notice given to him on that day conferred on him the right of forthwith instituting the present action. It is clear that by our law, if the parties had stood to each other in the ordinary relation of master and servant, the mere fact that insufficient notice had been given by the defendants to the plaintiff to leave their service would not confer on the plaintiff the right of bringing an action for damages for wrongful dismissal, unless such notice had been acted upon by the plaintiff, or unless the period fixed by the notice had actually expired. All the authorities in our law go to shew that the principles of law which regulate the letting of one's services are substantially the same as those which regulate the letting of one's property. The lessor of a house who receives insufficient notice of his lessee's intention to quit, does not, by the mere receipt of such notice, acquire the right to sue the lessee for damages, and there is no reason in law why a person who lets his services should stand in a different position. (See *Voet*, 19, 2, 22.) It might be contended that the parties to the present action do not occupy the relation of master and servant, and that the contract between them is that of *mandatum* and not of *locatio conductio;* but no authority has been produced to shew that even a mandatory would, under circumstances like the present, be entitled to damages by the mere receipt of a notice that his principal intended to put an end to the contract at some future time, but before the time fixed for the expiration of the mandate. In regard to the law of England, there are no doubt cases in which it has been held that where a person has entered into a binding agreement to take another into his service on a future day, but, before that day arrives, announces his intention not to do so, he is entitled to be believed, and the servant may thereupon immediately bring an action against him. In all these cases, however, something appears to have taken place, in consequence of the refusal to interfere with the performance of the contract when the time arrived. Thus, in the case of

Hochster vs. *De la Tour* (2 E. & B. 678), which is the leading case on the subject, the servant, upon receipt of the notice that his intended master had changed his mind, obtained another engagement which would have interfered with the performance of his former contract. In the subsequent case of *Avery* vs. *Bowden* (6 E. & B. 953), the defendant had agreed by charterparty to load a cargo on board the plaintiff's ship at Odessa, certain running days to be allowed. The declaration contained a count for not loading, which alleged that before the expiration of the running days the defendant had dispensed with the ship's remaining at Odessa. To this count the defendant pleaded, that before the cause of action arose war had been declared between England and Russia, and that the contract had thus been rescinded. The facts appeared to be that after the arrival at the port of loading, and before the declaration of war, the agent of the charterer had repeatedly told the master that he had no cargo for the ship, and that he, the master, had better go away; but the master had continued to require a cargo until the declaration of war was known at Odessa, which was before the expiration of the ship's laying days. Upon these facts it was held by the Court of Queen's Bench that, assuming that the agent of the charterer had on his part renounced the contract before the declaration of war, this renunciation, not having been accepted by the master, did not either constitute a dispensation or give a cause of action. Lord Campbell, in delivering the judgment of the Court in favour of the defendant, said:—"According to our decision in *Hochster* vs. *De la Tour*, to which we adhere, if the defendant within the running days, and before the declaration of war, had positively informed the captain that no cargo had been provided, or would be provided, for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract, and thereupon, sailing away from Odessa, he might have loaded a cargo at a friendly port from another person, whereupon the plaintiff would have had a right to maintain an action on the charterparty to recover damages equal to the loss he had sustained from the breach of contract on the part of the defendant. The language used by the defendant's agent before the declaration of war can hardly be considered as a renunciation of the

1879.
Nov. 25.
Dec. 2.

Nixon *vs.*
Blaine & Co.

contract; but if it had been much stronger, we conceive that it could not be considered as constituting a cause of action, after the captain still continued to insist upon having a cargo in fulfilment of the charterparty." This judgment was affirmed in the Exchequer Chamber, where the Judges stated that, in their opinion, there was no evidence of a dispensation. From this and other subsequent cases cited by him, Mr. *Manby Smith*, in his treatise on the Law of Master and Servant (3rd ed., p. 149), fairly deduces the proposition that—if the servant do not act upon the master's announced renunciation of the contract, and before the day arrives for the commencement of the service, becomes, either by the act of God, *vis major*, or his own misconduct or misfortune, incompetent or unable to perform his part of it, the master would be at liberty to avail himself of those circumstances to rescind the contract, and could not afterwards be sued for a breach of it. *A fortiori*, it would seem that a servant who is actually in his master's employment does not by the mere receipt of insufficient notice acquire an immediate right to sue his master for damages, and that if, before the expiration of the notice, the servant grossly misconducts himself in the service, the master may avail himself of such misconduct as a defence to an action brought against him for wages accruing due after such misconduct, or for damages sustained by the servant by reason of not being employed after such misconduct. But it by no means follows that the servant is without his remedy in respect of wages or commission which accrued due before his misconduct. Some of the English cases which have been quoted (such as *Turner* vs. *Robinson*, 6 C. & P. 15; *Ridgway* vs. *Hungerford Market Company*, 3 A. & E. 171) no doubt lay down that a servant rightfully dismissed for misconduct during his period of service cannot recover any wages for the portion of the year during which he has served. I am not clear that the same doctrine would apply in this Colony. Applying again the principles of the *locatio conductio* of the Roman-Dutch law, we find *Voet* (19, 2, 23) lays down that the lessee of a house who has just grounds for quitting it without notice, is bound, at all events, to pay rent for the time during which he has had the use of it, and it might fairly be argued that a person who hires the services of another cannot avail himself of his servant's misconduct to evade the payment of wages for the

period during which he has enjoyed the services. It is unnecessary, however, to decide the point, because the English cases which have been quoted clearly proceed upon the assumption that the servant's misconduct was the cause of the dismissal, and in all of them the dismissal took place after the misconduct. In the present case the plaintiff's misconduct took place after he had received the notice of the 26th March. By that notice the defendants had recognised his right to receive three months' notice, and to receive his wages and commission up to the end of the three months. It was the defendants' own act to put an end to the agreement before the first annual increase of the returns of the soft goods department over and above the average returns of the three previous years could be ascertained. If, therefore, the plaintiff misconducted himself after receiving this notice, his misconduct may excuse the defendants from paying him any wages or commission accruing due after his misconduct, but it could not deprive the plaintiff of the right which had become vested in him by virtue of the notice to recover at the end of the three months the value of the services which should be actually rendered by him up to that time. In fact, the defendants have paid the plaintiff his salary up to the end of April, although they were in my opinion only legally bound to pay his salary up to the time of his misconduct. On the other hand, they refuse to pay him any portion of the commission, although they admit that the increased returns up to the end of April were considerable, and that the bonus of 2½ per cent. on those increased returns would amount to £112 7*s*. Strictly speaking, the plaintiff cannot recover any commission on increased returns after the 10th of April, but to save the trouble and expense of a further inquiry the Court will be prepared (the parties consenting) to estimate the returns up to the 10th of April at £100. This amount the plaintiff is entitled to recover as commission, but a technical difficulty may arise as to whether it can be awarded as damages. The objection has not been taken, and if it had the Court would probably under the circumstances have allowed the plaintiff to amend his declaration. The defendants have not tendered any sum either as damages or as commission, and the judgment of the Court must be for the plaintiff for £100, with costs.

DWYER, J., said:—I think the judgment of the Court

1879. Nov. 25. Dec. 2.

Nixon *vs.* Blaine & Co.

should be in favour of the plaintiff. I have not had the opportunity of going fully into all the points referred by to the CHIEF JUSTICE, but I have no hesitation in saying, that according to the principles laid down in the English cases, any one who was in menial service would be entitled to a month's notice of discharge, and a person in the position of the plaintiff would be entitled to three months' notice. I think it is desirable there should be some expression of opinion on this point, but as the case is decided on other grounds, I can only state my own view of the law. I agree in the view taken by the CHIEF JUSTICE that the plaintiff is entitled to the wages which had accrued to him up to the time of his dismissal, although such dismissal was owing to his own misconduct, and also to the amount of commission earned up to that time.

STOCKENSTRÖM, J., said :—I am of the same opinion, and agree with the law as laid down by the CHIEF JUSTICE.

The Court intimated that if the parties did not agree to estimate the amount of commission which had accrued at £100, the matter would be referred to the Master for investigation and report.

The parties having agreed, judgment was entered for the plaintiff accordingly for £100, and costs.

[Plaintiff's Attorneys, FAIRBRIDGE, ARDERNE, & SCANLEN.
Defendants' Attorneys, REID & NEPHEW.]

FRYER *vs.* FARQUHAR'S TRUSTEE.

Insolvency.—Preferent Creditor.—Proof of Debt.—Ord. No. 6, 1843, *sec.* 30.

A trustee of an insolvent estate may pay a preferent creditor the amount of his lien over property belonging to the estate, and so release the property for the benefit of the estate, without a proof of debt being filed by such creditor.

1879. Nov. 20. Dec. 2.

Fryer *vs.* Farquhar's Trustee.

The trustee of the insolvent estate of Farquhar filed the liquidation and distribution account of his administration. In this account was brought up the sum of £114 as paid by the trustee to the estate of the late Van Wyk, for rent of