pay the costs of the suit, as their proceedings appear to have been sharp, as well as wrong in point of law. But having reference to the evidence before me of the comparative convenience of the rival localities; to the division of opinion amongst the ratepayers, as testified by the votes on each side at the meetings which have taken place; to what occurred at the general meeting last January; and to the fact that the money has actually been expended,—I think that before ordering repayment of the money, I should give the Trustees an opportunity, if they desire it, of ascertaining whether under all the circumstances a majority of the ratepayers, at a special meeting properly called for the purpose, may not be disposed to adopt once more the old site, and to regard the costs of the suit as a sufficient punishment for the wrong which the defendants have committed. I presume the County Council in that case would pass the necessary by-law, as their only object has evidently been to adopt the site which the people of the locality prefer.

Should the selection of the plaintiff's lot be adhered to, he must do what is equitable towards the defendants, as the price of getting relief in this Court. Part of the consideration he was to receive for his lot is the old site of the School; and he should be content on getting it, either to pay the defendants for the building which they have put up, according to what it is worth, not for a School, but for any other purpose it may be useful for; or to allow the defendants to have the lot at its fair value exclusive of their building. But on this point I will hear the parties, in my Chambers or otherwise, if necessary. Though the defendants have not acted properly, it would be contrary to the rule of this Court to punish them more severely than justice to others renders necessary.

The delay in filing the bill was relied on as a bar to relief; but I think no such delay occurred as had that effect.

It was also urged, that the bill was not such as a ratepayer could file. Many bills by ratepayers have been entertained. I have not thought it proper to delay my judgment for the purpose of considering whether the principle of those cases is strictly applicable to a case of this kind, in view of the various enactments in the School Acts, and of the numerous English and Canadian authorities on like questions; as the objection was not taken when the demurrer to the bill was argued before the Chancellor; and, though the objection was taken before me at Brantford, it was not argued, or any reference to authorities made.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., *Barrister-at-Law, Reporter to the Court.)*

IN RE RUMBLE v. WILSON.

Contract or tort—Jurisdiction.

A plaint charging that the defendant hired of plaintiff a horse, &c., to go from A. to B. and back, and agreed to take good care of same as a bailee, &c., with an averment that the defendant so carelessly, &c., drove said horse, &c., that horse was killed, &c., is a plaint in contract and not in tort.

[Chambers, March 10, 1869.]

Summons issued on 29th January last, calling on parties to shew cause why a writ of prohibition should not be issued after judgment pronounced. The statement of the cause of action was as follows:

"For that the defendant hired of plaintiff a horse, harness, and buggy, in October, 1868, to go from Maple Village to Pine Grove and back, and undertook and agreed to take good care of the same as a bailee, and the plaintiff alleges that the law required him so to do, and to return the said property in safety to him again. And the plaintiff further states that the said Albert Wilson so carelessly drove and used the said property that the said horse, harness, and buggy, were not returned in safety to him, nor were the same used with care, but on the contrary with negligence and carelessness, in consequence of which the horse was killed, the buggy was broken to pieces, and the harness broken, whereby further the plaintiff saith he hath suffered damage to the amount of $85" The cause was tried before a jury who found for the plaintiff.

It was said that a new trial was moved for but refused, and that this was the second action that had been brought, the plaintiff having been non-suited in the first because he happened unavoidably not to be present; and that no question of want of jurisdiction was ever raised.

Boyd shewed cause, and contended that the plaint was not in tort, but in contract: *Mayor of London* v. *Cox*, L. R. 2 E. & I. app. 280; *Morris* v. *Cameron*, 12 U. C. C. P. 422; *Jennings* v. *Rundell*, 8 T. R. 335; *Jones* on Bailments, pp. 69 to 68; *Story* on Bailments, 411; *Lloyd's* C. C. Prac. 221; *Noys'* Maxims, (Bythewood's ed. 791.) If objection had been taken at the trial the particulars could have been amended.

F. Wright, in support of the application, argued that the Division Courts Act recognizes the distinction between contracts and torts, and that the question was whether the action was maintainable without reference to any contract, and is founded on contract though framed in tort: *Bullen & Leake*, 102, notes 2nd ed., 121 3rd ed., citing *Pozzi* v. *Shipton*, 8 A. & E. 963; *Marshall* v. *York &c., R. W. Co.*, 11 C. B. 655; *Tatton* v. *G. W. R. Co.*, 2 E. & E. 844; *Legge* v. *Tucker*, 1 H. & N. 500; *Ansell* v. *Waterhouse*, 6 M. & S. 385; and in such a case the Judge should look at the actual facts as well as at the plaint and particulars: *In re Miron* v. *McCabe*, 4 Prac. Rep. 171.

A. WILSON, J.—In *Jennings* v. *Rundall* it was decided that a cause of action founded on contract cannot be declared on as a tort so as to exclude the plea of infancy; that to such a tort infancy may be pleaded because it is founded on contract. In that case the defendant was charged with immoderately driving the plaintiff's horse, by means of which it was injured. The count was, "that the plaintiff on, &c., at the request of the defendant, delivered to the defendant a certain horse of the plaintiffs, to be moderately ridden, yet defendant contriving and maliciously intending, &c., wrongfully and injuriously rode the horse, &c."

The authorities to which I have been referred, shew that the plaintiff could not have proved his case without first of all proving a contract for the particular act of hiring. In this respect an action against a common carrier differs from ordinary bailments, for against the common carrier there is a special customary common law obliga-