

warehouse in the sales of job lots. This was also contradicted by the defendants, but the books to some extent corroborated Owens. None of these facts appeared to have been submitted to the defendants' solicitor or to Mr. Corley. There was also a great conflict of evidence as to the actual value of the goods.

In view of the very contradictory character of the evidence, it should have been left to the jury, as far as respects the search warrant, to find whether the defendants did "lay all the facts of their case fairly before counsel, and whether they acted bona fide upon the advice given" (*Ravenga v. McIntosh*, 2 B. & C. 693); and also whether the goods were in fact sold at less than their value. If there are facts in dispute, the jury must pass upon these facts before the Court can say whether reasonable and probable cause is or is not absent: *Still v. Hastings*, 13 O. L. R. 322, where the leading authorities are reviewed.

There was also evidence that, before the information for search warrant, the defendant Anderson visited the plaintiffs' premises and saw the goods in question, some of which were exposed for sale and others were in boxes as sent from the defendants' warehouse, and that no attempt was made to secrete any of the goods or to prevent the defendants from examining them. This important fact also does not appear to have been submitted to the solicitor or Mr. Corley.

Issuing a search warrant is not a mere ministerial act, but a judicial act of the justice of the peace: *Rex v. Kehr*, 11 O. L. R. 517.

An action will lie for wrongfully issuing and executing a search warrant: see cases cited in *Stephen on Malicious Prosecution*, pp. 7, 8, 24, and *Clerk & Lindsell's Law of Torts*, 4th ed., pp. 642-3; and particularly *Elsee v. Smith*, 1 D. & R. 97; *Granger v. Hill*, 4 Bing. N. C. 212; *Holt v. Evered*, 17 Q. B. D. 338; *Quartz Hill v. Eyre*, 11 Q. B. D. 674.

Appeal dismissed as to claims for malicious prosecution; appeal of plaintiff Sarah R. Willinsky allowed in respect of her claim for damages arising out of the issue and execution of the search warrant, and a new trial of that claim directed. No costs of the former trial or of this appeal.

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