

sum was paid to the defendant; the sale being made upon the representation that the car had not been run 1,000 miles. This statement was alleged by the plaintiff to be untrue, and he refused to accept delivery of the automobile; and now sued to recover the \$775 paid.

If this was an action arising out of contract, express or implied, the County Court had jurisdiction: County Courts Act, R.S.O. 1914 ch. 59, sec. 22 (1). When the purchaser paid for the automobile, there was, no doubt, an express contract to deliver the automobile in accordance with the stipulations of the contract, and there was an implied contract that if, when delivery was tendered, the automobile was not found to be as contracted for, the vendor would refund the price. The purchaser was not driven to an action based on misrepresentation nor to an action to rescind the contract by reason of a misrepresentation.

No doubt, the plaintiff might, if he had so chosen, have brought an action *ex delicto*, but he had also a right of action founded upon contract. His claim was that he bought a certain thing and paid for it, but did not get it. The test laid down in similar cases is, that, where it is essential to allege a contract, the action is founded upon a contract; where it is essential to allege a tort, then the action is founded upon a tort. See *Taylor v. Manchester Sheffield and Lincolnshire R. W. Co.*, [1895] 1 Q.B. 134, and *Kelly v. Metropolitan R. W. Co.*, [1895] 1 Q.B. 944.

Motion dismissed with costs to the plaintiff in any event.

MIDDLETON, J., IN CHAMBERS.

JUNE 19TH, 1916.

\*REX v. GRAND TRUNK R. W. CO.

*Municipal Corporations—Convictions for Offences against Municipal By-law—Railway—Emission of Smoke from Locomotive Engine in Round-house through Ventilating Flue—Municipal Act, R.S.O. 1914 ch. 192, sec. 400 (45)—“Flue, Stack or Chimney” —Offences against Regulation of Dominion Board of Railway Commissioners—Amendment Refused—One Offence not Committed by Defendant Railway Company—Quashing Convictions—Costs.*

Motion by the defendant company to quash its conviction by the Police Magistrate for the City of Windsor for that the

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