CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

MARTIN HONAN.....APPELLANT;

AND

THE BAR OF MONTREAL..... .....RESPONDENT.

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*May 23.

*Oct. 24.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, APPEAL SIDE.

Prohibition—Advocate—Bar of the Province of Quebec—Discipline—Jurisdiction—Irregular procedure—Domestic tribunal—Powers—Arts. 3504 *et seq. R. S. Q.*—58 *V. c.* 36 *(Que.).*

A writ of prohibition will not lie to prevent the execution of the sentence of an inferior tribunal where there has not been absence or excess of jurisdiction in the exercise of its powers.

In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an inquiry into charges against him which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witnesses had been examined upon oath during the inquiry and no notes in writing of the evidence of witnesses adduced had been taken, the effect of such absence of written notes being that the appellant had been deprived of an opportunity of effectively prosecuting an appeal to the General Council of the Bar of the Province of Quebec.

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*PRESENT:— Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

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Held, affirming the judgment appealed from (Q. R. 8 Q. B. 26), that the local Council of the Bar of Montreal had jurisdiction to proceed with the inquiry in the interest of the profession notwithstanding the withdrawal of the charge by the private prosecutor; that a complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade and commerce and unduly retaining the money of a client, contrary to the by-laws of the local section of the bar, is a matter over which the Council of the Bar had complete jurisdiction, and further, that the omission to preserve a complete record of the proceedings upon the inquiry held by the council, or to take written notes of the evidence of witnesses adduced, constituted mere irregularities in procedure which were insufficient to justify a writ of prohibition.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side (1), reversing the judgment of the Superior Court, sitting in review, at Montreal and maintaining the judgment of the Superior Court, District of Montreal, which quashed a writ of prohibition sued out by the appellant with costs.

A statement of the case will be found in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

McDougall Q.C. for the appellant. The appellant complains of the sentence of the Council of the Bar:—(1) Because the letter of complaint does not allege any offence that might give the Council of the Bar of Montreal jurisdiction; (2) because no act is alleged which constitutes an offence at law, or under the rules of the Bar of the Province of Quebec; (3) because the Council of the Bar of Montreal could not take action nor give a decision upon that complaint, and appellant was never summoned nor required to answer the charges; (4) because the decision is arbitrary and unjust and contrary to law and to the by-law of the

(1) Q. R. ∞ Q. B. 26.

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Bar of the Province of Quebec; (5) because the decision does not allege any offence that could authorise such sentence; (6) because the complaint is entirely false and had been withdrawn by the complainant; (7) because the decision was *ultra vires* of the powers of the council, and no notes of evidence were taken or transmitted to the General Council; (8) because there is no rule by the General Council of the Bar of the Province of Quebec which classes the acts with which the appellant is reproached in the complaint, as being derogatory to professional honour and dignity; and (9) because the complainant had been given credit for the moneys in question upon his account due for professional services for a much larger amount before the complaint was made.

Prohibition is the appropriate remedy to stay the execution of the sentence; *O'Farrell* v. *Brassard* (1); or for redress of the wrong sustained; *Roberts* v. *Humby* (2); Lloyd on Prohibition, pp. 11, 12 & 13; art. 2329 R. S. Q. Prohibition lies to restrain all courts, whether or not courts of record, from proceeding in matters over which they have no jurisdiction; or having jurisdiction, when the court has attempted to proceed by rules differing from those which ought to be observed; *The Queen* v. *Judicial Committee of Privy Council* (3).

Ex parte Burke (4) establishes that for an error not apparent on the face of the proceedings and without objection as to the jurisdiction, recourse may be had to prohibition for setting aside a judgment of an inferior court. See also *Mayor of London* v. *Cox* (5) at page 241 and cases there cited. The appellant had a right to a regular summons before the tribunal which

(1) 3 Q.L.R. 33; 1 Leg. News 32.
(2) 3 M. & W. 120.
(3) 3 Nev. and P. 15.
(4) 7 L. C. R. 403.
(5) 36 L. J. Ex. 225.

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was to pass judgment on the pretended complaint. The complaint was not made on oath and appellant did not receive a copy. We also refer to arts. 450 and 1031 C. C. P. (1) which apply to this case; art. 3523 R. S. Q. and 58 Vict. ch. 36, sec. 2 (Que.)

Globensky for the respondent. The council had full jurisdiction under art. 3527 R. S. Q., and consequently prohibition cannot lie; *Molson* v. *Lambe* (2); Wood on Prohibition, pp. 141, 147; Shortt on Informations, 771; Spelling on Extraordinary Relief, par. 1760. A writ of prohibition can only issue for excess of jurisdiction; *Re Beaudry* (3); *Laliberté* v. *Fortin* (4).

Since the repeal of arts. 3569-3596, R. S. Q., regulating proceedings before the council (5), there is no necessity for taking notes in writing of the evidence in such cases, nor to take that evidence upon oath. The new regulations do not even give power to administer an oath in such proceedings. The third section of the repealing Act details the new procedure and permits the exercise of wide discretion as to the verification of such charges. The provision for an appeal cannot be construed as requiring either the administration of an oath or written notes of evidence. The state of the statutes leaves this case under the application of the maxim *omnia præsumuntur*, etc.

By the new statute the council has become a domestic tribunal in disciplinary matters and requires no precise form of information or complaint, and may exercise discretion both as to inquiry and sentence to the exclusion of all courts, subject only to the appeal of the General Council of the Bar. Art. 3537, R. S. Q. The by-law in respect to offences against professional honour and dignity clearly covers

(1) Art. 1003 C. P. Q.
(2) 15 Can. S. C. R. 253.
(3) 5 R. L. 223.
(4) Q. R. 2 Q. B. 573.
(5) 58 Vict. ch. 36, sec. 11 (Que.).

the present case. At most, the manner of procedure can constitute nothing more than an irregularity which affords no ground for prohibition. The appellant did not take these objections before the council but acquiesced in the procedure and continued to acknowledge both the jurisdiction and procedure of the domestic forum in following up his remedy by appeal to the General Council.

The discontinuance by the private prosecutor cannot affect the validity of the sentence. The disciplinary power in the council remained intact and could not be removed by a settlement between the parties. Comparing the arrêt on a similar point referred to by Mellot, Règles de la Profession d'Avocat, no. 499, p. 279. We also refer to the *O'Farrell Case* (1); *Duval* v. *Hébert* (2); *Bergevin* v. *Rouleau* (3); *Simard* v. *Corporation of Montmorency* (4); *Mayor of Sorel* v. *Armstrong* (5).

GIROUARD J.—The Bar of the Province of Quebec constitutes a general corporation having jurisdiction over the whole province and is divided into districts or sections which are local corporations. Thus, the Bar of Montreal forms a section and a separate corporation subject in certain cases to the higher jurisdiction or control of the council of the general corporation, called the General Council of the Bar of the Province of Quebec. Both the general corporation and the corporations of sections may pass by-laws for matters of general interest to their respective bodies and to the members thereof, but the by-laws of a section must not conflict with those of the general council. The general corporation has power to make by-laws

for maintaining the honour and dignity of the bar and discipline among its members,

(1) 3 Q.L.R. 33; 1 Legal News, 32. (2) 23 L. C. Jur. 179.
(2) 17 L. C. Jur. 229. (4) 4 Q. L. R. 208; 8 R.L. 546.
(5) 20 L. C. Jur. 171.

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and also

for defining and enumerating the professions, trades, occupations, business or offices incompatible with the dignity of the profession of advocate as well as the offices or charges incompatible with the practice of the profession.

The statute then indicates how the delinquents are to be dealt with. The Revised Statutes of Quebec (Art. 3527), says:

Each council of a section has power:

1. To pronounce, as the importance of the case may require, a censure or reprimand against any member of the section guilty of any breach or discipline, or of any act derogatory to the honour or dignity of the bar, or who is convicted of exercising or of having filled any position or office the occupation of which is incompatible with the profession of advocate, of exercising any calling or trade, of being engaged in any industry, or of carrying on any business, or holding any office inconsistent with the dignity of a member of the bar, or of having infringed the by-laws of the general council or of the council of his section.

2. To deprive such member of the right of voting, and of the right of attending the meetings of the section, for any term, in the discretion of the council, not exceeding five years.

The council of such section may also, according to the gravity of the offence, punish such member by suspending him from his functions for any period whatsoever, in the discretion of the said council, and may deprive him forever of the right of practising his profession.

In default of a by-law of the general council applicable to a particular case, the council of the section decides definitely *to the exclusion of all courts*, subject only to appeal to the general council, whether the act complained of is derogatory to the honour or dignity of the bar, or against the discipline of the members, if the position or office is incompatible with the practice of the profession of advocate, and the calling, trade or industry, business or office is inconsistent with the dignity of the profession.

The Quebec Statute, 58 Vict. ch. 36 (1895), says:

3. Article 3527 of the said statutes is amended:

b. By adding thereto the two following paragraphs:

4. In the exercise of the powers conferred by this article, the councils proceed deliberately and may have recourse to all means they deem expedient to ascertain the facts to be verified, and to allow the accused to defend himself;

5. Every decision of a council of a section, which entails the dismissal, suspension or other punishment of a member of the bar, is subject to appeal to the general council.

This constitution of the Bar of Quebec will be found in the revised statutes of the province, art. 3504 and following, except the last two paragraphs which were enacted in 1895 by 58 Vict. ch. 36.

The mode of procedure to be followed in the trial of the accused was thus materially changed. Under sections 3569 and 3596 R. S. Q. the complaint had to be made under oath, the witnesses sworn (art. 3577), proof taken down in writing (art. 3575), and on appeal the record was transmitted, etc., (art. 3586). All these rules are repealed by 58 Vict. ch. 36. s. 11, and replaced by the section quoted above, which simply provides that the councils *may have recourse to all means they deem expedient to ascertain the facts to be verified.* The appeal to the general council is instituted by a mere letter addressed to the secretary-treasurer of such council containing a copy of the decision, and thereupon it is decided summarily. 58 Vict. ch. 36, s. 3.

It is apparent that the Legislature has armed the councils of the Bar of Quebec with discretionary powers which may inflict serious, if not irreparable, injury upon its members and also to the public. Carré, Lois de la Procédure (3rd ed.), Int. n. 10, says that

> les règles et les formalités de la procédure écartent en général de l'administration de la justice, le désordre, l'arbitraire et la confusion.

The present case is an illustration of this result. The councils of the bar are bound by no rules of procedure, except "to allow the accused to defend himself." He must therefore be summoned to appear and be allowed to defend himself, but how? And what rules will protect his defence? The statute has left all that to the discretion of the tribunal. It is not even necessary that there should be a private information. The

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initiative may be taken by the council or by a member thereof called the *Syndic*.

Clause 2 of 58 Vict. ch. 36 says:

2. Article 3523 of the said statutes, as amended by the same section of the said Act, is further amended by adding thereto the following:

The syndic is specially charged with the supervision of the discipline of the bar. He is bound immediately to denounce to the council of the section any infringement of the by-laws, all conduct of any member derogatory to the honour of the bar, and to submit to it any accusation for similar acts which is handed to him by any person, saving the right of the council to receive the same directly or to take the initiative in the exercise of its disciplinary powers.

The appellant, who is an old practising advocate of the Bar of Montreal, complains of a decision of its council which suspended him during three months, and by writ of prohibition demands that the Bar be prohibited from executing the sentence for, in substance, three reasons, first, because the private complaint does not allege any offence in law or under the by-laws of the Bar that might give jurisdiction to the council of the Bar of Montreal; secondly, because the council did not take any note in writing of the evidence adduced, so as to permit the appellant to have its decision revised and reversed; and thirdly, because the private prosecutor, Labbé, had withdrawn his charge against the appellant.

The two last reasons are unfounded. Notwithstanding the *désistement*, the Bar could proceed with the inquiry in the interest of the profession. All the courts were against the appellant upon this point. The appellant adduced evidence before the local council, but did not request that it should be taken in writing, and it was not so taken. The local council perhaps inferred from his course that he never intended to appeal upon the sufficiency of the evidence, but (if an appeal was contemplated at all), only upon the sufficiency of the charge. In appeal, he found himself

without any proof, and although he offered to summon again his witnesses, his appeal was dismissed summarily by the general council.

The local council should not have taken for granted that the appeal would be limited, and the moment that the sentence pronounced opened the door of the general council they should have seen that it was susceptible of revision. This was undoubtedly a great hardship to the appellant, but it constituted a mere irregularity or illegality in the proceedings which cannot justify the issue of a writ of prohibition. Even the rejection or refusal of legal evidence will not affect the jurisdiction of the tribunal. *Ex parte Higgins* (1); Am. & Eng. Ancy. of Pleading, vo. Prohibition (2 ed.) pp. 1108, 1125, 1126, 1127; see also *Molson* v. *Lambe* (2); *The Governor and Company of Adventurers of England* v. *Joannette* (3); *Mackonochie* v. *Lord Penzance* (4), per Lord Blackburn; *Reid* v. *Graham* (5).

The only question in the case is really that of jurisdiction. The Code of Procedure lays down this principle (art. 1031), which is taken from the English common law:

Writs of prohibition are addressed to the courts of inferior jurisdiction whenever they exceed their jurisdiction.

See also R. S. Q. art. 2329.

Has the council of the Bar of Montreal exceeded its jurisdiction? Jurisdiction is claimed both under the statute and the by-laws. We have quoted the statutes in full; we will now see what the by-laws provide for. The by-laws of the general council, passed on the 16th September, 1886, sec. II, art. 6, say:

The following are declared incompatible with the dignity of the legal profession; the carrying on for pecuniary profit of any handicraft, industry, trade or commerce, etc;

(1) 10 Jur. (O.S.) 838.
(2) 15 Can. S. C. R. 253.
(3) 23 Can. S. C. R. 415.
(4) 6 App. Cas. 424.
(5) 25 O. R. 573.

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and art. 7:

The following actions, among others. are derogatory to the honour and dignity of the profession, viz.: par. 6. Any breach of trust (*abus de confiance*) by an advocate to the detriment of client * * par. 11. To unduly withhold the monies, documents and papers of clients.

The complaint made against the appellant reads as follows:

MONTRÉAL. mai 20, 1895.

ARTHUR GLOBENSKY, Ecr.,
Syndic du Barreau de Montréal.

CHER MONSIEUR,—Référant à la plainte qui vous a été faite contre M. Honan, avocat, je prends la liberté de vous exposer les faits:

Dans le mois de décembre dernier, une saisie avant jugement a été émanée par M. Honan contre Baldwin Bros., courtiers de New York, pour la somme d'environ neuf cents piastres, argent qui était dû à la société.

La dite société était Madame Anabella Stein, épouse de Honan, et du soussigné, *mais au fond c'était Honan qui était associé.*

Il apparaît que le juge Mathieu a débouté l'action le 27 ou 28 février dernier.

Etant domicilié à New York à cette date j'ai reçu un message de la part de Honan ainsi conçu:

Judge Mathieu has quashed the seizure *re* Baldwin, send immediately sixty dollars to inscribe case in review, "sure to win;"

Auquel message j'ai fait réponse que je ne voulais pas envoyer ce montant. Il a tant insisté en envoyant d'autres messages, que je lui ai envoyé les soixante dollars par un chèque que vous avez en votre possession.

A mon retour ici, j'ai demandé à M. Honan où il en était dans l'affaire Baldwin, il m'a fait réponse que *la cause était inscrite pour le huit avril.* Après lui avoir demandé plusieurs fois il m'a fait réponse comme auparavant, que la cause était encore remise à une autre date.

Il avait, dans ce temps-là, réglé la cause avec les avocats de la partie adverse, et s'est fait payer ses frais par eux, et plus gardant les soixante dollars que je lui avais remis pour inscrire la cause en révision.

Il était entendu qu'il n'y aurait aucun frais en fait de la saisie et que ces $60 devaient être appliquées pour l'inscription en Cour de Révision seulement *laquelle inscription n'a jamais été faite.*

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Je considère que cet argent doit m'être remis et je demande justice.

Votre obt. serviteur,

N. E. LABBÉ.

On the 26th June, 1895, the Council of the Bar of Montreal, after having heard the parties and their witnesses but without taking any note of the evidence, rendered the following decision :

In re LABBÉ *v.* HONAN.

Les parties comparaissent devant le conseil et plaident leur cause.

Le conseil ayant mûrement délibéré trouve la plainte fondée, déclare le défendeur coupable de conduite dérogatoire à l'honneur professionel et à la dignité du Barreau pour avoir indûment obtenu du plaignant une somme d'argent qu'il retient encore injustement en sa possession, et condamne le dit Martin Honan à la suspension pendant trois mois.

L. E. BERNARD,

Montréal, 9 juin, 1886. *Secrétaire du Barreau.*

The appellant appealed to the General Council, but on the 29th October, 1895, his appeal was summarily dismissed, there being no evidence before the appellate tribunal, which moreover refused to hear the witnesses *de novo* or send the case back to the local council for the purpose of obtaining written evidence, and of allowing the appellant to defend himself. The judgment in appeal reads as follows :

It is decided by the General Council of the Bar that Martin Honan, Esquire, a member of the Bar of the Section of Montreal, who has appealed to this Council from a decision of the Council of his section of the twenty-sixth of June last, suspending him from his functions as an advocate for a period of three months, having failed to show any good or sufficient reason why the said decision should be set aside, his appeal therefrom be rejected.

Quebec, February 26th, 1896.

W. C. LANGUEDOC,

Sec.-Treas. Gen. C.B.P.Q.

Thereupon, the appellant applied for a writ of prohibition to prevent the local council from carrying the sentence into execution.

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The Superior Court (J. Alp. Ouimet J.) quashed the writ of prohibition. The Court of Review (Taschereau, Gill and Mathieu JJ.) reversed this judgment, which was, however, restored by the Court of Appeal (3 to 2), Bossé, Blanchet and Hall JJ.; *contra* Würtele and Ouimet JJ.:

Considérant que le Bref de Prohibition ne peut être adressé à un tribunal inférieur que lorsqu'il agit sans juridiction ou l'excède au cours de ses procédures et que l'on ne peut y recourir uniquement pour faire réformer ses décisions quelqu'erronées qu'elles soient;

Considérant que les faits contenus dans la plainte soumise au Conseil du Barreau de Montréal, savoir: que l'intimé aurait obtenu une somme de soixante piastres pour inscrire en révision un jugement renvoyant une saisie-arrêt que l'intimé avait fait émaner, comme procureur du plaignant, tandis qu'il avait alors lui-même réglé l'affaire avec les avocats de la partie adverse qui lui avait aussi payé ses frais, constitue, *primâ facie*, une faute grave, un abus de confiance regrettable et par conséquent un acte dérogatoire à l'honneur professionel et à la dignité du Barreau, et que même en admettant que l'intimé aurait eu un intérêt dans la procédure en question comme associé du plaignant, sous le nom de son épouse, et avait en outre une réclamation de deux cents piastres à exercer contre le plaignant pour honoraires et déboursés, ces faits ne pouvaient soustraire l'acte reproché à l'intimé au contrôle disciplinaire du conseil de la section à laquelle il appartient d'empêcher cette dernière de procéder sur la plainte qui lui était soumise, la loi lui donne juridiction sur tous les actes professionnels de ses membres sans exception et sans distinction;

Considérant que le Conseil du Barreau de Montréal avait partant juridiction pour entendre et décider cette plainte, et que les allégués qu'il aurait adjugé sans preuve ou contrairement aux faits, et n'aurait pas pris l'enquête par écrit ou par notes (arts. 236, 243, 264, 266 C.P.C.) sont insuffisants pour donner ouverture au Bref de Prohibition;

Considérant que le Conseil du Barreau de Montréal n'a pas non plus excédé sa juridiction;

Cette Cour maintient l'appel, casse et annule le jugement rendu par la Cour de Révision à Montréal le trente et unième jour de mars mil huit cent quatre-vingt dix huit, et confirme celui rendu le seizième jour d'octobre mil huit cent quatre vingt seize par la Cour Supérieure renvoyant le dit Bref de Prohibition.

Mais considérant que l'acte 58 V. ch. 36 a conservé l'appel de la décision d'un conseil de section au Conseil Général de la Province et décrète que les accusés devront avoir une défense entière et complète;

qu'en ne prenant pas même de notes de l'enquête faite devant lui, le Conseil de la section du Barreau de Montréal a fait perdre à l'intimé le bénéfice de cet appel.

Cette Cour ordonne que chaque partie paie ses frais, en Cour Supérieure et en Cour de Révision et devant cette Cour.

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We entirely agree with the Court of Appeal that the Council of the Bar had jurisdiction over the subject matter disclosed in the complaint, not only for the reasons mentioned by the learned judges, but also because the appellant was charged with carrying on trade and commerce. This court is not sitting in appeal from the decision of the Council of the Bar or even on a writ of certiorari, but on a writ of prohibition, and, therefore, we have no power to look into the evidence adduced on the merits, much less to appreciate the same, however favourable it might be to the appellant.

Members of a corporation who submit to extraordinary powers like these enjoyed by the Bar of the Province of Quebec "to the exclusion of all courts," have no reason to expect relief from courts of justice, except when there is absence or excess of jurisdiction. The appeal is therefore dismissed, but without costs, as was done by the Court of Appeal. We would go even further. The wrong inflicted by the Bar of Montreal upon the appellant—in not allowing him to effectively prosecute his appeal—is so serious, so grave in its consequences, that it should be a sufficient reason for the Bar not to carry out the sentence pronounced and we hope that the Bar of Montreal will be satisfied with this recognition of its supreme authority.

Appeal dismissed without costs.

Solicitor for the appellant: *Martin Honan.*

Solicitors for the respondent: *Globensky & Lamarre.*