

HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS.

JUNE 9TH, 1913.

KELLY v. MCKENZIE.

Jury Notice—Motion to Strike out—Judge in Chambers—Discretion—Con. Rule 1322—Proper Case for Trial without a Jury—Nature of Remedy—Equitable Relief.

Motion by the plaintiff to strike out the defendant's jury notice.

W. Proudfoot, K.C., for the plaintiff.

H. S. White, for the defendant.

LENNOX, J.:—This is an action in which the remedy sought by the plaintiff could have been obtained only in the Court of Chancery prior to the Judicature Act. The defence, in effect, is simply a denial of the plaintiff's right to any part, or at all events the whole, of the relief claimed. The defendant claims to have the issues tried by a jury, and the plaintiff moves to have the jury notice struck out. The propriety of leaving the determination of this question for the trial Judge in an action of a common law character has been declared on many occasions, and the cases are collected and reviewed by the Chancellor in *Stavert v. McNaught* (1909), 18 O.L.R. 370. In *Montgomery v. Ryan* (1906), 13 O.L.R. 297, the Chief Justice of the Common Pleas based his order striking out the jury notice upon the double ground that it was a case that "plainly ought to be tried without a jury"—one of investigation of accounts—and a case to be tried in Toronto where non-jury sittings are practically continuous throughout the year; and, delivering the judgment of a Divisional Court in *Bryans v. Moffat* (1907), 15 O.L.R. 220, at p. 223, the same learned Chief Justice said: "Speaking for myself, I think, the rule of practice laid down in *Montgomery v. Ryan*, 13 O.L.R. 297, might well be extended to any case, whether in town or country, where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, would be tried without a jury." It was held that the Chancellor exercised a proper discretion in striking out the jury notice.

On the issues that case is not distinguishable from this action. I think then that the order should go.