

Com. Law Cham.]

IN RE. HUNTER V. WILSON—SHARP V. MATHEWS.

[Insolv. Case.]

IN RE RUMBLE V. WILSON.

Contract or tort—Jurisdiction.

A plaintiff 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 agreement that the defendant so carelessly, &c., drove said horse, &c., that horse was killed, &c., is a plaintiff 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 plaintiff was not in tort, but in contract: *Mayer of London v. Cox*, L. R. 2 E. & J. 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. Skipton*, 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 plaintiff and particulars: *In re Miron v. McCabe*, 4 Prac. Rep. 171.

A. WILSON, J.—In *Jennings v. Rundell* 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 obligation, which renders him liable upon his duty independently of contract altogether.

In this case, suppose there had been two persons who had hired the horse, and only one had been sued, could he not have pleaded the non-joinder of the other? I think he could.

The plaintiff or particulars here shew that the defendant "undertook and agreed to take good care, &c." which is certainly a contract: *Chitty on Pleading* (6th ed. 87.)

The fact that the defendant got a non-suit on this same complaint, which he could not properly have got if the court had no jurisdiction, and the fact that he moved for a new trial—which he could not have got either—shew, as the fact is alleged, that the defendant never set up the want of jurisdiction, and therefore that no want of jurisdiction ever appeared by the evidence, and none, I think, appear on the face of the proceedings, but the contrary.

I have delayed this in consequence of the pressure of term business, and not for any difficulty in coming to a conclusion, for the opinion I express now is the same as that which I stated during the argument.

Summons discharged without costs.

INSOLVENCY CASES.

SHARP & SECORD V. ROBERT MATHEWS.

Insolvent Act 1864, sec. 3, cl. e. and sub-sec. 7—Writ of attachment, Grounds for—Affidavit—Form of, and who can make.

The mere intention on the part of a debtor to dispose of his property, and the apprehension of his sole creditor that he will not then, although perfectly able, and owing no one else, pay the creditor his debt, does not bring the debtor within sec. 3, clause c., of the Insolvent Act, 1864.

In entitling affidavits for an attachment under the Insolvent Act, 1864, form F. should be followed.

Sec. 3, ss. 7, is complied with, although the creditor or his agent who swears to the debt is also one of the two persons testifying to the facts and circumstances relied on as constituting insolvency.

[Chambers, Jan. 26, 29, 1869.]

On the 6th of January, the Judge of the County Court of the county of Wentworth made an order for a writ of attachment to issue out of that Court against the above named defendant, as an insolvent, at the suit of the above plaintiffs. On the 7th of January the writ was served. On the 9th of January the defendant filed his petition in the County Court praying that the writ of attachment might be set aside. The petition was accompanied with the affidavits of the defendant, and of two other persons, testifying to the *bona fides* of the transaction, which the plaintiffs assailed as exposing the defendant to