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HARRIS vs. THE LAW SOCIETY OF ALBERTA

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Barristers and solicitors—Legal Profession Act, R.S.A. 1922 c. 206—Disbarment by Law Society—Powers of Society—Procedure—Lack of essential proceedings—Nullity of order of disbarment—Appeal not taken—Question as to acquiescence, waiver, or estoppel—Whether Law Society liable in damages.

Under the Alberta *Legal Profession Act*, R.S.A. 1922, c. 206, the benchers of the Law Society of Alberta were to appoint and maintain a "discipline committee," consisting of at least three members, who were to deal with complaints against any member of the Society, and might recommend that the benchers strike the name of the member off the rolls, and the benchers might order the same to be done. There were provisions for procedure before the discipline committee. The member might appeal "from the decision of the committee and of the benchers" to the Appellate Division of the Supreme Court of Alberta, the appeal to be by notice to the benchers and "founded upon a copy of the proceedings before the said committee and the benchers, the evidence taken, the committee's report and the order made by the benchers thereon.

The benchers had appointed R. as chairman, and all the other benchers as members, of the discipline committee. On complaints lodged against plantiff (a member of the Law Society), R. appointed three benchers as a special committee to examine into them, receive evidence, and report. They held meetings, of which notice was given plaintiff, who had full opportunity to, and did, hear the evidence, cross-examine, and adduce evidence. This special committee then reported to the convocation of benchers that they had found the complaints proven, that plaintiff had been guilty of improper professional conduct, and they recommended that his name be struck from the rolls of the Society. This recommendation was received and adopted by the convocation on July 5, 1923; it was further recorded that plaintiff was found to have been guilty of improper professional conduct; and it was ordered that his name be, and it was, struck off the rolls. Plaintiff did not appeal. In 1924, 1926, 1927, and 1930, he applied for reinstatement. He did not know until 1925 that the committee before which he had appeared was not the official discipline committee. In 1928 he sued the Law Society of Alberta, alleging that his name had wrongfully and without legal right been struck off the rolls, and praying for a declaration that he was still a member of the Society, entitled to practise, and claiming damages.

Held: (1) Plaintiff was entitled to have his name restored to the rolls. The benchers' order striking it off was null and void. Under the Act such an order could be made only after investigation and recommendation by the discipline committee, which never took place. The fact that the official discipline committee comprised all the benchers who eventually received and adopted the recommendation of the special committee, could not, even apart from the fact that those benchers adopt-

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

ing it had made no investigation of their own, overcome the statutory requirement of the acting by the discipline committee as a distinctive body. (*Per* Duff C.J.: The discipline committee, in ascertaining the facts, may proceed through the agency of one or more of its members for the purpose of taking evidence and getting the facts. But in deciding upon their recommendation the discipline committee must, under the Act, give the member charged an opportunity of appearing before them and presenting his defence. It might be that, had plaintiff been heard in his defence by the benchers in convocation, the report of the special committee, notwithstanding the form of the proceedings, might have been considered as adopted by the benchers, sitting as a discipline committee, after hearing plaintiff, as the Act requires; and that the proceedings might have been considered as conforming in substance to the statutory procedure. The error of substance was in not giving plaintiff a hearing before the members comprising the discipline committee; and this defect sterilized the proceedings as regards legal consequences).

It was not a case where plaintiff should have appealed under the Act, because (1) there was no recommendation of the discipline committee from which he could appeal, and (2) the benchers' order was a nullity. Nor could plaintiff by his conduct be taken to have abandoned by waiver or consent his rightful objections to the validity of the proceedings and of the order; moreover, since the benchers' lack of power deprived the order of any effect, and the legislation in question must be looked at from the viewpoint of public interest, estoppel on the ground of acquiescence could not be invoked.

(2) The act of the benchers, obviously done in good faith, was not such as would entail any liability on defendant in damages. In exercising their power of striking a member's name from the rolls, the benchers perform a function not merely ministerial, but discretionary and judicial. In this case they were intending, in what they did, to do what they were entitled to do, viz., to perform their statutory public duties. They made the order in what they *bona fide* believed to be the exercise of a judicial discretion, and they, or the defendant society which they represented, were not subject to an action in damages because the report which they adopted as the foundation of their order happened, without their actual knowledge, to lack authority and validity (*Partridge* v. *General Council of Medical Education,* 25 Q.B.D. 90).

Judgment of the Appellate Division, Alta., [1935] 1 W.W.R. 735, dismissing the action, reversed in part.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing and setting aside the judgment of Simmons C.J.T.D. at the trial.

The action was brought against the Law Society of Alberta for a declaration that the plaintiff is still a member of the Society and is entitled to practise as a barrister and solicitor, and for damages for causing the plaintiff's name to be struck off the rolls of the Society.

(1) [1935] 1 W.W.R. 735; [1935] 2 D.L.R. 583.

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By the judgment at trial it was ordered and adjudged that the resolution passed by the Benchers of the Law Society of Alberta on July 5, 1923, whereby the plaintiff's name was struck from off the rolls of the Society, and the striking of his name from off the rolls, were null and void; that he was entitled to have his name restored to the rolls in the same condition and for all the same purpose and effect as if it had never been removed or struck off on July 5, 1923; that plaintiff has been ever since, and including, July 5, 1923, and is still a member of the Society, and entitled to practise as a barrister and solicitor; and that he recover from the defendant $1,500 (damages), and costs.

By the judgment of the Appellate Division the plaintiff's action was dismissed, and defendant was given costs of the appeal and in the Trial Division.

The plaintiff was given by the Appellate Division special leave to appeal to the Supreme Court of Canada.

The question involved was the validity and effect of the proceedings which led to plaintiff's name being, and by which it was, struck off the rolls of the Society. The material facts of the case are sufficiently stated in the judgment of Rinfret J. now reported, and are indicated in the above headnote. By the judgment of this Court, now reported, the plaintiff's appeal was allowed, and the judgment of the trial Judge restored, with the modification that plaintiff is not entitled to recover damages against the defendant; the plaintiff to have costs of his appeal to this Court and his costs in the trial Court, but the defendant to have its costs of appeal to the Appellate Division.

O. M. Biggar K.C. for the appellant.

A. Macleod Sinclair K.C. for the respondent.

DUFF C.J.—I concur with the judgment of my brother Rinfret.

It is clear, I think, that the authority of the Benchers to order the name of a member to be struck from the rolls is conditioned upon a report by the Discipline Committee, recommending that that should be done, having been before the Benchers and considered by them (s. 32 (2)). By the same subsection it is the Discipline Committee which, primarily, has the responsibility of dealing with and investigating charges and complaints regarding members of the Society.

And if the Committee considers that the evidence warrants a recommendation to the Benchers that the member implicated shall be struck from the rolls, the next step is a report by the Discipline Committee containing such a recommendation. A Discipline Committee in being, therefore a decision by that Committee, a recommendation by it, would appear to be essential before an order striking a name from the roll can be validly made by the Benchers.

At the pertinent time, the Committee consisted of all the Benchers. I think it is plain that this Committee, which was the only Discipline Committee, never investigated the charges against the appellant. Three gentlemen were named by the Chairman of the Committee to perform this duty and these three gentlemen reported as the Discipline Committee to the Benchers; and it was upon this report that the Benchers acted.

Now, I should not wish to be understood as intimating that the procedure of the Discipline Committee must conform to the rules that would prevail if they constituted a court of justice. I have no doubt that the Discipline Committee, in ascertaining the facts, may proceed through the agency of one or more of its members for the purpose of taking evidence and getting the facts. Nevertheless, in deciding upon their recommendation, the Discipline Committee, by force of subsection 7, must give the member charged an opportunity of appearing before them and presenting his defence.

As it is the Committee as a whole, or a proper quorum of it, which is to make the recommendation upon which the Benchers may act, the member concerned is obviously entitled to appear before the Committee, at a meeting properly convened, to deal with the charges against him. The appellant was not heard before any such meeting.

At first sight it might appear to be rather pedantic to draw a distinction between the Benchers and the Discipline Committee who consisted of the same persons. It may become, however, matter of substance in the strict sense when, as here, the essential step prescribed by the statute just mentioned, giving notice to the accused member and an opportunity of being heard before a properly convened meeting of the Benchers in their capacity of Discipline Committee, has been omitted. The rule of law is correctly stated,

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I think, in Craies' Statute Law, at p. 355, in this sentence:

> * * * when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with.

The authority of the Benchers, as well as that of the Discipline Committee, rests in its entirety upon the statute; and the authority of the Benchers, as already intimated, to make an order pursuant to the recommendation of the Committee is conditioned upon a recommendation by the Committee after a proper hearing. There is no authority given to the Benchers to consider a charge against a member except upon such a recommendation by the Committee. It follows that the appellant is entitled to a declaration that the order striking him off the roll is made without authority and that his name should be restored.

I am disposed to think that, if the appellant had been heard by the Benchers in his defence in convocation, the report of the Committee, notwithstanding the form of the proceedings, might have been considered as adopted by the Benchers, sitting as a Discipline Committee, after hearing the appellant as the statute requires; and that the proceedings might have been considered as conforming in substance to the statutory procedure.

In the procedure actually followed, however, it is impossible to say that the appellant was given an opportunity of exercising his statutory right to appear before the Discipline Committee and present his defence. That is a defect *in substantialibus,* a defect that sterilizes the proceedings as regards legal consequences.

As to the right of appeal, it presupposes a decision by the Discipline Committee as well as by the Benchers. The Benchers are not in the position of a tribunal such as a Superior Court, which has (speaking generally) jurisdiction to decide finally, subject to appeal, upon any question touching its own jurisdiction (*In re Padstow Total Loss and Collision Assce. Ass'n.* (1). Its decision upon that question —the question of its own jurisdiction—is necessarily reviewable collaterally for the purpose of determining whether or not it is operative in law in the absence of statutory provision to the contrary. The provision in the statute giving a right of appeal neither expressly nor by implication negatives this right.

(1) (1882) 20 Ch.D. 137.

These matters in themselves have been fully dealt with by my brother Rinfret in a manner with which I entirely concur; I have adverted to them solely as introductory to what I have to say on the subject of the claim for damages.

The determination of that branch of the appeal is, I think, governed by the decision in *Partridge's* case. That case came before the Court of Appeal on two occasions; first, (*ex Parte Partridge*) (2) in an appeal from the Queen's Bench Division who had granted a mandamus against the General Council of Medical Education requiring the restoration of the name of Partridge to the Dentists Register from which, it was alleged, it had been illegally erased. The appeal failed.

The Council was invested by statute with power to erase a name from the register by section 13 of the *Dentists Act*; and, by section 15, the procedure in such cases was prescribed. By section 13, the Council was empowered to erase any entry which had been fraudulently or incorrectly made. Partridge's name had been properly entered upon the register. They also had authority under that section to erase the name of a dentist convicted of crime or found guilty of infamous or disgraceful conduct in a professional respect; and by section 15 it was provided that for the purpose of exercising this power they must "ascertain the facts * * * by a Committee," and that as to the facts the report of the Committee should be final. The proper committee reported upon the facts.

The facts reported were that Partridge's diploma had been withdrawn by the Royal College of Surgeons in Ireland on the ground that, in violation of an undertaking by him, he had resorted to advertising. On this report the Council directed the name to be erased.

The Council, before directing the erasure of Partridge's name, did not call upon him or give him an opportunity for an explanation and did not find that any of the conditions had arisen under which alone they were entitled to take such action.

In these circumstances, as already mentioned, it was held that Partridge's name had been erased without legal authority, and a mandamus requiring its restoration was granted.

(2) (1887) 19 Q.B.D. 467.

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Partridge then brought an action for damages against the Council, alleging that they had unlawfully and maliciously removed his name from the register. The trial judge, Huddleston B., acquitted the Council of the charge of malice and dismissed the action. The Court of Appeal (*Partridge* v. *The General Council of Medical Education*) (1) dismissed the appeal from this judgment on the ground that, since the power to erase a name from the register under section 13 was not a ministerial but a judicial power, and the Council having intended to act, and believed they were acting, in exercise of their powers under the statute, no action would lie in the absence of malice. The Master of the Rolls said: (2)

It appears to me that a body such as the defendants can only be made subject to an action for things which they have done erroneously without malice in carrying out their duties under the Act, if it can be shewn that they were acting merely ministerially * * * They seem to me all to shew that such an action as this cannot be maintained except where the duty intended to be exercised is only ministerial.

Now, it must be observed that the error committed by the Council was not merely an error of fact, it was an error of law. They had been erroneously advised as to their powers under the statute. Nevertheless, acting, as they conceived themselves to be acting, in exercise of the discretionary power conferred upon them in the public interest and acting *bona fide,* they were not liable to an action. Fry L.J. says, at p. 98:

The conclusion I arrive at upon the facts is that the council, desiring, as I have said, to do their duty under the Act in this case, thought that the register must in such a case automatically follow the qualification in Ireland, and, when that was withdrawn, the register must be corrected accordingly; and that, that being so, they had power to order such correction by giving a special direction under s. 11. In that view they were wrong; but they were, as it seems to me, in making that error exercising a discretion. They were doing what they thought right in the exercise of the discretionary power given them over the register by the statute.

Lopes L.J. says (pp. 98-99):

It must be taken, I think, that the defendants acted bonâ fide and without malice, but that they improperly erased the name of the plaintiff from the register. They acted honestly, but they made a mistake in their mode of proceeding. They thought, as it appears to me, that, without calling on the plantiff for an explanation, they were justified in erasing his name from the register, because the qualification in Ireland had been withdrawn which originally entitled him to be placed on the register. The question is whether an action can, under those circumstances, be maintained against them for what they did. It is not disputed that the defend-

(1) (1890) 25 Q.B.D. 90. (2) 25 Q.B.D. at 96.

ants were performing a public duty; and that they intended to act under the statute. The point contested was whether they were in fact acting judicially or merely ministerially in what they did. If they were acting under s. 13, it cannot be disputed that they were acting judicially. But it is said that they were acting under s. 11 alone; and that acting under that section they were acting only ministerially. I will not refer to s. 11 at length. The effect of the section is that the council have power to give special directions to the registrar to which he is bound to conform. That being so, they have, in my opinion a discretion as to the directions they should give, and, therefore, in giving such directions they are acting judicially. The result is, as it seems to me, that whether they were acting under s. 13 or s. 11 only, they were acting judicially, and, as they were so acting and they acted without malice, according to the cases the action is not maintainable.

I cannot find any distinction in substance between *Partridge's* case (1) and that now presented to us for decision. The Benchers obviously acted under an erroneous view either of the facts or the law; probably as to the facts. It is unlikely that they had present to their minds the fact that they as a whole constituted the Discipline Committee: in any event, it is certain that they assumed the three gentlemen on whose report they acted to be in some way qualified to investigate the complaint and to report upon it as the Discipline Committee. Obviously, they acted in entire good faith. The error of substance, as I have said (which was present in *Partridge's* case (1)), was in not giving the appellant a hearing before all the Benchers at convocation when the report was considered. That error was the natural consequence of the assumption that the three gentlemen who had heard the appellant were invested with the functions of the Discipline Committee.

Consistently with *Partridge's* case (1), the respondents cannot be held liable in an action for damages.

The judgment of Rinfret, Lamont, Crocket and Kerwin JJ. was delivered by

RINFRET, J.—The question involved in this appeal is the validity of the proceedings taken against the appellant before the Benchers of the Law Society of Alberta, the appellant having been by resolution declared unworthy to practise as a lawyer, and he having been disbarred.

In 1923, the appellant was a member of the Law Society of Alberta. Complaints were made against him by several

(1) 25 Q.B.D. 90.

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of his clients that he had rendered himself guilty of conduct unbecoming a barrister and were lodged with the secretary of the society. The secretary brought these complaints to the knowledge of Mr. Geo. H. Ross, K.C., as Chairman of the Discipline Committee, stating that it became necessary for him to "select a Committee and appoint a date for the sitting of same."

Thereupon, Mr. Ross, of his own initiative, appointed three Benchers to examine into the complaints, receive evidence thereon and report.

The three Benchers so appointed met together on certain dates, after having notified the solicitors for the complainants and the present appellant; they proceeded to inquire into the complaints; they received evidence thereon in the presence of the appellant, who was given full opportunity to cross-examine and to adduce evidence on his own behalf —and who availed himself of the opportunity.

The three Benchers then reported to the Convocation that they had found the charges or complaints proven; that the appellant had been guilty of improper professional conduct; and they recommended that the Convocation strike the name of the appellant from the rolls of the Society. This recommendation was received, accepted, approved and adopted by the Convocation on the 5th of July, 1923; it was further recorded that the appellant was found to have been guilty of improper professional conduct; and it was ordered that his name be, and the same was, struck off the rolls.

The appellant did not appeal from the recommendation of the three Benchers who heard the complaints and evidence, nor from the decision of the Convocation. On the contrary, on February 29, 1924, on July 6, 1926, and again on July 5, 1927, and still later, on October 31, 1930, the appellant applied for reinstatement as a member of the Law Society. The applications of 1924, 1926 and 1927 were refused. The application of 1930 was referred to an investigating committee which went into the matter very minutely and made an elaborate report recommending that the application should be granted and the name of the appellant should be restored to the rolls; but the recommendation of the committe does not appear to have been entertained by the Benchers in Convocation.

As a matter of fact, the appellant then (since January 10, 1928) had already entered suit against the respondent, alleging that his name had wrongfully, and without legal right, been struck off the rolls of the Law Society, and praying for a declaration that he was still a member of the Society, entitled to practise as a barrister and solicitor before the courts of Alberta, and to exercise and enjoy all the rights and privileges of a barrister and solicitor; and also claiming damages for the loss of remuneration, at the rate of $500 per year, for all the years that had already elapsed or that would elapse before final determination of this action.

The defence was that the appellant had been properly and rightfully disbarred, and that, at all events, by his conduct, he had waived all irregularities, he had acquiesced in the decision of the Benchers and he was estopped from disputing its validity.

The Supreme Court of Alberta (Simmons C.J.) declared that the resolution passed by the Benchers of the Law Society of Alberta in Convocation on the 5th day of July, 1923, was absolutely null and void; that the appellant was entitled to have his name restored to the rolls of the Society "in the same condition and for all the same purpose and effect as if the same had never been removed"; that the appellant was and "has been ever since, and including, the 5th day of July, 1923, and is still a member of the Law Society of Alberta, and entitled to practise as a barrister and solicitor * * * and to exercise and enjoy all rights and privileges of a barrister and solicitor;" and that the appellant is entitled to recover from the respondent the sum of $1,500 with costs.

The Appellate Division, however, reversed this judgment on the ground that the resolution of the Benchers striking off the appellant from the rolls was not void, but merely voidable; that a special remedy, viz., an appeal to the Court of Appeal in the province, was provided for by the statute, of which the appellant had failed to avail himself; that such remedy was exclusive in the circumstances; and that, moreover, the appellant, "after knowledge of the defect of the proceedings before the Benchers, instead of questioning their validity, had, in effect, acquiesced in them by his applications for restoration to the rolls, not on the ground

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of his name having been improperly removed therefrom, but through the indulgence of the Benchers."

By order of the Appellate Division of Alberta, the appellant was granted special leave to appeal to this Court.

As must have appeared from the foregoing statement of the facts and of the reasons in the courts of Alberta, the result of the appeal turns upon the question whether the proceedings had before the Benchers of the Law Society were absolutely void, as found by the trial judge, or merely voidable, as held by the Appellate Division.

In order to decide the point, reference must first be made to the *Legal Profession Act,* being chapter 206 of the Revised Statutes of Alberta, 1922, as it stood at the material dates.

Under that statute, which applies to the respondent, the Society is governed by a body composed of some of its members designated Benchers (sec. 7).

It is the duty of the Benchers, from time to time, to appoint and maintain a committee of their own body, to be known as the Discipline Committee, consisting of at least three members. The Benchers may alter the number, the constitution and the tenure of office of such committee (sec. 32 (1)). Then comes subsection 2 of section 32 of the Act, which ought to be quoted in full:

(2) The discipline committee shall deal with and may investigate every written charge or complaint against or regarding any member of the society who has been convicted of an indictable offence, or who is known or reported to be guilty of or who is charged with dishonourable, disgraceful, infamous, unbecoming, improper or criminal conduct, professional or otherwise; and if the committee considers the charge or complaint warrants it may recommend that the benchers strike the name of the said member from the rolls, and the benchers may order the same to be done.

The other subsections of section 32 deal with the result of a decision ordering that the name of a member should be struck from the roll. They empower the benchers, in the alternative, merely to reprimand or to suspend an offending member, or to order that he should pay a penalty.

Then, subsections 6 to 12 deal with the procedure that must be followed before the discipline committee in the investigation of a charge or complaint against a member of the society. The committee may have such legal or other assistance as it may think necessary, and so may the member whose conduct is the subject of the inquiry have the right to be represented by counsel or agent.

The discipline committee

may meet to take evidence or otherwise ascertain the facts concerning any such complaint or charge, but notice in writing of any such meeting shall be served personally or in such other manner as may be ordered by a judge of the Supreme Court, upon the member whose conduct is the subject of enquiry, at least two weeks before the time fixed for such meeting, setting out the written charge or complaint with such particulars as may be necessary to inform the person charged or complained of fully of the substance and effect of the charge or complaint against him, and specifying the time and place of such meeting (subsec. 7).

There are provisions for procuring the compulsory attendance of witnesses, for the taking under oath of their testimony, for " cross-examination of all witnesses called, with the right to adduce evidence in defence and reply"; and it is stated that

the rules of evidence on such enquiry and the proceedings and penalties in the case of disobedience shall be the same as obtain in civil cases in the Supreme Court.

The discipline committee is empowered to proceed with the subject-matter of the enquiry in the absence of the member whose conduct is challenged or complained of, upon proof of personal service, or of such substituted service as may have been ordered, of the notice to the said member, in accordance with the provisions of the Act.

We think the provisions dealing with the right of appeal from the decision of the discipline committee and of the benchers should be quoted verbatim, in view of the opinion based upon those provisions expressed by some of the Judges of the Appellate Division:

(1) Any member, whose name has been ordered to be struck from the rolls or who has been ordered to be suspended under the powers hereby conferred, may appeal from the decision of the committee and of the benchers to the said Appellate Division or such other Court as may from time to time exercise the functions of a Court of Appeal in the Province, at any time within six months after the date of the order complained of, or within such further time as a judge of the Appellate Division shall allow, and such Court may, upon hearing said appeal, make such order, either confirming the action of the said committee and the benchers or varying or reversing the same or for further enquiries by the committee and the benchers or otherwise and as to costs as may to it seem meet.

(2) The said appeal shall be by notice in writing to the benchers to show cause, which said notice shall be served not less than ten days before the hearing thereof, and shall be founded upon a copy of the proceedings before the said committee and the benchers, the evidence taken, the committee's report and the order made by the benchers thereon.

(3) The secretary of the society shall upon the request of any member desiring so to appeal, furnish to such member a certified copy of such proceedings, report, order and papers without expense.

But before we proceed to examine the particular provisions of the statute above referred to and to apply them

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to the circumstances of the present case, a few additional facts must be adverted to:

In obedience to the Act, the benchers of the Law Society of Alberta had, on the 4th January, 1923, appointed Mr. Geo. H. Ross, K.C., as chairman and all the other benchers as members of the discipline committee.

The resolution appointing them was still in force throughout the proceedings had before the specially selected committee of three benchers appointed by Mr. Geo. H. Ross to investigate the charges against the appellant and also at the time when the benchers adopted the recommendation and made the order to strike off the rolls the name of the appellant.

The three benchers who inquired into the charges made against the appellant were not appointed as a discipline committee, but were selected by Mr. Ross as a special committee.

The members of the discipline committee appointed on the 4th of January, 1923, and still in existence at the time of the investigation into the complaints against the appellant, were never notified of the charge, nor called upon to inquire into them and to deal with them as members of the discipline committee.

Mr. Ross, duly appointed chairman of the discipline committee, did not sit on the investigating committee, nor was he called upon to do so.

The only report, or recommendation, made to the benchers upon the charges against the appellant, came from the special committee, and none was ever made by the discipline committee.

The appellant had no knowledge of the fact that the special investigating committee before which he appeared was not the official discipline committee. He was made aware of that fact only in 1925.

Upon those facts, the question is whether the proceedings now in question were absolutely void, or only voidable, and what were the rights of the appellant after he found out the irregularities to which he had been submitted?

The *Legal Professional Act*, the essential parts of which we have outlined, and more particularly the sections of the Act we have quoted as bearing directly upon the matters at issue, show that the Law Society of Alberta, or the benchers of that society, are not vested with a general and

unqualified control of the members of the Society in respect of any "dishonourable, disgraceful, infamous, unbecoming, improper or criminal conduct, professional or otherwise" with which they are charged, or of which they may be found guilty. It is important to keep in mind, therefore, that we are not dealing with a body invested with the plenary authority of a common law court, but a body to which has been given only limited statutory authority. The authority which is given to the benchers is such that it may not be exercised without the conjunctive co-operation of another body, which is the discipline committee. It is really so that the two bodies must act in order properly to deal with charges or complaints of a nature to entail the striking of the name of a member from the rolls and his consequent disbarment. One body may not act without the other and the action of one alone is insufficient to obtain the required result in conformity with the statute and consistently with the authority there conferred.

This is rendered still clearer by the provision dealing with the right of appeal to the Appellate Division and whereby the appeal is contemplated "from the decision of the committee and of the benchers." It may even be pointed out that the power and duty to investigate the charge or complaint is delegated, not to the benchers, but to the discipline committee; and it is only upon the recommendation of that committee that the benchers are authorized to order the consequential disbarment. The authority to make the order is not given the benchers, except upon the recommendation of the discipline committee.

In this case, the discipline committee, though in existence, never dealt with or investigated any charge or complaint; nor was there any recommendation from that committee. Further, although an investigation was not the province of the benchers, at all events, no investigation is proven to have been made by them; and they merely adopted the recommendation of a committee appointed by Mr. Geo. H. Ross and for the existence of which no provision appears in the statute.

It is to no purpose to argue that the official discipline committee, as originaly appointed in the premises, comprised all the benchers who eventually received and adopted the recommendation of the special committee.

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Quite apart from the circumstance that the benchers who were present at the meeting when that report was adopted had, in fact, made no investigation of their own, the statute clearly provides for two distinctive bodies: the discipline committee and the benchers; and each body is given separate and distinct duties to perform.

On the charges made against the appellant, only one body acted; and that body was not empowered to act alone—indeed, it had no power to enter into the case at all until after the other body had previously acted. It follows that, in our view, the trial judge was right in treating the order made by the benchers alone as an absolute nullity and completely void of any operative effect. It was not only an erroneous decision, still less a decision only affected by procedural irregularities or mere absence of machinery; it was a decision given where there was no authority to give it.

The benchers simply could not make the order without the anterior investigation and recommendation of the discipline committee. The report on which the order of the benchers was founded was not even that of a sub-committee appointed by the benchers among themselves; it was the report of three benchers named without authority by Mr. Geo. H. Ross, and who had no power to deal with the matter in the way it was done. As pointed out by the learned Chief Justice of the Supreme Court of Alberta, the appellant was deprived of the undoubted right he possessed "to make his full defence before the statutory body which then had power to hear his case, to wit: the discipline committee composed of all the benchers at that time."

He never had a chance to explain or vindicate himself before the discipline committee; and each of the members of the discipline committee, or, in the circumstances, each of the benchers, was not given the opportunity, which he was bound to have, of fulfilling the duty of weighing the evidence for or against the appellant.

We, therefore, think the order of the benchers of the 5th July, 1923, was made outside the scope of the powers of the benchers. As such, it was completely null, and not only voidable.

As a consequence, this was not a case where the appellant ought to have availed himself of the provisions of the statute in respect to appeal. In the first place, there was no recommendation of the discipline committee from which

he could appeal; and, besides, the order of the benchers was a nullity and deprived of any conclusive effect (*Toronto Railway Company* v. *Corporation of the City of Toronto* (1)).

Nor could the situation be rectified by waiver, or consent, on the part of the appellant. There could be no effective consent on that point while the proceedings were going on and up to the time when the order was made by the benchers, for the appellant was not then aware of the fact that he had not been called before the discipline committee. On the contrary, the circumstances rather led him to believe that he was before the regular body. It was only in 1925 that he was put in possession of information which suggested in his own mind some question of the validity of the investigation and of the order made against him.

Never in any of his applications for reinstatement did he raise the question of the validity of the proceedings. Certainly he never indicated any express intention of waiving any rights that he had; and he cannot be taken to have abandoned his rightful objections to the validity of the proceedings and of the order.

But moreover and in point of law, the lack of power in the benchers deprived the order of any effect, and particularly since a question of this kind may not be treated as a mere private matter and the legislation we are now considering is, to a large extent, intended for the protection of the general public and must be looked at from the viewpoint of public interest, we do not think estoppel on the ground of acquiescence can be invoked here by the respondent. The defence on this line of reasoning, therefore, fails; and the judgment of the trial court declaring that the resolution passed by the benchers, whereby the name of the appellant was struck from the rolls, is now and always was null and void, and that the appellant is entitled to have his name restored to the rolls, ought to stand.

We may add that the case of *Hands* vs. *The Law Society of Upper Canada* (2), much relied on at the argument, does not help the respondent. In that case, the questions in dispute turned upon the failure to observe some requirements of procedure, while, in the present case, the appellant

(1) [1904] A.C. 809.

(2) (1888) 16 Ont. Rep. 625;
(1889) 17 Ont. Rep. 300;
(1890) 17 Ont. App. Rep. 41.

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was not called before the proper forum, and the statutory body pretending to deal with the whole matter was not legally constituted.

But, in addition to declaring that the resolution of the benchers was absolutely null, that the appellant was still a member of the Law Society of Alberta, entitled to practice as a barrister and solicitor and to exercise and enjoy all rights and privileges as such, the Court ordered that the appellant do recover from the respondent the sum of $1,500 damages.

We do not think, under the circumstances of this case, the respondent is liable in damages.

We say nothing of the fact that the claim was brought by the appellant, not against the benchers who formed the special committee, or against the whole of the benchers acting in convocation, but against the Law Society of Alberta, for the Society undoubtedly adopted the order as its own. The Society acted upon it. The name of the appellant was struck from the rolls and he was effectively prevented from practising his profession. Before the courts, the Society undertook to defend the act of the benchers and no question was raised as to its full responsibility therefor.

Of course, the learned Chief Justice very properly refused to allow damages as from the date when the appellant acquired knowledge of the facts leading to the invalidity of the order; but, in our view, the act of the benchers was not such as would entail any liability in damages of the Law Society. The learned judge found that the benchers acted without malice. He said:

> The evidence is quite convincing, from my viewpoint, that the benchers themselves thought that a committee had a right to hear the evidence and make a report to the benchers. I am satisfied that is what was done in this case. I am satisfied that they heard the evidence and made what they believed an honest report on the evidence. In fact, I may go a little further and say that I am satisfied that if the whole of the benchers had heard the evidence they might have reached the same conclusion.

It is obvious that the benchers were acting in good faith. They were only " endeavouring to do their duty to the public and the profession." Now, provided they take the proper course, and within the conditions specified by the statute, the benchers have the power to order the striking of the name of a member from the rolls of the Society. In

the exercise of those powers, they perform a function not merely ministerial, but discretionary and judicial.

Like the trial judge, we are convinced, upon all the circumstances disclosed in the record, that the benchers honestly believed they were adopting the report of a properly constituted committee; they "were intending in what they did to do what they were entitled to do, viz., to perform the public duties imposed upon them by the Act." They gave the order in what they *bona fide* believed to be the exercise of a judicial discretion, and they, or the Law Society which they represent, are not subject to an action in damages, because the report which they adopted as the foundation of their order happened, without their actual knowledge, to lack authority and validity. On this point, this case comes within the rule laid down in *Partridge* v. *General Council of Medical Education* (1).

The appeal will, therefore, be allowed, and the judgment of the trial judge shall be restored with the modification that the appellant will not be entitled to recover from the respondent the sum of $1,500.

The appellant should have his costs of the appeal to this Court. However, in view of the partial success of the respondent in obtaining the modification of the judgment of the trial Court in respect of damages, the respondent must have its costs of the appeal to the Appellate Division of the Supreme Court of Alberta, but it should pay the appellant's costs in the trial Court, including the costs of the examination for discovery.

Appeal allowed in part, with costs.

Solicitor for the appellant: *A. W. Miller.*

Solicitors for the respondents: *A. Macleod Sinclair & Walsh.*

(1) (1890) 25 Q.B.D. 90.