STANLEY A. RICHARDSON (PLAINTIFF) ..... } APPELLANT; 1940

* March 6, 7.
* June 29.

AND

ELDON R. TIFFIN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Physicians—Arrangement between plaintiff and defendant, both physicians, for defendant to purchase practice of third physician (retiring) with moneys furnished by plaintiff and to practise for fixed time and pay share of profits to plaintiff—Subsequent contracts for further periods of practice and division of profits—Restrictive covenants against defendant practising within certain time and area—Validity, severability, of the restrictive covenants—Plaintiff suing for an accounting—Nature of the agreements—Consideration—Statute of Frauds (R.S.O., 1937, c. 146), s. 4—Question as to application of ss. 47, 50, of Medical Act (R.S.O., 1937, c. 225), in view of plaintiff becoming disentitled to practise.

Plaintiff and defendant, both physicians, arranged that defendant should in defendant's name purchase from C., a physician retiring from practising in the same town in which plaintiff practised, C.'s practice and certain equipment, plaintiff furnishing to defendant the money for the purpose; and this was done. Plaintiff and defendant entered into an agreement whereby defendant was to "practise for" plaintiff for three years, plaintiff to pay to defendant $300 each month and expenses of the practice and 10% of the net proceeds of the practice (determined after deducting expenses including defendant's said "monthly salary"). Defendant carried on the practice in the office formerly occupied as tenant by C., the building containing it having been purchased by plaintiff. Said three-year period began on May 1, 1930. On April 17, 1933, plaintiff and defendant entered into a second agreement whereby defendant agreed to continue the practice "for and on behalf of" plaintiff "and in his own name and with the same good will and co-operation between the parties as has existed in the past" to May 1, 1936, defendant to receive 50% of the net profits. On September 6, 1935, plaintiff and defendant entered into a third agreement in terms similar to those of the second agreement, the period of the third agreement to last until May 1, 1939. Each of the agreements contained a covenant by defendant not to practise within a certain area within a certain time. On certain settlements of accounts, defendant gave to plaintiff two promissory notes dated respectively January 1, 1934, and May 1, 1935. In October, 1935, plaintiff's name was struck from the register under the *Medical Act* (R.S.O., 1937, c. 225). About September, 1937, defendant refused to recognize any claim of plaintiff on the promissory notes or under the agreements. Plaintiff sued for payment of the notes and an accounting. Defendant pleaded that the second and third agreements were *nuda pacta* and failed wholly (as did also the promissory notes) for

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1940

RICHARDSON v. TIFFIN.

want of any consideration, and that he had more than fully paid all moneys payable under the first agreement; he also attacked the agreements by reason of the restrictive covenants, and also pleaded the *Medical Act* aforesaid and the *Statute of Frauds*. At trial, McTague J.A. ([1939] O.R. 444) gave judgment to plaintiff for an accounting. This judgment was reversed by the Court of Appeal for Ontario (*ibid*), which dismissed the action. Plaintiff appealed.

Held (*per* Rinfret, Davis and Kerwin JJ.; the Chief Justice and Crocket J. dissenting): Plaintiff's appeal should be allowed and the judgment at trial restored.

Per Davis J.: Whether or not the restrictive covenants made by defendant in the agreements are unenforceable, they are clearly severable; in any case there was nothing in the evidence to support the contention that either the second or third agreement was made by defendant because of any thought or fear of enforcement of the restrictive covenant. While it cannot be said that a trust was created by the first agreement, there was consideration for all the agreements, and the court is not concerned with the adequacy thereof. The plain intention of the parties, and it was fully carried out, was that defendant would practise by himself and in his own name, and it was only in the sense of sharing with plaintiff the earnings of the practice that the rather loose language in the agreements as to defendant practising "for" or "for and on behalf of" plaintiff were used. As to the *Medical Act*, plaintiff's name was not struck from the register until October, 1935, and in any case it was the earnings from defendant's practice, carried on by himself and in his own name alone, which were covered by the agreements.

Per Kerwin J.: As to the second agreement, whereby defendant was to continue the practice "for and on behalf of" plaintiff for three years, defendant's contention that, if any consideration existed, it did not appear in the written document and thus the agreement was not enforceable by virtue of s. 4 of the *Statute of Frauds* (R.S.O., 1937, c. 146), is sufficiently met (apart from other items of consideration suggested) by plaintiff's promise therein to pay defendant 50% of the net profits. By entering into the first agreement, defendant undertook in effect that he would at its expiration turn over to plainiff the practice which he had been enabled to commence with plaintiff's money, unless some new agreement was entered into. The new agreement being valid to the extent indicated, defendant is bound to account to plaintiff in accordance with its terms. Plaintiff did not contravene ss. 47 and 50 of the *Medical Act* and is not prevented because of those enactments from compelling an accounting. The validity of the restrictive covenants is not material in determining the present case.

Per the Chief Justice and Crocket J. (dissenting): Plaintiff is not entitled to any rights as between himself and defendant on the footing that, in defendant's contract of purchase from C., plaintiff was the principal contracting through defendant as his agent, or that defendant's rights under that contract were held by him in trust for plaintiff; the contract between C. and defendant was a personal contract—C.'s patients were to be introduced to defendant (as to the true nature of the pith and substance of such a contract, *May* v. *Thomson*, 20 Ch. D. 705, at 718, referred to); further, it was well known to plaintiff and defendant that C. contracted in the full belief that defendant

was contracting as principal and in particular in the full belief that defendant was not contracting as plaintiff's agent, and, in the circumstances, plaintiff could not have enforced the contract as a principal (*Ferrand* v. *Bischoffsheim*, 4 C.B., N.S. 710, at 717); further, the proposition of plaintiff's rights upon the footing aforesaid was really based on the assumption that plaintiff and defendant were inducing C. to enter into the contract by industrious concealment in circumstances which imparted to that concealment the character of misrepresentation; and it is not open to plaintiff to base his case upon his own wrong; he cannot set up a relationship in support of his claim which rests upon fraud upon third parties (*Jackson* v. *Duchaire*, 3 Term Rep. 551, and other authorities cited). It was definitely understood between plaintiff and defendant that the arrangement between them should be kept secret. The agreement between them did not contemplate the establishment of any such relationship as that of a partnership or that of principal and assistant. The patients treated by defendant in the course of his practice were his patients. If there was any *vinculum juris* which plaintiff could have invoked against defendant's resistance, it was that of debtor and creditor. The restrictive covenants were void in law; such a covenant in gross would be contrary to public policy and unenforceable; and such a covenant is not valid and enforceable as subsidiary to the contract between plaintiff and defendant—a contract merely binding defendant to practise for three years and pay to plaintiff a share of the earnings. There was no consideration to defendant for his second and third agreements with plaintiff; at the expiration of the period of the first agreement, plaintiff had nothing to give to defendant. It was not competent in this action to go outside the writing to find consideration for defendant's promise, the agreement being within s. 4 of the *Statute of Frauds*. The promissory notes, which were given in settlement of moneys supposed to be payable under the second and third agreements, do not advance the matter. Though their production establishes a *prima facie* right, a presumption of valid consideration, yet the facts are all before the court and the only possible consideration was money supposed to be owing under defendant's promises given without consideration. A promise to pay money, unenforceable because not supported by a valuable consideration, can, itself, be no consideration for a promise to pay these sums, whether in the form of a promissory note or in any other form. Putting the point in another way: the direct and immediate cause of the making and delivery of the notes and the whole basis of the agreement embodied therein was the mistaken belief, common to both parties, that the amounts thereof were due and owing; and the notes are unenforceable because, by reason of such mistaken belief, they were void. The mistake was one in respect of particular private rights involving the application of general principles of law to the facts; a mistake due to ignorance in respect of a right which both parties supposed to exist. On the principle of *Cooper* v. *Phibbs* (L.R. 2 H.L. 149) and cases which have followed it, such a mistake vitiates the contract or the instrument under which it is given. (This sort of mistake is not the basis of a right to recover back money as paid under a mistake of fact, for there the mistake must be one of pure fact and not of mixed fact and law).

1940

RICHARDSON v. TIFFIN.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of McTague J.A. at trial (2)) dismissed the action.

The action was brought for an accounting from defendant (and payment of moneys found due thereon) under three agreements entered into between the plaintiff and defendant, both physicians, in respect of the practice of medicine by defendant in the town of Wallaceburg, Ontario, and for payment of the amount of two promissory notes made by the defendant in favour of the plaintiff. The material facts of the case are dealt with in the reasons for judgment in this Court now reported, and also in the reasons for judgment in the Courts below. The trial judge, McTague J.A., gave judgment to plaintiff for an accounting. This was reversed by the Court of Appeal (Henderson J.A. dissenting in part), which gave judgment dismissing the action. Plaintiff appealed to this Court, asking that the judgment at trial be restored. The appeal to this Court was allowed and the judgment of the trial judge restored with costs throughout (the Chief Justice and Crocket J. dissenting).

J. R. Cartwright K.C. for the appellant.

D. L. McCarthy K.C. and *K. G. Morden* for the respondent.

The judgment of the Chief Justice and Crocket J. (dissenting) was delivered by

THE CHIEF JUSTICE—With great respect for the learned trial judge, I agree with the Court of Appeal that the appellant is not entitled to any rights as between himself and the respondent on the footing that in the contract of the 5th of November, 1929, he was the principal contracting through the respondent as his agent with Dr. Cowan.

Dr. Cowan and the appellant had been practicing medicine in Wallaceburg for many years. Dr. Cowan was about to retire from practice and the appellant conceived the design that he would have the respondent step into Dr. Cowan's place and take over his patients and his practice

(1) [1939] O.R. 444; [1939] 3 D.L.R. 301.

(2) [1939] O.R. 444, at 444-448.

under an arrangement by which the appellant would receive the lion's share of the profits of the practice. It is plain from the evidence that it was essential to the success of the scheme that Dr. Cowan should be ignorant of any connection between the appellant and Dr. Cowan's successor. He knew that Dr. Cowan would have no dealings with him, or anybody associated with him. The respondent was a young man who had just finished his medical education and had been practising for some months in a place called Merlin, not far from Wallaceburg, and he was selected by the appellant as a suitable person to step into the shoes of Dr. Cowan. On the 31st of October, 1929, the appellant and the respondent entered into an agreement on the following terms:—

Stanley A. Richardson, M.D.
Wallaceburg.

Memorandum of agreement made this 31 of October, 1929. Between S. A. Richardson of the Town of Wallaceburg, physician herein called the party of the first part AND Eldon R. Tiffin hereinafter called the party of the second part.

Witness that in consideration of Ten Thousand Eight Hundred Dollars paid in 36 equal monthly instalments of Three Hundred Dollars each by the party of the first part along with necessary expenses entailed while practicing for the party of the first part, also ten per cent. of all monies received from practice done by party of the second part after payment of all expenses of the said practice including his monthly salary, the party of the second part agrees to practice for the party of the first part to the best of his ability for a period of three years.

The party of the second part agrees to furnish his own car and all its upkeep except gasoline and oil used in practice.

The party of the second part also agrees not to practice in or within twenty miles of the town of Wallaceburg without the consent of the party of the first part under penalty of $10,000 as liquidated damages before May 1, 1939.

The respondent's agreement with Dr. Cowan is as follows:—

AGREEMENT made this 5th day of November in the year one thousand nine hundred and twenty-nine, BETWEEN R. D. Cowan of the Town of Wallaceburg, in the County of Kent in the Province of Ontario, Physician, hereinafter called the vendor of the First Part AND E. R. Tiffen, Physician, hereinafter called the Purchaser of the Second Part;

WHEREAS the Vendor has for several years past exercised his profession of Physician and Surgeon at the said Town of Wallaceburg, and is now desirous of retiring from his practice in the said Town of Wallaceburg, and the purchaser is desirous of establishing himself as a Physician and Surgeon at the said Town of Wallaceburg.

NOW THIS AGREEMENT WITNESSETH that the Vendor agrees to sell and the purchaser agrees to purchase all drugs and medicines now used therein exclusive of all medical books, private papers, medical

1940

RICHARDSON v. TIFFIN.

Duff C.J.

bags and instruments (which said excepted articles shall be removed by the Vendor) also said practise and the good-will and benefits thereof from May the First, 1930, for the said sum of Twelve Hundred and Fifty Dollars ($1,250).

THE VENDOR HEREBY delivers over to the purchaser the said practice or business and the good-will thereof for his absolute use and benefit; and likewise the full and uninterrupted possession of the office in which the said practice now carried on by him together with the effects hereinbefore mentioned and described as being covered hereby.

THE VENDOR COVENANTS that he will not practise either as a Physician or a Surgeon or act directly or indirectly as partner or assistant to or with any other physician or surgeon either at the said Town of Wallaceburg or elsewhere within twenty miles thereof, under penalty of $5,000.

Subsequently, some months after the execution of this agreement, Dr. Cowan insisted that the respondent should take over the furniture and equipment in his office and this was accordingly done and the respondent paid $250. These two sums of $1,250 and $250 were paid by the appellant to the respondent in order to enable the respondent to carry out the arrangement.

It was held by the learned trial judge that the appellant was the principal in the agreement between the respondent and Dr. Cowan and that the respondent's rights under that agreement were held by him in trust for the appellant, and it is upon that position that the respondent's counsel based his case in the argument before this Court. In considering this subject it is necessary to take account of the true nature of the pith and substance of an agreement such as that between Dr. Cowan and the respondent. It was discussed by Sir George Jessel in a case, *May* v. *Thomson* (1), and it is convenient, I think, to reproduce his words now:—

I pause there to consider what there was to sell. The main subject of the sale was, as I have said, a medical practice: the lease and furniture were only an adjunct of the practice. What is the meaning of selling a medical practice? It is the selling of the introduction of the patients of the doctor who sells to the doctor who buys: he has nothing else to sell except the introduction. He can persuade his patients, probably, who have confidence in him to employ the gentleman he introduces as being a qualified man, and fit to undertake the cure of their maladies; but that is all he can do. Therefore, when you talk of the sale of a non-dispensing medical practice—of course, when a man keeps what is called a doctor's shop there is a different thing entirely to sell—you are really talking of the sale of the introduction to the patients, and the length, the character and duration of the introduction, the terms of the introduction, are everything. And there is something more, according to my experience, in cases

(1) (1882) 20 Chancery Division 705, at 718.

of the sale of medical practices—I do not know how the evidence is with regard to it in this case—there is always a stipulation that the selling doctor shall retire from practice either altogether or within a given distance. It is so always, and there is also sometimes a stipulation that he shall not solicit the patients, or shall not solicit them for a given time. They are both very important stipulations as regards keeping together the practice for the purchasing doctor.

As it seems to me, it is quite obvious, apart altogether from the exceptional circumstances to which I am about to refer, that an agreement of this kind is a personal agreement in this sense, that the introduction is to be an introduction to the purchaser, to the person who is the party to the agreement. It was thought by two great judges, Lord Eldon and Lord Langdale, that any agreement by one doctor to sell for money a recommendation of his patients to another was not compatible with the policy of the law (see Allan on Goodwill, p. 49). In 1803, however, a case of this kind was referred by Lord Eldon to the Court of King's Bench in the case of an attorney and that Court certified to the Lord Chancellor that the agreement was valid (*Bunn* v. *Guy* (1)). It seems plain that the judges in dealing with this subject were influenced by the circumstance that a contrary decision would have upset a great many arrangements which people made and acted upon. I have seen no case, however, in which it has been held that the law would sanction an agreement between a physician "A" with a physician "B" that he, "A," would recommend his patients in consideration of a sum paid to him to any physician that "B" might name. However that may be, in my opinion this contract was a personal contract. The purchaser contracts *ex facie* as the real and only principal and there is nothing in the context to indicate a contrary intention. Furthermore, the circumstances of the case preclude the appellant from asserting that he was entitled to enforce the respondent's rights under the contract. It was well known to both of them that Dr. Cowan entered into the agreement in the full belief that the respondent was contracting with him as the only principal, and in particular in the full belief that he was not contracting as the agent of the appellant. In the circumstances, the appellant could not have enforced the contract as a principal (*Ferrand* v. *Bischoffsheim* (2)).

(1) (1803) 4 East 190.

(2) (1858) 4 C.B., N.S., 710, at 717.

1940

RICHARDSON v. TIFFIN.

Duff C.J.

Still again, the proposition we are considering is really based on the assumption that the appellant and the respondent were inducing Dr. Cowan to enter into the contract by industrious concealment in circumstances which imparted to that concealment the character of misrepresentation. It is not open to the appellant to base his case upon his own wrong; he cannot set up a relationship in support of his claim which rests upon fraud upon third parties (*Jackson* v. *Duchaire* (1)).

Some attempt was made to draw a distinction between the contract of the 5th of November, 1929, and the subsequent agreement to pay $250 for office furniture and equipment. What I have said applies equally to both agreements.

It should, perhaps, be added that Dr. Cowan's patients were introduced and recommended to the respondent by Dr. Cowan; that they were never introduced or recommended to the appellant, and, moreover, it was definitely understood between them that it was an essential condition to the success of the plan that the arrangement between the appellant and the respondent should be kept secret. The appellant insisted upon this more than once in his evidence and there can be no possible doubt about it. The patients whom the respondent treated in the course of his practice were his patients. Both parties agreed that it was most important that no suspicion should arise that the appellant had any connection with the respondent's practice. Under the agreement of the 31st of October, therefore, the appellant acquired the right to be paid the respondent's earnings from his practice in Wallaceburg during the period mentioned less ten per cent. of the proceeds, after the deduction of $300 a month for the respondent and the expenses of the practice, the appellant guaranteeing the allowance of $300. The sole consideration for this agreement that the appellant should be paid the net proceeds of the practice was, in fact, the sum of $1,500 subsequently paid by him to the respondent to enable the respondent to acquire Dr. Cowan's practice and the equipment of his office. The respondent has not desired to raise any question as to the appellant's right to be paid the net proceeds of his practice during the

(1) (1790) 3 Term Reports 551.

term of this first agreement and it is, therefore, unnecessary to consider whether the appellant acquired any enforceable right in this respect.

As to the covenant not to practise for ten years without the sanction of the appellant in the area mentioned, the validity of which is disputed, I shall discuss that in a moment. Mr. Cartwright argued that the covenant by the respondent to "practise for" the appellant for the specified period made the practice of the respondent that of the appellant in the sense, at all events, that the appellant was entitled at the expiration of the period to call upon the respondent to introduce and recommend his patients to him.

Now it is not disputed, and it is overwhelmingly evidenced by the conduct of the parties, that they did not in entering into this agreement contemplate the establishment of any such relationship between them as that of a partnership; that is to say, what is ordinarily understood as a partnership between medical men, or that of principal and assistant. It is a common enough thing for a doctor to have an assistant who is known to the world as his assistant, and the patients expect and take the consequences of that relationship, and so with regard to partnership. I am unable to agree, however, that the agreement now before us contemplates any such relationship between the parties. The agreement must be read in the light of the circumstances just mentioned, the necessity for secrecy with regard to the arrangement between them, the fact that this arrangement had been concealed with great care from Dr. Cowan, the manifest and admitted intention, because this was essential to the success of the appellant's design, that the respondent should appear before the world as the rival practitioner of the appellant. Obviously a secret arrangement between the respondent and the appellant by which as servant, or agent, or partner, or contractor, the appellant had any right to exercise any control over the respondent in his manner of practising medicine and, above all, to possess himself of the confidences acquired by the respondent from his patients in the course of and in connection with his practice would be a base fraud upon the respondent's patients, some of whom, it is highly probable to the knowledge of the parties, would have been shocked at the possibility that

1940
RICHARDSON
v.
TIFFIN.
Duff C.J.

their doctor had any such relationship with the appellant. The truth is that the appellant was only concerned about one thing and that is the profits from the practice. The respondent was to practise " for " him in a very real sense, that is to say, to enable him to acquire the pecuniary benefits provided for by the agreement. I am satisfied that the relation of principal and agent, or trustee and *cestui que trust,* never arose. The relationship was one of debtor and creditor. If there was any *vinculum juris* which the appellant could have invoked against the resistance of the respondent, it was that of debtor and creditor. The respondent agreed with the appellant that he should practise medicine in Wallaceburg for three years and that the earnings received by him should be divided in the manner therein provided for.

Turning then to the covenant, with which the agreement concludes, it is in these words:—

> The party of the second part also agrees not to practise in or within twenty miles of the town of Wallaceburg without the consent of the party of the first part under penalty of $10,000 as liquidated damages before May 1st, 1939.

It is, of course, well settled law that such a covenant as this in gross would be contrary to public policy and unenforceable. It seems equally clear that such a covenant is not valid and enforceable as subsidiary to the contract of the 31st of October when properly understood as a contract; that is to say, binding the respondent to practise medicine for three years and to pay to the appellant a share of his earnings, there being no contract of partnership, no relationship of master and servant, no contract of sale and purchase, nothing but a payment of $1,500 by the appellant in consideration of which the respondent is bound to practise for three years and pay the appellant ninety per cent. of his net earnings. The purpose of the appellant is, of course, plain. At the expiration of the three-year period the respondent would be in his clutches and could only continue to practise in Wallaceburg upon any terms the appellant might dictate, and so on at the expiration of any and every further period.

As regards the agreement we have been considering, the respondent, as already observed, does not deny his responsibility under it. The Court of Appeal has held that all moneys owing have been paid.

The appellant sues on two other agreements, dated respectively the 17th of April, 1933, and the 6th of September, 1935. It is well, perhaps, to note in passing that the appellant sues on these two written agreements as well as on two promissory notes, dated respectively the 1st of January, 1934, and the 1st of May, 1935. The promissory notes were given in settlement of moneys supposed to be payable under these agreements. It seems very plain to me that there was no consideration for either of the agreements. The covenant not to practise without consent of the appellant in the agreement of 1929 was void in law for the reasons mentioned. At the expiration of the three-year period under that agreement, the appellant had nothing to give the respondent. The moneys paid to the respondent to pay Dr. Cowan were paid in order to get rid of Dr. Cowan, pursuant to the appellant's design. Dr. Cowan's covenant was personal to the respondent, and the appellant, for the reasons given, cannot get the benefit of that covenant by alleging the fraud on Dr. Cowan in order to establish a trust. The respondent was free to practise in Wallaceburg.

I agree with the Court of Appeal that the agreement whereby fifty per cent. of the respondent's net earnings were to go to the appellant was entirely without consideration.

The covenant not to practise without the consent of the appellant is void in law for reasons similar to those already given in respect of the covenant in the first agreement.

Mr. Cartwright contends that there is consideration on four grounds: (1) Tiffin had his office rent free. (2) He had the use of the equipment. (3) He got his medicines paid for out of the receipts from the practice during the first three years. (4) At the termination of the first contract there was a compromise of a doubtful claim in respect of the respondent's right to practise. And he also argues that the respondent is estopped from denying the existence of consideration.

As to the estoppel, it is based upon payments made by the respondent when ignorant of his rights. I am quite unable to discover here the elements of estoppel. The respondent no doubt thought that the second and third agreements were legally binding upon him when he made

1940
RICHARDSON
v.
TIFFIN.
Duff C.J.

those payments, as probably the appellant also did, but it is going a little too far, I think, to suggest that the appellant was in any way misled by what the respondent did, or that anything the respondent did in any way affected the appellant's course of conduct. The appellant acted, I have no doubt, entirely upon his own view of his own rights. There was mutual mistake, which is not without its bearing upon one point in the appeal, although, as Mr. Justice Middleton points out, it is not a mistake of such a character as entitles the respondent to recover back moneys already paid, because there the rule which distinguishes between the mistake of law and the mistake of fact is rigorously applied and mistake of law, or of mixed law and fact, is not sufficient, even although it is mistake as to particular private rights. That disposes of point number five on this matter of consideration.

As to point number four, there was no compromise of a doubtful claim; no such claim was made and no dispute arose of which there could be a compromise.

As to the equipment and the medicines taken over from Dr. Cowan, the appellant is precluded from alleging they were his for the reasons given, and at the trial no point was made as to their existence at the date of the second agreement. As to the medicines purchased subsequently, as well as equipment, they were the respondent's, being paid for out of his earnings.

As to the office, as well as the furniture and equipment, the evidence is that the whole building was rented by the respondent at a rent of $42 a month and partly sub-let by him, as the appellant admits.

Q. Or about the time of second agreement; early in May, 1933?—A. I can't tell you the date.

Q. Just about the time the first agreement expired?—A. Yes.

Q. And about that time he took over the whole building and paid you $42 a month for it, from that time after?—A. Yes.

Indeed the appellant admits that the rent of the office would be chargeable to expenses under the first agreement. There is nothing in either of the agreements sued upon as to the occupation of the office. There is not a word about it in the documents, and the transaction by which the respondent rented the whole building at $42 a month must be taken to be an independent transaction. In my view of these documents, there is nothing in them by

which the appellant had legal right to control the respondent in the selection of his office. There is an express stipulation that the respondent is to continue the practice of medicine in Wallaceburg, but there is not a word about the situation of his office. Furthermore, these agreements state explicitly what the consideration is and the net result of the stipulations is that the respondent is to pay to the appellant his net earnings from the practice of medicine in Wallaceburg for the period mentioned, after deducting all necessary expenses.

In an action on this agreement by one party against the other it is not competent to go outside the writing to find consideration for the promise relied upon. The agreement is within the fourth section of the *Statute of Frauds* and the memorandum in writing must show the consideration. The agreement, therefore, cannot be supported by any consideration which does not sufficiently appear from the memorandum. The action is upon the written agreement and there is no suggestion of *quantum meruit* in the pleadings. Part performance has obviously no application to an agreement such as this.

As to the promissory notes, they do not advance the matter. The appellant's position is that he sues upon a promise given without consideration by the respondent to pay moneys to him. The production of the promissory notes establishes undoubtedly a *prima facie* right in the appellant to recover on those notes; that is to say, there is a presumption they were given for a valid consideration. But the whole of the facts are before us and the only possible consideration was money supposed to be owing to the appellant by the respondent under his promises given without consideration. A promise to pay money unenforceable because not supported by a valid consideration can, itself, be no consideration for a promise to pay these sums, whether in the form of a promissory note, or in any other form.

There is another way in which the point can be put. There can be no doubt that both parties believed that the amounts mentioned in the promissory notes were at the dates of those notes, respectively, due and owing by the respondent to the appellant. This mistaken belief was the direct and immediate cause of the making and delivery of the promissory notes by the respondent to the appellant.

1940

RICHARDSON v. TIFFIN.

Duff C.J.

It was the common mistake of both parties and it was the whole basis of the agreement embodied in the promissory notes. This belief, as will appear from what has been said, was a mistaken belief, and the promissory notes are unenforceable, because by reason of this belief they were void. The mistake was a mistake in respect of particular private rights involving the application of general principles of law to the facts; a mistake due to ignorance in respect of a right which both parties supposed to exist. On the principle of *Cooper* v. *Phibbs* (1), and cases which have followed it, such a mistake vitiates the contract, or the instrument under which it is given (Pollock, p. 445; 23 Halsbury, 2nd edition, p. 131). This sort of mistake is not the basis of a right to recover back money as paid under a mistake of fact, for there the mistake must be one of pure fact and not of mixed fact and law (Halsbury, p. 166; Pollock, p. 460).

Returning to the allegation that the respondent in contracting with Dr. Cowan was contracting as his agent:

> Where it appears that the object of such contract or transaction was to defraud third persons, whether specific individuals, or the public in general, or a class or section of the community,

the Court will treat the transaction as void (23 Halsbury, 2nd edition, p. 124).

In *Farmers' Mart Ltd.* v. *Milne* (2), Lord Dunedin says:—

> Now taking it upon Scotch authority first, before coming to English authority, I find that the matter is very clearly dealt with, as it always is, by Mr. Bell in his "Principles." After stating that there are such things as illegal and immoral contracts, he deals in s. 37 with contracts void at common law. He first sets forth contracts properly immoral, *contra bonos mores,* then certain rules as to *pactum illicitum,* and so on, and then he says this: "Contracts for indecent or mischievous purposes or considerations, or prejudicial or offensive to the public or to third parties, or inconsistent with public law or arrangements are invalid." * * * My Lords, I have so far kept only to Scotch authority. In English authority the matter is dealt with in precisely the same way. I note in the admirable work on Contracts by Sir Frederick Pollock, 8th ed., p. 292, that he expresses the matter in almost the same terms as Mr. Bell, where he says, "An agreement will generally be illegal, though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates any civil injury to third persons."

(1) (1867) L.R. 2 H.L. 149. (2) [1915] A.C. 106, at 112, 113.

Leake on Contracts, p. 593:

> Contracts made for the purpose of defrauding or injuring third parties are illegal and void; as a contract to publish a book with a title-page containing a false statement of the authorship, in fraud of the public; the sale of a fictitious patent right, the buyer to promote a company to work it, as being a fraud upon the intended shareholders; or the sale of mining and other properties at fictitious prices for the purpose of forming companies to buy them; or an agreement between two or more persons by means of fictitious purchases to induce intending buyers, contract to the fact, to believe that there is a market for shares, and that the shares are of greater value than is really the case.

The principle of these passages is not limited to contracts. "The Court will not interfere to protect the use of a deceptive trade mark" on the principle *ex turpi causa non oritur actio.* (Kerly on Trade Marks, p. 486).

The appeal should be dismissed with costs.

RINFRET J.—I would allow the appeal and restore the judgment at the trial with costs to the appellant throughout.

DAVIS J.—I would allow the appeal and restore the judgment at the trial with costs to the appellant throughout. As I differ somewhat from the grounds upon which the learned trial judge reached his conclusion, I shall state as briefly as I can my view of the case.

The respondent, Dr. Tiffin, a duly qualified physician, graduated from Queen's University in 1928 and after doing interne work until some time in the middle of 1929 (he was then only twenty-five years of age), went to Merlin, a small place in western Ontario (near the town of Wallaceburg) where he had been as an undergraduate in the summer of 1928. Shortly thereafter he was induced by the appellant, Dr. Richardson, who had been admitted to practice in 1913 and who had been practising the last ten years in Wallaceburg, a place of about 5,000 population, to take up practice there. A third doctor, a Dr. Cowan, was retiring from practice in Wallaceburg (he had been in practice there for seven or eight years and had a very extensive practice) and Dr. Richardson suggested to the young Dr. Tiffin that he take over Dr. Cowan's practice in Wallaceburg. Dr. Richardson had had an assistant with him up until July of 1929. Just what the motive was that led Dr. Richardson to induce Dr. Tiffin to go to

1940
RICHARDSON
v.
TIFFIN.
Davis J.

Wallaceburg and take over Dr. Cowan's practice is not shewn other than it was expected that it would result to their mutual advantage.

There may be something in the suggestion that Dr. Cowan would not have sold his practice to Dr. Richardson; there may have been some unfriendliness between the two doctors. At any rate the young doctor, the respondent, apparently had no money and Dr. Richardson gave him the money to buy "the practice," together with the office equipment and medical supplies, steel operating table, desk, safe, chairs for the wating room, stove—"all that you would use in the way of ordinary equipment and for an office, and a considerable quantity of medicines," from Dr. Cowan. That took a sum of $1,500. It is not suggested that this sum was as such a loan or as such to be repaid. (The agreement between Dr. Cowan and Dr. Tiffin was dated November 5th, 1929.)

Now the location of Dr. Cowan's office in Wallaceburg was obviously of real importance to any young doctor taking over the practice. The office was in residential property; but Dr. Cowan did not own the property—he had been a tenant. And so Dr. Richardson purchased the property from its then owner so as to have the same office available for Dr. Tiffin. Counsel informed us that the price was about $5,000. The evidence is not explicit on the point but apparently it was a dwelling house that had been made into two living apartments separate from the doctor's office.

The young doctor had pressed Dr. Richardson in their negotiations in October, 1929, to what would appear to be a very good financial arrangement for a very recent graduate in medicine of twenty-five years of age. Dr. Tiffin asked and obtained a definite guarantee of $300 a month over and above expenses, together with ten per cent. of earnings in excess of the salary and the expenses. Even gasolene and oil for use in his motor car were included in expenses. A memorandum of the arrangement between them was put in writing on October 31st, 1929. It was for three years from the time Dr. Tiffin could take over Dr. Cowan's practice, which was anticipated as it actually happened to be, May 1st, 1930. Dr. Tiffin at the trial was asked as to the character of his practice during the first couple of years. He said that in a financial way it

was very small. Asked as to how near he got to $300 a month and expenses during the first two years, his answer was, "Well, I was beginning to approach it at the end of the second year."

The arrangement was carried out for the three years and at its expiration another memorandum of agreement was made between Dr. Richardson and Dr. Tiffin. This was on April 17th, 1933. By this memorandum Dr. Tiffin agreed to continue the practice of medicine in Wallaceburg to May 1st, 1936 (another three-year period) "in his own name and with the same good will and co-operation between the parties as has existed in the past." The prior arrangement for a fixed salary and expenses and a ten per centum share of net earnings gave way to a fifty per cent. division of the net profits. At the date of the making of this second agreement the two doctors went over the books and settled the balance then due to Dr. Richardson, on the basis of the actual moneys that had come in, up to that time, at $816.53. The second agreement had provided that all moneys that might be paid in thereafter by the patients from time to time were first to be applied on accounts owing by them up to May 1st, 1933, and were to be divided on the basis of the share division which governed the first agreement.

Dr. Tiffin after the second agreement made monthly returns to Dr. Richardson regarding the earnings of the practice and from time to time made payments of money on account to Dr. Richardson. The payments did not equal the amounts to which Dr. Richardson was entitled, as shewn by the returns, and on January 1st, 1934, the doctors went over the accounts and made a settlement. There was a balance of over $3,000 in favour of Dr. Richardson, and Dr. Tiffin handed over to him some shares of stock in the Dominion Sugar Company of a then value of $1,185, and to cover the balance gave Dr. Richardson his demand note for $2,108.10. Subsequently, on May 1st, 1935, the doctors again settled their accounts and at that time there was a further balance owing to Dr. Richardson amounting to $1,368.16 (over and beyond the $2,108.10 note that had not been paid) and Dr. Tiffin gave Dr. Richardson at that time another promissory note for the balance as then settled upon, $1,368.16.

1940
RICHARDSON
v.
TIFFIN.
Davis J.

The second agreement would not have expired until April 30th, 1936, but on September 6th, 1935, the doctors made another agreement. The written memorandum was in exactly the same language as the second memorandum except that the period for the continuance of the arrangement was fixed until the 1st of May, 1939, which would be three years from the expiration of the then existing agreement. Dr. Tiffin again agreed to continue the practice of medicine "in his own name and with the same good will and co-operation between the parties as has existed in the past." Dr. Tiffin continued under these arrangements year after year from May 1st, 1930, until at least September, 1937. He kept making his monthly returns to Dr. Richardson regularly up to May 31st, 1937; the last payment was made June 19th, 1937. Dr. Tiffin, asked by the trial judge:

Q. Why did you stop making payments in 1937?

replied:

Dr. Richardson's daughter went away for the summer, and before she was available again to make any more, Dr. Richardson came back himself in September, at which time I had a conversation with him, but we were not able to reach a settlement, and I got legal advice at that time.

Then follow in the evidence these questions and answers under cross-examination:

Q. When Dr. Richardson did come back in September, 1937, he did go to see you and asked you to make a settlement with him, didn't he?

A. Yes.

Q. Did he not mention at that time the fact you owed him these two notes?

A. At that time I think so, yes; he mentioned the whole thing.

Q. And he asked you for payment of the notes, along with balances due for these payments?

A. Yes.

The evidence is not precise as to how long Dr. Tiffin continued to carry on his practice in the building that Dr. Richardson had acquired and in which Dr. Cowan had had his office, but it is plain that Dr. Tiffin moved in on May 1st, 1930, and continued there until about July, 1937. It must be said that Dr. Tiffin, with much loyalty to Dr. Richardson, lived up to the terms of the agreements for over seven years and there is no suggestion on his part that Dr. Richardson did not give him at the same time the good will and co-operation agreed upon. Dr. Richardson at the trial stated that he had assisted and

co-operated with Dr. Tiffin in the latter's working up of the practice; that he turned over patients from time to time to Dr. Tiffin and to him alone; that in cases such as confinements, after a certain period he would turn them over to Dr. Tiffin. There is not the slightest evidence from Dr. Tiffin that that was not so. It seems to me to have been a pity that Dr. Tiffin was legally advised, if he was as he so states, in September, 1937, to repudiate the agreements and the promissory notes and to deny any liability to Dr. Richardson. But whether he was given any such legal advice or not, he refused thereafter to recognize any claim of Dr. Richardson either on the promissory notes or under the agreements. Accordingly Dr. Richardson issued the writ in this action, on November 7th, 1938, claiming payment of the two notes with interest, and an accounting.

Dr. Tiffin pleaded that the second and third agreements (those of April 17th, 1933, and September 6th ,1935) were *nuda pacta* "and fail wholly for want of any consideration" and that he had paid Dr. Richardson more money than he was entitled to under the first agreement. Dr. Tiffin further pleaded, with respect to the second and third agreements, that Dr. Richardson's name had been stricken off the Registry under the *Medical Act* (the date was October, 1935) and for that reason, even if the second and third agreements had been valid and subsisting agreements, that they had duly come to an end for the reason that Dr. Richardson could not then legally continue the practice of medicine himself. As to the promissory notes, Dr. Tiffin in his pleading took the position that in so far as one or both of them may originally have covered moneys owing under the first of the three agreements, they had been fully paid, and in so far as they may have covered moneys under the second and third agreements, no consideration was given for the said notes by Dr. Richardson and for that reason no moneys were owing thereunder. Dr. Tiffin further pleaded the *Medical Act* and the *Statute of Frauds* and further, by amendment at the trial, that the second and third agreements were null and void as being in restraint of trade, and that by reason of the restrictions therein contained all three agreements were "unfair, oppressive and tyrannous" and ought not to be enforced. Dr. Tiffin counter-claimed for the return of $3,177.71 which he claimed to have been overpaid by him under the first

1940

RICHARDSON v. TIFFIN.

Davis J.

agreement, and for a declaration of the Court that the second and third agreements were never valid and subsisting agreements and never at any time became effective, and for the return of the two promissory notes for cancellation.

This may be a convenient place to refer to the restrictive covenants. In the first agreement the covenant was in these words:

> The party of the second part (Dr. Tiffin) also agrees not to practice in or within twenty miles of the town of Wallaceburg without the consent of the party of the first part (Dr. Richardson) under penalty of $10,000 as liquidated damages before May 1/1939.

In the second agreement the covenant was in these words:

> In consideration of years of association in the practice of medicine in a similar manner and in further consideration of this agreement and the moneys herein provided the party of the second part (Dr. Tiffin) agrees not to practise medicine directly or indirectly by himself or through any person on his behalf within 25 miles of the Town of Wallaceburg for a period of six years from the date set for the expiration of this agreement, namely, May 1st, 1936.

In the third agreement the covenant was in exactly the same language as in the second agreement other than that the period of six years was to run from the date set for the expiration of the third agreement, namely, May 1st, 1939. All the agreements were apparently drawn up by the doctors themselves without the intervention of any solicitor. This probably accounts for the rather loose language in the first agreement, "while practising for the party of the first part" and "agrees to practise for the party of the first part to the best of his ability"; and in the second and third agreements the words "agrees to continue the practice of medicine in the town of Wallaceburg for and on behalf of the party of the first part and in his own name." There is no doubt that the plain intention of the parties, and it was fully carried out, was that Dr. Tiffin would practise by himself and in his own name, and it was only in the sense of sharing the earnings of the practice with Dr. Richardson that these words were used. It may be observed that there was a restrictive covenant in the agreement of November 5th, 1929, between

Dr. Cowan and Dr. Tiffin when the former sold his practice to the latter. The covenant there was:

> The vendor covenants that he will not practise either as a physician or a surgeon or act directly or indirectly as partner or assistant to or with any other physician or surgeon either at the said town of Wallaceburg or elsewhere within twenty miles thereof, under penalty of $5,000.

McTague J.A., who tried the case, gave judgment in favour of Dr. Richardson but in view of the evidence as to periodic statements and payments on account he thought it better to give the parties a complete accounting from the beginning, May 1st, 1930. As to the *Medical Act,* he found that Dr. Richardson did not practise medicine after his name was stricken from the Registry in October, 1935, and that whatever rights he had against Dr. Tiffin arose out of contract, not prohibited in any way, that he could see, by the statute. The trial judge found that the agreements were not without consideration. As to the second and third agreements being invalid on account of the restrictive covenants, the trial judge passed no opinion upon the question of the validity of the covenants because in his view they were in any event severable and did not affect the validity of the other provisions of the agreements. Nothing was said in the reasons or in the formal judgment about the counter-claim.

Upon appeal by Dr. Tiffin to the Court of Appeal for Ontario, that Court allowed the appeal without costs and dismissed both the action and the counter-claim without costs. The majority of that Court took the position that the first agreement was invalid upon the ground that a trust on the part of Dr. Tiffin, which the learned trial judge had found, could not be established, and all the members of that Court decided that the second and third agreements were entirely without consideration. "The position of affairs is, therefore," said Middleton J.A., with whom Gillanders J.A. agreed, "that all moneys that have been paid under these agreements is payment in a mistaken view of the law, and that neither party can recover anything from the other." Henderson J.A., who dissented in part, took the view the first agreement was valid and he would have given Dr. Richardson a reference, at his own risk as to costs, to ascertain what moneys, if any, were still owing in respect of the three years covered by the first agreement.

1940

RICHARDSON v. TIFFIN.

Davis J.

From that judgment Dr. Richardson appealed to this Court.

Dr. Tiffin did not appeal against the dismissal of his counter-claim.

Counsel for the respondent, Dr. Tiffin, sought to support the judgment appealed from by a somewhat exhaustive review of many well known decisions on covenants in restraint of trade and on want of consideration. But in my view they had no real application to the facts of this case. Whether or not the restrictive covenants are enforceable is beside the question because if they are unenforceable they are clearly severable. In any case there is nothing in the evidence to support the contention that either the second or the third agreement was made by Dr. Tiffin because of any thought or fear on his part of the enforcement of the restrictive covenant. The only reference at all in the evidence on this point was when Dr. Tiffin was asked in cross-examination as to the third agreement whether he had not been interested in making some bargain with Dr. Richardson to prevent being restrained at the end of the second three-year period from practising in Wallaceburg. His answer was: "He (that is, Dr. Richardson) made that bargain." Dr. Tiffin added that he had been dissatisfied with the proposed extension to May, 1941, and he changed it to May, 1939, and then signed. While I cannot agree with the learned trial judge that a trust was created by the first agreement, I think the simple statement of the facts throughout shows that there was consideration for all three agreements. We are not concerned with the adequacy of the consideration. So far as the *Medical Act* is concerned, Dr. Richardson's name was not stricken from the Registry until October, 1935, and in any case it was the earnings from Dr. Tiffin's practice, carried on by himself in his own name alone, which were covered by the agreements.

The defence to the action had, in my view, no merit in fact and no foundation in law. I would therefore allow the appeal and restore the judgment at the trial with costs to the appellant both of the appeal to the Court of Appeal and of the appeal to this Court.

KERWIN J.—The facts in the present case are set forth in the reasons for judgment of the trial judge, Mr. Justice McTague, and the most important of them are referred to by Mr. Justice Henderson in the Court of Appeal. I do not delay, therefore, to repeat them in detail.

The first agreement between the parties, who were medical practitioners, is admitted by each to be valid and binding. By it the appellant (plaintiff) was to pay the respondent (defendant) three hundred dollars per month for thirty-six months, together with the necessary expenses connected with the practice of medicine, and also ten per cent. of the receipts from that practice, after payment of all expenses including the monthly salary: the respondent was to practise for that period for the appellant. The appellant paid to the respondent fifteen hundred dollars, which was used by the latter to purchase the practice and goodwill of a Dr. Cowan, together with certain of the latter's equipment. The appellant also purchased the premises in which Dr. Cowan had practised, and the respondent continued to practise there, using the said equipment down to the time he repudiated any obligations towards the appellant. The appellant claims there is a balance due him under that agreement, while the respondent claims to have overpaid.

The second agreement, dated April 17th, 1933, provides that the respondent would continue the practice for and on behalf of the appellant and that the latter would pay the respondent fifty per cent. of the net profits of the practice for three years. It is alleged that this agreement is not enforceable by virtue of that part of section 4 of the *Statute of Frauds* (R.S.O., 1937, c. 146) which provides that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof. The precise contention is that if any consideration existed, it did not appear in the written document. The promise of the appellant to pay the respondent is sufficient to dispose of this contention without reference to the other items of consideration suggested by the appellant.

By entering into the first agreement, the respondent undertook, in effect, that he would, at its expiration, turn over to the appellant the practice which he had been enabled to commence with the appellant's money, unless

1940
RICHARDSON
v.
TIFFIN.
Kerwin J.

some new agreement was entered into. The new agreement being valid to the extent indicated, the respondent is bound to account to the appellant in accordance with its terms.

In addition to the same defences being raised against the third agreement entered into by the parties on September 6th, 1935, the respondent sets up that, due to the fact that at the times that agreement became operative and the action was commenced, the appellant's registration under the Ontario *Medical Act* had been cancelled, the appellant cannot compel an accounting from the respondent because of sections 47 and 50 of that Act. I agree with the view of the trial judge that the appellant did not contravene these sections.

There was no material alteration in the second and third agreements by reason of the affixing of seals by the appellant on his own duplicates. In any event, no alteration was made in the duplicates in the possession of the respondent, and upon them the appellant is entitled to rely. It is unnecessary to express any opinion as to the validity of the restrictive covenants and that question should be left for determination when it arises. I would allow the appeal and restore the judgment at the trial, with costs throughout.

I cannot part with the case without referring again to the respondent's plea of section 4 of the *Statute of Frauds*. The mere fact that it was thought advisable to set up this defence indicates to me, at least, that it is high time that steps be taken to consider the advisability of repealing the section. The Law Revision Committee in England in its sixth interim report (May, 1937) has already made a recommendation to that effect.

Appeal allowed with costs.

Solicitors for the appellant: *Smith, Rae, Greer & Cartwright.*

Solicitors for the respondent: *Fraser & Burgess.*