L'ASSOCIATION PHARMACEUTIQUE DE QUÉBEC (PLAINTIFF).. } APPELLANT,

AND

J. E. LIVERNOIS (DEFENDANT).....RESPONDENT.

1900
*Oct. 11.
*Nov. 13.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Appeal—Jurisdiction—Withdrawal of defence raising constitutional question—R. S. C. c. 135, s. 29 (a)—"Quebec Pharmacy Act"—Retroactive legislation—Suit for joint penalties—Second offences—Unlicensed sale of drugs—50 V. c. 5, s. 7—*R. S. Q. Arts.* 11, 4035, 4039*b*, 4040, 4046, 4052.

Where a motion to quash an appeal has been refused on the ground that a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal.

The amendment to the "Quebec Pharmacy Act" by 62 Vict. c. 35, s. 2 (Que.) adding Art. 4039 (*b*), Revised Statutes of Quebec, has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force. 50 V. c. 5, s. 7. (Que) ; Art. 11 R.S.Q.

Penalties for several offences under the said Act may be joined in one action and, when the aggregate amount is sufficiently large, the action may be brought in the Superior Court as a court of competent jurisdiction under the statute. Such action may properly be taken in the name of the Pharmaceutical Association of the Province of Quebec.

It is improper in such an action to describe the subsequently charged offences as second offences under the statute, as a second offence cannot arise until there has been a condemnation for a penalty upon a first offence charged.

The sale in the Province of Quebec, by an unlicensed person, of drugs by retail, whether or not such drugs be poisonous, or partially composed of poison, or absolutely free from poison, is a violation of the prohibition contained in Art. 4035, Revised

*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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Statutes of Quebec, whether or not the articles sold be enumerated in the "Quebec Pharmacy Act" as poisonous or as containing an enumerated poison.

Judgment of the Court of Queen's Bench (Q. R. 9 Q. B. 243) reversed. Taschereau and Gwynne JJ. dissenting.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side (1), affirming the judgment of the Superior Court, district of Quebec (2), dismissing the plaintiff's action with costs.

On a motion to quash the appeal during the session of the Supreme Court, in May, 1900, it was held that the court had jurisdiction to hear the appeal on the ground that a question had been raised in the pleadings as to the constitutionality of an Act of the Quebec Legislature (3), but when the appeal came on for hearing, counsel for the respondent declared that this plea was abandoned, and the question arose, whether or not, in view of the fact that the case was not otherwise appealable under the provisions of the Supreme and Exchequer Courts Act, there still remained any right of appeal, and whether there remained in the court any jurisdiction to entertain the appeal upon the other issues raised.

Fitzpatrick Q.C. (Solicitor-General), and *Robitaille Q.C.* for the respondent.

L. P. Pelletier Q.C. and *Brosseau Q.C.* for the appellant.

The judgment of the court ordering the hearing to proceed was delivered by:

TASCHEREAU J.—(Oral).—The mere fact of a constitutional question having been raised in the pleadings entitled the appellant to enter his appeal, and that appeal having been properly brought, the whole case

(1) Q. R. 9 Q. B. 243. (2) Q. R. 16 S. C. 536.
(3) 30 Can. S. C. R. 400.

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on the appeal remains at large and within the jurisdiction of this court. The appellant cannot be deprived of his right to appeal by the withdrawal of the plea of *ultra vires*. The hearing upon the merits is ordered to proceed.

The circumstances of the case and questions at issue upon the merits of the appeal are stated in the judgments reported.

L. P. Pelletier Q.C. and *Brosseau Q.C.* for the appellant. The amending Act passed pending this litigation cannot affect the proceedings, it cannot be construed retrospectively; Maxwell, Statutes (3ed.) pp. 588, 589; 50 Vict. ch. 5, s. 7 (Que.); R. S. Q. Art. 11; *Couture* v. *Bouchard* (1); *Williams* v. *Irvine* (2).

The penalties imposed constitute debts due the association and may be joined and sued for together. They are in no sense fines to be sued for by *qui tam* action and as the united sums form an amount within the jurisdiction of the Superior Court, it is a competent tribunal in which the plaintiff may sue in its own name, as in an action for debt. See Dal. Rep. vo. "Peine" nn. 162, 750; *Larivière* v. *Choquet* (3); Pand. Fr. Rep. vo. "Amendes," nn. 12, 127, 253, 326, 327; vo. "Cumul des Peines" n. 12; S. V. 33, 1, 458. We refer also to 27 Merlin *vo.* "Récidive"; Dal. 64, 1, 200; '89, 1, 217; '90, 2, 196; S. V. '99, 1, 361; *Pharmaceutical Society* v. *Armson* (4); *Pharmaceutical Society* v. *Piper & Co.* (5); *Pharmaceutical Society* v. *Delve* (6); *Jeffrey* v. *Weaver* (7); *Ward* v. *Snell* (8); *College of Physicians* v. *Harrison* (9); *Creswell* v. *Hoghton* (10); Retailing Definition, 21 Am. & Eng. Encycl. 296; Wholesale Definition, 29 Am. & Eng. Encycl.

(1) 21 Can. S. C. R. 281.
(2) 22 Can. S. C. R. 108.
(3) M. L. R. 1 S. C. 461.
(4) [1894] 2 Q. B. 720.
(5) (1893] 1 Q. B. 686.
(6) [1894 1 Q. B. 71.
(7) [1889] 2 Q. B. 449
(8) 1 H. Bl. 10.
(9) 9 B. & C. 524.
(10) 6 T. R. 355.

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108; Definition and Continuation of Penal Acts, Hardcastle Part 3, chap. 1, pages 472, 3, 4; Trade-Marks Definition, 26 Am. & Eng. Encyl. 241; Art. 113 C. P. Q.

Fitzpatrick Q.C. (Solicitor General) and *Robitaille Q.C.* for the respondent. There can be no recovery of penalties for second offences as there has not been a conviction or condemnation for any first offence under the Act; R. S. Q. art. 4046; Endlich on Statutes, § 388; Bishop, Statutory Crimes, § 240; Dal. Rep. *vo.* "Peine," n. 257. There is no proof that the respondent:—(*a*) Keeps an establishment for retailing, dispensing or compounding drugs or poisons enumerated in schedule A; (*b*) Nor that he sold drugs or poisons enumerated in schedule A; (*c*) Nor that he dispensed prescriptions; (*d*) Nor that he has assumed to act as a chemist and druggist. On the other hand the respondent has proved that he carries on a wholesale drug business, and has in his employ a licenciate of pharmacy. He neither retails drugs nor fills prescriptions. The sales made were in the course of his wholesale business. We invoke the amending Act, 62 Vict. ch. 35, as retroactive and a bar to the action; 1 Demolombe, nn. 64, 65; Dal. Rep. *vo* "Peine," n. 112; Dal. Supp. *vo.* "Lois," n. 224; 1 Mourlon, n. 73; Endlich, Statutes, § 486; 1 Beaudry-Lacantinèrie Dr. Civ, n. 65; 1 Duranton, n. 74. In any case the proof can only justify a condemnation for one first offence, but the patent or proprietary medicines sold, although containing morphia and strychnine had them in such minute quantity that they are not poisonous, and consequently do not come within the scope of art. 4035 R. S. Q., and being patented and not dangerous to health or to human life, their sale is permitted by 62 Vict. ch. 35, s. 2, and a conviction cannot be now had under the statute as amended.

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TASCHEREAU J. (dissenting.)—I would dismiss this appeal. I concur in the views expressed by Mr. Justice Bossé in the court appealed from.

GWYNNE J. (dissenting.)—This is a civil action commenced in the Superior Court of the District of Quebec at the suit of the appellants who, by the conclusions in their declaration filed on the 20th of October, 1898, claim the right

to recover from the defendant the sum of three hundred and twenty-five dollars with interest and costs, including costs of exhibits, plaintiff's moreover specially reserving the right to take any further conclusions as they may be entitled to by law.

The premises from which this conclusion is drawn as stated in the declaration are that, as is there alleged,

the defendant illegally and without right, he not being a licentiate of pharmacy, nor a physician duly inscribed as a member of the College of Physicians and Surgeons of this province, keeps open a shop for the retailing, dispensing and compounding of drugs and of the poisons enumerated in schedule A annexed to section 4035 of the Quebec Pharmacy Act and especially during the month of August, 1898, to wit, on the 2nd, 3rd, 4th, 5th and 6th of said month and year, did exercise said profession in his shop and has illegally, he not being a licentiate of pharmacy nor a physician duly inscribed as a member of the College of Physicians and Surgeons of this province, sold drugs and medicinal preparations containing poisons mentioned in the above schedule A, to wit, on the 2nd of August last during the forenoon a bottle of Gray's Syrup ; *and* on the *same day during the afternoon* a bottle of Wampole's Cod Liver Oil ; *subsequently on the 3rd of August*, an ounce of Tincture of Gentian Compound ; *subsequently*, on the 4th of August a bottle of Fowler's Extract of Wild Strawberry ; *subsequently* on the 5th of August, a bottle of Cherry Pectoral and an ounce of Bromide of Potash ; *subsequently* on the 6th of August *at about noon*, an ounce of Tincture of rhubarb and an ounce of Bismuth Lozenges ; *and* the same day *in the afternoon* a bottle of Hypo-bromic Compound (Wampole's) ; this bottle of Hypo-bromic Compound (Wampole's) was supplied on presentation of a prescription written and given by Doctor Elliott, of Quebec ; *forming altogether seven offences for which defendant has incurred a penalty of* $25 *for the first offence* and of $50 for the *second* and *each subsequent* offence, forming a total of $325.

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To this action the defendant pleaded a denial of the allegations in the declaration and put upon the plaintiffs the onus of proving their case as alleged. He also pleaded a plea insisting that the Act 53 Vict. ch. 46, Que., amending the Quebec Pharmacy Act upon which the action was based, was *ultra vires* of the Provincial Legislature. The case was tried in the Superior Court of the District of Quebec before Sir L. N. Casault C.J. That court received evidence in relation to the several grounds of complaint mentioned in the declaration and having come to the conclusion that it was not proved that the defendant filled up any prescriptions or made, compounded or prepared any drugs or medicines, and, as to the articles alleged to have been sold by the defendant, that "tincture of Gentian," "Bromide of Potash," "Tincture of Rhubarb" and "Bismuth Lozenges" are not mentioned in schedule A of 53 Vict. ch. 46, and that "Gray's Syrup," "Wampole's Cod Liver Oil," "Cherry Pectoral," "Fowler's Extract of Wild Strawberry" and "Wampole's Hypo-Bromic Compound" were all proprietary medicines, all of which, except Fowler's Extract of Wild Strawberry, were proved to contain a minute portion of a poison mentioned in schedule A, but in such small proportion as to be not only innocuous but beneficial medicines, and thereupon the court, upon the ground that by force of an Act of the Legislature of Quebec, 62 Vict. ch. 35, the sale of the proprietary medicines was not prohibited, dismissed the plaintiff's action with costs. No judgment was pronounced by the court upon the plea of *ultra vires*, which in so far as appears was not relied upon or argued. The judgment of the Superior Court upon appeal by the plaintiffs, was affirmed by the Court of Queen's Bench in Appeal, and from that judgment the present appeal is taken. Upon a motion to quash this

appeal for want of jurisdiction to entertain it, a majority of this court was of opinion that, notwithstanding that the amount claimed in the conclusions of the declaration was only $325, still the plea of *ultra vires* being on the record, an appeal at the suit of the plaintiffs to this court well lay.

Accordingly, the case came for hearing before us, when the question as to *ultra vires* of the statute was not only not argued, but the learned counsel for the respondent abandoned all reliance on the plea which raised that question, but such abandonment of the plea cannot divest the court of its duty to decline to interfere, if satisfied that the legislature had no jurisdiction in the matter. But there can be no doubt that the legislature had by sub-sec. 15 of sec. 92 of the British North America Act jurisdiction to legislate for the imposition of fines, penalties or imprisonment for enforcing any law of the province made in relation to any matter within any of the classes of subjects enumerated in sec. 92.

The case was argued wholly upon the grounds upon which the Superior Court proceeded, and upon the frame of the declaration itself it is apparent that no conviction can be obtained or fine be imposed under the statute declared upon for any second or subsequent offence when no conviction for the first offence has been stated in the declaration and proved, and up to the present moment no conviction for a first offence against the provisions of the statute has been obtained. Whether an offence has or has not been committed which warrants a conviction and the imposition of the penalty prescribed by the statute for a first offence is the question now under consideration, and that in point of fact is the only question which is, if any be, open upon the record and with which we have to deal. The Act relied upon by the learned counsel for

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the appellants in their argument before us selected as a first offence against the provisions of the statute, the sale of a bottle of "Gray's Syrup." It matters not which of the sales enumerated in the declaration should be selected inasmuch as all the articles sold, with the exception of "Tincture of Gentian," "Bromide of Potash" and "Tincture of Rhubarb," which are not in the list of prohibitions, consisted of proprietary medicines, so that we may deal with the case as if the sale of "Gray's Syrup," the article relied upon by the appellants themselves as constituting the first offence for conviction of which this action has been instituted, was the sole complaint stated in the declaration. For the determination of the present appeal, I do not think it necessary to consider whether or not in a procedure like the present, to impose a penalty for an offence committed against the provisions of the statute it is sufficient to aver merely the sale of a bottle of "Gray's Syrup" without alleging that it contained some one or more of the prohibited poisons mentioned in the schedule A, so as to admit evidence upon that point; but dealing with the case apart from any such consideration, as it was dealt with in the courts below, we find by reference to article 4035 of the Revised Statutes of Quebec, that it is simply a repetition in consolidation of sec. 20 of 48 Vict. c. 36 (Que.), and is as follows:

4035. No person shall keep open a shop for retailing, dispensing or compounding of drugs or of the poisons enumerated in schedule A annexed to this section, or sell or attempt to sell any drug or poison mantioned in the said schedule, or any medicinal preparation containing any of the said poisons, or engage in the dispensing of prescriptions, or use or assume the title of chemist and druggist, or chemist or druggist, or apothecary or pharmacist, or pharmeceutist, or dispensing or pharmaceutical chemist, or any other title bearing a similar interpretation, within this province, *unless* he be a physician inscribed as a member of the College of Physicians and Surgeons of

this province, or be registered in accordance with the provisions of this section as a licentiate of pharmacy.

Then followed articles 4036, 4037, 4038 and 4039 which are simple repetitions in consolidation of secs. 21, 22, 23 and 24 of 48 Vict. ch. 36, the latter article being as follows:

The provisions of the four preceding articles shall not prevent the sale of the articles mentioned in schedule B. annexed to this section—provided that patent medicines be sold without their wrappers being opened, and that the other articles be sold in closed packets with the name of the substance contained in such packet labelled thereon.

Now in the above mentioned schedule A are enumerated twelve drugs almost all of which, if not all, are well known "poisons" which word as used in the statute is by Art. 4019, paragraph 9, which is but a repetition in consolidation of sec. 2, paragraph "i," of 48 Vict. ch. 36, declared to mean "such drugs or chemicals as are dangerous to human life." Then in schedule B are enumerated twenty-six items, the first of which is "all patent medicines," and of the twenty-five not one is enumerated in and prohibited in schedule A, although two of them at least "carbolic acid crude," and "Paris green" are well know powerful poisons.

The enactment therefore that a clause which does not prohibit the sale of any of those substances "*shall not prevent*" their sale does not seem to be a felicitous mode of expression in an act of the legislature, but it is with the item "All Patent Medicines," that we have to deal, and this expression so used in this penal statute comprehended, I think "proprietary medicines," that is to say, medicines which some person or persons have an exclusive right to make and sell.

We have it thus established by legislative authority that the sale of patent medicines, which term includes proprietary medicines by a person other than a druggist, chemist, physician or licentiate of pharmacy, was

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not prohibited by 48 Vict. ch. 36, and that thereafter, as before the passing of the Act, it was competent for any person to sell such medicines; and this was consonant with common sense and with the whole spirit and intent of the Act which was passed to prevent the practice of the profession or business of physicians, chemists and druggists by incompetent persons, and the preparation and sale by such persons of poisons, or medicinal preparations containing poisons injurious to human life which proprietary medicines are known to be, as those at least mentioned in the present case have been proved to be, not harmless only, but beneficial. Now, while it had been always and still was quite competent for any person to sell patent or proprietary medicines without any interference whatever, an Act was passed in 1890, 53 Vict. ch. 46, intituled "An Act to amend the Quebec Pharmacy Act." That Act made no alteration whatever in the article 4035, save by adding to it three sub-sections which have no relevancy in the present case, and by the last or seventeenth section of the Act enacting as follows:

> The schedules A and B, after article 4052 of the said Revised Statutes, are replaced by the following schedule A, and the schedule C shall be known as schedule B.

This schedule C which was annexed to 48 Vict. ch. 36, was a "Poison Sales Register" which *all persons having authority to sell poisons* in the Province of Quebec were required to keep by sec. 19 of 48 Vict. ch. 36 consolidated as article 4034 in the Revised Statutes.

What was meant by enacting that this "schedule C shall be known as schedule B," which is wholly obliterated and done away with does not seem very clear. In the new schedule A which is substituted for the two former schedules A and B, in substitution for twelve drugs prohibited in the former schedule

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A, are enumerated thirty-three poisonous drugs which are the only prohibited ones, and one of these, namely, "carbolic acid crude" is the only one which had been in schedule B. As to "Paris green" which was also in schedule B, special provision to be noted hereafter was made. Not one of the other items which had been enumerated in schedule B is referred to, and so by expunging the schedule B, the incongruity already referred to as an infirmity in the former Act in enacting that a clause which does not prohibit the sale of an article shall not prevent the sale of that article, would be removed.

The statute then enacted that "Art. 4039 of the Revised Statutes is replaced by the following: Nothing herein shall prevent the sale by persons not registered in pursuance of this law of 'Paris Green or London Purple,' so long as said articles are sold in well secured packages distinctly labelled with the name of the article, the name and address of the seller, and marked 'poison.'"

It is difficult to conceive that the legislature while thus authorising the sale of a deadly poison by unlicensed persons, contemplated by the clause to bring about the prohibition of the sale of proprietary medicines by unlicensed persons. It seems much more probable that in abrogating schedule B in the manner in which it was abrogated, the difference between a patent medicine not in terms prohibited, and specific drugs as all the other articles in schedule B were (and which also were not prohibited articles) was not noticed, or that it was thought unnecessary to make any distinction between them except in the provision made as to the poison "Paris green." But whether the abrogation of schedule B, under these circumstances had the effect of *creating* the prohibition of the sale by unlicensed persons of patent medicines which

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the Act declared had not been prohibited by it, we need not now inquire, for in 1899 the legislature passed the Act 62 Vict. ch. 35 upon which the learned Chief Justice Sir L. N. Casault proceeded at the trial, whereby a clause was added to Art. 4039 which was designated 4039 *b*, whereby it was enacted as follows:

> Nothing in this Act applies to or in any manner affects the preparation or sale of a patented or proprietary medicine,

thus restoring in the letter the provision in the original Act in conformity with its spirit, and intent, and indicating sufficiently, I think, that the change, if any was effected by the manner in which schedule B was abrogated, as regards patent or proprietary medicines, was caused through inadvertence and not intentionally, and that after the passing of 62 Vict. ch. 35, no court can pronounce the sale of a proprietary medicine, although the sale may have taken place before the passing of the Act, to be an offence against the provisions of the Act punishable by fine and imprisonment. It has been argued that as the Act was passed subsequently to the institution of the proceeding to have the sale pronounced to be an offence against the provisions of the Act the statute cannot affect the present proceeding which it is contended was an offence between the passing of 48 Vict. ch 46, and of 62 Vict. ch. 35, though it never had been an offence against the provision of any law before or since. This contention rests wholly upon a further contention, namely, that when this proceeding was instituted, the Pharmaceutical Association, the present appellants, had a *right* to the sum of twenty-five dollars now demanded of which right the subsequent Act has not deprived them, but this contention is wholly based on a fallacy, for no one can have any right in a sum to be inflicted as a fine in case only of an offence against the provisions of the Act being established, until the

offence is established, and fine imposed upon conviction; and as to the appellants in particular having had any right at the time of their instituting the present proceeding, more than any other informers, that contention appears to be devoid of any foundation; the Act does not say that to enforce and recover the penalty the appellants may proceed and recover it in a civil action as a debt due to them. The 36th sec. of 48 Vict. ch. 36, which is consolidated in Art. 4051 of the Revised Statutes, enacts that

all fees, penalties and fines payable under this Act *shall* belong to the Pharmaceutical Association of the Province of Quebec for the purposes of this Act,

but for a fine or penalty to become *payable* under the Act a conviction for an offence against the provisions of the Act must first be obtained; and this clause gives no civil action to the appellants to recover the amount of fine as a debt. The only section regulating prosecutions for the purpose of convicting a person of an offence charged to have been committed against the provisions of the Act is sec. 25 of 48 Vict. ch. 36, which is consolidated as Art. 4040 of the Revised Statutes, which enacts that

prosecutions instituted for the recovery of any fine imposed under this Act may be instituted by the association or by any other person before the judge of the sessions, the police magistrate or recorder in the cities of Montreal and Quebec, or before a district magistrate or justice of the peace of the place where the offence was committed in the other parts of the province, *or may be* instituted before any competent court of the place where the offence was committed by simple civil action in the ordinary manner.

This last clause, as it appears to me, plainly means that the fine may be imposed and recovered by civil action in the ordinary manner in which *fines and penalties for the contravention of* [illegible] *law* may be enforced and recovered in a court having civil jurisdiction, that is to say in the manner prescribed in Art. 16 C. C.

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namely, by an ordinary process of law in the name of Her Majesty alone or jointly with another prosecutor before any court having civil jurisdiction to the amount sought to be recovered; and as the amount sought to be recovered here is the amount payable for a first offence, if any such should be proved, namely, twenty-five dollars, the only court of civil jurisdiction competent to convict the appellant, if the offence should be proved, is the Circuit Court whose jurisdiction in matters under $100 is absolute, to the exclusion of the Superior Court. Upon all these grounds, therefore, the appeal, in my opinion, must be dismissed with costs.

SEDGEWICK J.—This is a proceeding instituted by the Pharmaceutical Association of the Province of Quebec against the defendant who styles himself a merchant-photographer and wholesale drug merchant, but who carries on the business of a druggist and chemist in the City of Quebec, and the charge alleged against him is a violation in several particulars of the Quebec Pharmacy Act.

It would appear that the council of the association, in the interests of the profession and of the public, as well as in pursuance of their statutory duties, resolved to prosecute offenders against the Act, and employed one Crankshaw to procure the necessary evidence. In the month of August, 1898, and on five different days of that month, he visited the respondent's drug store and purchased, in two instances from himself and in the other instances from his employees, the following articles: a bottle of Gray's Syrup, a bottle of Wampole's Cod Liver Oil; an ounce of tincture of Gentian Compound; a bottle of Fowler's Extract of Wild Strawberry; a bottle of Cherry Pectoral: an ounce of bromide of potash; an ounce of tincture of Rhubarb;

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an ounce of Bismuth Lozenges, and a bottle of hypobromic compound (Wampole's). These articles were for the most part submitted, for examination and analysis, to Dr. Fafard, an eminent analyst and professor of chemistry in the University of Laval, who found and testified that four of them, namely, Gray's Syrup, Wampole's Cod Liver Oil, Ayer's Cherry Pectoral, and Wampole's Hypo-Bromic Compound, contained poisons, namely morphine and strychnine. The evidence of both Crankshaw and Dr. Fafard was amply corroborated and all the courts below agreed upon the facts just stated.

The right of the plaintiff association to recover depends solely upon the provisions of the Quebec Pharmacy Act, and for the purposes of this opinion, I set out the following articles:

Art. 4035. No person shall keep open a shop for the retailing, dispensing or compounding of drugs or of the poisons enumerated in schedule A, annexed to this section, or sell or attempt to sell any drug or poison mentioned in the said schedule, or any medicinal preparation containing any of the said poisons, or engage in the dispensing of prescriptions, or use or assume the title of chemist and druggist, or chemist or druggist, or apothecary, or pharmacist, or pharmaceutist, or dispensing or pharmaceutical chemist, or any other title bearing a similar interpretation, within this province, unless he be a physician inscribed as a member of the College of Physicians and Surgeons of this province or be registered in accordance with the provisions of this section as a licentiate of pharmacy.

Art. 4040. Prosecutions instituted for the recovery of any fine imposed under this section may be instituted by the association or by any other person, before the judge of the sessions, the police magistrate or recorder, in the cities of Montreal and Quebec, or before a district magistrate or justice of the peace of the place where the offence was committed, in the other parts of the province, or may be instituted before any competent court of the place where the offence was committed by simple civil action in the ordinary manner.

Art. 4052. Nothing in this section shall interfere with the privileges conferred upon physicians and surgeons by the various Acts relating to the practice of medicine and surgery in this province, or with the business of wholesale dealers in drugs in the ordinary course

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of wholesale dealing, or with chemical manufacturers, or with duly licensed veterinary surgeons in their practice or business as such.

It is admitted that the defendant is not a physician inscribed as a member of the College of Physicians and Surgeons nor is he a licentiate of pharmacy, and the first question is as to whether he has violated any of the provisions of art. 4035.

That article prohibits (among other things) the retailing or selling by unauthorised persons of several classes of articles, namely, (1) drugs; (2) poisons enumerated in the schedule; and (3), any medicinal preparations containing any of such poisons. According to the interpretation clause, the word *drugs* means articles used medicinally, whether compound or simple, and the word *poisons* means drugs or chemicals which are dangerous to human life. So that the statute is violated if drugs are retailed or sold, whether such drugs be poisons, or partially composed of poisons, or are absolutely free from poisons.

It was proved beyond controversy at the trial that the respondent sold the articles in question, and that they are drugs not only within the meaning of the Act, but according to the ordinary and popular meaning of that word, and the fundamental error, I respectfully venture to state, in the judgment appealed from, is the view that in order to constitute an offence under the Act, the articles sold must either be an enumerated poison, or an article containing an enumerated poison.

While no doubt the main object of the legislature in enacting the statute was to protect the public from the possible incompetency of vendors of drugs or chemicals dangerous to human life, it also was its object to take charge of the whole retail drug business and compel all persons engaged in it to pass a qualifying examination and obtain a license therefor. The contention, very feebly put forward, that the respond-

ent was not a retail druggist, but a wholesale dealer as well in drugs as in photographic supplies, is in my view out of the question. The purchases proved were made on five different days. The articles purchased were probably, in every case but one, the minimum amount which one could purchase at a drug store. The articles submitted for analysis could all be carried in a small bag, and to say that these transactions were wholesale and not retail transactions is, in my view, nothing but farcical.

I am also of opinion that the proceedings were rightly brought in the Superior Court by virtue of art. 4040 above set out. Whether the proceedings were criminal, or penal, or purely civil in their nature, makes no difference. The prosecution by whatever name it may be called, was authorised to be instituted before any competent court by civil action in the ordinary manner. The Superior Court comes within that description. The proceedings were properly taken in the name of the association and any moneys recovered became the property of the association for the purposes mentioned in art. 4051.

The prosecutors set out in their declaration, in pursuance of the practice of the Superior Court, the circumstances upon which they relied in order to justify a condemnation. They allege several offences, but they describe all these offences committed after the first as *second* offences. In this they were wrong, as (it was admitted) a person can only be convicted of a second offence after a conviction for a first offence, so that none of the offences alleged in the declaration were second offences. They were each however, *first* offences, and inasmuch as in a civil proceeding several causes of action may be joined, there is no reason why in one proceeding in a civil court several penalties may not be sued for and recovered for more than one offence.

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There is not, however, any necessity to consider this point more fully, as counsel for the association consented at the argument that if the appeal should be allowed a judgment for one offence might be entered as the object of the association was not, in the present case, punitive, but rather to obtain an authoritative declaration as to their rights, and as to the disabilities of persons carrying on the ordinary retail drug business in the province.

One point remains. After these proceedings were instituted and after the learned trial judge had taken the case *en délibéré*, the Quebec Legislature amended the Pharmacy Act by adding to art. 4039*a*, another article which reads in part as follows:

> Nothing in this Act contained shall extend to or interfere with, or affect the making or dealing in any patent or proprietary medicines.

Now it is admitted that four and perhaps five of the articles purchased from the respondent by Crankshaw were patent or proprietary medicines, but it is equally clear that other articles purchased were not; they were drugs however, and therefore not within the article, and a judgment for the association may be sustained in respect to those articles not within the purview of the amendment just referred to.

Nevertheless, we think that this Act has no retroactive effect. Whether the amending statute would have been so considered under the old common law may be doubted, but any such consequence has been removed in the Province of Quebec by art. 7 of the Act respecting the Revised Statutes of Quebec, and by art. 11 of the Preliminary Title. In view, however, of the fact that we propose to give judgment for the plaintiff's for $25 only this point need not be further discussed.

In my view the appeal should be allowed with costs, and judgment entered in the Superior Court for

$25 with costs upon the lower scale, together with the costs of the appeal.

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KING and GIROUARD JJ. concurred in the judgment allowing the appeal for the reasons stated by Sedgewick J.

Appeal allowed with costs.

Solicitors for the appellant: *Drouin, Pelletier & Fiset.*

Solicitors for the respondent: *Robitaille & Roy.*