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*Nov. 2-4.
*Nov. 18.

ULRIC BARTHE (DEFENDANT).....APPELLANT;

AND

ALPHONSE HUARD (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Evidence—Privilege—Notary—Jury trial—Practice—Charge to jury—Objections after verdict—New trial—Misdirection—Discretion.

H., to qualify as candidate in a municipal election procured from a friend a deed of land giving him a *contre-lettre* under which he collected the revenues. Having sworn that he was owner of real estate to the value of $2,000 (that described in the deed), B. in his newspaper accused him of perjury and he took action against B. for libel. On the trial the deed to H. was produced, and the existence of the *contre-lettre* proved, but the notary having the custody of both documents refused to produce the latter, claiming privilege on the ground that it was a confidential document. The trial judge maintained this claim, but oral evidence was admitted proving to some extent what the *contre-lettre* contained. A verdict having been given in favour of H.,

Held, that the trial judge erred in ruling that the notary was not obliged to produce the *contre-lettre*, as it was impossible without its production to determine what, if any, limitations it placed upon the deed, and there should be a new trial.

B. in his newspaper article also accused H. of having been drunk during the election, and the judge, in charging the jury, said, "You should consider the case as if the charge of drunkenness had been made against yourselves, your brother or your friend."

Held, that this was calculated to mislead the jury and was also a reason for granting a new trial.

If objection to one or more portions of the judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but in such case an appellate court, to prevent a miscarriage of justice, may order a new trial as a matter of discretion.

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*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec, which, pursuant to the verdict of the jury, ordered judgment to be entered in favour of the plaintiff for $800 damages with costs.

The circumstances of the case are stated in the judgments now reported.

Alex. Taschereau K.C. and *Cannon,* for the appellant.

C. E. Dorion K.C. and *Alleyn Taschereau,* for the respondent.

GIROUARD J.—The appeal is allowed with costs in this court and in the Court of King's Bench, and a new trial is ordered, the costs of the former trial to follow the event. I concur for the reasons stated by Mr. Justice Davies.

DAVIES J.—This was an appeal from the judgment of the Court of King's Bench for Quebec (Cross J. dissenting) affirming the judgment of the Superior Court which on the findings of a jury in an action for libel directed judgment to be entered against defendant (appellant) for $800 damages and costs.

Many interesting questions were discussed at bar arising out of the facts, but in the view I take of the case, that a new trial should be granted, it is alike unnecessary and undesirable to refer to any question not bearing directly upon the granting of a new trial.

Amongst other libels charged against defendant was one of having published in his newspaper a statement that respondent Huard was a perjurer. The

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charge arose out of an affidavit made by Huard, in order to qualify himself as an alderman of Quebec,

that he possessed in the City of Quebec for his own use immovables worth $2,000 at least above his debts and that he had not acquired the said properties through fraud or collusion.

On the trial the appellant (defendant) had called into the witness-box a notary with whom he alleged the deed or conveyance to Huard, under which he pretended to qualify, had been deposited together with a certain counter letter executed by Huard to the vendor of the property limiting and qualifying his title and interest in the property conveyed and shewing as contended by appellant that Huard had really no beneficial interest in it, and that it was held by him collusively.

The notary produced the deed when called upon to do so, but declined to produce the counter letter on the ground that it was a confidential document deposited with him in his official capacity as notary, and that it was his privilege to decline to produce it.

The trial judge sustained his contention and held that the notary was justified in declining to produce the counter letter.

Subsequently when Huard was examined he said he had no objection to its production, but that he had not then the document to produce.

The result of the judge's ruling in favour of the notary's claim of privilege and Huard's statement that while he had no objection to produce it he had not the document in his possession or control was that the document was practically rejected as evidence and was not in evidence before the court or jury.

We are of the opinion that in ruling as he did the

learned judge erred and that the notary was bound when called upon under his subpœna to have produced the counter letter.

It was argued that the fact of the existence of this counter letter and also its substance was in evidence, and that the jury knew practically all that its production would prove.

I cannot accede for a moment to this argument. The jury did not and could not know, nor did nor could the trial judge know just what limitations this counter letter placed upon the deed to Huard, nor whether it afforded evidence that he did not hold the property for his own use, but did hold it collusively. What effect their production might have had upon the jury we are quite unable to say. Libel actions are peculiarly within their province to decide, and it is quite impossible for us to say that the practical rejection of such evidence did not substantially prejudice the defendant. On this ground therefore there should be a new trial.

While the judge's charge to the jury was not objected to as a whole, objection was taken to a particular part of it in which the judge told the jury that

> they should consider the case as if the charge of drunkenness had been made against themselves, their brother or their friend.

I cannot but think that this was an entirely wrong and false doctrine to lay down as to the proper functions of a jury. It was calculated to mislead their minds as to the manner and extent to which they should assess the damages or make their findings.

It is possible that if the learned judge's attention had been called to this language and its full meaning at the time, and objection taken to it he would have

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corrected the apparently misleading direction before the jury had retired or if they had already retired, before they had agreed upon their verdict, but no such objection was taken at the time.

This only goes to shew the imperative necessity of Courts of Appeal insisting, when asked to grant new trials as a matter of right, that only objections to particular statements made by the judge in his charge to the jury will be considered or given effect to when it is shewn that objection has been taken to them at a time when their misleading character can be corrected before the jury.

The appeal should be allowed and a new trial granted with costs in this court and in court of appeal, costs of trial court to abide the event.

IDINGTON J.—This is an action for libel in which appellant complains of misdirection of the learned trial judge in rejecting evidence and charging the jury.

I think the learned judge rightly rejected publications alleged to have provoked, and thereby mitigated, the damages claimed, because the evidence had failed to establish respondent's responsibility therefor.

Until such responsibility is shewn it is idle to claim pity or excuse for such a defendant as the appellant was.

Such a defence is not, as some seem to have treated it, an answer to the action. It only goes to mitigate damages, and he claiming the damages must be shewn to have provoked or inspired something which the jury might properly consider in assessing damages.

The rejection of the evidence of the *contre-lettre* is now conceded to have been erroneous, but it is

maintained that no substantial prejudice has been thereby occasioned.

The errors of the learned trial judge's charge are sought to be excused on the same ground.

Whatever might have been said in that regard as to the part of the charge directing the jury to look upon the accusations in question as if made against themselves, their brother or their friend (grave error as with great respect I submit it was) if it had been, as likely, a slip of the tongue, and standing alone in a charge otherwise unimpeachable, it cannot be entirely overlooked when we find it accompanied by a further charge upon one of the leading features of the case which must be held quite erroneous.

The respondent had been elected and to qualify himself as a property holder swore to a qualification which in law he was not entitled to rest upon for any such purpose.

He had a friend convey some property to him for the express purpose of qualifying him and gave the friend a *contre-lettre* whereby he and not the respondent was to get the fruits of the property and become entitled to a return of the property itself.

That was a thing the respondent did not venture to repeat or to rest upon when he was re-elected.

It may have been he had not, in so swearing, committed perjury. However, that was a question for the jury, but required from the judge the legal definition thereof, and full explanation.

But beyond and above all that the jury should have been told the respondent was not in law justified in taking such an oath for such a purpose.

The parties were entitled to have it explained to the jury fully, why on the one hand it might not be

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considered perjury in law, or on the other might have been so held. And when properly so directed the issue should have been left to the jury to draw their own conclusion from the facts.

Then, if giving him the benefit of any doubt, they should find the charge not proven perhaps (and certainly so if the surrounding facts so warranted it) they should have been further directed to consider whether or not the publication imported, not perjury, but merely false swearing, and that as written it would be so understood by the readers thereof. In the event of such a finding being possible, they should have been told to try the issue so raised.

Even if this secondary meaning was not open to the jury on the surrounding facts—as to which I say nothing but merely suggest it as a possibility—the true position of the respondent claiming damages in respect of such a charge made in relation to his reprehensible conduct in taking office by means of an unjustifiable oath should have been left to the jury to deal with as they saw fit.

They might have concluded on that score that under the circumstances he was not entitled to more than nominal damages, or alternatively might, moved by the presence, in evidence, of envenomed hate, and determined to teach journalists to use properly measured words in describing an enemy, have palliated his offence against society.

They were there to appreciate in this regard the true value of the reputation of the respondent.

It is impossible to say how much a correct appreciation of the law and excluded fact might have influenced them or how much that want of appreciation thereof may have substantially prejudiced the result,

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but I am driven to conclude that an accumulation of such grave errors must have produced some substantial injustice.

DUFF J. agreed with Davies J.

ANGLIN J.—The appeal in this case should in my opinion be allowed and a new trial ordered.

For what was, if untrue, a very gross libel upon the plaintiff charging perjury and drunkenness under most aggravating circumstances a jury condemned the defendant in $800 damages.

The defendant complains of the refusal of the learned trial judge to compel the production in evidence of a document which bore materially upon his plea of justification in regard to the charge of perjury. The alleged perjury consisted in taking a false oath of qualification as municipal councillor. The plaintiff had obtained a deed of a property from a friend to enable him to take the oath of qualification. He had given (probably concurrently) a *contre-lettre* to his friend, who retained possession of the property and collected the rents. The learned judge declined to compel the production of the latter document which was in the hands of a notary who was called as a witness. A claim of privilege asserted by the notary was upheld. Evidence was given of what were alleged to be the contents of the *contre-lettre*. This evidence, in my opinion, was inadmissible. The ruling that the *contre-lettre* itself was privileged from production was, I think, erroneous and in its absence it may well be that the defendant's plea of justification upon the charge of perjury was not fairly or fully presented to the jury. The case having gone to the jury upon both charges and damages having been awarded

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in a lump sum it is impossible to sever them. Neither can we say that their amount would have been the same if the *contre-lettre* itself had been before the jury.

The defendant also complains of serious misdirection by the learned trial judge. As to this, however, he is in the difficulty that no objection to the charge was taken at the trial, although formal objections in writing were filed on the morning following the verdict. As I read former article 473 C.P.Q., although the judge was only required to reduce to writing the portion of his charge to which objection had been taken (making mention of the objection) as soon as conveniently possible, it was intended that he should have the opportunity of doing so immediately (*sur-le-champ*). Moreover, this article was found under the caption "proceedings before the jury." I therefore think it clear that under it the party objecting was required to state his objections to the trial judge before verdict. Apart from the provisions of this article the manifest impropriety and inconvenience of any other course would seem to render this imperative. Although it repeals article 473, the Quebec statute, 8 Edw. VII. ch. 77, sec. 2, does not, in my opinion, alter the practice in regard to the necessity for taking objections to the charge before verdict. It follows that the appellant cannot, on the ground of misdirection, claim a new trial as of right.

But the court may, nevertheless, where the misdirection has been serious and is likely to have resulted in a miscarriage of justice, as a matter of discretion grant a new trial. The court of appeal upon technical grounds held that the charge of the learned judge was not before it. We are not therefore embarrassed by any exercise of discretion by that tri-

bunal. The charge having been procured and placed before the court by the respondent, I think it may properly, as against him, be treated as part of the record, though not taken in shorthand and filed as provided for by the statute of 1908.

The principal misdirection to which our attention has been called consists in two statements, (*a*) that as a matter of law the plaintiff, Huard, was legally qualified; and (*b*), that, in dealing with the direct charge of drunkenness and the insinuation that the defendant had visited improper places, the jury should treat the case as if these charges had been made against one of themselves, a brother, or a friend.

In effect, at all events in the circumstances of this case, the former statement amounted to a withdrawal from the jury of the defendant's plea of justification in answer to the charge of perjury. In my opinion it was quite erroneous and it is not possible to say that it did not result in a miscarriage of justice.

The other passage objected to is entirely out of harmony with the ideas which have always obtained as to the manner in which a jury should deal with cases presented for their consideration.

The charge read as a whole does not qualify or modify the effect of either of these objectionable statements.

I think, therefore, that this court should, upon these grounds, in the exercise of its discretion, as well as because of the erroneous ruling in regard to the production of the *contre-lettre,* direct a new trial.

Appeal allowed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondent: *Lavergne & Taschereau.*