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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. SEPTEMBER 21ST, 1910.

GAMBLE v. TOWNSHIPS OF VAUGHAN AND MARKHAM.

Damages—Personal Injuries—Explosion of Dynamite—Physical Injury—Traumatic Neurasthenia—Liability of two Township Corporations—Relief over—Quantum of Damages.

The plaintiff, a widow, residing in a house fronting upon Yonge street, in the township of Markham, alleged that she had been injured in December, 1908, as the result of an explosion of dynamite used by a contractor for the defendants the Corporation of the Township of Vaughan in a gravel-pit situate in that township, across the road and a short distance from the plaintiff's house.

The plaintiff brought this action (to recover damages for her injuries) against the corporations of the two townships, because the highway on which the gravel from the pit was being laid ran between the townships, and was under the control of both corporations.

The defendants the Corporation of the Township of Markham claimed relief over against their co-defendants.

The action and the claim for relief over were tried, without a jury, by CLUTE, J., who found that there was a want of reasonable care amounting to negligence in the use of the dynamite; that from eight to ten times as much dynamite was used as was necessary, and that, if only a reasonable and proper amount had been used, it would not have caused any serious results to the plaintiff; that the plaintiff suffered injury by reason of the explosion, and that the injury she suffered was physical, and not purely mental. He distinguished the case from Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222, Henderson v. Can-

ada Atlantic R.W. Co., 25 A.R. 437, 29 S.C.R. 632, and Geiger v. Grand Trunk R.W. Co., 10 O.L.R. 511, accepting the view of the medical experts called for the plaintiff, that in her case it was physical injury caused by the explosion. He also found, though with some slight hesitation, that both township corporations were liable to the plaintiff. He assessed the damages at $570; and he directed judgment to be entered in favour of Markham against Vaughan for any damages and costs which Markham might pay to the plaintiff and for Markham's own costs also.

Both defendants appealed against the judgment for the plaintiff, and the defendants the Corporation of Vaughan appealed from the judgment for relief over. The plaintiff also appealed, on the ground that the damages were assessed at too small a sum.

The appeals were heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

W. Proudfoot, K.C., for the Corporation of Vaughan.

H. C. Macdonald, for the Corporation of Markham.

T. H. Lennox, K.C., and C. W. Plaxton, for the plaintiff.

THE COURT held that the evidence established physical injury, resulting in traumatic neurasthenia and partial deafness, but declined to increase the damages awarded. It was held, also, that judgment was properly given against both defendants, and for relief over against Vaughan.

The defendants' appeals were dismissed with costs, and the plaintiff's appeal without costs.

[See Toms v. Toronto R.W. Co., ante 169.]

MEREDITH, C.J.C.P. NOVEMBER 26TH, 1910.

*NORTHERN CROWN BANK v. INTERNATIONAL ELECTRIC CO.

Promissory Note—Instrument Payable on Demand—Negotiation on Day of Date — "Overdue" Note — Whether Holders Affected by Defects of Title—Bills of Exchange Act, secs. 70, 142, 182, 186.

Action to recover the amount of a promissory note for $3,500, dated the 28th June, 1906, made by the defendants, payable to

*This case will be reported in the Ontario Law Reports.

the order of the Electric Advertising Co., with interest at five per cent. per annum "before and after due and until paid," which was indorsed to the plaintiffs on the day of its date.

The defence was that the note was made without consideration; that it was negotiated by the payees in fraud of the defendants; and that, being payable on demand, it was overdue when the plaintiffs became the holders of it; and that they, therefore, took it subject to any defect of title affecting it at maturity.

F. Arnoldi, K.C., for the plaintiffs.
I. F. Hellmuth, K.C., for the defendants.

MEREDITH, C.J.:— . . . Counsel for the defendants . . . relied on In re George, 44 Ch. D. 627, and Edwards v. Walters, [1896] 2 Ch. 157, which establish that a promissory note payable on demand is at maturity immediately upon its being made, and treat that as settled by authority. The question in each of these cases was as to whether there had been an effective renunciation by the holder of a promissory note, within the meaning of sec. 62 of the English Bills of Exchange Act, which provides (as does sec. 142, sub-secs. 1 and 3, of the Canadian Act) that "when the holder of a bill, at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor."

It was argued by the learned counsel that if, as appears to be the law, a promissory note payable on demand is at maturity immediately upon its being made, the promissory note sued on was overdue when it passed into the hands of the plaintiffs, and they, therefore, took it subject to any defect of title affecting it at maturity.

It was further argued that the language of sec. 182 of the Canadian Act shews that it was framed on the hypothesis that this was the law, and that the purpose of the section was to create an exception to the general rule, limited in its operation to the particular matter with which the section deals.

Section 182 reads as follows: "Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue."

In my opinion, the contention . . . is not well founded.

Before the passing of the Bills of Exchange Act it was the law that a promissory note payable on demand is not to be considered as overdue without some evidence of payment having

been demanded and refused: Byles on Bills, 9th ed., p. 164, and cases there cited; and that this is still the law appears from Glasscock v. Balls, 24 Q.B.D. 13. . . . The Bills of Exchange Act is not referred to . . . but there can be no doubt that the Court must have been of opinion that it had made no change in the law as expounded in the cases before the Act was passed.

It is clear, I think, from the provisions of the Act, that a bill of exchange payable on demand is not to be deemed to be overdue for the purpose of affecting the title of a person taking it, unless it appears on the face of it to have been in circulation for an unreasonable length of time. . . .

[Reference to sec. 70, sub-secs. 1 and 2.]

It is clear, then, that, had the instrument sued on been a bill of exchange, as it was negotiated on the day it was made, it would not have been deemed to be an overdue bill.

As sec. 186 makes the provisions of the Act relating to bills of exchange applicable to promissory notes, sec. 70, but for the provisions of sec, 182, would be applicable to promissory notes.

But, inasmuch as promissory notes payable on demand had always stood on a different footing from bills of exchange so payable, being, as it was said, more in the nature of continuing securities, sec. 182 was enacted for the purpose of continuing that distinction, and in order to provide that, though a bill payable on demand was to be deemed to be overdue when it appears that it had been in circulation for an unreasonable length of time, a different rule should be applicable to a promissory note payable on demand, which should not be deemed to be overdue because at the time of its negotiation it appeared that a reasonable time for presenting it for payment had elapsed since its issue. I mean, of course, overdue within the meaning and for the purposes of sec. 70.

Although the provision of sec. 182 is a negative one, that "a note payable on demand is not to be deemed to be overdue . . . ," the same effect ought to be given to it as to the affirmative one contained in sec. 70. It is probable that the negative form was used . . . because the purpose of sec. 182 was to make an exception to the rule prescribed by sec. 70.

In any case, how is it possible, in the face of the provision of sec. 182 that a note payable on demand "is not be to be deemed to be overdue . . . by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue," to hold that the note sued on is to be deemed to have been overdue at the time the plaintiffs became the holders of it, when it was indorsed to them on the very day of its issue?

In my opinion, the defence fails, and the plaintiffs are entitled to judgment for the amount of the note, with interest at five per cent. per annum from its date, and with costs.

LATCHFORD, J. NOVEMBER 26TH, 1910.

INSPECTOR OF PRISONS AND PUBLIC CHARITIES v. MACDONALD.

Lunatic—Maintenance in Public Asylum—"Property" of Lunatic—Right under Will to be Maintained on Farm—Action by Inspector of Prisons and Public Charities—R.S.O. 1897 *ch.* 317, *secs.* 47, 48—*Right to Dower—Election to Take Benefits under Will—Maintenance of Lunatic during Lifetime of Husband — Claim for Payment — Amendment — Statute of Limitations — Costs of Action Improperly Brought.*

Action by the Inspector, under the authority of R.S.O. 1897 ch. 317, secs. 47-62, as a corporation sole under R.S.O. 1897 ch. 321, sec. 6, to recover from the defendants the amounts owing for the maintenance of one Isabella McDougall, confined as a lunatic in the Asylum for the Insane at Kingston.

The plaintiff alleged that, at the time Isabella McDougall was placed in the asylum she was in possession of, or subsequently came into possession of, certain property, within the meaning of sec. 47 of ch. 317.

The defendants were the executor and the four children of the late Alexander McDougall, of Glengarry, who died on the 22nd October, 1891, having first made a will.

Probate of the will was granted to the defendant Macdonald as executor, and he sold the personalty and leased the realty. It was said that he had removed from Ontario, and he did not defend the action.

By an order made on the 23rd December, 1908, the defendant Macdonald was removed from his executorship, the plaintiff was appointed in his stead, and all the assets of the testator were vested in the plaintiff. By another order made on the 27th January, 1910, the paragraph of the first order vesting the assets in the plaintiff was struck out, and the removal of the defendant Macdonald and the appointment of the plaintiff were limited to the period of the pendency of this action.

The defendants Catharine McDougall and Alexander McDougall were of age when the action was brought, and the other two defendants, Mary McDougall and Hugh John McDougall, were infants. Mary McDougall came of age while the action was pending, but filed no new defence; the official guardian had submitted the rights of the infants to the Court.

The action was tried before LATCHFORD, J., without a jury, at Cornwall.

J. A. Macdonell, K.C., G. R. Geary, K.C., and F. T. Costello, for the plaintiff.

D. B. Maclennan, K.C., for the defendant Alexander McDougall.

R. A. Pringle, K.C., for the defendants Mary and Hugh John McDougall.

LATCHFORD, J.:— . . . By a clause in his will Alexander McDougall devised his real estate, consisting only of his hundred-acre farm, to his eldest son, the defendant Alexander McDougall, in fee, "subject to the support and maintenance of my mother, Nancy McDougall, also subject to the support and maintenance of my beloved wife, Bella McDougall, while she remains my widow, such maintenance and support to be in lieu of all dower, and to be had on the farm for both my mother and my wife in style and manner as they would have with me should I be living, my said wife assisting in the household duties as now, but not otherwise or living abroad; and subject also to the maintenance and support and education of my other children, namely, Hugh John, Kate, and Mary, to such reasonable extent as the place may afford without incumbering the same." He appoints his executors the guardians of his infant children "in event of my wife's death or her becoming from any cause incapable of acting as such during their minority." The executors are given power to sell the personal estate, and, after payment of the testator's debts, "to invest the balance, if any, for the support of my mother, wife, and children." They are also authorised to lease the farm, "on the best terms possible, for the use and benefit of my family, should they (the executors) consider this course best in the interest of the estate and my family."

The will was made on the 7th July, 1891, and probate of it was granted on the 7th November, 1891. Seven years previously, in 1884, the testator's wife was from the 18th June to the 9th October confined in the asylum at Kingston. There was a recurrence of her affliction in 1889, when she was again confined

. . . from the 20th February to the 30th August. . . . She . . . became insane for the third time eleven months after her husband's death, and was returned to the asylum on the 22nd September, 1892, remaining until the 13th June, 1894, when she was discharged, only to return a week later. She has been confined there continuously since. There is no evidence that she is not still a widow. Apart from $20 paid in 1889, nothing has been received for her maintenance. The balance of the account to the 30th August, 1889, is $67.80. From that date to the 30th June, 1910, the account filed amounts to $2,558.64. . . .

In addition to the prayer that the executor be removed and that the plaintiff be appointed in his place, the plaintiff claims an account from the executor, an injunction restraining him from collecting any moneys belonging to the estate, and finally asks for "an order that, in default of payment of the amount due for maintenance . . . the farm belonging to the deceased be sold, and out of the proceeds thereof the plaintiff be paid the amount found due for maintenance, and the balance be paid into Court to meet the future maintenance of the said Isabella McDougall." . . .

On behalf of the plaintiff it was argued that the charge for maintenance during the husband's lifetime is a debt of his estate. . . . The claim is trivial, merely $67.80. It is not made expressly in the statement of claim, and, if an amendment is allowed, the defendant Alexander McDougall contends that he should be allowed to plead the Statute of Limitations. . . . The statute will obviously be a complete defence. . . .

In appointing the executors to be guardians of the children, in the event of Isabella McDougall "becoming from any cause incapable," the testator, I think, indicated his fear that there would be a recurrence of the affliction. . . . He provided for her support while she remained on the farm, and only during that time. There was no such restriction, it may be observed, upon the charges in favour of the testator's mother and his children.

There is no evidence that Isabella McDougall claimed dower in the land. On the other hand, there is the fact that for nearly a year she resided on the farm, performing her household duties as in her husband's lifetime. She had undoubtedly the right to claim dower in the farm in preference to the benefits conferred upon her by the will. . . .

[Reference to Nixon v. Ashenhurst, 7 O.R. 664, 666.]

Viewed in the light of the special circumstances of this case: the smallness of the estate, barely sufficient to afford sustenance

to the little family, their mother and grandmother; the tender age of the children; the possibility that their mother would for the third time become insane; the propriety of devising the farm to the eldest son with small legacies to the other children; the provision made for the support on the farm of all the persons dependent upon the testator; the preservation of the little home if the dreaded affliction did not recur; the knowledge which I have no doubt his widow had that the gift to her was expressly made in lieu of dower—I find that the widow elected to take the benefits conferred by the will in lieu of dower in the farm.

One question then arises: are the benefits conferred upon Isabella McDougall by the will sufficient to enable the plaintiff to maintain this action? Its solution depends upon whether or not what she took under the will gives the plaintiff a right of action under sec. 47 of R.S.O. 1897 ch. 317. . . . Had the patient, at the time she was placed in confinement or subsequently thereto, come into possession of property, within the meaning of sec. 47? . . . If what the testator bequeathed to his wife, and what she, as I have found, elected to take and did take in lieu of dower, is, within the meaning of sec. 47, property of which she had possession, the action is maintainable; otherwise it must fail. . . .

Such a strictly personal and . . . incommunicable right as she enjoyed for a time could not be taken possession of, managed, or appropriated by the Inspector, or be by him leased, sold, mortgaged, or conveyed, even under the very wide powers given by sec. 48. It is, I think, the possession of such property only as the Inspector is empowered to deal with under sec. 48 that gives him a right of action under sec. 47, and Isabella McDougall was not at any time in possession of property of that nature.

Counsel for the plaintiff submitted many cases to shew that lunacy will not operate to divest the person so afflicted of an estate which has vested. These cases would be applicable here had any property, and not merely a right to support, been bequeathed to the lunatic, or any fund set apart for her maintenance. . . .

[Reference to Partridge v. Partridge, [1894] 1 Ch. 351; Gilchrist v. Ramsay, 27 U.C.R. 500.]

An execution creditor of Isabella McDougall could not proceed by way of equitable execution against the interest which she was to have enjoyed jointly with her children during their infancy: see Fisken v. Brooke, 4 A.R. 8, 23, overruling Buchanan v. Brooke, 24 Gr. 585.

As I consider that Isabella McDougall never came into pos-

session of property within the meaning of the statute, this action is not maintainable and will be dismissed with costs. The plaintiff wholly misconceived his rights in interfering as he has done with the administration of the estate. . . . The plaintiff must, as a matter of course, pay into Court all moneys he has received, and, if he still holds the promissory notes, deposit them with the Accountant. He is not to be entitled to any disbursements. . . .

It would be unjust if any of the defendants were to be out of pocket by reason of the unwarrantable act of the plaintiff in instituting these proceedings. I have no power to compel the plaintiff to pay the defendants' costs as between solicitor and client, but I hope the costs on that scale will be paid. . . .

RIDDELL, J., IN CHAMBERS. NOVEMBER 28TH, 1910.

RE MORAN.

Accident Insurance — Misnomer of Beneficiary—Evidence to Shew Person Intended.

Application by Nora Moran for payment out of Court to her of moneys paid in, under the Trustees' Relief Act, by an insurance company.

J. A. Macintosh, for Nora Moran.
F. W. Harcourt, K.C., for others interested.

RIDDELL, J.:—Thomas Moran, of Winchester township, had a family of three sons and five daughters. One of the daughters, Nora, had been called Laura by a Frenchman who had difficulty (it is said) in properly pronouncing her real name. Thereafter her brother Patrick, who was nearer of an age with her than the other members of the family, was accustomed to call her "Laura," and, so long as he remained at home, she was frequently so called in the family. Patrick in 1898, at the age of twenty, went to British Columbia; he insured in the Ocean Accident and Guarantee Co. for $1,500 in favour of his "sister Laura Moran." He was killed in 1910; the company paid the money into Court; and Nora Moran now applies for payment out.

It appears affirmatively that the deceased had no sister

"Laura," unless Nora is to be considered such. It is impossible that he could have meant May, Elizabeth, Katherine, or Cecilia, who were his other sisters, and it is manifest that his sister whose baptismal name was Nora was known to his heart and kept in his memory under the childhood's nickname of Laura.

The case is without doubt, in my view.

The rule must be substantially the same as in the case of a will, and Theobald thus lays it down: "The testator may have habitually called certain persons or things by peculiar names by which they are not commonly known, and this evidence is admissible; thus where the gift was to Catherine Eamley, evidence was admitted to shew whom the testator was in the habit of calling by that name:" 4th ed., p. 221. In Lee v. Pain, 4 Hare 201, at p. 251, the legacy was to "Mrs. and Miss Bowden." Mrs. Washbourne's maiden name was Bowden, and the testatrix, who knew her and her daughter intimately, was in the habit of speaking of them as Mrs. and Miss Bowden, and, on the mistake being pointed out, she acknowledged it and said she meant the daughter of Mrs. Bowden. There were no other Mrs. and Miss Bowden who could have been intended, and the Vice-Chancellor, Sir James Wigram, held Mrs. and Miss Washbourne entitled.

There are many cases more or less in point cited in the notes to Dowset v. Sweet, Amb. 175, to be found in the edition in the general library, but I do not think it at all necessary or helpful to cite any others.

The money will be paid out, principal and interest, to Nora Moran, less costs of all parties, which are to be out of the fund.

RIDDELL, J., IN CHAMBERS. NOVEMBER 28TH, 1910.

RE MCLEAN STINSON AND BRODIE LIMITED.

Company—Winding-up—Petition for—"Party" to Proceeding—President of the Company—Shareholder—Contributory—Cross-examination upon Affidavit of Manager of Petitioning Creditors—Questions—Relevancy—Conspiracy.

Motion by the Rimouski Fire Insurance Company, the petitioners for an order for the winding-up of McLean Stinson and Brodie Limited, for an order setting aside an appointment issued by Stinson, president of the latter company, for the cross-examination of one Alphonse Audet, assistant-manager of the peti-

tioning company, upon his affidavit filed in support of the petition; and motion on behalf of Stinson to commit Audet for refusing to answer questions upon cross-examination before a special examiner.

Shirley Denison, K.C., for the petitioning company and Alphonse Audet.

W. J. McWhinney, K.C., for Stinson.

Strachan Johnston, K.C., and S. King, for certain creditors.

RIDDELL, J.:—A petition for the winding-up of this company was filed by the Rimouski Fire Insurance Company on the 2nd November, 1910. It was alleged that the company owed the petitioners over $10,000, and that it was hopelessly insolvent. Another was subsequently filed by Stinson Brodie Ring & Co. Limited, claiming a large sum due. On the 10th November the directors of the company passed a resolution for the instruction of a solicitor to consent to a winding-up order.

The matter came on upon the 11th November before the Chancellor, and counsel appeared for Stinson, the president of the company, saying that he had just been retained, and asked for an enlargement. This was granted. Stinson then took out an appointment to examine Audet, the assistant-manager of the Rimouski company, upon his affidavit filed with the petition—and the examination was proceeded with before Mr. Bruce, special examiner. Upon that examination Audet refused to answer certain questions. The matter came on again on the 18th November before the Chief Justice of the Common Pleas, when, upon the representation that examinations were going on and had not been completed, it was again enlarged. It came on again before me on the 23rd November. There were certain investigations going on which, as all parties agreed, rendered it advisable that a further enlargement should be had.

But Mr. Denison moved to set aside the appointment for the examination taken out by Stinson, and Mr. McWhinney moved to commit Audet for refusing to answer, and these motions I am now to deal with.

As to the first-named motion, it is argued that Stinson is not a party to the petition in any way; and consequently he had no right to examine any witness.

A winding-up proceeding "is a substitute for a suit for winding-up a partnership. It is a power applicable by the Act of Parliament to corporations. . . . Partners have a right to file a bill one against the other, and to have the usual decree for the administration of the partnership property and for the

settling of the partnership accounts and liabilities. In the case of large companies, winding-up was thought to be a more convenient course than a common partnership suit, but in every other respect it is the same. In a common partnership suit nobody can be made a party or can be heard except the partners themselves, and originally a winding-up was the the same thing. Contributories were the only persons who could be heard, but, as creditors were interfered with by the operation of a winding-up, the Act of Parliament has made a winding-up a matter both for creditors and contributories. A creditor may present a petition for winding-up, and both creditors and contributories are heard upon that . . . :" In re Bradford Navigation Co., L.R. 5 Ch. 600, at pp. 601, 602, per James, L.J., delivering the judgment of the Court. "It is settled as the rule that, when the application is to wind up a company, any creditor or shareholder may appear to support or object:" per Malins, V.-C., in In re B. N. L. Assurance Association, L.R. 14 Eq. 499, at p. 501. Even an allottee who has begun proceedings to rescind his contract is in the same position: Tomlin's Case, [1898] 1 Ch. 105. And the same practice has prevailed in Canada, and "it is desirable to follow the rule for guidance to be found in the English cases under the Winding-up Acts:" per Boyd, C., in Re Alpha Oil Co., 12 P.R. 298, at p. 299.

Stinson is the holder of paid-up shares only; but that does not prevent him from being a "contributory" who has the right to appear and oppose the granting of the order—he is in a position analogous to that of a partner in a private partnership, and therefore is interested, so that he may appear and be heard. This is his legal right, it is not a matter of grace but ex debito justitiæ, and he does not appear as amicus curiæ. Persons other than creditors or contributories may indeed be told by the Court, "I should be glad to hear you as amicus curiæ, if you have any interest, that I may know what public grounds there are:" but the position of such persons is wholly different from that of Stinson.

There is no hard and fast definition of the word "party" in the Consolidated Rules. In the case of a petition I am unable to say that one who has the right to appear and support or oppose is not a "party." It would seem that he might appeal. See the Bradford case, ut supra. I think Stinson comes within the meaning of the word "party" for the purposes of examination of witnesses, etc.

The motion to set aside the appointment for examination will, therefore, be refused with costs.

Then as to the refusal to answer, Stinson alleges that he, Wilgar, Brodie, and Ring were the directors of the company, that he was absent in England in September and October, that on his return he found that a plot had been formed to ruin the company and remove him as president, and take away from the company a valuable contract with the Rimouski company as their general agents, and give the contract to one of the directors and two employees of the company. He further says that the consent to a winding-up order passed in his absence was in furtherance of the scheme to wreck the company and destroy his position in the interests and in the business of the company and in the said contract—and charges Audet with being privy to the whole plot or scheme.

Upon the examination of Audet by counsel for Stinson, Audet took the position that the only thing to be investigated was the solvency of the company; and, upon advice of counsel, refused to answer questions which had no relation to the financial condition of the company.

One line of questions looked toward establishing that there was a scheme, to which Audet was a party, to transfer the valuable contract the company had with the petitioners, Audet's company, to directors of the company. This, it is obvious, might be of such a character as would make the directors so taking the contract trustees for the profits for the company. Full disclosure of the arrangement should be made, so far as it concerns any directors or employee of the company, or any then agent or nominee, in order to arrive at the company's real financial standing.

Moreover, if the petitioners are shewn to have been parties to any such rascally plot as is sworn to, the Court would not be likely to grant a winding-up order at their instance. The words of the Act are (sec. 11), "The Court may make a winding-up order," under certain circumstances, but (sec. 14) "may . . . make any order that it deems just." It is more than probable that the Court would not grant a winding-up order upon the application of one who had conspired to bring about an apparent state of insolvency.

The witness will pay the costs of this motion forthwith.

All the motions are postponed till the 9th December, 1910—no order will be made staying the examinations—costs, except as above, to be in the cause.

RIDDELL, J., IN CHAMBERS. NOVEMBER 29TH, 1910.

*RE STINSON AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Physicians and Surgeons — College Council — Inquiry into Alleged Misconduct of Member—R.S.O. 1897 *ch.* 176, *sec.* 59 *— Time — "Prosecution" — Notice—Extension—Procuring Abortion—Crime—Sec.* 33 (1)*—"Infamous or Disgraceful Conduct in a Professional Respect"—Civil Proceeding—Powers of Provincial Legislature—Acquittal by Criminal Court on Same Charge—Effect of—Motion for Prohibition —Costs.*

Motion by Albert W. Stinson, a member of the College, for an order prohibiting the College Council or a committee thereof from proceeding with an inquiry into the applicant's conduct.

E. G. Porter, K.C., for the applicant.
J. W. Curry, K.C., for the College.

RIDDELL, J.:—Dr. Albert W. Stinson, of Cobourg, was tried at the General Sessions of the Peace at Cobourg on the 14th December, 1909, on a charge of unlawfully using an instrument on one Emma Dale in August and September, 1909, with intent to procure a miscarriage, contrary to sec. 303 of the Criminal Code. He was acquitted.

In July, 1910, he was served by the solicitor for the College . . . with a notice that a committee of the College, appointed for that purpose, would on the 16th August meet at Cobourg to inquire whether he had been guilty of any infamous or disgraceful conduct in a professional respect whereby he was liable to have his name erased from the register of the College—the particulars given, amongst other charges, being that he in August and September, 1909, "did perform a criminal operation upon a woman named Emma Dale, whereby she was caused to abort . . . and also that he, at the times . . . aforesaid, with intent to procure the miscarriage of the said Emma Dale, unlawfully used on the said Emma Dale an instrument, contrary to . . . sec. 303 of the Criminal Code." . . .

Pending the return of the notice, a second notice was served upon Dr. Stinson for the same day, that, in addition to the Dale charge, he was also charged with having performed a criminal

*This case will be reported in the Ontario Law Reports.

operation in April, 1909, upon Mrs. J., whereby she was caused to abort.

Dr. Stinson appeared on the 16th August at the meeting, and, without objection on his part, the evidence on the Dale charge was gone into. The committee thought it fair to allow him time to meet the J. charge, and adjourned the meeting till the 2nd November. Pending this adjournment another notice was served . . . less than two weeks before the 2nd November, covering substantially the same ground as the second notice.

On the 2nd November Dr. Stinson appeared . . . and the meeting was adjourned till the 30th November.

A motion for prohibition is now made.

(1) The first objection is, that the time for such an inquiry had elapsed; and R.S.O. 1897 ch. 176, sec. 59, is relied upon: "Every prosecution under this Act shall be commenced within one year from the date of the alleged offence." "Prosecution" in this section is used in the same sense as in sec. 55, of a proceeding before a Justice or Justices of the Peace for such offences as are mentioned in secs. 47, 48 (2), 49, 50, 51. An inquiry such as this is, under secs. 33 (2), 35 (1), is not a prosecution, however dire the result of such an inquiry may be to the medical man.

(2) That the proper two weeks' notice was not given by the second and third notices may be true; but the action of the committee in giving time to Dr. Stinson by enlarging the meeting till the 2nd November gets rid of all difficulty. Even if I should prohibit proceeding on these notices, a new one could be served at once, and the only effect would be to cause delay and expense.

(3) The main objection is, that the acts charged are crimes, and that the council cannot inquire into an alleged crime. . . Section 33(1) provides: "Where any registered practitioner has . . . been convicted, either in His Majesty's Dominions or elsewhere, of an offence which, if committed in Canada, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register." Accordingly, it is argued, the legislature has divided the causes for removal from the register into two classes: (1) crimes which in Canada are felonies or misdemeanours; and (2) infamous or disgraceful conduct in a professional respect. The investigation of the former class is left to the Criminal Courts, and it is only if and when the medical man is convicted in the Criminal Courts that his name is to be removed for such cause—but over the latter the Criminal Courts have no jurisdiction; therefore the

council must itself make inquiry. It is thought that sub-sec. (2) lends force to this argument, as the council is to make inquiry, and "upon proof of such conviction or of such infamous or disgraceful conduct," cause the name to be removed.

This argument would be wholly effective if it were the fact that a hard and fast distinction can be drawn between felonies and misdemeanours, on the one hand, and infamous or disgraceful conduct in a professional respect, on the other. But that is not the case. The greatest crime known to our law is treason . . . but no one would say that . . . treason was infamous or disgraceful conduct in a professional sense. . . But, on the other hand, there are many crimes which do constitute such conduct—this very crime of abortion for example. Again, not every piece of infamous or disgraceful conduct in a professional sense is a crime. . . . The two classes are neither mutually exclusive nor genus and species—the same act may belong to one only or to both. . . .

[History of the legislation.]

I am of opinion that the legislature in making the new provision of 50 Vict. ch. 24, sec. 3, . . . not only were . . . desirous that the commission of a misdemeanour should justify the council in acting, but also they intended to enable the council to act without the necessity of a conviction, if the offending act were of such a character as to be infamous or disgraceful in a professional respect—the words are not, "been guilty of any 'other' act which would be infamous or disgraceful conduct in a professional respect." . . .

The legislature cannot, I think, have intended that an abortionist should be able to snap his fingers at the council, and, under the guise of a registered practitioner, continue his nefarious work—if only he has been astute or lucky enough to escape prosecution, or, if prosecuted, to escape conviction. The legislation of 1910, 10 Edw. VII. ch. 77, sec. 2(3), seems to lend some support to the view I have indicated. . . .

(4) This inquiry is not a criminal trial, involving punishment for the crime alleged—it is merely the determination of facts upon which the civil rights of the accused may depend. . . The objection that this is ultra vires of the Province is, therefore, baseless—it is not a matter of criminal law, but of civil rights.

What I have already said will dispose of the motion so far as concerns the J. inquiry.

(5) In respect of the Emma Dale inquiry there is another objection. It is argued that, an acquittal having been had in the

General Sessions, the matter is concluded, and it is not open to any judicial body, such as this committee is, to inquire into it again. The maxim "nemo bis vexari debet pro eâdem causâ" is appealed to—but, in cases where the first "vexatio" has been in a Criminal Court, the maxim must be applied with caution. . . In the modern law, " a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but it is not even admissible, evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged:" per Blackburn, J., in Castrique v. Imrie, L.R. 1 H.L. 414, 434; per A. L. Smith, L.J., in Ballantyne v. Mackinnon, [1896] 2 Q.B. 455, 462; . . .

[Reference also to Hathaway v. Barrow, 1 Camp. 151; Smith v. Rummens, ib. 9; Blakemore v. Glamorgan Canal Co., 2 C. M. & R. at p. 139; Justin v. Gosling, 12 C.B. 39; Jones v. White, 1 Stra. 68; Brownsword v. Edwards, 2 Ves. Sr. 243, 246.]

No acquitted prisoner can afterwards, in a civil proceeding, set up by way of estoppel his acquittal, and thereby prevent the question of his guilt or innocence being gone into, if such question be material. Many examples might be given. . . The proceedings now going on are, as I have said, civil, and I think the acquittal does not stand in the way of full inquiry.

I should have much regretted to find the law different. No harm can result from the council having power, and as a consequence a public duty, to inquire into cases of apparent crime which would be, if proved, infamous or disgraceful conduct in a professional respect.

All cases of removal of names from the register may be submitted to the closest scrutiny by a Divisional Court under sec. 36 of the Act—not alone those of disgraceful or infamous conduct not involving a crime—and the Court can, I venture to say, be trusted to see to it that no undue harshness is exercised against any practitioner.

That procuring an abortion and using an instrument for such purpose are, not only crimes, but also infamous conduct in a professional respect, needs no argument.

I think the motion must be refused. As to costs, the position taken by the council has been and is wholly correct and proper. . . . The dismissal of the motion, then, will be with costs.

MURRAY v. MCKENZIE—SUTHERLAND, J.—NOV. 26.

Trust—Confidential Relationship—Gift of Jewellery—Release—Action to Set aside.]—Action for an account, the return of certain jewellery, to set aside a transfer of certain bonds, and to set aside a release executed by the plaintiff and an order of a Surrogate Court Judge made upon the passing of the defendant's accounts as executrix of the will of Barbara Murray, deceased. The plaintiff was the adopted son of the testatrix, who died on the 8th June, 1904; and the defendant was a niece of the testatrix. The estate consisted of personal property only, worth about $8,000. Under clauses 4 and 5 of the will, portions of the jewellery of the testatrix were bequeathed to the defendant and her children; under clauses 6, 7, 8, and 9, other portions to other legatees; and under clause 10, other portions to the plaintiff. Under clause 11, all the estate and effects not disposed of under the previous clauses were to be divided between the plaintiff and defendant, share and share alike. When the testatrix died the plaintiff was nineteen years old, and the defendant about fifty. The plaintiff and the testatrix had been living at the defendant's house, and the plaintiff continued to do so for about two years after the death. The plaintiff before he was of age gave the defendant the jewellery bequeathed to him, and released to her his interest in certain bonds. A few days after the plaintiff came of age, the defendant's accounts were passed by a Surrogate Court Judge, and an order allowing them was made, and the plaintiff executed in favour of the defendant, as executrix, a release of all his claims against the estate. At the trial the defendant offered to give up the jewellery, no matter what the result of the action. The plaintiff alleged that the defendant was in a position of a trustee and was his confidential adviser. SUTHERLAND, J., said that, while the principles that a trustee cannot bargain with the cestui que trust for his own benefit, and that trustees are not to profit by the trust, were well understood, he did not think that, in the circumstances of this case, he could strain them so far as to make them apply to the purchase by the defendant of the plaintiff's share in the bonds, so as to make the latter accountable. There could be no doubt that the bonds were considered by both parties and were in fact of small value; and the defendant, in the purchase of the plaintiff's share, acted in perfect good faith. The Court will not undo a trifling benefit conferred by one person on another standing in a confidential relation to him unless there be mala fides:

Rhodes v. Bate, L.R. 1 Ch. 252. The defendant should not, in the circumstances, have accepted from the plaintiff the gift of jewellery; but it was apparent from the offer to return the articles that, if the plaintiff had approached the defendant in a reasonable way before action, they would have been given up, and this litigation would have been avoided. Action dismissed with costs. S. H. Bradford, K.C., for the plaintiff. W. R. Smyth, K.C., for the defendant.

BRITISH NORTH AMERICAN MINING CO. v. PIGEON RIVER LUMBER CO.—SUTHERLAND, J.—NOV. 26.

Trespass — Timber — Recovery of Possession — Damages — Counterclaim—Improvements.]—The plaintiffs alleged that the defendants trespassed upon the Princess location owned by the plaintiffs and cut therefrom 2,500 cords of pulp wood and floated them down the Jarvis river, and asked for a declaration that the timber in the river was cut off the Princess location and was the property of the plaintiffs, and for damages and an injunction. The defendant Smith counterclaimed for two sums of $420.25 and $52 and for improvements to the plaintiffs' property. The learned Judge held that the defendants were entitled to the declaration asked; that, in the circumstances disclosed in evidence, no sale of the timber was ever made by the plaintiffs to Smith, and Smith could and did make no valid sale to the defendant company; that the plaintiffs were entitled to the possession of the timber; that the plaintiffs were not entitled to substantial damages in respect of the trespass; that the defendant Smith's money demand should be set off against the claim for damages for trespass; and that the alleged improvements were of no substantial benefit to the plaintiffs. Judgment for the plaintiffs for possession of the timber, with costs of action against both defendants. No order as to the costs of the counterclaim. L. G. McCarthy, K.C., and McComber, for the plaintiffs. F. H. Keefer, K.C., for the defendants.

TREBILCOCK v. TREBILCOCK—MASTER IN CHAMBERS.—NOV. 30.

Interpleader—Adverse Claims to Mortgage Interest—Husband and Wife—Payment into Court—Costs—Alimony.]—In an action by a wife against her husband for alimony and

other relief, it was alleged that two mortgages made by one Mrs. Davidson to the defendant were in reality the property of the plaintiff, and the plaintiff asked a declaration to that effect. The first gale of interest on these mortgages, becoming due, was claimed by both litigants, and the mortgagor moved for leave to pay the money into Court. *Held*, that this was her right, and she should pay into Court this and all future accruing payments until the action should be determined, less $20 costs of this application and $4 for every future payment. These costs as between plaintiff and defendant to abide the result of the issue on this point, unless otherwise ordered. If the defendant thinks he should have the interim alimony reduced on this account, he may make the necessary motion. G. Prior Deacon, for the mortgagor. Cooke (Baird & Co.), for the plaintiff. C. C. Robinson, for the defendant.

TITCHMARSH v. BURKHEAD—MASTER IN CHAMBERS—NOV. 30.

Pleading—Statement of Defence—Tort—Husband and Wife—Reasonable and Probable Cause—Embarrassment.]—In an action against husband and wife for an alleged tort of the wife, the plaintiff moved to strike out paragraphs 7, 8, and 9 of the statement of defence. Paragraph 7 alleged reasonable and probable cause for the prosecution of the plaintiff: *held*, that this could not be struck out at this stage; it could be determined only at the trial, whether this was a valid defence to the action as framed. The other two paragraphs were pleaded by the husband and wife separately: *held*, that this could not be done: In re Beauchamp, [1904] 1 K.B. 572; Cuenod v. Leslie, [1909] 1 K.B. 880; and these paragraphs came within the definition of "embarrassing" in Stratford Gas Co. v. Gordon, 14 P.R. 407. By the 8th paragraph it was denied that the husband had anything to do with the alleged tortious acts of his wife; and by the 9th it was asserted that the statement of claim disclosed no cause of action against the husband: *held*, that these paragraphs were unnecessary and irrelevant: Capel v. Powell, 17 C.B.N.S. 743; Cuenod v. Leslie, supra, at p. 885. Order striking out paragraphs 8 and 9. Success being divided and the point being new, costs to be costs in the cause. J. B. Mackenzie, for the plaintiff. H. S. White, for the defendants.

Re ROWLAND AND MCCALLUM—RIDDELL, J., IN CHAMBERS—DEC. 1.

Appeal—Leave to Appeal from Order of Judge in Chambers —Conflicting Decisions—Con. Rule 777 (3) (*a*).]—Motion by McCallum for leave to appeal to a Divisional Court from an order of MEREDITH, C.J.C.P., in Chambers (18th Nov., 1910) dismissing a motion by McCallum for prohibtion to the Judge of the County Court of Huron in respect of a proceeding under the Drainage Act. RIDDELL, J.:—I need not reiterate the care which should be taken in applications of this sort to see that the matter comes fairly under the new Con. Rule 777 (1278). In the present case, I think that it can fairly be said that there are conflicting decisions—and though in one case the decisions are those of the Judges of the Court of Appeal, these should, I think, for the purpose of the Con. Rule be considered decisions of "Judges of the High Court." I grant leave to appeal under Con. Rule 777 (3) (a). Costs in the appeal. H. S. White, for McCallum. W. Proudfoot, K.C., for Rowland.

**Re* FOSTER AND TOWNSHIP OF RALEIGH—DIVISIONAL COURT—DEC. 1.

Municipal Corporations—Powers of Licensing and Regulating— Billiard Tables— By-Law—License Fee—Prohibitive Amount—Revenue—Powers of Provincial Legislature.]—Appeal by Charles Foster from the order of MIDDLETON, J., 22 O.L.R. 2€, ante 65, dismissing a motion to quash a by-law. THE COURT (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) dismissed the appeal with costs. J. M. Ferguson, for the appellant. J. G. Kerr, for the respondents.

*This case will be reported in the Ontario Law Reports.