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APPELLATE DIVISION.

MAY 28TH, 1913.

NATIONAL TRUST CO. v. BRANTFORD STREET R.W. CO.

Mortgage—Security for Bonds of Railway Company—Default—Payment of Interest pendente Lite—Possession—Receiver—Taxes—New Trial—Costs.

Appeal by the plaintiffs from the judgment of KELLY, J., 3 O.W.N. 1615.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. A. Paterson, K.C., for the plaintiffs.

S. C. Smoke, K.C., for the defendants.

THE COURT set aside the judgment dismissing the action, and directed a new trial. Costs of the former trial and of this appeal to be in the discretion of the Judge at the new trial.

MAY 29TH, 1913.

SCULLY v. RYCKMAN.

Money Lent—Action to Recover—Conflict of Evidence—Credibility of Witnesses—Finding of Fact of Trial Judge—Documentary Evidence—Appeal.

Appeal by the defendant from the judgment of LENNOX, J., ante 850, in favour of the plaintiff for the recovery of $2,000 and interest.

The action was brought for $2,250 and interest, but the trial Judge found against the claim for $250; and as to that the plaintiff did not appeal.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

I. F. Hellmuth, K.C., and Christopher C. Robinson, for the defendants.

J. P. MacGregor, for the plaintiff.

MULOCK, C.J., in a written opinion, gave a resumé of the evidence at the trial and the further evidence given before the appellate Court, and stated:—

After careful perusal and re-perusal of the evidence and exhibits, I find myself unable to discover any circumstances, documentary or otherwise, in the case, entitling an appellate Court to disregard the trial Judge's findings as to the credibility of the respective parties; and, therefore, see no ground for disturbing his judgment, and think this appeal should be dismissed with costs.

RIDDELL, J., gave written reasons for agreeing that the appeal should be dismissed with costs. After a brief statement of the facts, he concluded:—

There are curious features in the story of each party and some inconsistencies or apparent inconsistencies; but I cannot find anything to induce me to hold that the learned trial Judge was wrong in giving effect to the testimony of the plaintiff rather than to that of the defendant. It cannot be necessary once more to state the principles upon which an appellate Court proceeds on a conflict of testimony, where the trial Judge has seen the witnesses.

SUTHERLAND, J.:—During the hearing, I was disposed to attach considerable weight to the argument on behalf of the appellant that, in any event, the claim should be reduced by $1,000.

A careful perusal of the evidence and documents, and a consideration of the findings of the trial Judge, have led me to think otherwise.

I agree that the appeal should be dismissed with costs.

LEITCH, J., also agreed that the appeal should be dismissed.

CLUTE, J.:—. . . The trial Judge has accepted the evidence of the plaintiff as against the defendant; and, if the result rested alone upon the credit given to the respective parties, I should feel bound by the finding; but the documentary evidence is such that I feel compelled to recognise in it a weight that overbears the finding of the trial Judge to the extent of $1,000. . . .

I am not unmindful of the rule that, "when a finding of facts rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons: Lodge Holes Colliery v. Mayor, etc., of Wednesbury, [1908] A.C. 326. But, as was said in Coghlan v. Cumberland, [1898] 1 Ch. 705: "There may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not, and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

Such circumstances, I think, the documents afford, to lead to the conclusion that the most that Scully claimed to be due from the defendant, prior to the issue of the writ, was $1,000 plus $250 for commission.

Resting my judgment, accordingly, upon the documents, I think the plaintiff's claim should be reduced by $1,000.

As to the balance of the $2,000 the receipt is of a very ambiguous nature. It is in such form as one might expect to be given in a betting transaction; and, although my confidence in Scully's evidence as against the defendant is much shaken, by reason of his claim for $2,000 instead of $1,000 balance, and his denial that he had ever claimed $1,000 balance, yet there is not sufficient documentary or other independent evidence to enable me, having regard to the findings of the trial Judge, to find in favour of the defendant with respect to the remaining $1,000.

I would vary the judgment by reducing it to $1,000 and give no costs of appeal.

Appeal dismissed; CLUTE, J., *dissenting in part.*

MAY 29TH, 1913.

SHEARDOWN v. GOOD.

Vendor and Purchaser—Contract for Sale of Land—Purchaser's Action for Specific Performance — Omission of Term in Written Agreement — Fraud — Refusal to Decree Specific Performance—Finding of Trial Judge—Discretion—Appeal.

Appeal by the plaintiff from the judgment of LATCHFORD, J., dismissing the action with costs.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and LEITCH, JJ.

C. W. Plaxton, for the plaintiff.

L. V. McBrady, K.C., for the defendant.

The judgment of the Court was delivered by SUTHERLAND, J.:—The action is by the assignee of a purchaser against the vendor for specific performance of a written agreement for the sale of land. The unwilling vendor asserts as a defence that a term was to be included in the writing permitting her to recede from the bargain within ten days.

The learned trial Judge has found that the vendor understood from the real estate agents who acted for her and for the purchaser respectively that such a clause was to be embodied in the contract which she signed. He credited her testimony where it conflicted with theirs, and came to the conclusion "that there was not that fairness and equality" between them and her "which should exist to warrant the Court in decreeing specific performance." The omission of the term referred to was, in effect, a fraud perpetrated upon the vendor. The document should be read and construed as though it contained it.

The exercise of jurisdiction in such cases is a matter of judicial discretion, and "much regard is shewn to the conduct of the parties:" Lamare v. Dixon, L.R. 6 H.L. 414, 423; Coventry v. McLean, 22 O.R. 1, at p. 9.

In view of the findings of the trial Judge, I think that the judgment cannot be disturbed, and that the appeal should be dismissed with costs.

MAY 29TH, 1913.

SCOBIE v. WALLACE.

Fraud and Misrepresentation—Agreement for Purchase of Land —Misrepresentations by Agent of Vendor—Complicity of Vendor — Cancellation of Agreement — Return of Money Paid—Findings of Trial Judge—Appeal—Evidence.

Appeal by the defendant from the judgment of LENNOX, J., ante 881.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

G. F. Henderson, K.C., for the appellant.

A. E. Fripp, K.C., for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:— The action is brought to cancel an agreement dated the 24th July, 1912, between the defendant, a real estate agent of Ottawa, and the plaintiff, a farmer, whereby the plaintiff agreed to purchase certain lots near the city of Regina, Saskatchewan, for $3,675, upon which was paid, at the time of signing the agreement, $1,225; the balance payable in six and twelve months.

The trial Judge finds that the plaintiff was induced to sign the agreement in question by representations and statements made to him by the defendant's agent, Michael Bergin: (a) that the lots he was purchasing were "inside lots in the city of Regina;" (b) that they were within one mile and a half of the city post-office; (c) that the city was actually built up as far out as these lots; (d) that Bergin had recently visited Regina, and could be depended upon to give reliable information; (e) that the plaintiff entered into this agreement relying upon the truth of these representations, as the agent knew; and (f) that they were false and were knowingly and fraudulently made.

The question at issue is purely one of fact. A perusal of the evidence satisfies me that it amply supports the findings of the trial Judge; and there is no reason, so far as I can see, for this Court to interfere.

The appeal should be dismissed with costs.

MAY 29TH, 1913.

PATTERSON v. TOWNSHIP OF ALDBOROUGH.

Appeal—Question of Fact—Finding of Trial Judge on Disputed Facts — Absence of Reasons for Finding — Different View Taken by Appellate Court—New Trial—Highway—Nonrepair—Excavation—Injury to Traveller—Negligence—Want of Sufficient Barrier.

Appeal by the defendants from the judgment of MAGEE, J., dated the 4th June, 1910, whereby he directed judgment to be entered for the plaintiff against the defendants for $300 damages and costs; the action being for damages for personal injuries sustained by the plaintiff by falling into an excavation in a highway.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

C. St. Clair Leitch, for the appellants.

J. D. Shaw, for the plaintiff.

The judgment of the Court was delivered by SUTHERLAND, J.:—The plaintiff alleges in his statement of claim that the defendant corporation, in connection with the construction of a new bridge on a public highway, had dug an excavation across the travelled portion of the road, and negligently failed to provide a sufficient guard or barrier, or light or other warning, to prevent persons lawfully using the road from falling into the excavation; in consequence of which, he says, he, with his horse and buggy, fell into the excavation, and he was injured.

The defendants in their statement of defence say that, in the performance of their statutory duty to keep the highway in repair, it was necessary to replace a wooden culvert, and, in consequence, to make the excavation in question; and that, in order that travel on the highway might not be stopped, the defendants constructed another sufficient and safe driveway for travel at the side of the excavation. They also say that they erected a proper guard or barrier across the travelled portion on either side of the excavation. They further plead that the injuries complained of by the plaintiff were the result of his own negligence, and that he could have avoided them by the exercise of reasonable and ordinary care.

A perusal of the evidence leads me to the conclusion that the

disposition of the case is unsatisfactory; and I think that the proper course is to send it back for a new trial.

The learned trial Judge has given no reasons which might afford a guide to us upon the appeal.

It is true that, in the case of the trial of an action by a Judge without a jury, "when a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons:" Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury, [1908] A.C. 323, at p. 326.

It has, however, been frequently pointed out how desirable it is for a trial Judge to give the reasons on which he bases his judgment. "If the Judge simply disbelieved McFarquhar, his so finding would have been of assistance to us:" per Falconbridge, J., in MacGregor v. Sully (1900), 31 O.R. 535, at p. 539, referring to Gurofski v. Harris (1896), 27 O.R. 201, at p. 203.

"The Divisional Courts have more than once said that County Court Judges should give reasons for the conclusions they arrive at:" per Riddell, J., in Re St. David's Mountain Spring Water Co. and Lahey (1912), ante 32, at p. 34.

In this case one is at a loss to know just in what way the evidence impressed the trial Judge. While one hesitates, in proposing to send a case back for rehearing, to express an opinion upon the evidence taken at the first trial, it is perhaps necessary, where no reasons have been assigned in support of the judgment, to indicate from the written evidence one's reasons for so determining.

One can scarcely read the evidence of the plaintiff without coming to the conclusion that it would be very unsafe to act upon his unsupported testimony on the material facts.

There is also a considerable amount of what looks like reliable evidence given on the part of the defendants to the effect that a reasonable barrier had been erected by them at a suitable distance from the trench, and that it was in position just before the accident.

There is the evidence also of one witness to the effect that the plaintiff admitted, when it was suggested to him that something must have been wrong with the mare before she would go over the pole put up by the defendants as an obstruction, that she could not help it, as she was going at lightning speed. It is true that the plaintiff denied this; but we are left to conjecture which of the two the trial Judge believed.

"Where a case tried by a Judge without a jury comes before the Court of Appeal, that Court will presume that the decision of

the Judge on the facts was right, and will not disturb it unless the appellant satisfactorily makes out that it was wrong:" per Lord Esher, M.R., and Lopes, L.J., in Colonial Securities Trust Co. v. Massey, [1896] 1 Q.B. 38.

"The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them:" Coghlan v. Cumberland, [1898] 1 Ch. 704, at p. 705.

Speaking for myself, a perusal of the written testimony would have led me to the conclusion that the defendants had reasonably protected the trench in question by a guard, and that the accident was occasioned by the negligence of the plaintiff.

In these circumstances, it was most desirable, if not actually necessary, to have the benefit of the views of the trial Judge as to the evidence and the weight to be attached to it. The defendants, against whom judgment has gone upon disputed facts and upon evidence which seems unsatisfactory to support it, are placed in an awkward position in supporting an appeal without having an opportunity to examine and criticise before an appellate Court the reasons on which the trial Judge has based his judgment.

One hesitates to reverse altogether the decision of the trial Judge on questions of fact.

I think the proper course to be taken is to direct a new trial; costs throughout to abide the event.

MAY 29TH, 1913.

*CARTWRIGHT v. CITY OF TORONTO.

Assessment and Taxes—Tax Sale—Mortgage—Part Discharge—Consideration—Agreement with City Corporation—Failure to Prove—Evidence—Depositions of Deceased Plaintiff on Discovery—Admissibility—Foreclosure—Arrears of Taxes—Land Purchased by City Corporation at Sale—Validating Statute—Defective Description in Assessment Roll—Notice to Owner—Omission to Give—Curative Effect of Statute—Failure to Redeem within Time Limited.

Appeal by the plaintiffs (by revivor) from the judgment of MIDDLETON, J., ante 863, dismissing the action.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

George Bell, K.C., for the appellants.

G. R. Geary, K.C., and C. M. Colquhoun, for the defendants.

MULOCK, C.J.:—. . . The action is to set aside a sale to the defendant corporation, for taxes, of certain lands in the city of Toronto. Mrs. Jane Prittie, then owning these and other lands mortgaged them to the original plaintiff, Sir Richard Cartwright, on the 13th February, 1892, to secure payment of $43,000. The Corporation of the City of Toronto desired to acquire the fee simple of a portion of the mortgaged lands for sewer purposes; and, after protracted negotiations with Mrs. Prittie, the then owner of the equity of redemption, the council of the municipality authorised such purchase from her for the sum of $55,000; and the completion of the matter in the city's behalf was placed in the hands of their solicitor, Mr. Biggar.

In addition to Sir Richard Cartwright's mortgage, the mortgaged lands, at that time, were incumbered with lien for money owing under various executions and for taxes, including local improvement rates, and Mrs. Prittie authorised the application of the whole of the purchase-money, viz., $55,000, in payment of these various charges, including $28,476.18 to Sir Richard for the purpose of obtaining from him a release from his mortgage.

The $55,000 was applied in accordance with Mrs. Prittie's direction, Sir Richard Cartwright receiving thereout $28,476.18,

*To be reported in the Ontario Law Reports.

whereupon, on the 28th April, 1893, he released from his mortgage the lands being so purchased by the city. On the 8th August, 1894, he foreclosed as to the residue of the mortgaged lands.

For the plaintiffs it was alleged at the trial, but not proved, that, on the occasion of Mr. Biggar's paying to Sir Richard Cartwright the $28,476.18, and obtaining the release of the mortgage, Mr. Biggar undertook to pay, out of Mrs. Prittie's purchase-money, all arrears of taxes and to commute all local improvement rates due or to become due in respect of the unreleased portion of the mortgaged lands, but that he failed to do so; and it was contended on behalf of the plaintiffs that, in consequence of Mr. Biggar's alleged default, the amount owing for arrears of taxes, in respect of which the lands were sold, exceeded the amount which, having regard to such agreement, would have been properly chargeable against the said lands; and that, for such reason, the sale should be set aside.

Sir Richard Cartwright had been examined by the defendants for discovery; and, he having died before the trial, the plaintiffs sought to put in such examination in support of their contention as to the undertaking by Mr. Biggar. The learned trial Judge refused to admit the examination; and its exclusion at the trial is one of the present grounds of appeal.

Examination for discovery, as it exists to-day, is the creature of the Consolidated Rules, and the use which may be made of such an examination is fixed by Con. Rule 461. . . . I interpert this Rule as, in effect, saying that, where a party to an action is examined for discovery by another party adverse in interest, the party examined is not entitled to put in evidence at the trial any part of his examination, unless the opposite party shall have first put in a portion thereof; and, even then, he is entitled to put in only so much thereof as the trial Judge, having regard to the portion already put in, thinks should go in.

Here, the defendants not having put in at the trial any portion of Sir Richard Cartwright's examination for discovery, his representatives are not entitled to make use of his examination as evidence; and the trial Judge rightly excluded the same.

Even admitting that Mr. Biggar gave such an undertaking, it would not bind the defendants, unless authorised by them. The purchase-money was payable to Mrs. Prittie, or her appointees, and was only applicable in such manner as she might authorise. So far as appears, Mr. Biggar was not authorised by the defendants to give any undertaking in respect of any portion of Mrs. Prittie's money; and I, therefore, fail to see how the

examination of Sir Richard, even if admitted, can be of any service to the plaintiffs. It is not necessary, therefore, to determine whether such examination—the original plaintiff being dead—is admissible at the trial in behalf of the present plaintiffs. . . .

[The learned Chief Justice then referred to the various grounds upon which the tax sale and deed were attacked.]

These various objections are, I think, cured by sec. 8 of 3 Edw. VII. ch. 86, as construed in Toronto Corporation v. Russell, [1908] A.C. 493.

As to the right of the plaintiff to redeem, he is also precluded by Toronto Corporation v. Russell, in which redemption was also sought. The sale in question in that case was held at the same time as the sale in question here, and the writ of summons in the action attacking it and asking redemption was issued on the 21st September, 1906; and it was held that the time for redemption had already expired. In the present case, the writ was not issued until the 27th November, 1906—also too late—and thus the plaintiff is not entitled to redemption.

The appeal should, I think, be dismissed with costs.

CLUTE, SUTHERLAND, and LEITCH, JJ., concurred.

RIDDELL, J.:—I agree in the result arrived at by the Chief Justice. This conclusion is reached by a different route in one regard. I have again considered the authorities and the Con. Rules, and am still of the opinion arrived at in Johnson v. Birkett (1910), 21 O.L.R. 319. There is, consequently, no proof of the alleged agreement of Sir Richard Cartwright—and I do not consider whether, had the agreement been proved, it could have any effect.

In all other respects I agree that our hands are tied by the decision in Toronto Corporation v. Russell, [1908] A.C. 493.

Appeal dismissed with costs.

MAY 29TH, 1913.

*CORBY v. FOSTER.

Parent and Child—Liability of Parent for Tort of Infant Child—Assault—Repetition of Former Assault—Notice to Parent of First Offence—Failure to Prove—Evidence—Finding of Jury—Perverseness—Interference by Appellate Court—Knowledge of Dangerous Propensity—Conduct of Parent—Evidence of Scienter—General Verdict of Jury—Proper Case for Submission of Questions—Failure to Shew Approval or Ratification by Parent of Conduct of Child—Absence of Negligence—Rule as to Liability for Injury Done by Animals—Application of, to Children.

Appeal by the defendant from the judgment of BOYD, C., who tried the action with a jury at Orangeville.

Thomas Corby's son, Nelson Corby, a boy of ten years, was in September, 1911, kicked by Elwood Foster, twelve years old, and rather seriously hurt. Nelson Corby and Thomas Corby sued the father of Elwood Foster for damages.

The jury made a general finding or returned a general verdict for the plaintiffs with damages assessed at $200, for which sum the trial Judge directed judgment to be entered, with County Court costs and a set-off.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. E. Raney, K.C., for the defendant.

G. M. Vance, K.C., and C. R. McKeown, K.C., for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J.:—The rule of the common law, differing from that of the civil law, is, that "a parent is not, because of his family relationship, legally responsible to answer in damage for the torts of his infant child:" Thibodeau v. Cheff, 24 O.L.R. 214, 218, and cases cited.

This law is not disputed by the plaintiffs, but they contend that, in the particular circumstances of this case, a liability exists. What is relied upon is an alleged kicking by the same boy of the infant plaintiff, some time before, and notice of this given to the defendant. . . .

*To be reported in the Ontario Law Reports.

[The learned Judge set out the testimony upon the disputed question whether notice was actually given to the defendant—the former kicking not being disputed.]

It seems to me quite plain that, while the adult plaintiff does venture the assertion at times that he told the defendant that the one boy had kicked the other, whenever he is brought directly to the point, he will not pledge his oath that he did so—but his story agrees, in substance, with that of the defendant, his wife, and the independent witness McCormick. . . .

It would be wholly unsafe, in my view, to allow a jury to find notice to the father of the previous kicking, in the state of the evidence.

No one has any desire in the least to depart from the well-established rule that "the credibility of witnesses, the reliability of their stories, the balancing of probabilities, is exclutively for" the jury, "and an appellate tribunal may not enter upon that field of inquiry:" per Anglin, J., in Walker v. Canadian Pacific R.W. Co., in the Supreme Court of Canada (not yet reported), citing Toronto R.W. Co. v. King, [1908] A.C. 260. The case in the Supreme Court was one of "utterly conflicting and irreconcilable evidence given on the material facts by witnesses for the plaintiff and those for the defence:" per Davies, J.—as are most, if not all, of the reported cases in which the doctrine is laid down or applied—and I should be loath to apply it to the full extent in a case in which the witnesses for the plaintiff, when the matter was brought squarely to their attention, told a story that agreed with that of the witnesses for the defence.

It is argued that the conduct of the defendant is some evidence of knowledge of a propensity to kick on the part of his son.

Dr. McGibbon says that, meeting the defendant one night on the road, he "told him the cheapest and quietest and nicest way would be for a settlement;" and the defendant then said "that he fully intended to settle with Mr. Corby, but he had gotten a very insulting letter on behalf of Mr. Corby which had completely changed his mind, and from the time he had got the letter he was resolved not to do so." The defendant says: "I had no right to help him; . . . I would not have minded helping pay the boy's bill had it not been for the insulting letter. The letter asked for the doctor's bill and for disfigurement of the boy. . . He just thought I had to do it, I guess. . . . I told you I didn't like that letter, and neither I do. . . ."

The letter produced does not appear to be improper; it is

not even a demand for amends or compensation, but rather a request; and, reading it calmly, one cannot see why such offence was taken at it. But it seems that the defendant considered it a claim that he was legally liable, and so treated it; and, taking offence, changed his intention—perhaps, inclination would better express his state of mind—accordingly.

It would, in my view, be carrying the law to an absurd length if it should be held that this state of mind was evidence of scienter—of knowledge that his son had a vicious habit of kicking or had kicked before. . . .

[Reference to Thomas v. Morgan (1835), 2 C. M. & R. 496; Beck v. Dyson (1815), 4 Camp. 198; Sayers v. Walsh (1848), 12 Ir. L. Rep. 434; Mason v. Morgan (1865), 24 U.C.R. 328; Wigmore on Evidence, vol. 2, secs. 1061(c), 1062.]

It may be that when the owner of an animal which has done injury is informed of such act, if he, without protecting himself by stating that what he does is without prejudice or by denying all legal obligation or the like, makes an offer to settle, such offer is some evidence of scienter; but that is because, if he did not intend his offer to be considered an admission of liability, he could and should have protected himself. The case is wholly different when all that appears is an intention or inclination to pay something, not manifested to the other party. No one can protect himself against his own thoughts or give warning to himself that he must not take charity or a desire for peace for knowledge of legal liability. It would be intolerable if because a defendant said, "At one time I thought I would settle this claim, but I changed my mind," a jury might infer that he admitted the justice of the claim; and the same remarks apply to the discussion the defendant is said to have had with his wife about . . . paying. . . .

It seems to me that, if the jury intended to find that the defendant had knowledge of a propensity to kick in his son, the finding could not be allowed to stand—I think we should at least send the case back for a new trial. It is not a case like Toronto R.W. Co. v. King, [1908] A.C. 260. . . .

[Reference to Ferrand v. Bingley, etc., Local Board (1891), 8 Times L.R. 70, 71 (C.A.); Metropolitan Life Insurance Co. v. Montreal Coal and Towing Co. (1904), 35 S.C.R. 266, 271; Walker v. Canadian Pacific R.W. Co., supra.]

In the present case I do not think that the jury have necessarily found notice. The Chancellor did not put questions to the jury, as I think, with great respect, should have been done, but allowed them to find a general verdict. A perusal of the charge

shews that the jury may not have passed upon the question at all —which would be another reason for ordering a new trial at least.

Moreover, the whole finding of the jury is perverse, against the charge. It is quite true that a new trial will not be granted, much less a verdict reversed, simply because the trial Judge is not satisfied with it: Fraser v. Drew (1900), 30 S.C.R. 241. But this is of no slight importance: Aitkin v. McMeckan, [1895] A.C. 310, 316. . . .

I do not think, however, that in the present case we need determine what should be done if the jury had found notice; for, assuming notice, the plaintiff's case is not advanced.

All the cases in which a father has been made liable for the act of his child are cases in which "the father has knowledge of the wrong-doing and consents to it, where he directs it, where he sanctions it, where he ratifies it or participates in the fruits of it," because then "he becomes in effect a party to it:" Thibodeau v. Cheff, 24 O.L.R. 214. And where there does not exist any express consent, etc., circumstances may be such that a jury may infer consent, etc. . . .

[Reference to Beedy v. Reding (1839), 16 Me. 362; Hoverson v. Noker (1884), 60 Wis. 511, 50 Am. St. Repr. 381; Johnson v. Glidden (1898), 11 S. Dak. 237, 74 Am. St. Repr. 795, 801, et seq.; Baker v. Haldiman (1857), 24 Mo. 219; Dunks v. Grey (Cir. Ct. E. D. Penna., 1880), 3 Fed. Repr. 862; Thibodeau v. Cheff, 24 O.L.R. 214; 2 Inst. 305; Morgan v. Thomas (1853), 8 Ex. 303, 304; 1 Bl. Com. 430.]

There is nothing in the present case to shew any knowledge, and, therefore, any approval, of a line of conduct on the part of the son. And there is nothing upon which a finding of negligence can be based. . . . What could the father have done that would have been effectual to prevent the occurrence here complained of? . . .

An attempt was made to bring the case within the rule as to animals owned by a defendant; but the same rules do not apply to a beast, which is owned by any one, and a child, who is not. A beast is not responsible for its trespasses, a child is. . . .

[Explanation and discussion of the rule as to animals; reference to Fleeming v. Orr (1855), 25 L.J. O.S. 73, 74; Charlwood v. Greig (1852), 3 C. & K. 48; Jones v. Owen (1871), 24 L.T.N.S. 587; Manson's Law relating to Dogs (1893), p. 2; Smith v. Pelah (1764), 2 Str. 1263.]

But boys cannot be placed in classes like beasts and labelled feræ naturæ or mansuetæ naturæ; nor, when a father is notified

of an act of violence on the part of his son, can he hang him. The patria potestas under the ancient civil law gave the father the power of life and death, but the common law does not recognise such an extreme right. Nor can the father tie up his son, if he is ordinarily compos mentis; he must keep him and let him go about.

The rules about dogs have never been applied to boys, and we should not be the first to apply them.

I think the appeal should be allowed with costs, and the action dismissed with costs.

MAY 29TH, 1913.

*BECKMAN v. WALLACE.

Vendor and Purchaser—Contract for Sale of Land—Action by Purchasers for Specific Performance—Conduct of Plaintiffs—Acts of Agent—Fraudulent Misrepresentation Inducing Defendant to Enter into Contract—Refusal to Carry out Contract before Discovery of Fraud—False Signature to Offer—Ratification after Acceptance—Damages—Pleading—Amendment—Costs.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J., ante 949, dismissing without costs an action brought by the plaintiffs (purchasers) for specific performance of an alleged contract for the purchase and sale of land.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

F. J. Hughes, for the plaintiffs.

C. S. MacInnes, K.C., for the defendant.

The judgment of the Court was delivered by RIDDELL, J.:—The written reasons for judgment did not, in my opinion, specifically find a certain fact material to the determination of the case, and I have seen the learned Chief Justice in reference thereto. The determination of this fact must depend upon the relative credit to be given to the defendant and to the witness Dillon. The trial Judge says that implicit credit should be given to the statements of fact made by the defendant—and, where Dillon's evidence disagrees with hers, her evidence should be taken.

*To be reported in the Ontario Law Reports.

With that to guide, the facts are to be taken as follows. The defendant was the owner of a certain house; Dillon, a real estate agent, came to her with an offer for purchase not signed, but in the name of Samuel Lang, one of the plaintiffs. . . .

[The learned Judge then set out a portion of the defendant's testimony at the trial, from which it appeared that there were no signatures when the offer was brought to her; that she thought it should be signed by Lang and his wife and his solicitor; and Dillon was to come back, and he came back and said that he would procure the signatures; that he went away again, and came back with the document apparently signed by Long, his wife, and his solicitor; and the defendant then signed it]

The fact was, that Dillon had himself signed the name of both wife and solicitor—the name of the wife, I assume for the purposes of this judgment, and as I think the fact to be, with her consent expressed in the presence of her husband, the purchaser; the name of the solicitor was signed without any authority, so far as appears. This I do not think of importance; if the case should turn on whether either name or both was or were inserted by the authority of the persons whose names appear, I think a new trial should be granted on proper terms. But I shall assume authority. The signature purporting to be that of the wife was in "feminine" hand, quite different from the other part of the writing, and was plainly intended to make the defendant believe that a woman, *the* woman, had signed it.

The offer was made by Samuel Lang for the property for $3,400: $50 cash; $550 on completion of sale; balance a first mortgage on certain terms—"Sale to be completed on or before the 25th day of November, 1912." . . . Dillon paid the $50, and took the document, after the defendant had signed an acceptance, to Lang, and Lang assigned to Beckman.

Beckman's solicitor communicated with the defendant, and ultimately, on the 25th November, tendered the remainder of the cash and a mortgage executed by Lang and his wife to a person at the defendant's residence, who refused, on her instructions.

I am of opinion that there was no conduct on the part of the plaintiffs and no circumstances then known to the defendant which justified her in refusing to carry out the transaction.

Many circumstances were urged at the hearing as shewing improper conduct on the part of the plaintiffs, but they were all (with an exception to be mentioned later) of a trivial nature. . . But, after the defendant had definitely refused to carry out her

sale, she found, during the course of a Division Court trial, that the alleged signature of the wife of the purchaser had not been made by her, but by Dillon—and this is set up now as entitling her to judgment.

Both Beckman and Lang join as plaintiffs, and the action is an ordinary action for specific performance. The defendant pleads (in addition to a general denial) want of tender and the Statute of Frauds. As I have indicated, neither of these defences has been established; and, consequently, were the defendant to stand or fall by her pleadings she should fail. But the conduct of the plaintiffs is set up as an answer to the claim; and the learned Chief Justice has given effect to this contention. . . .

We must now, in addition to the facts explicitly admitted on the trial, take as proved the circumstances leading up to the acceptance of the offer, as the defendant gives them. With these proved, I think that the appeal must fail. It is well-established that, if there be a fraudulent misrepresentation as to any part of that which induces a party to enter into a contract, the party may repudiate the contract; with an innocent misrepresentation or a misapprehension the case is different: Kennedy v. Panama, etc., Mail Co. (1867), L.R. 2 Q.B. 580; Brownlie v. Campbell (1880), 5 App. Cas. 925, 936; Seddon v. North Eastern Salt Co., [1905] 1 Ch. 326. Circumstances might well be imagined in which the signing of the woman's name would be quite justifiable—and even the production and putting forward of such a document as having been executed by Mrs. Lang. But here Dillon knew that it was the signature of Mrs. Lang that was required—and the very fact of Dillon signing the name in "woman's hand" shews that he knew that it was the woman's signature that was required. And there can be no doubt that he expressly, as well as tacitly, represented that the name was Mrs. Lang's signature.

This was a fraud in law—it was a false statement—a statement as a fact of what Dillon knew to be untrue. And it does not cease to be a fraud if it be considered that Dillon did not intend Mrs. Wallace to lose by the misstatement. I do not think he intended any harm to follow—but he made a statement which he knew to be false with the intent that it should be believed and acted upon as it was. This is fraud.

In my view, this would entitle the defendant to relief.

But it is argued that the defendant refused to perform her contract on other grounds which were not sufficient and in ignorance of this ground and without setting it up. That is true. Clough v. London and North Western R.W. Co. (1871), L.R. 7

Ex. 26, and like cases, however, decide principles of law adverse to this being an answer. A contract obtained by fraud such as this is voidable, and the party defrauded has the option, upon learning of the fraud, to avoid or affirm—and it makes no difference that, before the time of such recovery, he may have repudiated or refused to perform the contract on different grounds. He may even issue a writ to enforce the contract if this be done before the discovery of the fraud; and any lapse of time without avoiding is only evidence of affirmance of the contract, not affirmance ipso facto: Morrison v. Universal Marine Insurance Co. (1873), L.R. 8 Ex. 197; Re Murray, Dickson v. Murray (1887), 57 L.T.R. 223; In re Bank of Hindustan China and Japan (1873), L.R. 9 Ch. 1.

It was argued that the act of Dillon in signing the name of Mrs. Lang, even if not originally authorised by her, was ratified. In the view I have taken of the case, I have assumed prior authorisation—and, consequently, it has not been necessary to consider the effect of such ratification. If it should become necessary for any reason, it should be noticed that ratification is not always equivalent to prior mandate. Where it is essential to the validity of an act that it should be done within or before a certain time, the act cannot be ratified after that time: Doe d. Mann v. Walters (1830), 10 B. & C. 626; Dibbins v. Dibbins, [1896] 2 Ch. 348; Doe d. Lyster v. Goldwin (1841), 2 Q.B. 143; and many other cases; Bowstead on Agency, 5th ed., pp. 52 sqq. Here it was required that the signature should be produced before the acceptance—the ratification was later than this.

The defendant does not ask rescission, which she might have done on the facts; but sets up the facts as an answer to the claim for specific performance—and that she is entitled to do. Regularly she should have pleaded the facts; but, all the circumstances being before the Court, she should have the benefit of the defence she is entitled to on the facts.

The plaintiffs ask before us, in the alternative, for damages, should it be held that they are not entitled to specific performance. That they cannot have specific performance is plain; whether they should have damages depends on the facts. They are not precluded from claiming damages simply because they have not asked specifically for it. There is a prayer for general relief; and, even when the rules of pleading were more stringent and rigid than they are now, this was held to entitle the Court to grant the appropriate relief which the facts warrant: Slater v. Canada Central R.W. Co. (1878), 25 Gr. 363; and see Watson v. Hawkins (1876), 24 W.R. 884; Phelps v. White (1881), 7

L.R. Ir. 160; Holmested and Langton's Judicature Act, 3rd ed., p. 483.

But here the contract was induced by fraud, and there is a perfect defence to any claim.

It has not been contended, nor can it be contended, that, if the contract was obtained by the fraud of Dillon, the plaintiffs have any cause of action.

The result is, that the appeal should be dismissed. The Chief Justice relieved the plaintiffs of the payment of the defendant's costs, and the plaintiffs might well have been content. They should pay the costs of this appeal. The defendant may apply upon these costs the $50 paid by Dillon and interest.

Appeal dismissed with costs.

HIGH COURT DIVISION.

KELLY, J. MAY 26TH, 1913.

RE COOPER.

Will — Construction — Bequest of "all my Cash in Bank" — Moneys Deposited with Loan Company Included — Residuary Bequest to Nephews and Nieces of Brother — Intention of Testator to Make Bequest to Children of Brother.

Motion by the executors of the will of Francis Cooper, deceased, for an order, under Con. Rule 938, determining two questions of construction.

J. R. Code, for the executors.

H. T. Beck, for Barry S. Cooper and his adult children.

J. Tytler, K.C., for Margaret J. Fulton, Annie Fulton, and James B. Fulton.

J. R. Meredith, for the infant Annie K. Cooper.

KELLY, J.:—This application is to have it determined, first, whether, under the direction by the testator, Francis Cooper, to his executors, to pay to his brother Barry S. Cooper "all my cash in bank," Barry S. Cooper is entitled to moneys of the deceased deposited with the Canada Permanent Mortgage Corporation; and, secondly, who are entitled to the residue of the testator's estate.

(1) The provision in the will disposing of "cash in bank" is as follows: "My said executors are also directed to pay to my brother Barry S. Cooper, of St. Louis, Mo., all my cash in bank, provided, however, that my trustees are at liberty to pay my funeral expenses out of said moneys in the bank as aforesaid; but my brother Barry S. Cooper is to be recouped out of the residue for any such advance for burial as aforesaid."

At the time of his death, the testator had moneys on deposit in the Dominion Bank, in the Home Bank of Canada, and in the Canada Permanent Mortgage Corporation.

My opinion is, that he intended the money in the last-named institutions, as well as the moneys in the other two places of deposit, to go to his brother Barry S. Cooper.

(2) The residuary clause in the will is in these words: "All the rest and residue of my estate not heretofore disposed of for payment of necessary expenses I direct my executors and trustees to divide equally between three nieces and five nephews of Barry S. Cooper share and share alike."

The testator died in Toronto on the 14th June, 1912, and probate of his will, which bears date the 20th May, 1912, was issued on the 14th August, 1912, to his executors, the Rev. Robert James Moore and William Payne.

The testator was a bachelor, and he left surviving him two brothers, Barry S. Cooper and William F. S. Cooper, and several nephews and nieces, children of his deceased brothers and sisters, as well as eight other nephews and nieces, the children of his brother Barry S. Cooper.

So far as it is shewn, William F. S. Cooper was then a bachelor. Barry S. Cooper's nephews and nieces then numbered more than eight; it is not made clear what was their exact number. The executors appear to have doubts as to who is entitled to the residue.

Dealing first with the contention that the three daughters and five sons of Barry S. Cooper are the persons intended by the testator to be benefited: to adopt that view, it would be necessary to read into the will a word or words not used by the testator. For instance, the insertion of the word "children" after the words "five nephews" would aid in arriving at that result; but, in doing so, the meaning of the will as made by the testator would be altered, and a meaning given to it altogether different from that which the language used by him conveys. The chief ground for urging this view is, that the number of Barry S. Cooper's children (three daughters and five sons) corresponds with the number of nephews and nieces of Barry S. Cooper

mentioned by the testator. Except that there is (or may be) an error in stating the number composing the class to be benefited, the language of the will is clear as to where the residue is to go. The effect of so changing or adding to the language used by the testator would be to divert the residue from one class named by him and give it to another class. That would be making a will for the testator, and not declaring what his will means. What the Court has to do is to determine, from the language used by the testator, what was his intention. The expressed intention in this will is, to give the residue to the nephews and nieces of Barry S. Cooper. Perhaps the testator had in mind a different intention; perhaps he meant to say "children of Barry S. Cooper," but he did not say that or express such different intention. Perhaps he was wrong in stating the number of Barry S. Cooper's nephews and nieces — that is, the number composing the class intended to be benefited—he does, however, clearly indicate the class. The fact that the number of nephews and nieces corresponds with the number of Barry S. Cooper's children is not in itself sufficient to shew that he meant the children of Barry S. Cooper, or a justification for importing into the will, in order to give it that meaning, a word or words not used by the testator.

Nor do I think that the residuary clause is void for uncertainty, as has been suggested. The testator shewed an intention of benefiting a certain class; and where the Court, as a matter of construction, arrives at the conclusion that a particular class of persons is to be benefited according to the intention of the testator, if there has been an inaccurate enumeration of the persons composing that class, the Court will reject the enumeration. . . .

[Reference to In re Stephenson, Donaldson v. Bamber, [1897] 1 Ch. 75, per Lord Russell of Killowen, C.J., at p. 81; per Lindley, L.J., at p. 83; per A. L. Smith, L.J., at p. 84; Jarman, 6th ed., vol. 2, pp. 1706, 1708.]

The testator may have been aware of the number of the children of his brother Barry S. Cooper; it is not clear that he knew the number of this brother's nephews and nieces. Barry S. Cooper himself, from his affidavit filed, seems to have some doubt of the exact number of his nephews and nieces.

My conclusion is, therefore, that, on the true reading and construction of this will, the residue is to go to the nephews and nieces of Barry S. Cooper, living at the time of the testator's death, irrespective of the fact that the number named by the

testator, namely, three nieces and five nephews, may be more or less than the real number at that time.

Costs of all parties out of the estate, those of the executors as between solicitor and client.

BRITTON, J. IN CHAMBERS. MAY 28TH, 1913.

RE EMMONS v. DYMOND.

County Courts—Removal of Cause into Supreme Court of Ontario—County Courts Act, 10 Edw. VII. ch. 30, sec. 29—"Fit to be Tried in the High Court"—Reason for Transfer.

Application by the defendant for removal of this action from the County Court of the County of Middlesex to the Supreme Court of Ontario.

E. C. Cattanch, for the defendant.
R. U. McPherson, for the plaintiff.

BRITTON, J.:—The County Courts Act, 10 Edw. VII. ch. 30, is the Act now in force. Section 22, sub-secs. 3, 5, and 6, and sec. 23, make provision for the transfer of cases from a County Court to the Supreme Court of Ontario, where the facts are as stated in these sections and sub-sections.

Section 29 governs as to what cases and on what conditions causes may be removed, where sec. 22 and its sub-sections and sec. 23 do not apply.

This application must be considered as made under sec. 29. The words "fit to be tried in the High Court" mean, I think, "that ought to be tried in the High Court rather than in the County Court;" and I cannot say that a reason for transfer, or for certiorari, has been shewn. See In re Aaron Erb (No. 2), 16 O.L.R. 597; Re Hill v. Telford, 12 O.W.R. 1056.

The motion will be dismissed; costs in the cause. This will be without prejudice to any order the County Court Judge may make as to any amendment, or as to the trial, or any matter in the disposition of the case by him.

MASTER IN CHAMBERS. MAY 29TH, 1913.

PHILLIPS v. LAWSON.

Pleading — Statement of Claim — Causes of Action—Parties — Principal and Agent — Undisclosed Principal — Election— Amendment—Statement of Defence—Costs.

Motion by the defendants (other than the defendant A.B.) for an order for leave to amend their statements of defence, on the ground that A.B. was absent from the Province when their statements of defences were delivered, and that since his return he has given them certain information of which they desire to avail themselves; also for an order requiring the plaintiff to elect against which of the four defendants he would proceed or to strike out the name of the defendant A.B. See a note of a former motion, ante 679.

C. A. Moss, for the applicants.
J. P. MacGregor, for the plaintiff.

THE MASTER:—There is no doubt that the defendants should be allowed to amend so as to set up all defences on which they intend to rely. Owing to the absence of their co-defendant, who was the active member of the firm, and who signed his co-defendant Lawson's name to the agreement set out in the statement of claim, the facts, as he understood them, were unknown to the others. As the plaintiff has served a jury notice, the action cannot be tried until after vacation; and Mr. Moss is willing that proceedings should go on in vacation if the plaintiff so desires.

The other branch of the defendants' motion is supported by reference to Anson on Contracts, 12th ed., pp. 382, 383, and Smethurst v. Mitchell (1859), 1 E. & E. 622. These authorities shew that "where an agent acts on behalf of a principal whose existence he does not disclose, the other contracting party is entitled to elect whether he will treat principal or agent as the party with whom he dealt:" Anson, p. 383. In Smethurst's case, it was said by Hill, J. (p. 630): "All the cases establish that a vendor selling to the agent of an undislosed principal must elect to sue the principal within a reasonable time after he discovers him." Crompton, J., at p. 631, says: "The election to sue an undisclosed principal must be made within a reasonable time after he is discovered."

It was argued by Mr. MacGregor that there was here no case for election. His view was, that the plaintiff was suing only in respect of one bargain; that he was doubtful against whom his proper remedy was to be taken. He relied on Tate v. Natural Gas and Oil Co. of Ontario (1898), 18 P.R. 82. But that case is different in its facts. There is here no uncertainty as to the party liable. Both are liable if a definite bargain was made to buy the land in question. But this is not a joint but a separate liability, and the plaintiff must declare against which one he is proceeding, and all such amendments as result therefrom must be made, though nothing was said on this point in the notice of motion.

On the argument it was pointed out by Mr. Moss that the 8th clause of the prayer for relief asks, "in the alternative, for damages against the defendant firm and the defendant A.B. for breach of warranty of authority to make the said agreement for purchase for and on behalf of the said syndicate;" but that there is nothing in the statement of claim to support this. This seems true.

As the defendants have all pleaded, they were either not embarrassed by the statement of claim or were not able to deal with it effectively in the absence of A.B. In his statement of defence, delivered on 13th instant, in paragraph 13, he (A.B.) seems to have had this claim in mind when he said that he "gave no warranty of any sort in connection with his signature of the name of the defendant T. W. Lawson." The present notice of motion was served on the same day as that statement of defence was delivered.

The case is one of some complexity, and a very considerable sum is in question. This makes it desirable for all parties that the pleadings should be made as definite and correct as possible. In view of the fact that the cause was begun in August last, and of all that has taken place since, it seems fair, while granting the motion, to impose the usual term as to costs so far as applicable.

No amendment should be made of the statements of defence until the statement of claim has been amended. The statements of defence of the defendants other than A.B. were delivered in October last, and there have been examinations for discovery had since. The plaintiff can, if so advised, plead as in Bennett v. McIlwraith, [1896] 2 Q.B. 464. The defendants should amend within a week afterwards; and all costs lost or occasioned by this order should, in the special circumstances, be to the plaintiff in the cause. Pleadings may be delivered and other proceedings had in vacation at the will of either party.

BOYD, C. MAY 29TH, 1913.

*ROACH v. VILLAGE OF PORT COLBORNE.

Highway—Nonrepair—Sidewalk — Projecting Water-pipe — Injury to Pedestrian — Knowledge of Defect — Liability of Municipal Corporation—Damages.

Action for damages for personal injuries sustained by the plaintiff by a fall upon a sidewalk alleged to be out of repair.

The action was tried before BOYD, C., without a jury, at Welland.

G. F. Shepley, K.C., for the plaintiff.

M. K. Cowan, K.C., for the defendants.

BOYD, C.:—This case lies close to the line of liability, but falls, I think, within it. After hearing the evidence, I took a view of the locality, in the presence of the solicitors; and it was evident (as the solicitors agreed) that the protruding part of the pipe could have been easily and inexpensively reduced to the level of the walk. The pipe appears to have been in place originally as it now stands; but at first it was outside of the old board walk. When this was replaced by the more modern cement work, the walk was made wider so as to include the pipe as part of, and yet protruding from, the walk, before the plaintiff's house. The pipe with cap was about one inch from the edge, close to where a crossing is marked on the plan, with lines along the walk, but there is no change in level between walk and crossing. The cap on the pipe slanted so that it was fixed two inches on one side and one and three-quarter inches on the other side above the level of the cement surface, and the higher part was towards the outside edge of the walk. The rim of the cap was a little wider than the pipe, and so projected outside of it. The plaintiff went down to the street, as usual, to buy meat from the butcher (the street being six inches lower) and on finishing her purchase stepped up on the walk, but on the next step on the walk her foot caught on the higher side of the pipe, and she fell, with serious results. Her leg was fractured at the neck of the femur, and she may become a confirmed invalid. No doubt, she knew of the existence of this obstacle; she had even seen various people tripping over it at different times; but on this occasion she inadvertently became herself the victim.

Contributory negligence is not pleaded or suggested; the whole question is, "Was the situation such that it can be pro-

*To be reported in the Ontario Law Reports.

perly said that the street was out of repair?" At the close of the argument, I expressed an affirmative opinion; and, on considering the state of the authorities, I do not modify what I then said.

As distinguished from Ray v. Village of Petrolia, 24 C.P. 73, cited, the salient points of the situation here are these: this obstacle was on the very face of the pavement which was constructed for the special use of pedestrians; the public were invited to use this place as a permanent walk, and but for the failure to make this pipe flush with the surface it was an excellent piece of work. The locality is one of the chief streets of Port Colborne, running along the west side of the canal and in common local use. The defect was an obvious one, which should have been remedied when the walk was first put down. It does not make the matter any better if the theory of subsidence in the cement part from the pipe is substituted for the theory of original construction. The evidence is not clear as to which is the actual fact; but I am against the view that there has been such subsidence as to account for the condition of the place as I found it on my visit. Whether it be said that the walk was out of repair or that it was not put in safe condition at the outset is not material as regards the liability of the municipality. As it stood when the plaintiff fell, it was an unsafe place on the sidewalk, to the knowledge of the defendants. . . .

[References to Ray v. Village of Petrolia, 24 C.P. 73; Ewing v. City of Toronto, 29 O.R. 197; Ewing v. Hewitt, 27 A.R. 296.]

I find no case and have been referred to none in our Courts against the plaintiff's right to recover on the ground of de minimis.

The very point in respect of the very same kind of obstruction has been considered in the Massachusetts Courts. . . . Redford v. Watson, 176 Mass. 520; . . . O'Brien v. Watson, 184 Mass. 586.

The circumstance that this was towards the edge of the cement walk, so long as it was made part of the walk by the method of construction, does not appear to be material; the whole of the walk was specially intended for the use of pedestrians, and all should have been made safe and could have been so made by the outlay of a mere trifle of money.

The long continuance of this obstacle would not enure to the exemption of the municipality; once a nuisance always a nuisance until abated. Nor would the plaintiff's knowledge of its existence per se be a defence, and no more was proved in this case: Gordon v. City of Belleville, 15 O.R. 26.

The woman was seventy years old, hale and hearty before the accident, and her prospects of life, according to papers put in by consent, would be about nine years longer. A fair amount to allow, as I thought at the trial—perhaps erring on the side of insufficiency—would be $2,000.

Judgment for that sum.

BAUGHART BROS. v. MILLER BROS.—MASTER IN CHAMBERS—MAY 26.

Venue—Change—County Court Action—Convenience—Expense—Witnesses.]—In an action for goods sold and delivered to the defendants at Jarvis, in the county of Haldimand, by the plaintiffs, who lived and carried on business at London, in the county of Middlesex, the defendants moved to transfer the action from the County Court of the County of Middlesex to the County Court of the County of Haldimand. The defendants swore to five witnesses, including themselves, all resident at Jarvis, which is thirteen miles distant from Cayuga, the county town of Haldimand. The plaintiffs swore to a similar number, so that there was no preponderance. The defendants did not give the names of their three witnesses, nor state what they were expected to prove. The plaintiffs stated who their witnesses would be. The Master said that it was to be observed that the defendants and their witnesses would have to go from home in any case. It was self-evident that the cost of five persons going east from Jarvis to Cayuga and five others going from London to Cayuga would be greater than that of five going from Jarvis to London, where the plaintiffs and their witnesses resided. Motion dismissed; costs in the cause. The Master added that it is always open to the trial Judge, on an application by the defendant, to deal with the costs of witnesses, as suggested in McArthur v. Michigan Central R.W. Co., 15 P.R. 77. E. C. Cattanach, for the defendants. Featherston Aylesworth, for the plaintiffs.

EASTERN CONSTRUCTION CO. v. J. D. MCARTHUR CO.—MASTER IN CHAMBERS—MAY 26.

Particulars—Statement of Claim — Contract — Work Done under Railway Construction Sub-contract—Extras—Overcharges —Interest.]—The plaintiffs were sub-contractors of the defendants in respect of work on the Transcontinental Railway. The

work was done between March, 1907, and July, 1911. The plaintiffs made four claims in paragraphs 12, 13, 14, and 15 of their statement of claim, as follows: (1) for an unascertained sum for extras done after November, 1909, as to which an account was asked and payment when the proper sum should be ascertained; (2) for $142,735, with interest from the 31st July, 1911, the balance due of a hold-back of ten per cent. on the whole work; (3) overcharges on beef bought by the defendants and turned over to the plaintiffs at a cent and a half a pound more than agreed on, and for alleged injury by fire not chargeable to the plaintiffs; (4) payment of $118,963.92, with interest at five per cent. from the 30th September, 1909, the balance alleged to be due to the plaintiffs up to that date on progress estimates under the contract. Before pleading, the defendants moved for particulars of claims 1, 2, and 3, and as to the agreement under claim 3. The Master said that there did not seem to be any reason why these particulars could not be given. No affidavit was put in in answer to the motion. Although no details were given of claim 1, these must surely be in the possession or knowledge of the plaintiffs, who did the work for which they asked to be paid. There should be no difficulty in shewing the defendants how the exact amount of $142,735, which was the second claim, was arrived at. The figures on which it was based must be in the plaintiffs' possession, as also the details of the third claim. Particulars should be given within two weeks from service of the order, as far as possible. If, for any reason, they could not be given in full at once, they could be supplemented later. The defendants to have ten days thereafter to plead; and the costs of the motion to be to the defendants in the cause. A. M. Stewart, for the defendants. Featherston Aylesworth, for the plaintiffs.

SHAW v. TACKABERRY—FALCONBRIDGE, C.J.K.B.—MAY 26.

Executors—Sale of Land—Attack on, by Widow of Testator—Release—Claim against Estate—Adjudication by Surrogate Court Judge—Status of Widow as Plaintiff—Interest in Estate—Costs.]—Action to have the defendant Martha A. Russell declared a trustee for the defendant J. W. Tackaberry in respect of certain lands conveyed to her, and both declared liable to account to the plaintiff for mesne profits; and for an account. The action was tried, without a jury, at Chatham.—The learned Chief Justice said that, as to the attack which the plaintiff made on the sale of the real estate in the village of Merlin, she was out of

Court, by reason of the release (exhibit 20) which she gave to the executors, wherein she granted to them all her estate, right, title, or interest, whether by way of dower or otherwise, in the said lands. As regards that branch of her case in which she attacked the adjudication by the Surrogate Court Judge of the claim of the defendant Tackaberry against the estate, it was to be observed, in the first place, that she was represented by counsel when the learned Judge assumed to hear and determine the matter. His order or judgment stood unappealed from, and it was a purely academic question. Even if the contention of the plaintiff should prevail, the unpaid claims of the creditors of the estate would more than absorb the whole amount available for the distribution; and the plaintiff, accordingly, had personally no interest in the action. No authority had been cited to the effect that the merely sentimental interest which the plaintiff might have in her late husband's creditors getting as much as possible out of the estate, would form a basis or foundation for this action. The plaintiff, therefore, failed as to both grounds of her action. The transaction which she impeached with reference to the real estate was a most improper one. The Chief Justice did not find specially that it was a fraudulent one, but it bore many of the ear-marks of fraud. The action should be dismissed, but, in all the circumstances, without costs. H. D. Smith and J. A. McNevin, for the plaintiff. O. L. Lewis, K.C., for the defendant Tackaberry. S. B. Arnold, for the defendant Russell.

KENNEDY v. KENNEDY—BRITTON, J., IN CHAMBERS—MAY 27.

Lis Pendens—Motion to Vacate Registry of—Speedy Trial of Action—Terms.]—Appeal by the defendant from the order of the Master in Chambers, ante 1336, refusing an application by the defendant to discharge the registry of a certificate of lis pendens as to part of the lands affected, and to expedite the trial. BRITTON, J., dismissed the appeal with costs. A. McLean Macdonell, K.C., for the defendant. E. D. Armour, K.C., for the plaintiff.

SAUERMANN v. E.M.F. CO.—MIDDLETON, J.—MAY 28.

Contract — Construction — Sale of Automobile—Refund of Price—Return of Vehicle Put in as Part of Price.]—On the settlement of the judgment pronounced on the 14th April, 1913 (ante 1137), a question was raised as to the amount to be recovered; and counsel spoke to the minutes before MIDDLETON, J.,

who said that the agreement of the 13th June, 1912, mentioned "the sum heretofore paid" by the plaintiff to the defendants. An old Ford automobile was accepted by the defendants at $300, as part of the price of the vehicle purchased by the plaintiff from the defendants; and they contended that the agreement of settlement meant that, in the event of the E.M.F. car being pronounced unsatisfactory, they were to refund only the cash paid. This seemed too narrow a construction to place on the agreement. The old car was accepted as equivalent to a payment of $300; and, if the defendants' car proved "unsatisfactory," they were to keep it and refund the whole price. The Court had not to consider what was fair, as the defendants contended, but only to ascertain what was agreed. J. L. Counsell, for the plaintiff. W. A. Logie, for the defendants.

FRITZ v. JELFS—MASTER IN CHAMBERS—MAY 29.

Pleading—Statement of Claim—Motion to Strike out Portion—Prejudice—Materiality.]—The facts of this case appear in the note of a former motion, ante 1271. The defendant Green was one of the two constables there stated to "have forcibly ejected the plaintiff and put his goods and chattels on the street." This defendant Green delivered a statement of defence, by which he alleged, in paragraphs 3 and 4, that all he did was on instructions from his superior officer to go to the plaintiff's residence, and that, when he got there, he saw the plaintiff *"acting in a drunken and disorderly manner,"* and that he did nothing more than was his duty. The plaintiff moved to strike out all of paragraph 3, and especially the words in italics, as being likely to prejudice the jury against him. The Master said that it was at all times difficult to strike out part of a pleading: see Bristol v. Kennedy, ante 337; and it was especially undesirable to interfere with a statement of defence: Stratford Gas Co. v. Gordon, 14 P.R. 407. The conduct of the plaintiff on the occasion complained of would seem to be very material to the defence, if it could be proved; and in any case it must be left to the trial Judge to say whether evidence could be given on this matter. The plaintiff, so far from being in any way put at a disadvantage by the statement of defence, was now made aware exactly of what this defendant relied on to escape liability. Motion dismissed; costs in the cause. L. E. Aurey, for the plaintiff. G. H. Sedgewick, for the defendant Green.

BRUCE v. NATIONAL TRUST CO.—MASTER IN CHAMBERS—MAY 31.

Mechanics' Liens—Proceeding to Enforce Lien—Statement of Claim Filed without Affidavit—Setting aside—Vacating Register of Lien and Certificate of Lis Pendens.]—In a proceeding under the Mechanics' Lien Act, the statement of claim was filed on the 1st February, but without any affidavit attached. The defendant moved to set aside the statement of claim. It appeared that the statement of claim was filed on the very last day permissible. It was said on the argument that the plaintiff was out of reach of his solicitor at the time, and it was suggested that sec. 19 of the present Act, 10 Edw. VII. ch. 69, might be applied. The Master said that this was confined in its terms to secs. 17 and 18; and, while it was held in Crerar v. Canadian Pacific R.W. Co. (1903), 5 O.L.R. 383, that the necessary affidavit might be made by the solicitor as agent (as might well have been done in this case), it would be judicial legislation to say that no affidavit was necessary. The nature of the procedure under this Act was considered in Canada Sand Lime Brick Co. v. Ottaway (1907), 10 O.W.R. 686, 788, and Canada Sand Lime and Brick Co. v. Poole (1907), 10 O.W.R. 1041. The statement of claim must be set aside and the registry of the lien and certificate of lis pendens vacated with costs. Happily in this case there was no danger of the plaintiff failing to recover in another proceeding anything he might be found entitled to from the defendants. S. G. Crowell, for the defendants. C. M. Garvey, for the plaintiff.