FIRST DIVISIONAL COURT. MARCH 26TH, 1919.

COTTRELL v. GALLAGHER.

Negligence—Collision of Vehicles in Highway—Injury to Plaintiff Driving Horse and Waggon by Defendant Driving Automobile—Evidence—Onus—Presumption—Motor Vehicles Act, sec. 23—Verdict of Jury—Appeal—Testimony of Witness at Previous Trial of Defendant for Criminal Negligence—Decease of Witness—Inadmissibility of Transcript of Evidence—Previous Proceeding not between same Parties or Privies—No Opportunity for Cross-examination by Plaintiff—Quantum of Damages.

Appeal by the defendant from the judgment of LATCHFORD, J., upon the verdict of a jury, in favour of the plaintiff, for the recovery of $975 and costs in an action for damages arising from an injury sustained by the plaintiff upon a highway in the city of Toronto. The plaintiff was driving a horse and waggon upon the highway, when, as he alleged, the defendant, who was driving an automobile, approached the plaintiff from the rear, and, without using proper care and without warning, ran into the plaintiff, who was thrown to the ground and seriously injured.

The defendant had been previously tried for criminal negligence and acquitted. A copy of the stenographer's notes of the evidence given at the trial by one Nicholson, since deceased, was tendered as evidence by the defendant, but the Judge presiding at the trial of this action refused to admit it.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Frank Arnoldi, K.C., for the defendant, the appellant, argued that the trial Judge erred in not allowing Nicholson's evidence to be read, as the issues in the criminal and civil cases were practically the same, referring to Phipson's Law of Evidence, 5th ed., p. 416, and to Town of Walkerton v. Erdman (1894), 23 Can. S.C.R. 352. He also argued that on the evidence at the trial the verdict should have been for the defendant, and that in any case the damages were excessive.

A. G. Slaght, for the plaintiff, contra.

MEREDITH, C.J.O., delivering the judgment of the Court at the conclusion of the argument, said that counsel for the appellant had failed to satisfy the Court that the verdict was one that should be set aside, having regard to the principles upon which the Courts now act in dealing with the findings of a jury.

There was evidence which, if believed, warranted the con-