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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1917.

*AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Libel—Newspaper—Defence of Fair Comment—Particulars—Trial—Evidence Going beyond Particulars—Improper Admission—Failure to Prove Facts Forming Foundation for Comment—Mistrial—New Trial—Leave to Amend—Costs.

Appeal by the plaintiffs from the judgment of BRITTON, J., at the trial, upon the verdict of a jury, dismissing an action for libel.

The appeal was upon the ground mainly that evidence had been improperly received at the trial.

The nature of the case and the particulars of the alleged libel are stated in a former report, 36 O.L.R. 551.

The appeal was heard by CLUTE, RIDDELL, and LENNOX, JJ., and FERGUSON, J.A.

I. F. Hellmuth, K.C., and W. J. Elliott, for the appellants.

M. K. Cowan, K.C., and G. M. Clark, for the defendants, respondents.

CLUTE, J., in an elaborate written judgment, in which he referred to the facts and the authorities, said that at the trial there was an almost continual protest on the part of the plaintiffs' counsel that evidence was being admitted which was inadmissible, tending to prove facts which were not set out in the particulars as forming the basis for fair comment, and that the facts as set out in the particulars were not proven; and upon these grounds, at the close of the defendants' evidence, the plaintiffs' counsel

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

moved for judgment, and contended that, upon the pleadings and evidence, it was now simply a question of damages. The plaintiffs now asked for a new trial upon substantially the same grounds—that evidence was given of facts not set out in the particulars upon which it was alleged fair comment was based, and the facts alleged forming the foundation for fair comment were not proven.

There was much evidence for the defence, tending to support the comment made. There was evidence of the bona fides of the defendants, and it was clear that the matter was of public interest. Nevertheless, the learned Judge reluctantly reached the conclusion, on the authorities, that there must be a new trial, upon the ground that evidence was admitted, in support of the defendants' plea of fair comment, for which no particulars were given, and which might influence the jury. There had been a miscarriage at the trial, owing partly to the plaintiffs not clearly defining what was complained of in the newspaper article on which the action was based, portions of which article did not refer to the plaintiffs, and to the particulars not fully covering the ground upon which the defendants offered evidence.

There should be a new trial. Both parties should be allowed to amend the pleadings and particulars as they might be advised. The defendants should pay the plaintiffs' costs of the appeal, and the costs of the former trial should abide the event.

LENNOX, J., for reasons briefly stated in writing, agreed that there should be a new trial, and that the question of costs should be disposed of as stated by CLUTE, J.

RIDDELL, J., in a written judgment, discussed the facts and law, and stated that he had come to the conclusion that there must be a new trial. Upon that trial a different course must be pursued, with the real issues well kept in view. The defendants should prove the facts alleged against the plaintiffs, and then justify the comments. Some part of the difficulty arose from the plaintiffs' statement of claim including what could not be considered applicable to them—they should have leave to amend.

The order should be for a new trial, with leave to both parties to amend. The defendants should pay the plaintiffs' costs of the appeal and of the former trial.

KELLY, J., agreed in the result stated by RIDDELL, J.

In the result, the appeal was allowed with costs, and a new trial ordered; costs of the former trial to abide the event.

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1917.

*QUILLINAN v. STUART.

Libel—Publication to Person for Purpose of Copying Letter Containing Defamatory Words—Publication to Employer of Person Defamed—Qualified Privilege—Excess—Malice—Verdict of Jury—Judge's Charge—Misdirection—No Substantial Wrong or Miscarriage—Judicature Act, sec. 28—Damages—Quantum—Question for Jury—Application for New Trial.

Appeal by the defendant from the judgment of SUTHERLAND, J., at the second trial, upon the verdict of a jury, in favour of the plaintiff, for the recovery of $5,000 damages and costs, in an action for libel.

The verdict at the first trial was for $15,000. A new trial was directed by a Divisional Court: Quillinan v. Stuart (1916), 36 O.L.R. 474, 10 O.W.N. 96, where the facts are stated.

The appeal from the judgment at the second trial was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

I. F. Hellmuth, K.C., for the appellant.

Wallace Nesbitt, K.C., and J. M. Godfrey, for the plaintiff, respondent.

LENNOX, J., read a judgment in which he said that the letter which contained the libellous expressions "slut," "carrion," etc., in regard to the plaintiff, a woman, who was the clerk and attorney of Masters, to whom the letter was written and addressed, was in fact published—whether in the legal sense or not—to two persons, namely, Masters and one O'Donnell, who was the accountant in the branch of the bank of which the defendant was agent, and who made a typewritten copy of the defendant's pencil-draft. This copy was the writing sent to the defendant. In the charge of the learned trial Judge, he told the jury that they would be able to find, and would be warranted in finding, "that the communication reached only two people; that is, it was published in the legal sense to two people." This was not a misdirection. The letter was undoubtedly written on a privileged occasion; there was the qualified privilege which exists whenever the writer has an interest or duty, legal or moral, to make the communication complained of to the person to whom it is made, and when this person has also a correlative

duty or interest: Halsbury's Laws of England, vol. 18, p. 687; Odgers on Libel and Slander, 4th ed., pp. 272, 273; Hamon v. Falle (1879), 4 App. Cas. 247.

Upon the question whether the communication of the letter to O'Donnell was a publication in law, the principles to be deduced from Edmondson v. Birch & Co. Limited and Homer, [1907] 1 K.B. 371, and Robinson v. Dun (1897), 24 A.R. 287, had no application. There was no necessity for having the letter copied; the right to employ stenographers, etc., is based on necessity: Finden v. Westlake (1829), Moo. & Malk. 461; Williamson v. Freer (1874), L.R. 9 C.P. 393. There was no proper motive or need for communication to O'Donnell. The letter was solely and purely in reference to the defendant's private affairs. If it had been on the business of the bank, and the defendant had used the services of O'Donnell, it would have been different. The publication to O'Donnell was outside the privilege.

It was for the trial Judge to tell the jury that there was qualified privilege to publish the contents of the letter to Masters, and that, as to that publication, they must find evidence, extrinsic or intrinsic, of actual malice, before they could give a verdict for the plaintiff; and that, in determining the question of malice, all the correspondence, the conduct of the defendant, his statement of defence, and his evidence, should be taken into consideration. All that was fairly covered by the Judge's charge.

If anything had been said that should not have been said or if anything that should have been said had been omitted, no substantial wrong or miscarriage had been occasioned, and a new trial should not be granted on the ground of misdirection: Judicature Act, R.S.O. 1914 ch. 56, sec. 28; Winnipeg Electric R.W. Co. v. Wald (1909), 41 S.C.R. 431; McGraw v. Toronto R.W. Co. (1908), 18 O.L.R. 154; Wood v. McPherson (1888), 17 O.R. 163.

There was a fair trial, and ample evidence, both intrinsic and extrinsic, to go to the jury in support of express malice. There was no reason to assume that the jury was misled, and they were justified in finding the plaintiff entitled to damages.

The amount of the damages in an action for libel is peculiarly for the jury. The sum of $5,000 was much more than the learned Judge considered reasonable; but, the trial having been a fair one, he could not substitute his opinion for the jury's finding.

The appeal should be dismissed with costs.

RIDDELL, J., agreed in the result.

ROSE, J., also agreed in the result, for reasons stated in writing.

FERGUSON, J.A., read a dissenting judgment. He was of opinion that there had been a substantial miscarriage, and that there should be a new trial.

Appeal dismissed; FERGUSON, J.A., *dissenting.*

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1917.

McLAREN v. KNIGHT.

Trespass—Entry upon Hotel Premises—Search for Intoxicating Liquor—Justification under Search-warrant—Canada Temperance Act, sec. 136—Amending Act, 6 & 7 Geo. V. ch. 14—Form of Warrant—"All Necessary and Proper Assistance"—Request to Defendant by Constable to Assist—Number of Persons Called on—Discretion of Constable—Entry with Intention not Covered by Warrant—Illegal Acts after Entry—Failure to Prove—Withdrawal of Case from Jury.

Appeal by the defendant from the judgment of the County Court of the County of Perth, in an action for trespass in entering a hotel to search for intoxicating liquor. The action was tried with a jury, who found a verdict for the plaintiff for $1, for which sum and costs judgment was given.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

J. J. Gray, for the appellant.

R. S. Robertson, for the plaintiff, respondent.

RIDDELL, J., read the judgment of the Court. He said that an information was laid by one Powell before the Police Magistrate for the Town of St. Mary's, then under the Canada Temperance Act, and a search-warrant was issued by him on the 29th July, 1916, addressed to all and any of the constables or other peace officers in the County of Perth, directing them, "with necessary and proper assistance, to enter into" the hotel and premises known as the Royal Edward Hotel, in the town of St. Mary's, the plaintiff's hotel, "and there diligently search for intoxicating

liquor," and, if the same should be found, to bring it before the magistrate. The warrant followed Form R. in the schedule to an Act amending the Canada Temperance Act, 6 & 7 Geo. V. ch. 14.

The warrant was handed to a constable, who procured the assistance of four persons, the defendant being one. The party of five went into the bar of the plaintiff's hotel, and there found many bottles and two men drinking. Some of the party, amongst them the defendant, kept watch at the door to see that no one escaped with liquor.

The defendant, who was a minister and president of a temperance society, being sued in trespass, justified under the warrant.

The form was authorised by sec. 136 of the Canada Temperance Act (see the amending Act). Parliament, having jurisdiction over the subject-matter, may give the magistrate power to issue a warrant in this form—and it must be considered that Parliament intended the warrant to have validity for the purposes set out in it. The argument that the only assistance a constable can call is to prevent a breach of the peace should not prevail.

No jury could be allowed to find, on the evidence, that the number of persons (five) was more than necessary or proper. The judgment of the constable, exercised in good faith, was conclusive.

The defendant knew that Hunt had to search, was requested to help, told that his assistance was needed, and that he was expected to watch the door, remaining outside. There was nothing to indicate that the defendant went with any intention beyond what the warrant directed.

It was argued that the defendant acted illegally after he entered, and consequently that the entry became tortious ab initio; but there was no evidence of any illegal act.

The County Court Judge should not have left the case to the jury at all.

The appeal should be allowed with costs and the action dismissed with costs.

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1917.

*MINOR v. GRAND TRUNK R.W. Co.

Railway—Injury to Person and Vehicle Crossing Tracks at Highway Crossing—Negligence—Findings of Jury—Excessive Speed of Train—Other Grounds of Negligence Negatived—Powers of Parliament—Regulation of Speed of Trains—Railway Act, R.S.C. 1906 ch. 37, sec. 275—Part of Village not thickly Peopled—Fencing—Immateriality.

Appeal by the defendants from the judgment of BRITTON, J., ante 164.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

D. L. McCarthy, K.C., for the appellants.

W. M. German, K.C., for the plaintiff, respondent.

RIDDELL, J., reading the judgment of the Court, said that the plaintiff was driving his motor-truck across the railway tracks in the village of Port Colborne, when the truck was struck by the engine of a train and destroyed, and the plaintiff was injured. In the statement of claim, negligence was charged as follows: (1) the train was running at a much higher rate of speed than is allowed by the statute; (2) failure and neglect to blow a whistle or ring a bell. The jury found negligence, in that the train was running at too high a rate of speed at the time of the accident; no contributory negligence; damages, $1,000.

It must be taken that the jury had negatived all negligence charged except excessive speed.

The trial Judge charged the jury that the defendants were limited by the law to a speed of ten miles an hour; and it must be considered that the jury had found that that rate had been exceeded.

It was admitted on all hands that the Parliament of Canada has power to regulate the speed of trains—and a train cannot be said to be negligently or improperly run in respect of speed unless it is transgressing the statute.

The Railway Act, R.S.C. 1906 ch. 37, sec. 275, provides: "No train shall pass in or through any thickly peopled portion of any city, town, or village at a rate greater than ten miles an hour, unless the track is fenced or properly protected in the

manner prescribed by this Act, or unless permission is given by some regulation or order of the Board."

The primary object of the enactment is not the protection of persons crossing the track on a highway. Fencing or other protection could not help them. But such persons have a right, in such places, to rely upon the trains not exceeding the statutory limit.

It was admitted by counsel for the plaintiff that the accident did not take place in a thickly peopled part of the village; and, therefore, the local knowledge of the jurors cannot be appealed to, as it was by Idington, J., in Andreas v. Canadian Pacific R.W. Co. (1905), 37 S.C.R. 1, at pp. 19, 20. The place not being thickly peopled, the jury were not at liberty to find that the speed was excessive: the Andreas case, supra; Zufelt v. Canadian Pacific R.W. Co. (1911), 23 O.L.R. 602; Parent v. The King (1910), 13 Can. Ex. C.R. 93; and *cf.* Grand Trunk R.W. Co. v. McKay (1903), 34 S.C.R. 81; Grand Trunk R.W. Co. v. Hainer (1905), 36 S.C.R. 180.

If in fact the track was not fenced, that was immaterial—the fencing or protection mentioned in the section is necessary only where the place is thickly peopled.

The appeal should be allowed and the action dismissed, both with costs.

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1917.

*MAYNE v. GRAND TRUNK R.W. CO.

Railway—Passenger Stepping off Moving Train—Negligence of Conductor—Finding of Jury—Invitation to Alight—Evidence—Divided Court.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, upon the findings of a jury, in favour of the plaintiff.

The action was brought by the widow of William J. Mayne, under the Fatal Accidents Act, to recover damages for the death of her husband, caused, as she alleged, by the negligence of the defendants. The deceased was a passenger upon a train of the defendants; he stepped off in the dark while the train was in motion, and sustained injuries from which he died. The negli-

gence alleged was in effect that the conductor of the train had invited the deceased to alight when and where he did.

The judgment was for $4,000 damages and costs.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

D. L. McCarthy, K.C., for the appellants.

T. N. Phelan, for the plaintiff, respondent.

RIDDELL, J., with whom ROSE, J., agreed, was of opinion, for reasons stated in writing, that there was no conduct on the part of the conductor which could be construed into an invitation to alight, and that the appeal should be allowed and the action dismissed.

LENNOX, J., and FERGUSON, J.A., were of opinion, for reasons stated by each in writing, that the finding of the jury that the death was caused by the negligence of the defendants—"by the conductor not remaining at the door of the car until the train stopped"—was warranted by the evidence, and that the appeal should be dismissed.

The Court being divided, the appeal was dismissed with costs.

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1917.

KONKLE v. KONKLE.

Contract—Joint Dealings of Uncle and Nephew in Mining Lands and Company-shares—Moneys Paid by Uncle—Agreement as to Sale of Shares—Alleged Breach—Conversion of Shares—Failure to Prove—Evidence—Damages.

Appeal by the defendant from the judgment of MIDDLETON, J., ante 242.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

W. S. MacBrayne, for the appellant.

C. W. Bell, for the plaintiff, respondent.

RIDDELL, J., read a judgment in which he said that the plaintiff was the uncle of the late J. W. Konkle, who was an engineer,

and who had, as he thought, a chance to make money in a mining scheme. The uncle and nephew went into a speculation together, the uncle putting up the money, the nephew the experience and skill—but there was no thought of the nephew becoming personally liable to the uncle for any part of the uncle's disbursements.

A joint stock company was formed, and each of the original adventurers received some stock. On the 26th June, 1911, the uncle and nephew made an agreement: "Referring to claim by J. O. Konkle"—the plaintiff—"against J. W. Konkle junior for moneys advanced for prospecting and payment for Eldorado properties, it is hereby agreed between us that A. J. Barr & Co. shall sell 100,000 shares to net us 8 cents per share; the proceeds to be divided pro rata, less the sum of $3,385 to be paid to the said J. O. Konkle."

J. W. Konkle died in April, 1916, and letters of administration were taken out by the defendant. The plaintiff claimed $1,500 against the estate, and judgment was given for $760 and costs, from which the defendant appealed.

The rights of the parties depended upon the agreement quoted. It had been taken for granted that the nephew and uncle were each to contribute 50,000 shares to the 100,000 to be sold by Barr; and that, after the payment of $3,385 to the uncle, the remainder would be equally divided. It was not so stipulated, but it was not unfair or unreasonable so to interpret it.

The right of action of the plaintiff at the best was for damages for non-performance of the contract by J. W. Konkle; and it must be proved that the contract was broken. There was no evidence to shew that J. W. Konkle did not carry out his contract —not one word to shew that Barr did not sell 100,000 shares on this account. Literally, the only evidence which was offered to shew breach of contract was the fact that the administratrix, the defendant, could find only 40,500 share-certificates. For all that appeared, the nephew might have had far more at the time of his death—the plaintiff did not take the pains to find out from the transfer company how the stock stood; and, even if the nephew had, at the time of his death, only 40,500 shares, sufficient might have been placed in Barr's hands to answer the contract.

The plaintiff never called upon his nephew to place the shares in Barr's hands—and the plaintiff himself had never done so nor expressed his willingness to do so.

Even supposing the contract broken, what were the damages? There was not a word of evidence to shew or to suggest that,

even had Barr the 100,000 shares in his hands, he could have sold for 8 cents or 1 cent.

The appeal should be allowed and the action dismissed, both with costs.

LENNOX, J., agreed in the result, for reasons stated in writing.

FERGUSON, J.A., and ROSE, J., also concurred.

Appeal allowed.

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1917.

*REX v. CANTIN.

*REX v. WEBER.

Canada Temperance Act—Magistrate's Conviction—Motion to Quash—Right to Certiorari Taken away by sec. 148—Jurisdiction of Magistrate—Evidence of Offence.

Appeals by the defendants from the orders of LATCHFORD, J. (17th November, 1916), and MIDDLETON, J. (8th December, 1916), in Chambers, refusing to quash convictions under the Canada Temperance Act, R.S.C. 1906, ch. 152. The reasons for the decision of LATCHFORD, J., were given in Rex v. Berry (1916), 38 O.L.R. 177, ante 158, a case decided at the same time as Rex v. Cantin.

The appeals came on for hearing before RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

L. E. Dancey, for the appellant Cantin.

Glyn Osler, for the appellant Weber.

J. R. Cartwright, K.C., for the Attorney-General.

RIDDELL, J., read a judgment in which he said that, on information duly sworn before the Police Magistrate for the Township of Hay, a summons was issued against N. Cantin for unlawfully bringing intoxicating liquor into the county of Huron, contrary to the provisions of the Canada Temperance Act. Cantin duly appeared before the magistrate, and evidence was given of the finding in his cellar of beer and whisky to a very considerable

amount; this, he said, he had got in for himself and his family—that he had bought it in Montreal. The magistrate convicted.

A motion to quash the conviction was dismissed by LATCHFORD, J., on the ground that such a motion was forbidden by the Act, R.S.C. 1906 ch. 152, sec. 148, unless it could be shewn that the magistrate had no jurisdiction. The first appeal was from this order.

Mr. Justice Latchford was right in his conclusion. Even if the rule laid down in Colonial Bank of Australasia v. Willan (1874), L.R. 5 P.C. 417, should be followed, and it is proper to have the conviction in this Court at all (as to which Riddell, J., reserved his judgment), it was clear, he said, that the Court could not interfere if the magistrate had jurisdiction. He had undoubtedly jurisdiction to enter upon the inquiry; and, if he made a mistake in the conclusion he arrived at, the Court had no right to interfere—it could interfere only if it were made to appear that the magistrate's commission did not justify him in exercising jurisdiction in the locus, or that he was not in fact proceeding on an alleged violation of the Act.

At all events, the magistrate was well warranted in finding as he did: Rex v. Reinhardt Salvador Brewery Co. Limited (1917), ante 346; Regina v. Cunerty (1894), 26 O.R. 51.

The appeal should be dismissed with costs.

In the Weber case, the same considerations should prevail, and the appeal should be dismissed with costs.

LENNOX, J., and FERGUSON, J.A., concurred.

ROSE, J., read a dissenting judgment. He said that it was not disputed that, notwithstanding sec. 148 of the Act, taking away the right to a certiorari, a conviction might be quashed, upon the proceeding now substituted for certiorari, if it appeared that the magistrate had no jurisdiction. The course taken by the Common Pleas Division in Regina v. Coulson (1896), 27 O.R. 59, had since been generally followed in Ontario. The dissenting opinion of Cameron, J., in Regina v. Wallace (1883), 4 O.R. 127, was that which commended itself. It should be held that the Court could (in these two cases) inquire whether there was before the magistrate any evidence at all that the accused committed the offence; if there was no evidence, the magistrate had no jurisdiction, and the conviction might be quashed. The Court should hear argument as to whether there was any evidence.

Appeal dismissed; ROSE, J., *dissenting.*

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1917.

*BILLINGTON v. HAMILTON STREET R.W. CO.

Street Railway—Negligence—Passenger Standing in Car Injured by Falling when Car Stopped—Evidence—Violent or Sudden Stop—Findings of Jury—Meaning of.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, upon the findings of a jury, in favour of the plaintiff.

The action was to recover damages for injuries sustained by the plaintiff (a woman) while a passenger on a car of the defendants, by reason of the negligence of the defendants' servants, as the plaintiff alleged. The plaintiff was standing in the car or walking through it to find a seat, when the car stopped, and she fell on the floor, and was injured.

The judgment was for $6,000 and costs.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

D. L. McCarthy, K.C., and A. Hope Gibson, for the appellants.

G. S. Kerr, K.C., for the plaintiff, respondent.

LENNOX, J., read a judgment in which he said that, although stopping the car was not negligence per se, the defendants were liable if the stop were effected in a negligent way and caused the injury. The learned Judge would not, upon the evidence, have come to the conclusion reached by the jury; but that was not enough. A violent or sudden stop was not necessary or justifiable in the circumstances of the case, and there was evidence, which the jury had to consider, that the stop was of that character; they were at liberty to accept and act upon that evidence. They found that the car was brought to a sudden stop without precaution or warning, and that that was the cause of the injury. However unconvincing it might be, it could not be said that 10 or 12 reasonable men could not have answered the questions as they had answered them.

The appeal should be dismissed.

RIDDELL, J., and FERGUSON, J.A., concurred.

ROSE, J., read a dissenting judgment. He was of opinion that the finding of the jury did not mean that the car was stopped in an unusually or unduly violent manner; by a "sudden stop" they meant a stop of which no warning was given; and the plaintiff was not entitled to judgment upon the finding. Passengers who are standing ought to take precautions against being thrown down by any stop that is not unusually violent. There was no evidence to support the finding of the jury that the stop was at an "irregular" place.

Appeal dismissed; ROSE, J., *dissenting.*

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1917.

NESTOR v. NESTOR.

Will—Construction—Devise of Homestead to Son, Subject to Right of other Children to Use it as a Home—Right to Endure beyond Lifetime of Devisee.

Appeal by the plaintiff from the judgment of MULOCK, C.J.Ex., ante 220.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

A. C. Kingstone, for the appellant.

G. B. Burson, for the defendants, respondents.

THE COURT allowed the appeal with costs, holding that the effect of the will was, that the home for the family was to last during the lifetime of its members, and not merely during the lifetime of the devisee.

HIGH COURT DIVISION.

LATCHFORD, J. FEBRUARY 26TH, 1917.

*GREENBERG v. LAKE SIMCOE ICE SUPPLY CO.

Contract—Formation—Correspondence—Quotation of Prices for Supply of Coal—Non-acceptance—Absence of Mutuality of Obligation—Fraud—Right to Rescind Contract (if Made).

An action for damages for breach of an alleged contract to supply the plaintiff with coal.

The action was tried without a jury at Toronto.

L. M. Singer, for the plaintiff.

B. N. Davis, for the defendants.

LATCHFORD, J., in a written judgment, said that on the 25th August, 1916, the defendants, dealers in coal as well as ice, wrote to the plaintiff, a retailer of coal, a letter in which they said: "We beg to confirm our quotations on coal taken by you . . . namely, $6.65 per ton . . . for all coal taken up to August 31st, 1916, and $6.75 per ton for all coal taken from Sept. 1st to April 30th, 1917." The prices stated were to be subject to increase if freight charges increased, and to other terms and conditions not material to be considered. No quantity was agreed to be supplied; and on the part of the plaintiff there was no undertaking or agreement to purchase from the defendants any coal whatever.

After coal had been supplied to the plaintiff to the extent of about 40 tons, it transpired that the plaintiff had attempted to bribe the clerk in charge of the scales at their Florence street yard to issue false weight-tickets to him, and thus defraud the defendants for his benefit.

The defendants made a careful investigation; and, when convinced, as they were on ample evidence, that the plaintiff had endeavoured to perpetrate a gross fraud upon them, they refused to supply him further with coal.

The defendants had the right, at any time after the date of the letter, to refuse, with or without cause, to supply the plaintiff with coal. The letter contained no more than a quotation of prices. It was not a contract. The plaintiff was not under the slightest obligation to purchase a single ton of coal from the defendants. There was no consideration from him to the de-

fendants, and no acceptance—regarding the quotation as a proposal, as in Harty v. Gooderham (1871), 31 U.C.R. 18—except in so far as the plaintiff from time to time, prior to the revelation of his fraud, applied for and was supplied with coal. Until each such transaction was completed, there was no mutuality of obligation: Johnston v. Rogers (1899), 30 O.R. 150, and cases cited.

But, even if a contract existed to sell to the plaintiff the same quantity of coal, approximately 600 tons, as he had purchased from the defendants in the season of 1914-15, there was not only a clear defence to the action, but the defendants had the right to rescind the contract on the ground of fraud: Panama and South Pacific Telegraph Co. v. India Rubber Gutta Percha and Telegraph Works Co. (1875), L.R. 10 Ch. 515; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392, 427; Grant v. Gold Exploration and Development Syndicate, [1900] 1 Q.B. 233, 249.

Action dismissed with costs.

MIDDLETON, J. FEBRUARY 26TH, 1917.

*MACKAY v. CITY OF TORONTO.

Municipal Corporations—Services and Advice of Accountant Employed by Mayor—Action to Recover Remuneration—Absence of Contract, Seal, By-law, and Action of Council—Executed Contract—Benefit of Services—Adoption—Ratification—Knowledge—Municipal Act, R.S.O. 1914 ch. 192, secs. 8, 10, 214, 249—Interpretation Act, R.S.O. 1914 ch. 1, sec. 27—Subject of Contract not Necessary for Purpose for which Corporation Created—Value of Services.

Action to recover $42,546.50 for fees and disbursements for advising the defendants, the Corporation of the City of Toronto, upon the proposed purchase of the undertakings of the Toronto Railway Company and the Toronto Electric Light Company.

The action was tried without a jury at Toronto.

A. W. Anglin, K.C., and Glyn Osler, for the plaintiff.

A. C. McMaster and C. M. Colquhoun, for the defendants.

MIDDLETON, J., in a written judgment, said that there was no contract, oral or written, between the plaintiff and the defendants. The plaintiff's employment was by the Mayor, and no agreement as to remuneration was made; so the right to recover must depend upon the acceptance by the defendants of the plaintiff's services or some ratification by the city council of what was done by the Mayor, and the amount to be paid must be determined by the value of the services rendered.

The employment by the Mayor (Mr. Hocken) was in 1913. The instructions apparently were to report upon the broad financial and business aspects of the proposal to purchase. The Mayor asked for information as to the fee which would be charged, but the plaintiff protested against naming his fee, and said he would leave it to the Mayor or any reasonable man. The matter being left in this vague way, the plaintiff entered upon the inquiry and made an interim report, which was presented to the council and printed.

Finally all negotiations for purchase were abandoned, and the plaintiff sent in a bill for $42,546.50, which the council refused to pay.

The testimony of Mr. Hocken was to be accepted in full as substantially correct.

The defendants set up that there was no contract under the corporate seal; that there was in fact no contract with the defendants at all; and that there could be no valid contract without a by-law.

The plaintiff contended that the contract was an executed one, and there was the right to recover notwithstanding the lack of a by-law or contract under seal; and that the council adopted the employment in such a way as to preclude the defendants from now denying liability.

The learned Judge referred to Clarke v. Guardians of Cuckfield Union (1852), 21 L.J.Q.B. 349; Nicholson v. Guardians of Bradfield Union (1866), L.R. 1 Q.B. 620; Young v. Corporation of Leamington (1883), 8 App. Cas. 517; Lawford v. Billericay Rural District Council, [1903] 1 K.B. 772; Doe d. Pennington v. Taniere (1848), 12 Q.B. 998.

These cases established as an exception to the common law rule requiring contracts of corporations to be under seal the case of contracts actually made by the proper executive body for work or goods done or supplied to carry into effect those purposes for which the corporations were created, if the work done or materials supplied were accepted and the whole con-

sideration for payment executed. This exception does not extend to cases in which there is a statutory requirement of a contract under seal.

Later English cases have not modified this statement of the law: Hoare v. Kingsbury Urban Council, [1912] 2 Ch. 452; Douglass v. Rhyl Urban Council, [1913] 2 Ch. 407.

The learned Judge then referred to the Municipal Act, R.S.O. 1914 ch. 192, secs. 8, 10, 214, 249; the Interpretation Act, R.S.O. 1914 ch. 1, sec. 27; and said that there was no obligation upon a municipal corporation to contract under seal, and the use of the common seal as evidence of corporate action rests upon the common law, save that its use is essential to authenticate and validate a by-law.

A by-law is an essential condition precedent to the making of a contract by a municipal corporation: Waterous Engine Works Co. v. Town of Palmerston (1892), 21 S.C.R. 556.

In Ontario, a corporation other than a municipal corporation is liable upon an executed contract for the performance of work necessary for the purpose for which it was created in the absence of a corperate seal to the contract, while a municipal corporation is not so liable unless there is a by-law authorising the contract.

Reference to Leslie v. Township of Malahide (1907), 15 O.L.R. 4; Campbell v. Community General Hospital of Sisters of Charity of Ottawa (1910), 20 O.L.R. 467; McMurray v. East Nissouri (Section 3) Public School Board (1910), 21 O.L.R. 46; Taylor v. Gage (1913), 30 O.L.R. 75; Wright v. City of Ottawa (1914), 7 O.W.N. 151; Township of King v. Beamish (1916), 36 O.L.R. 325; Manning v. City of Winnipeg (1911), 21 Man. R. 203; Regina v. Henderson (1898), 28 S.C.R. 425; Ponton v. City of Winnipeg (1908), 41 S.C.R. 18.

The absence of a by-law afforded an answer to the plaintiff's claim, and the facts that the contract had been executed, and that the defendants had received benefit from the plaintiff's services, were not sufficient to prevent their setting up this defence.

A municipal corporation may ratify an act done on its behalf without the statutory authority of a by-law; but the ratification is in itself a contractual act, and must be based upon a by-law.

Again, before ratification of an unauthorised act it must be shewn either that there was full knowledge of all that had been done or that there was an intention to adopt and ratify so as to assume full liability, no matter what had been done: Marsh v. Joseph, [1897] 1 Ch. 213; Pole v. Leask (1863), 9 Jur. N.S. 829.

Again, if the rule in Clarke v. Guardians of Cuckfield Union, supra, could be applied, it could not be said that the purchase

of the two concerns was a purpose for which the corporation was created, or that the obtaining of the plaintiff's advice was a thing necessary to the purposes for which the corporation was created.

Again, what was lacking was not any mere formality—the absence of a by-law or the corporate seal—but the entire absence of any action on the part of the council, by which alone the corporation could act.

If the plaintiff had a right to recover, he should receive for his services $7,500.

Action dismissed with costs.

MIDDLETON, J. FEBRUARY 27TH, 1917.

RE McMILLAN.

Will—Construction—Direction to Set apart Fund for Building Church Parsonage—Failure of Purpose Indicated—Absence of General Charitable Intention—Fund Falling into Residue.

Motion by the executors and trustees under the will of Henry McMillan, deceased, for an order determining a question arising on the will and giving directions as to the disposition of a sum of $1,000 and accumulated interest.

The motion was heard in the Weekly Court at Toronto.

J. E. Lawson, for the executors and trustees.

J. M. Godfrey, for J. McMillan.

E. C. Ironside, for Allan McMillan.

D. Urquhart, for the Baptist Home Mission Board.

F. W. Harcourt, K.C., for two infants.

MIDDLETON, J., in a written judgment, said that the testator by his will stated his intention of building a parsonage for the Baptist Church at Sowerby; and, should this intention not be carried out in his lifetime, he empowered his executors to complete any building in the course of erection in his lifetime, and "in case no steps shall have been taken towards the construction of such a parsonage then I authorise direct and empower my said executors to set aside the sum of $1,000 toward the cost of building a parsonage for the use of the said Baptist Minister in charge of the Baptist Church at Sowerby aforesaid or his successors in the ministry of the said Church and to pay over the said amount

upon the completion of such parsonage to the trustees for the time being of said Baptist Church property."

The deceased had in his lifetime been active in the erection and maintenance of a small church edifice at Sowerby. The church never had a minister, but students preached there during the summer months. Mr. McMillan seemed to have been the backbone of the whole enterprise, and on his death the church was continued as a mission station for some years, but was finally abandoned, most of the members transferring their membership to Thessalon or Blind River churches. There were not enough Baptists at Sowerby to make a church there possible, and the field was served by the churches at Thessalon and Blind River.

The $1,000 was set apart, and had accumulated to $1,700.

The residuary legatees desire to have this distributed, and the executors asked the direction of the Court.

It was plain that the purpose for which the testator intended this bequest had failed; and the question was, whether the fund passed to the residuary legatees, or should be dealt with under the cy-près doctrine, and so should be applied in some other way similar to that pointed out by the testator.

Had the testator set apart this sum for charity in such a way as to enable the Court to say that the failure of the specific object was immaterial and the bequest did not revert to the residue, or was the testator's intention to benefit the specifically named charity only?

Reference to Biscoe v. Jackson (1887), 35 Ch. D. 460; Re Taylor (1888), 58 L.T.R. 538.

Here there was no general charitable intent, but the testator's desire was to benefit the particular thing named. He was interested in this particular Baptist Church, and desired it to have a parsonage. He wanted to build up this particular denomination in this particular village; and this gift cannot be diverted to any other locality or any other denomination without a failure to carry out the testator's intention.

There being no general charitable intention, and the purpose indicated being now impracticable, the fund should be divided among the residuary legatees.

Costs out of the fund in question.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 28TH, 1917.

*McTAVISH v. LANNIN AND AITCHISON.

Costs—Security for—Public Authorities Protection Act, R.S.O. 1914 ch. 89, sec. 16—Action against Police Officers—Entry of Dwelling-house without Search-warrant — Trespass — Arrest without Warrant—Execution or Intended Execution of Duty—Bona Fides—Good Defence on Merits—Criminal Code, sec. 30.

Appeal by the defendants from the order of the Master in Chambers, ante 402, dismissing the defendants' application for security for costs under the provisions of sec. 16 of the Public Authorities Protection Act, R.S.O. 1914 ch. 89.

R. S. Robertson, for the defendants.
R. T. Harding, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the plaintiff sued two constables for entering and searching her house without a warrant, arresting and imprisoning her, and for slander in accusing her, in the presence of her children, of theft.

Sections 3 to 11 of the Act relate generally to actions against Justices of the Peace; sec. 12 deals with the case of constables acting under warrants; and secs. 13 to 15 cover all actions where the act complained of is done in execution or intended execution of any statute or of any public duty or authority, or for neglect of any such duty or authority. Section 16 is wider, and covers not only Justices, included in the first group, but all persons falling within sec. 13, and gives them the right, subject to certain provisions, to security for costs. All that sec. 16 requires is, that the defendant shall shew that the action is brought against him for an "act done in . . . execution or intended execution of any . . . public duty or authority."

On receiving information which, on reasonable and probable grounds, led the officers to the belief that an offence had been committed for which the offender might be arrested, and that the plaintiff was the person who committed the offence, the officers were justified in arresting her without a warrant, even though it should be found that there never had been any offence, or that, if an offence, the plaintiff was not guilty: Criminal Code, R.S.C. 1906 ch. 146, sec. 30.

What was done by the defendants was done in execution or intended execution of their duty; they acted in good faith.

The merits of the action are not to be tried on the motion for security. The security is to be there to answer the costs of the action if the defendants succeed at the hearing; and the defendants had shewn all that is required by the statute, including "a good defence upon the merits," as that expression must be understood in this and kindred statutes.

The appeal should be allowed and an order made for security; costs of the motion below to be in the cause; costs of the appeal to the defendants in any event.

RIDDELL, J., IN CHAMBERS. FEBRUARY 28TH, 1917.

*GAGE v. REID.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507 — Affidavit of Solicitor — Venue — Application to Change—Prejudice—Fair Trial—Convenience—Conflicting Decisions—Good Reason to Doubt Correctness of Order.

Motion by the plaintiff for leave to appeal, under Rule 507, from an order of MASTEN, J., in Chambers, reversing an order of the Master in Chambers which changed the venue from Belleville to Whitby.

J. B. Mackenzie, for the plaintiff.
H. S. White, for the defendant.

RIDDELL, J., in a written judgment, said that, in considering whether leave to appeal should be given in purely interlocutory matters, the general rule is that the decision of the Judge in such matters is primâ facie final. Leave under Rule 507 may be granted: (1) where there are conflicting decisions by Judges, and it is desirable that an appeal should be allowed; (2) where there appears to the Judge applied to good reason to doubt the correctness of the order, and the appeal involves matters of such importance that leave to appeal should be given.

It was considered in Ryckman v. Randolph (1909), 20 O.L.R. 1, that "Judges" in the former Rule [Con. Rule 1278] did not include Judges in England, but only Ontario Judges. The former Rule read "Judges of the High Court;" the present reads "Judges." But the combined effect of the Interpretation Act, R.S.O. 1914 ch. 1, sec. 28 (*i*), and Rule 3 (*d*), is to give the

new Rule the same effect as the former. The decisions of Ontario Judges only, whether of the High Court Division or the Appellate Division, who have the same powers, and consequently for the purposes of this Rule are to be considered "Judges," can be looked at in respect of conflicting decisions: Re Rowland and McCallum (1910), 22 O.L.R. 418.

Decisions of English Judges, however, may be looked at in order to determine whether there is good reason to doubt the correctness of the order.

In regard to the change of venue, there are no conflicting decisions.

The action is for false imprisonment: see Gage v. Reid (1917), ante 362, where the Appellate Division ordered a new trial on the ground of improper remarks at the former trial by counsel for the defendant in regard to the nationality of the plaintiff (an Austrian).

The application for change of venue was made by the plaintiff, and was supported by an affidavit of his solicitor, which was admissible: Cossham v. Leach (1875), 32 L.T.R. 665; Davis v. Murray (1882), 9 P.R. 222. The grounds were two: (1) that the plaintiff would not receive a fair trial at Belleville; and (2) balance of convenience.

It could not be said that there was any substantial balance of convenience in favour of Whitby.

The other ground was the "unshaken belief" of the plaintiff's solicitor "that the assertions made by the defendant's counsel" at the former trial would, by reason of the notoriety through the county of Hastings, which they secured at the time of the trial and subsequently, render it most unlikely that a jury could be empanelled there which would be unprejudiced enough to give the plaintiff fair play. Belief in itself is not of avail; facts must be shewn which tend to justify the belief.

There was no reason to suppose that there was a general prejudice against the plaintiff in the county of Hastings. Without very strong and clear evidence that county should not be stigmatised as not being able to produce a jury which would give a fair trial.

It would be impossible, consistently with the authorities, to hold that there was good ground to doubt the correctness of the order of Masten, J.

Motion dismissed with costs to the defendant in any event.

MULOCK, C.J.Ex., IN CHAMBERS. FEBRUARY 28TH, 1917.

*WESTERN CANADA FLOUR MILLS CO. LIMITED v. D. MATHESON & SONS.

Costs—Taxation—Item 9 of Tariff—Interpleader Proceedings—Final or Interlocutory—Rule 3 (b)—"Action."

An appeal by the claimants in interpleader proceedings from a ruling of the Senior Taxing Officer upon the taxation of their costs of the proceedings.

An interpleader order was pronounced on the application of a sheriff, who had seized, under the plaintiffs' execution, goods which were claimed by the appellants. Before the order was issued, the plaintiffs abandoned, and an order was made directing the sheriff to withdraw from possession and requiring the plaintiffs to pay to the claimants their costs of the proceedings. Upon taxation of these costs, the officer ruled that the proceedings were interlocutory, and allowed to the claimants only the costs fixed by item 9 of the tariff; the appeal was from that ruling, to increase the amount allowed.

A. A. Macdonald, for the appellants.
C. M. Garvey, for the plaintiffs.

MULOCK, C.J.Ex., in a written judgment, said that the test for determining whether an order was interlocutory or final had been discussed in numerous cases: King v. Simmonds (1845), 14 L.J. N.S. Q.B. 248; Pheysey v. Pheysey (1879), 12 Ch.D. 305; McAndrew v. Barker (1878), 7 Ch.D. 701; Whiting v. Hovey (1885), 12 A.R. 119; Blakey v. Latham (1889), 43 Ch.D. 23; Leonard v. Burrows (1904), 7 O.L.R. 316.

In their relation to the action, the interpleader proceedings were interlocutory, determining nothing in respect of the issues involved in the action.

The order in this case was interlocutory, and the Taxing Officer was right, unless the question was affected by Rule 3 (*b*): "'Action' shall include garnishee proceedings and proceedings for relief by interpleader." This Rule is substantially the same as Con. Rule 6 (*e*) of the Rules of 1897. Reference to Whiting v. Hovey, supra, and Hogaboom v. Gillies (1895), 16 P.R. 402. Neither Con. Rule 6 (*e*) nor its successor, Rule 3 (*b*), was intended to

change the clearly established law that interpleader proceedings in an action are interlocutory, but merely to affect the right of appeal, which had been left in an unsatisfactory condition.

Notwithstanding Rule 3 (*b*), the interpleader proceedings in question were interlocutory.

Appeal dismissed with costs.

LAROCQUE v. LANDRY—SUTHERLAND, J.—FEB. 28.

Will—Action to Set aside—Onus—Want of Testamentary Capacity—Undue Influence—Costs.]—An action by the two daughters of Mary Daoust, deceased, for a declaration of the invalidity as a will of a testamentary writing executed by the deceased on the day before her death. The defendant was the executor named in the will. The action was tried without a jury at Ottawa. SUTHERLAND, J., in a written judgment, after setting out the facts, said that the onus was on the plaintiffs: Badenach v. Inglis (1913), 29 O.L.R. 165; and they had satisfied the onus. The testatrix was not competent to make the will. Upon the evidence as a whole, she was in such a mentally and physically weak condition, at the time that the will was prepared and executed, as to be unable to understand or appreciate its contents. Reasonable and adequate efforts were not made to ascertain how she desired to dispose of her property. The will seemed to have been framed upon the suggestion of the defendant; and no evidence was offered on which it could properly be found that any questions put to the testatrix were understood or appreciated by her, or that, when she made her mark to the will, she appreciated its conditions or the disposition she was making of her property. Judgment setting aside the will; costs of all parties out of the estate. T. D'Arcy McGee, for the plaintiffs. D. A. Sauvé, for the defendant.

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9. Construction — Devise — Habendum — "Lawfully Begotten Heirs for ever"—Estate Tail—Lands Included in Devise—Lands otherwise Acquired by Devisee—Lands Forming Part of Original Road Allowance—Municipal By-law Closing up Road Allowance—Municipal Act, R.S.O. 1877 ch. 174, secs. 486, 487, 488, 525—Residuary Devisees—Inclusion of Tenant in Tail—Beneficiaries under Will of Devisee also Entitled under Will of Devisor—Election—Dower—Assignment of—Distribution of Estate—Costs. *Re Walmsley*, 11 O.W.N. 6.—KELLY, J.

10. Construction—Devise—Life Estate—Gift over to "Children"—Estate Tail—Rule in Shelley's Case—Vendor and Purchaser—Title to Land—Notice to third Person—Rule 602. *Re Thompson and Robbins*, 11 O.W.N. 344.—MIDDLETON, J.

11. Construction—Devise of Farm—Mistake in Number of Concession—Falsa Demonstratio—Infant Devisee—Duty of Executors—Legacies Charged on Lands Devised—Application to Court—Conditional Devise—Vested Estate Subject to Divestment in Case Devisee should not Return from War

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20. Construction—Irreconcilable Residuary Clauses—Later of two to Prevail—Rule of Thumb—"Money"—Proceeds of Sale of Land—Distribution of Estate. *Re Stocks*, 11 O.W.N. 212.—MIDDLETON, J.

21. Construction—Legacies—Identification of Charitable Institution—Deficiency of Assets—Payment in Full of Specific Legacies—Abatement of Legacies Payable out of Residue—Enlargement of Fund to Produce Annuity—Income of Fund Given for Life on Conditions—Refusal of Legatee to Accept—Life Estate Falling into Residuary Estate—Charitable Gift—Perpetual Trust. *Re Fitzgibbon*, 11 O.W.N. 71.—MIDDLETON, J.

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23. Construction—"Nearest Heirs"—Ascertainment—Evidence—Incompleteness—Notice. *Re Locker*, 11 O.W.N. 246.—MIDDLETON, J.

24. Construction—Payment of Debts—Appointment of Trust Fund—Benefit of Widow—Dower—Election—Direction to Sell and Realise—Blended Fund—Rights of Creditors—Priorities. *Re Williamson*, 11 O.W.N. 142.—MIDDLETON, J.

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