The Ontario Weekly Notes

CASES DETERMINED IN THE COURT OF APPEAL AND IN THE HIGH COURT OF JUSTICE FOR ONTARIO, SEPTEMBER, 1909, TO SEPTEMBER, 1910.

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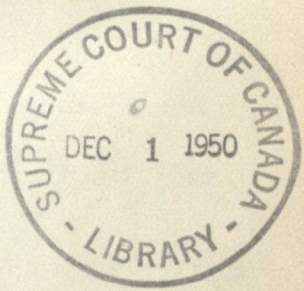

VOL. I.

Editor:

Edward B. Brown, K.C.

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THE CARSWELL CO., LIMITED
TORONTO

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COURT OF APPEAL.

SEPTEMBER 20TH, 1909.

FEWINGS v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Tracks — Negligence—Contributory Negligence—Findings of Jury.

An appeal by the defendants from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the plaintiff.

The action was for compensation for injuries received by the plaintiff through coming into contact with a locomotive of the defendants, where their railway crosses Richmond street in the city of London. There were five tracks at the intersection, and the defendants had installed gates and placed a watchman there for the purpose of protection at the crossing. This, it appeared, was done on the defendants' own motion and without any direction from the Railway Committee or the Board of Railway Commissioners. The gates were long arms on each side of the railway tracks and extending across the roadway. There were also short arms or extensions of the long arms, which crossed the sidewalk at every corner except the south-east corner, at which the watchman was stationed. The levers by which he operated the shutting and opening of the gates (by lowering and raising the arms) were placed on the boulevard west of the sidewalk at this corner, and the watchman's shanty was on the east side of the sidewalk. It was the watchman's duty when a train was approaching to lower the arms so as to prevent traffic over the crossing until the train had passed. The plaintiff, on reaching the corner where the watchman's shanty was situate, proceeded to walk slowly (she said) across the tracks. Having just glanced at the watchman's shanty and seen no one there, she looked for the watchman, but did not see him. She then turned her eyes towards the station and did not look towards the west, but continued on, keeping on the east side of the crossing. She said she did hear a whistle or the ringing of an

engine bell. The next thing she could remember was something happening to her, and she was picked up in an injured condition. As a matter of fact she had come into collision with the engine of a train which was approaching the station from the west. She had not got in front of it, but was struck by the buffer beam of the engine.

Several grounds of negligence were alleged.

The following were the questions submitted and the jury's answers:—

1. Were the defendants guilty of any negligence which caused the injuries to the plaintiff? A. Yes.

2. If they were, in what did their negligence consist? A. In not having the arm over the south-east sidewalk.

3. Was the plaintiff guilty of any negligence? A. Yes.

4. If she was, in what did her negligence consist? A. She should have used more precautions to protect herself.

5. If the plaintiff was guilty of such negligence, did her negligence so contribute to the happening of the accident and her injuries that but for her negligence the accident would not have happened? A. Yes.

6. Could the engineer of the Windsor train, after he became aware that the plaintiff was in a position of danger, by the exercise of reasonable care have prevented the accident? A. No.

7. Ought the engineer, if he had exercised reasonable care, to have sooner seen the danger to the plaintiff and the necessity of bringing his train to a stop if the accident to the plaintiff was to be avoided? A. Yes.

8. If the answer to question 7 is in the affirmative, could the engineer by the exercise of reasonable care have prevented the accident if he had acted more promptly? A. Yes.

9. What was the position of the gates when the plaintiff came to the tracks and when she was passing over them? A. They were down, except the arm on the south side over the last sidewalk.

10. At what sum do you assess the plaintiff's damages? A. $1,500.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

D. L. McCarthy, K.C., for the defendants.

G. H. Watson, K.C., for the plaintiff.

THE COURT held that, upon the findings of the jury, the judgment should have been entered for the defendants, and therefore allowed the appeal and dismissed the action.

Per OSLER, J.A.:—The case in truth is one in which, taking all the findings together, the negligence of both parties was concurrent and continuous down to the moment of the accident, or in which there has been as much want of reasonable care on the plaintiff's as on the defendants' part. In other words, the proximate cause of the injury has been the negligence as well of the plaintiff as of the defendants. Where that is the case, the plaintiff is not entitled to recover. In pari delicto potior est conditio defendentis.

I refer to The Bernina, 12 P. D. 58, 89; Waklyn v. London and South Western R. W. Co., 12 App. Cas. 41, per Lord Halsbury and Lord Watson, at pp. 45, 46; London Street R. W. Co. v. Brown, 31 S. C. R. 642, 651-2, per Davies, J.; Salmond on the Law of Torts (1907), pp. 35 et seq.; Pollock on Torts, 8th ed., pp. 459, 460.

SEPTEMBER 20TH, 1909.

McKEOWN v. TORONTO R. W. CO.

Fatal Accidents Act—Death of Child of Four Years by Negligence of Defendants—Pecuniary Loss of Parent—Reasonable Expectation of Benefit—Damages.

The plaintiff sued under the Fatal Accidents Act to recover damages for the death of his son, aged 4 years and 3 months, occasioned by the negligence of the defendants, and at the trial recovered judgment for $300. The judgment was affirmed by a Divisional Court, and the defendants obtained leave to appeal to the Court of Appeal, on the sole question whether there could be a recovery of damages, the child being of such tender age, and no special circumstances touching the question of the right of damages appearing or being found by the jury.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., and MAGEE, J.

W. Nesbitt, K.C., and M. Lockhart Gordon, for the defendants.

J. McGregor, for the plaintiff.

OSLER, J.A.:—It is the extreme youth of the child . . . which alone causes hesitation in maintaining the plaintiff's right to recover. The damages recoverable under the Act cannot be founded on sentimental considerations, but are to be given in respect of some pecuniary loss only, and that not merely nominal, caused by the

death. Here the child was an infant of 4 years of age, healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age can be said to have. Was its death a damage to the parent within the meaning of the Act? Having regard to the position in life of the latter, I cannot hold that in point of law it was not, or that, in the case of a child of that description, damages to be estimated by such considerations as the decided cases warrant may not be sustained. The question is for the jury, upon the evidence. It is settled that pecuniary benefit or advantage need not have been actually derived by the beneficiary previous to the death, and therefore the then present inability of the deceased to confer such benefit or advantage is not conclusive against the right to recover. The probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration. . .

I am on the whole of opinion that on the evidence a recovery is warranted by the rules or principles established in Pym v. Great Northern R. W. Co., 2 B. & S. 759, and in such cases as Franklin v. South Eastern R. W. Co., 3 H. & N. 211; Dalton v. South Eastern R. W. Co., 4 C. B. N. S. 296; Duckworth v. Johnson, 4 H. & N. 653; Wolfe v. Great Northern R. W. Co., 26 L. R. Ir. 548; Blackley v. Toronto R. W. Co., 27 A. R. 44n.; and others. The cases of Renwick v. Galt, etc., R. W. Co., 12 O. L. R. 35, 37, Clark v. London General Omnibus Co., [1906] 2 K. B. 645, and Jackson v. Watson, [1909] 2 K. B. 193, may also be referred to.

The damages, though they err on the side of liberality, as they usually and perhaps inevitably do in these cases, not being capable of being estimated with exactitude, are not so large as to invite interference; and I would therefore affirm the judgment and dismiss the appeal.

GARROW, J.A.:— . . . If it appeared that the infant was a cripple or an imbecile, or if its age was so tender that there could be no reasonable evidence given of its mental or physical capacity or condition, it would be otherwise. But in the present case the evidence clearly discloses that the infant killed was a bright and capable boy, both mentally and physically; and I therefore agree—reluctantly, I admit—that there was evidence which could not have been withdrawn from the jury; and the judgment must therefore be affirmed.

MAGEE, J., concurred.

MOSS, C.J.O., and MACLAREN, J.A., dissented, for reasons stated at length by the former.

SEPTEMBER 20TH, 1909.

RE TORONTO R. W. CO. AND CITY OF TORONTO.

Street Railway—Contract with Municipal Corporation—Construction of Lines of Railway upon Streets of City—Determination by Street Railway Company—Order in Council and Decision of Judicial Committee—55 Vict. ch. 99 (O.)—8 Edw. VII. ch. 112 (O.)

Appeal by the city corporation from a decision or order of the Ontario Railway and Municipal Board. The order was pronounced after hearing the parties upon an application made by the company, upon notice to the corporation, complaining that the corporation engineer refused to approve of plans of a line or lines of railway which the company proposed to construct upon and along certain streets, and praying for an order that the engineer be required to state his objections, if any, and that, in the absence of valid objections, the plans be taken as approved and the corporation restrained from interfering with the construction of the railway in accordance with the plans. The order found and declared: (1) that the company had the right to construct their railway upon certain streets therein specified; (2) that the corporation denied the right of the company and prevented the company from constructing their railway upon the said streets, and thereby committed a breach of the agreement between the company and the corporation; (3) that the corporation be enjoined from doing any acts to prevent the applicants from constructing lines of railway upon the said streets as set forth in the plans.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

W. E. Middleton, K.C., and W. Johnston, for the city corporation.

W. Nesbitt, K.C., and D. L. McCarthy, K.C., for the company.

MOSS, C.J.O., delivering the judgment of the Court, said that the question of law arising was in all substantial respects the same as that dealt with by the Judicial Committee of the Privy Council in City of Toronto v. Toronto R. W. Co., [1907] A. C. 315. . . . The Judicial Committee decided that, subject to clauses 14 and 17 of the conditions, it was for the company, and not for the city engineer with the approval of the city council, to determine

what new lines should be laid down on streets within the city as existing at the date of the agreement, and what routes should be adopted by the company. These conclusions were embodied in an order in council baring date the 7th May, 1907. The streets in question in the present proceeding are within the city as existing at the date of the agreement; and the decision of the Judicial Committee and the order in council are binding upon all concerned, unless they are deprived of their effect by the enactment of sec. 1 of the Act 8 Edw. VII. ch. 112*, which confessedly was passed by the Ontario Legislature upon the petition of the corporation in view of the decision of the Judicial Committee. It is urged on behalf of the corporation that it manifestly appears from their Lordships' reasons that their opinion as to the true construction and meaning of the agreement was based entirely upon their reading of the Act 55 Vict. ch. 99 (O.), and especially of sec. 4; and it is contended that the result is that this Court is now at liberty to revert to the view entertained by it (10 O. L. R. 657) and the majority of the Judges of the Supreme Court (37 S. C. R. 430). . . . The Railway and Municipal Board in dealing with the questions before it treated the Act 55 Vict. ch. 99 as a mere incorporating and invalidating Act, and proceeded to try the rights of the parties as they existed under the agreement alone, unaffected except as to validation by the Act; and, having regard to the plain object and intent of that Act, as well as to the declaration of sec. 1 of 8 Edw. VII. ch. 112, there can be no question as to the propriety of dealing with the agreement in that light. The conclusion of the Board is in harmony with what has been determined by the Judicial Committee. . . . After careful perusal and consideration of their Lordships' reasons, I . . am unable to conclude that their opinion as expressed as to the true meaning of the agreement was not, at least in part, formed upon a consideration of the language and terms of the agreement itself. . . . Nothing remains but to follow the decision embodied in the order in council.

Appeal dismissed with costs.

*1. Notwithstanding anything contained in the Act 55 Vict. ch. 99, and intituled an Act to Incorporate the Toronto Railway Company, and to confirm the agreement between the corporation of the City of Toronto and George W. Kiely . . . ; and notwithstanding any judicial decision interpreting the effect of the said Act and the said agreement, it is hereby declared that it is and always has been the true meaning and intent of the said Act that the rights retained by and secured to the corporation of the city of Toronto by the said agreement as to the control and management of the streets of the said city, and as to establishing and laying down new lines of railway, and as to extending the street car service upon the streets of the said city, as may be from time to time recommended by the city engineer and approved by the city council, have not been and are not affected by the said Act, but said rights remain and are as set out in the said agreement scheduled to the said Act."

SEPTEMBER 20TH, 1909.

O'BRIEN v. MICHIGAN CENTRAL R. R. CO.

Master and Servant—Injury to Servant — Negligence — Lump of Coal Falling from Tender of Train—Res Ipsa Loquitur —Evidence—Findings of Trial Judge—Release—Invalidity—Absence of Independent Advice—Misunderstanding.

Appeal by the defendants from the judgment of CLUTE, J., who tried the action without a jury.

The action was brought to recover damages for an injury caused to the plaintiff while in the defendants' employment as a section-man. When he was working upon the railway track a train from the east came along and a piece of coal fell from the tender and struck him on the ankle, which was thereby fractured.

The defendants pleaded not guilty by statute; that notice of injury had not been given within the time limited by the Workmen's Compensation Act; and a release after action.

CLUTE, J., held that, although the notice of action was too late, there was reasonable excuse for not giving it in time, and that the defendants had not been prejudiced; that the release had been obtained under circumstances which, having regard to the physical and mental condition of the plaintiff, rendered it inequitable that it should be allowed to stand; and that the evidence was sufficient to support the plaintiffs' claim under the Workmen's Compensation Act; and he awarded $1,500 as damages, upon which the $300 paid when the release was obtained was to be credited.

The defendant did not appeal upon the question of the notice of action, but objected to the findings of the trial Judge upon the other questions.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

I. F. Hellmuth, K.C., and E. C. Cattanach, for the defendants.

J. M. Godfrey and W. A. Henderson, for the plaintiff.

GARROW, J.A. (delivering the judgment of the Court) said, as to the release, that it was obvious that in determining this issue much would depend upon the mental and physical characteristics of the plaintiff as displayed in the witness box. It may not be in the usual sense a question of credibility, that is, the bald question whether the plaintiff or the very respectable witnesses called by the defence should be believed, but rather whether the plaintiff himself, who had not

been protected by independent advice, could be believed in stating that, no matter what was explained, he believed from what was said that what he was releasing, and all he intended to release, was a claim to wages during his compulsory idleness—all parties, headed by the doctor, apparently being under the impression that at the end of the period for which he was being paid he would be well and back at work. . . .

The evidence of negligence is . . . meagre . . . but it sufficiently appears, I think, that the coal was . . . unnecessarily piled in the tender, above the sides, in such quantity and manner that the rapid motion of the train could and did shake "down" the "chunk" which, falling upon the corner, flew off with dangerous force and struck the plaintiff. Counsel for the defendants contended that the maxim res ipsa loquitur has no application in cases of negligence alleged by the servant against the master, and relied upon the remarks to be found in Beven on Negligence, 3rd ed., pp. 129, 130. But what is there said, taking it altogether, only amounts to this, that liability does not arise from mere proof of the accident. . . . As I understand it, the application of the maxim, which after all is a mere phrase and not a rule of law, never dispenses with any necessary proof, but is only intended as a guide to the point in the evidence at which the burden of proof is shifted. Negligence consists of two elements, the burden of proving both of which originally rests upon the plaintiff, namely, the duty to take care and its breach. The maxim has nothing to do with the former; and in the case of the latter only determines that when the plaintiff has proved the duty and also a certain condition of things causing or conducing to the injury complained of, he has proved enough to call for explanation by the defendant—in other words, the burden of proof is shifted. So understanding the matter, I see no good reason why the maxim is not as applicable in such cases as this as it is in any other case of negligence. . . .

[Reference to Smith v. Baker, [1891] A. C. at p. 335; Scott v. London Dock Co., 3 H. & C. 596, 601.]

The unexplained fall of the coal, under the circumstances stated, is in itself, in my opinion, evidence from which an inference might well be drawn that those in charge or control of the locomotive (see sub-sec. 5 of sec. 3 of the Workmen's Compensation Act) were negligent in their mode of using it by piling or permitting it to be piled upon the tender so high and unprotected that chunks of it could be hurled by the necessary motion of the train with such force as to break a man's leg 15 or 20 feet away. The plaintiff's evidence . . . was uncontradicted. . . . Nor was any evidence whatever given by the defendants in explanation or excuse for such a

method of placing the coal in the tender. . . . Upon the whole I am of the opinion that there was not only some evidence of negligence, but quite enough to justify the inference drawn by Clute, J. See the very similar case of Gulf Colorado and Sant Fe R. Co. v. Wood, 63 S. W. Repr. 164, and Union Pacific R. Co. v. Erickson, 29 L. R. A. 137.

Appeal dismissed with costs.

MOSS, C.J.O., IN CHAMBERS. SEPTEMBER 20TH, 1909.

SEMI-READY LIMITED v. TEW.

Appeal to Court of Appeal — Leave to Appeal from Order of a Divisional Court—Amount Involved—Costs—Special Circumstances—Leave Refused on Undertaking of Defendant.

Motion by the plaintiffs for leave to appeal from the judgment of a Divisional Court, 19 O. L. R. 227.

George Kerr, for the plaintiffs.

G. M. Clark, for the defendant.

MOSS, C.J.O.:—I delayed disposing of this application at Mr. Kerr's request until I had an opportunity of conferring with the Chancellor, who tried the case.

The plaintiffs ask for leave to appeal from a judgment of a Divisional Court affirming the Chancellor's judgment.

The action is for a declaration that the plaintiffs are entitled to rank under the Assignments and Preferences Act, upon the estate of one Hallman, of which the defendant is the assignee appointed under the Act, for a preferential claim for rent and taxes, amounting in all to $978.46.

It is not now in dispute that if the plaintiffs were entitled to any sum they were entitled to $388.76, but, owing to some confusion in the figures, to which the form of the claim filed by the plaintiffs with the defendant contributed, it seems to have been thought at the trial that the proper amount was $322.10; and the learned Chancellor dismissed the action with costs upon an undertaking that the defendant would allow the plaintiffs to rank on the estate for a preferential lien to that amount.

In the Divisional Court the error seems to have been discovered, but was not rectified by the formal order dismissing the plaintiffs' appeal.

The defendant, however, admits that the proper sum is $388.76, and undertakes to allow that sum as a preferential claim. This reduces the amount in controversy in the proposed appeal to the sum of $589.80 and the costs, if they should be treated in any way as an element in considering whether there are special reasons for treating the case as exceptional.

With regard to the costs, there appear to be a number of reasons which might fairly influence the learned Chancellor in dealing with them as he did. And the Divisional Court, which was fully alive to the error as to the amount, having treated that as not affording any sufficient reason for interfering, and being satisfied on other grounds with the award of costs against the plaintiffs, it would require very special grounds to justify a further appeal from the discretion virtually twice exercised with regard to the disposition of the costs.

As to the remainder of the claim, even if I was more inclined than I am, as at present advised, to doubt the propriety of the decision with regard to it, I would not feel at liberty to treat that as a sufficient ground for allowing a further appeal where the amount involved is so considerably less than the statutory sum.

So far as the matter turned on questions of fact, it cannot be said that there is not evidence to support the concurrent findings of the two tribunals; and, on the face of these findings, I do not think there is really any question of law involved.

The order I make is that, upon the defendant undertaking to allow the amount of the plaintiffs' preferential claim at $388.76, the motion is dismissed, but under the circumstances without costs.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. SEPTEMBER 7TH, 1909.

WOODBURN MILLING CO. v. GRAND TRUNK R. W. CO.

Railway—Animal Killed on Track—Agreement for Use of Siding—Construction—Protection of Railway from Animals—Negligence—Leaving Gate Open—Duty of Railway Company—Implication of Terms in Contract.

The plaintiffs' claim was for the value of a horse killed upon the defendants' railway, owing, as alleged, to the negligence of the defendants.

The action was brought in the County Court of Middlesex, and was tried with a jury, whose finding was that the horse was killed

by the negligence of the defendants' servants in "leaving open the gate across the switch line leading to the plaintiffs' mill."

MACBETH, Co.C.J., dismissed the action, holding that the defendants were protected against any such liability for damage to animals of the plaintiffs by clause 10 of a special agreement between the parties: "The contractor (plaintiffs) shall protect the railway of the company from cattle and other animals escaping thereupon from such portion of the said siding as may be outside of the lands of the company . . ."

It appeared from the agreement that the defendants owned the siding, and that the plaintiffs asked the defendants to allow them to use it. The agreement embodied the terms upon which the user was permitted.

The plaintiffs appealed to a Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.)

J. C. Elliott, for the plaintiffs.

W. E. Foster, for the defendants.

RIDDELL, J., was of opinion that clause 10 meant that the plaintiffs should keep animals from escaping from that part of their land occupied by the siding to the property of the defendants. The object was plain; the defendants desired to be secured against animals coming upon their railway; that object could only be attained by keeping animals off the railway, which the plaintiffs agreed to do. The defendants owed no duty to the plaintiffs to keep their animals away from the line of the railway; and the placing of the gate by the defendants, their custom to have it closed from time to time, and the complaints of the plaintiffs that it had been found open after being used by some of the defendants' crews, could not create such a duty: Coggs v. Bernard, 1 Sm. L. C. (6th ed.) 177; Skelton v. London and North Western R. W. Co., L. R. 2 C. P. 631, 636; Soulsby v. City of Toronto, 15 O. L. R. 13. The opening of the gate was necessary for the common business of the plaintiffs and defendants, and the non-closing was a neglect to perform a voluntary act. "There is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody:" Daniels v. Noxon, 17 A. R. 206, 211; Thomas v. Quartermaine, 18 Q. B. D. 685, 694; Le Lievre v. Gould, [1893] 1 Q. B. 491, 497. No duty existing on the part of the defendants towards the plaintiffs to keep any gate or fence at the point in question, and none to keep a gate closed or to close it if opened, there can be no negligence on the part of the

company in respect of the plaintiffs, and so the action should fail. Any argument which could import here a condition imposed upon the agreement of the plaintiffs, so that they would be relieved from the agreement if the defendants left the gate open, must be equally effective in Yeates v. Grand Trunk R. W. Co., 14 O. L. R. 63, to import a similar condition relieving the plaintiff in that case from the effect of the agreement of his landlord if the trains of the defendants were run too fast or without proper signals. Nor is there any rule forbidding any person or company from making a contract relieving them from the consequences of negligence on the part of their employees. The practice of importing implied terms into a contract is a dangerous one: The Queen v. Demers, [1900] A. C. 103; Hill v. Ingersoll and Port Burwell Gravel Road Co., 32 O. R. 194; Churchward v. The Queen, L. R. 1 Q. B. 173, 195; Ogdens Limited v. Nelson, [1903] 2 K. B. 287, 297.

Appeal dismissed with costs.

FALCONBRIDGE, C.J., concurred.

BRITTON, J., dissented.

MEREDITH, C.J., IN CHAMBERS. SEPTEMBER 21ST, 1909.

DOBNER v. HODGINS.

Costs—Scale of—Action in High Court—Jurisdiction of County Court — Title to Land—County Courts Act, sec. 22—Foreign Lands—Fraudulent Representation as to Ownership—Pleading —Leave to Appeal from Order Determining Scale of Costs, Refused.

Motion by the plaintiff for leave to appeal from an order of LATCHFORD, J., affirming a ruling of a local registrar that the costs of the action were taxable on the County Court scale.

The action was brought in the High Court to recover $500, the amount of a promissory note made by the defendant, payable to the order of one Williams, and indorsed to the plaintiff.

The defendant, by his statement of defence, denied that the plaintiff was the holder of the notice in due course, and alleged that he was induced to make it by the fraud of the plaintiff and Williams; that Williams, to the knowledge of the plaintiff, and with a view of obtaining the promissory note, falsely pretending to own and control certain interests in lands in Wisconsin, which Williams offered to

sell and transfer to the defendant and one Brown, and that the defendant, acting on this representation and the agreement of Williams to procure and forward the transfer, gave the promissory note; that Williams was not the owner and was not in a position to transfer any interest in these lands, as the plaintiff well knew; and that he never did transfer the lands to the defendant; that when the note was given it was agreed between Williams and the defendant, as the plaintiff well knew, that it was not to be used, negotiated, or transferred until the transfer to the defendant of the interest in these lands should be completed, and that the plaintiff, when the note was transferred to him, received it without consideration and with full knowledge of the agreement and of the fraud alleged.

W. E. Middleton, K.C., for the plaintiff.

Grayson Smith, for the defendant.

MEREDITH, C.J., held that the title to land was not "brought in question" within the meaning of sec. 22 of the County Courts Act. The reason for excluding from the jurisdiction of the County Court save in certain excepted cases, actions in which the title to land is brought in question, is to prevent a binding adjudication on a question of title being pronounced by a County Court, and applies only where the title to land *in Ontario* is brought in question. But, even if this were not so, the defendants's pleading was in substance a defence of fraud, a fraudulent representation by Williams and the plaintiff that Williams was the owner of the Wisconsin land, and was in a position to transfer the interest in it, when in fact he was not. The title to land is not necessarily brought in question by such a defence, and in fact no question of title was raised at the trial.

There being no reason to doubt the correctness of the order of Latchford, J., the motion was refused with costs.

DIVISIONAL COURT. SEPTEMBER 21ST, 1909.

WILLINSKY v. ANDERSON.

Malicious Prosecution—Defendants not Responsible for Prosecution —Nonsuit—Malicious Issue and Execution of Search Warrant—Advice and Direction of Solicitor and Crown Attorney — All Facts not Laid before Advisers—Conflict of Evidence—Question for Jury—New Trial.

Motion by plaintiff to set aside nonsuits entered by FALCONBRIDGE, C.J.K.B., in actions brought by Sarah R. Willinsky, a mer-

chant carrying on business in Toronto, and M. L. Willinsky, her husband, who assisted in the business, for malicious prosecution and for wrongfully causing a search warrant to be issued and the premises and property of the plaintiffs to be searched, and plaintiffs' goods to be seized and taken away.

The defendants were wholesale merchants, and on the 5th November, 1907, they laid an information against one Owens, a salesman in their employment, charging him with theft of a quantity of goods which he had sold to the plaintiff M. L. Willinsky, acting for his wife. The ground for the charge of theft appeared to be that Owens had, without authority, sold one lot of goods for $5.70 which, the defendants asserted, should have been sold for $70.80, and another lot for $43, which, the defendants said, should have been sold for over $200. The evidence for the plaintiffs shewed that the goods had depreciated in value, and were what is known as "job lots," and were not worth more than the plaintiff agreed to pay. The goods were sold on credit and charged in the defendants' books to the plaintiff Sarah R. Willinsky.

The charge against Owens came before the police magistrate on the 21st November, 1907, when Owens was committed for trial. Both the defendants gave evidence, and either during or at the close of the investigation the police magistrate directed Mr. Corley, the Crown Attorney, to summon the plaintiff Sarah R. Willinsky on a charge of unlawfully receiving stolen goods.

The formal information or charge was, on the direction of the Crown Attorney, sworn to by one Newton, a detective, on the 22nd November, 1907. A summons upon this charge was thereupon served upon the plaintiff Sarah, and, when it came before the police magistrate on the 28th November, the information was amended so as to include her husband. Both were committed for trial on the charge of unlawfully receiving stolen goods.

Instead of laying before the grand jury indictments for theft and receiving, the Crown Attorney, after conferring with the Chairman of the Sessions, indicted the plaintiffs and Owens jointly for conspiracy to defraud the defendants. The grand jury returned a true bill. At the trial all the accused were found not guilty. The original charges were not otherwise disposed of.

On the information for theft being laid against Owens, the defendant Anderson laid an information before a justice of the peace charging that a quantity of his goods had been stolen, and that he suspected that they were concealed in the premises of the plaintiff Sarah R. Willinsky, upon which a search warrant was issued and placed in the hands of a detective, who, with the defendant Anderson, went to the plaintiffs' premises and seized and took away all the goods which the defendants said had been stolen by Owens.

The defendants' solicitor accompanied the defendant Anderson to the justice of the peace when the warrant was obtained, and the evidence also shewed that Mr. Corley, the Crown Attorney, approved of the warrant being issued upon the statements made by Anderson and his solicitor.

FALCONBRIDGE, C.J., at the close of all the evidence, gave effect to the defendants' motion for a nonsuit, being of opinion that the plaintiffs had failed to establish want of reasonable and probable cause with reference both to the search warrant and to the proceedings before the magistrate and at the Sessions; as to all the proceedings other than the search warrant, he was of opinion that the defendants were not responsible because they were instituted solely by the Crown authorities, and not by the defendants.

The appeal was heard by MEREDITH, C.J., MACMAHON and TEETZEL, JJ.

I. F. Hellmuth, K.C., and Sinclair, for the plaintiffs.

H. H. Dewart, K.C., for the defendants.

TEETZEL, J., delivering the judgment of the Court, said that as to the actions for malicious prosecution he agreed that the defendants were not responsible, because the first prosecution complained of was clearly the result of a direction by the police magistrate, which was given without any request or suggestion by either of the defendants. And it was equally clear that they were in no way responsible for converting the original charge into a charge for conspiracy. Otherwise than by giving their evidence as Crown witnesses, it could not be said that the defendants in any way aided or encouraged the prosecution of the plaintiffs; nothing was said by either of the defendants inconsistent with the innocence of the plaintiffs; and the absence of such evidence distinguished this case from Fitzjohn v. MacKinder, 9 C. B. N. S. 505.

As to the claim for damages by reason of the search warrant, the evidence of the plaintiffs and defendants was in conflict upon a number of points of importance, and, if the evidence of the plaintiffs and Owens was accepted, there were several important facts which the defendants did not submit either to their solicitor or to Mr. Corley. For instance, Owens swore that he was acting in all respects within the scope of his authority in agreeing upon the prices with Willinsky; also that the defendant MacBeth introduced Willinsky to him on the 19th September, which was corroborated by Willinsky, but denied by MacBeth. Owens also gave evidence that the entries in the books were in accordance with the practice in the

warehouse in the sales of job lots. This was also contradicted by the defendants, but the books to some extent corroborated Owens. None of thse 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.