

SECOND DIVISIONAL COURT.

DECEMBER 31ST, 1918.

## \*WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

*Municipal Corporations—Contract—Action for Balance of Price of Bridge Built by Plaintiff under Sealed Agreement with Township Corporation—Necessary Work—Completion according to Agreement—Executed Contract—Payment of Part of Price—Necessity for By-law—Municipal Act, R.S.O. 1914 ch. 192, sec. 249—Use of Bridge by Municipality—Right of Action not Defeated by Want of By-law—Failure to Plead Want of By-law—Amendment not Asked for—Dishonest Defence—Finding of Trial Judge on Real Issue—Fulfilment of Contract.*

Appeal by the plaintiff from the judgment of ROSE, J., 14 O.W. N. 221, dismissing without costs an action to recover \$2,500, the balance of the price of a bridge erected by the plaintiff for the defendants.

The learned trial Judge was of opinion that the decision of the Appellate Division in *Mackay v. City of Toronto* (1918), 43 O.L.R. 17, compelled him to hold that, even in the case of an executed contract such as that upon which the plaintiff sued, the other contracting party could not have judgment against the municipality unless the power of the council to enter into the contract had been exercised by by-law, in accordance with sec. 249 of the Municipal Act, or there had been an adoption of the contract, evidenced by a by-law.

The appeal was heard by MULLOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

T. G. Meredith, K.C., for the appellant.

J. M. McEvoy and C. St. Clair Leitch, for the defendants, respondents.

CLUTE, J., read a judgment in which he said that the findings of fact of the trial Judge should not be disturbed, and were quite sufficient to entitle the plaintiff to judgment if the want of a by-law was not an insuperable objection.

The learned Judge then proceeded to discuss and distinguish the *Mackay* case, *supra*. Among other things, he said that the contract in that case was quite out of the ordinary and one in which the strictest formality would be required. The present case was that of an ordinary contract. It was the duty of the

\* This case and all others so marked to be reported in the Ontario Law Reports.