

any of them. (b) Whether there was a settlement between the parties prior to the commencement of this action, as alleged in the statement of defence, which was binding upon plaintiffs.

W. J. McWhinney, for plaintiffs.

C. W. Kerr, for defendants.

THE MASTER:—It is agreed that the second issue should be tried before the others, as if this is found in defendants' favour, the action will be at an end. All the evidence on this will be found here, whereas it will be necessary to have commissions to England and New York if the matter is gone into on the merits.

But defendants are not willing to have the question of acceptance treated in this way, and, in view of their opposition, the motion as to this must fail, unless such issue, if found against plaintiffs, would admittedly end the action. See *Smith v. Smith*, 5 O. W. R. 520, 673, and cases cited. But, far from this, it does not seem that this issue can have any bearing except as to the measure of damages. And it is therefore not one of the class of issues which should be tried separately, unless perhaps by consent. The inconvenience arising from the application of the Rule, unless in very plain cases, has been pointed out by Jessel, M.R., in *Percy v. Young*, 15 Ch. D. 474. To the same effect is the language of Meredith, C.J., delivering the judgment of the Divisional Court in *Waller v. Independent Order of Foresters*, 5 O. W. R. 421, at p. 422: "Experience has shown that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon, and certainly in this case the result of adopting that course is most unsatisfactory. . . . If the result of the preliminary trial in this case, whichever way it resulted, would have put an end to the controversy . . . it would have been different."

It would seem to follow from this that, unless both parties agreed, the trial, even of the question of settlement, could not be first had.

As it is, the order will go for that only, with costs in that issue. . . .