

The College solicitor was, however, able to prevail on the magistrate to state a case for the opinion of one of the Divisions of the High Court of Justice,

We give the case in full, as it contains the material for the argument which took place at Osgoode Hall before Divisional Court.

#### STATEMENT OF CASE.

Frank S. Warner, prosecutor, and Robert Simpson, defendant.

The defendant, Robert Simpson, is the owner of a large departmental store building at the corner of Queen and Yonge streets, in Toronto, and was charged before me on the information of and complaint of one Frank S. Warner, that he did during the months of February, March, and April, 1896, unlawfully keep open shop at the city of Toronto for retailing, dispensing, and compounding poisons, contrary to the form of the Pharmacy Act and amendments thereto.

On the ground floor of said building a space is set apart for a drug department, which department is and has been under the management and control of one Charles P. Lusk, a duly qualified pharmaceutical chemist registered under the Pharmacy Act, and who had taken out the certificate under the provisions of section 18 of said Act.

It was admitted that the said Lusk did in said department dispense certain drugs containing poison, and sell certain poisons, all of which are mentioned and set out in schedule "A" of the Pharmacy Act and amendments thereto, giving to the respective purchasers a bill of sale, on which defendant Simpson's name was printed, and on one of which bills said Lusk had stamped his own name, and thereunder the word "druggist."

At the time of the purchase of the said poisons the said Lusk gave some of the purchasers thereof the printed circular marked exhibit "B," which forms part of this case.

The said Simpson was never inside the said drug department, and never interfered with the conduct of the business therein.

All the goods, including the said poisons, required for the drug department after the employment of the said Lusk were from time to time purchased by the said Lusk, on his own judgment, without consultation with said Simpson, but with the moneys or upon the credit of the said Simpson, who also received the proceeds of all sales made in such department, such proceeds going into the general cash receipts of the whole departmental store.

Poisonous drugs required in connection with the dispensing were kept in a closed dispensary partitioned off in said store, and of which said Lusk had the key, and no other employee in said department could gain access thereto without the permission of said Lusk, and upon leaving the department at night said dispensary was locked and the key kept by the said Lusk, but there are some poisons

mentioned in schedule "A" of said Act which are not in said partitioned dispensary, but are kept on shelves and in drawers behind the counters in said drug department.

The position between the said Simpson and the said Lusk appears by the agreement in writing between them, a copy of which is hereunto annexed and which forms part of this case; and there was a verbal agreement between said Simpson and the said Lusk that the latter should have absolute control of the said drug department to the exclusion of said Simpson.

On the foregoing facts, and in my view of the law, I dismissed the information and complaint of the said Warner, and, my order of dismissal being questioned by the prosecutor on the ground that defendant was guilty of the offence charged in the information under section 24 of the Pharmacy Act, I state this case so that my decision on the law of the case may be reviewed by a division of the High Court of Justice:

G. T. DENISON,  
Police Magistrate.

Dated the 11th May, 1896.

On the 15th of June the appeal of the College on the stated case was heard before Chief Justice Sir William Meredith and Mr. Justice Rose.

Mr. B. B. Osler, Q.C., and Mr. E. F. Malone appeared for the College; Mr. Shepley, Q.C., and Mr. Ludwig, for Robert Simpson.

The result of the argument was that the judges unanimously, and without reserving judgment, directed the police magistrate to convict Robert Simpson, which order was subsequently carried out.

There were some very important points brought out on the argument, as well as references to leading English and American cases.

The College solicitors relied considerably on the case of the Pharmaceutical Society vs. The London and Provisional Supply Association referred to in 4 & 5 Q.B.D. and 5 House of Lords and Privy Council Appeal Cases. This was an action against an incorporated company for selling poison.

The defence set up by the London and Provisional Supply Association was that, being an incorporated company, they did come within the meaning of the Pharmacy Act, as the Act only applied to *natural persons*, and prohibited such *natural persons* from selling, retailing, etc., without possessing the necessary qualifications.

They also contended that the public was protected in that the person having the management of the sales of poison was a registered chemist. The House of Lords decided in favor of the incorporated company, but during the argument, and from expressions used giving the judgment, it was clearly shown that, though an incorporation may be exempt,

still a natural person or a partnership was not exempt, and such persons and partnerships would have to conform to the law.

It was shown, on behalf of the College, that the Ontario Pharmacy Act differed from the English in that the clauses of the Ontario Act are all prohibitory, and that the only exception made by the Act was in the case of executors who were allowed to carry on the business of deceased chemists for the purpose of winding up such business, but that even in such cases such business had to be conducted by a pharmaceutical chemist registered under the Act.

In the House of Lords case, Lord Shelburne, the Lord Chancellor, in giving judgment, distinguished between the charge of selling poison and the charge of keeping open shop, and said: "No doubt the words 'keep open shop' may extend to something more, and comprehend the person who keeps an open shop for the sale of poisons, etc., although he may not by his own hands do the business of selling any poisons, if one is only master and proprietor of the business, if he be a person within the proper directions of the Act."

Again, in another part of the judgment, Lord Blackburn states: "But no doubt the Legislature, for what reason it is for those who passed the Act to say, have thought it best to say that a 'person,' which I take to be a natural person, shall not only not sell, but shall not keep an open shop for the sale. I myself think that probably one of the reasons for that was to facilitate convictions, and another may have been that it was thought, if there is a person who keeps a shop who is unqualified, he may have a qualified assistant, and he will be able to overrule the qualified assistant at any moment he pleases, and there may be danger in that."

Lord Cockburn says that the intention of the Legislature appears clearly to have been to prevent any shop or establishment to exist for the sale of poisons except under the immediate superintendence and control of a duly qualified proprietor. It is not enough that the proprietor employs a qualified person to manage the business; the master himself must be duly qualified. Two parties could not combine to carry on the general business of grocer and chemist, though the one attending to the latter part of the business might be a qualified chemist. There would be nothing to insure in such a case that, in the absence of the qualified person, the other might take upon himself to act in his stead, and thus the security against future mistakes in dispensing of medicine which the statute was intended to insure, might be seriously compromised.

When Mr. Shepley attempted to argue that the passing of the Pharmacy Act was *ultra vires* of the Legislature, the judges refused to give effect to such an argument. During the argument a case almost