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APPELLATE DIVISION.

MARCH 27TH, 1913.

RE GRAND TRUNK R.W. CO. AND ASH.

RE GRAND TRUNK R.W. CO. AND ANDERSON.

Railway — Expropriation of Land — Compensation — Offer of Money and Right of Way over other Land—Arbitration and Award—Jurisdiction—Costs.

Appeals by the railway company from the orders of BRITTON, J., ante 810.

The appeals were heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and SUTHERLAND, J.

D. O'Connell, for the appellants.

Grayson Smith, for the respondents.

THE COURT dismissed the appeals with costs.

MARCH 27TH, 1913.

SMITH v. BENOR.

Trust—Conveyance of Land—Consideration—Establishment of Trust—Oral Evidence—Statute of Frauds—Setting aside Conveyance — Finding of Fact — Appeal — Variation of Judgment.

Appeal by the defendant from the judgment of KELLY, J., ante 734.

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

I. F. Hellmuth, K.C., for the defendant.
McGregor Young, K.C., for the plaintiff.

THE COURT modified the judgment below by directing that, instead of an account being taken, the $500 referred to in the judgment be paid by the plaintiff to the defendant, in addition to the $200 ordered to be paid. With this modification, the judgment was affirmed. The defendant to pay the plaintiff's costs up to and including the judgment below. No costs of the appeal to or against either party.

HIGH COURT DIVISION.

BRITTON, J. MARCH 22ND, 1913.

RE LACASSE.

Will—Construction—Devise to Wife—Condition as to Remarriage—Residuary Devise—Vested Estate in Fee Subject to be Divested.

Motion by the executors of the will of Napoleon Lacasse, deceased, under Con. Rule 938, for an order determining a question arising upon the construction of the will.

J. U. Vincent, for the executors and the widow.
A. C. T. Lewis, for the Official Guardian.

BRITTON, J.:—Napoleon Lacasse died on the 6th October, 1906. His will was made on the day immediately preceding his death, and is as follows:—

"I revoke all former wills or other testamentary disposition by me at any time heretofore made, and declare this only to be and contain my last will and testament.

"I direct that all my just debts funeral and testamentary expenses be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease.

"I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say:—

"First, my wife Leocadie will have and possess everything that belongs to me during her natural life—if she does not change her name, but if she shall get married everything shall be

divided between the children. I give to her the money that is deposited at the post-office of Clarence Creek.

"All the residue of my estate not hereinbefore disposed of I give devise and bequeath to my wife Leocadie."

Then he named his executors.

On the 1st June, 1907, Mr. Justice Magee made an order for the partial distribution of the estate, but declined then to construe the will. His order was without prejudice to any application by the widow or executors or any child of the testator for its construction.

I am of opinion that, under this will, the widow takes the whole of the property and estate absolutely, subject to her being divested of it should she marry again. I come to this conclusion upon consideration of the whole will; and in no other way can full effect be given to the clause as to residue. Nothing of the testator's estate will descend to his heirs-at-law. It was not the intention of the testator to die intestate as to any part of his estate in case his widow should not marry again. If she does marry again, then, at once thereafter, all the property shall "be divided between the children."

Apart from the residuary devise, the widow would take an estate for life, with power of disposing of the fee should she not marry again; but the estate for life would be subject to the widow being divested of it, should she marry again. The power of disposing of the property can be exercised by her by will.

For all practical purposes and apart from any technical terms in regard to an estate in fee or an estate for life with power of disposing of the fee if the widow should not marry, either construction will give the same result. The case of Burgess v. Burrows, 21 C.P. 426, is very like the present. The language of Gwynne, J., at p. 429 of the report is: "The widow took under the will either a fee simple estate in the property in question, or an estate for life with power of disposing of the fee if she should not marry again, but both estates subject to being divested if she should marry again, in either of which cases the heir is excluded." That case fully discusses the whole question in the alternative as above stated. It came before the Court after the death of the widow. In the present case, the widow is living.

Costs of the executors and widow for whom Mr. Vincent appeared and costs of the Official Guardian to be paid out of the estate.

MIDDLETON, J. MARCH 22ND, 1913.

PEAKE v. MITCHELL.

MITCHELL v. PEAKE.

Highway—Dedication—Unregistered Plan—Lots Sold or Leased according to Plan—Registry Act—Substitution and Registration of New Plan—Consent—Location of Fences—Lands inside and outside of Town Limits—Access to Lands—Obstruction—Injunction.

The first action was brought by Margaret Peake, the owner of lot 162 on plan 73A, for a declaration with respect to her rights upon Victoria Terrace and with respect to certain other streets shewn upon the plan, and for a mandatory order directing the removal of certain fences, and for an injunction.

The second action was brought by the defendant in the first action against L. C. Peake, husband of Margaret Peake, for damages for trespassing upon the lands claimed by the plaintiff and for an injunction.

In 1887, certain lots in the town of Niagara-on-the-Lake, and a large parcel, of irregular shape, immediately west thereof, were conveyed to the Niagara Assembly. This parcel had an extensive frontage on the south shore of Lake Ontario, and was intersected by an inlet, called Lansdowne Lake, and by a ravine. The whole tract of land was subdivided into small lots. An amphitheatre was located in the centre of the western portion, and was surrounded by a circular street called the Chatauqua Amphitheatre. From this circle radiated a number of avenues on which sites for cottages fronted; and along the entire lake front, both east and west of Lansdowne Lake, Victoria Terrace was laid out.

The plan was not registered; but a number of lots, fronting on different avenues, were leased for 99 years; none of the leases were registered.

J. A. Paterson, K.C., for the plaintiff in the first action and the defendant in the second.

E. D. Armour, K.C., and C. P. Smith, for the defendant in the first action and the plaintiff in the second.

MIDDLETON, J. (after setting out the facts and the dealings with the property by mortgagees and a purchasing syndicate):—The first and most important question is the right of Mrs.

Peake, as one of the cottage-holders and by virtue of her ownership of lot 162, to have access to Victoria Terrace throughout its whole length.

This is important not only because the existence of the terrace as a drive and parade is greatly to the advantage of the occupants of the cottages, but also because it affords access to Queen street, an important thoroughfare leading to the business part of the town. Mrs. Peake contends that, as she leased according to the unregistered plan of 1891, the streets and lanes shewn upon that plan became and were highways, by virtue of the statute now found as 1 Geo. V. ch. 42, sec. 44.

Apart from any other answers to this claim or any discussion as to the meaning of the section in question, I do not think any such effect can be given to a plan which is not registered. Mitchell is, I think, entitled to the protection of the Registry Act. He purchased without knowledge of the lease or the plan, and these instruments are void as against him.

I think also that, when the arrangement was made for the purchase of the lands by the syndicate, the cottage-holders deliberately gave up whatever rights they had, consented to the substitution of the new plan and its registration, and conveyances in accordance with that plan; and I think their rights must be found in the conveyances which they then accepted.

. . .

The effect of the foreclosure and of the conveyances to the syndicate was to vest in them the entire fee simple, subject only to the rights given by the agreements to the cottage-holders, which were afterwards crystallised by the new plan and by its registration and by the subsequent conveyances.

The second question arises from what has already been indicated as to the location of the fence along Tennyson avenue. I think the proper inference to be drawn from the plan is, that the whole of the lands coloured brown were set apart as highways or streets, and that Tennyson avenue extended to the water's edge or what is shewn as the water's edge of Lansdowne Lake; and that Mitchell, therefore, had no right to enclose the small sandy beach near the outlet of the lake. I have no doubt that, had his attention been drawn to this, he would have removed the fence, and that this is no real factor in this litigation, although access to this portion of the beach appears to be of importance to the cottagers, as it is the only place where water can readily be obtained, to be drawn to the cottages.

The third question arises out of a matter that has not yet been discussed. Part of the land covered by the original plan

was situated within the town of Niagara, and part immediately west of the town line. When the original plan was prepared, the grounds were laid out without any regard to the location of the town line or the subdivision into lots according to the registered town plan; and, when part of this original plan was adopted as the basis of plan 73A, most of the land covered by it was outside the town limit. A small portion, however, extended into the town, and covered lands included in the town plan. This included the easterly segment of the circle described as the Chatauqua Amphitheatre, about one-quarter of the entire circle. It also covers two short streets that have never been laid out, Froebel avenue and Knox avenue, with a small portion of the end of Tennyson avenue, also never opened.

The portion of the amphitheatre is cut off by the town line was laid out as a travelled road, and was used by the cottagers—who were all north of the amphitheatre—to reach Longfellow avenue, which was connected with the amphitheatre on its south side. Mitchell has erected his fence following the town line across the amphitheatre and across Froebel, Knox, and Tennyson avenues, until it reaches Lansdowne Lake. It thus cuts across the travelled road in two places, and is a source of substantial inconvenience to those entitled to use the street. He attempts to justify this by the statement that the plan is invalid where it encroaches upon land within the town.

I do not think that he is in a position to assert this invalidity; I think he is bound by the terms of his conveyance, which excepts from the lands conveyed to him the streets laid out upon the plan, and reserves the rights of all others entitled to use the streets thereto.

This, I think, covers all the questions argued, although I have not dealt with all the matters discussed by counsel. I think the plaintiff Margaret Peake has a *locus standi* to maintain this action—Mitchell having by his fences obstructed her ingress and egress from her property. See Drake v. Sault Ste. Marie Pulp and Paper Co., 25 A.R. 251. No case is made by which any lost grant can be inferred; nor was it possible for Mrs. Peake to obtain an easement along that portion of Victoria Terrace east of Lansdowne Lake. All the circumstances outlined conclusively shew that dedication cannot be presumed. I do not make any order as to the fence along the bank of Lansdowne Lake, as this does not amount to an obstruction of which the plaintiff can complain—see also Sklitzsky v. Cranston, 22 O.R. 590.

As success is divided, I think each party may be left to bear his or her own costs.

MASTER IN CHAMBERS. MARCH 25TH, 1913.

CLARKE & MONDS LIMITED v. PROVINCIAL STEEL CO.

Discovery—Examination of Officer or Servant of Defendant Company—Sales-agent—"Representative" — Meaning of "Servant"—Con. Rule 1250 (439*a*).

Motion by the plaintiffs for an order requiring one H. B. Holloway to attend for examination for discovery as an officer or servant of the defendant company, under Con. Rule 1250 (439*a*).

Grayson Smith, for the plaintiffs.
O. H. King, for the defendant company.

THE MASTER:—It is admitted that Holloway is not an officer of the defendant company, though it is evident, from the correspondence and the affidavits filed on the motion, that Holloway was the selling agent in Toronto for the company, which has its head office at Cobourg. He assumed the right to sign the letters leading up to the matter in issue, in the name of the company, on the 23rd and 31st October. And on the 5th November, a letter was sent from the Cobourg office to the plaintiffs' solicitors, in which Holloway is spoken of as "our representative, Mr. Holloway." He was paid by a commission on sales made through him.

The real questions between the parties seem to be as to the authority of Holloway to bind the company, as the Statute of Frauds was stated to be the main defence; and whether there was any completed contract.

As all the negotiations were between the plaintiff company, on the one hand, and Holloway, on the other, it is clear that he is the one who can give all information as to what took place. This might allow the application of the judgment in Smith v. Clarke, 12 P.R. 217. See too Leitch v. Grand Trunk R.W. Co., 13 P.R. at p. 382. However that may be, it seems that Holloway comes within the definition of "servant." In 35 Cyc. 1430 it is said that the word "servant" means, "especially in law, one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of the employer"—see quotation in Ginter v. Shelton, 102 Va. 185, 188, where five different grades or classes of servants are suggested.

Here Holloway certainly rendered service or assistance to

the defendant company, whose chief, if not its only, market is in the cities and larger towns. The business could not be successfully carried on without agents or (to use their own word) "representatives" in such places.

The order will go requiring Holloway to attend again at his own expense.

As the exact point is novel, the costs of the motion will be in the cause.

MEREDITH, C.J.C.P. MARCH 25TH, 1913.

HANEY v. MILLER.

Partnership—Account—Reference— Method of Proceeding—Con. Rule 683.

Appeal by the plaintiff from an order or ruling of the Master in Ordinary requiring the plaintiff to bring in further accounts.

H. A. Burbide, for the plaintiff.
G. H. Kilmer, K.C., for the defendant.

MEREDITH, C.J.C.P.:—This is a partnership action, in which the plaintiff, on the 19th September, 1912, recovered a judgment against the defendant for the taking of the partnership accounts and the winding-up of the partnership affairs.

By this time it might, not unreasonably, have been expected that all that would have been done, and the purposes of the litigation attained; but, instead of that, the parties are yet little, if any, further advanced than they were when the judgment was signed: the months between have been given over to fruitless contention as to the bringing into the Master's office of partnership accounts, the character of such accounts, and by whom they should be prepared and brought in.

In their general outlines the accounts are quite simple; the parties were co-partners in three public works' contracts only; each had other things to attend to, and so a manager—under the name of "controller"—was appointed to carry on this business in their places; and that was done.

So that the mere taking of the accounts seems to involve the amount of profit or loss on each of these three contracts, and the amount paid into the concern by each of the partners, and the amount paid out, if any, to each of them. With these

items in mind, it seems to me that progress might well be made, and perhaps the end well reached without any elaborated accounts. At all events, it would be quite safe to get under way, and to proceed until some real obstacle should arise, if it ever should.

A Rule which we ought all to bear in mind, and which perhaps ought to be written in more conspicuous letters, requires that "the Master shall devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference:" Con. Rule 683.

Every partner is, of course, bound to account to his co-partner for his dealings and transactions in partnership matters: and the Master has, of course, power to require any party to bring in any account that should be brought in by him. But in this case there do not yet appear to have been any such dealings or transactions: the business was done through a manager appointed by the parties to do it for them. So that it seems to me to have been erroneous to treat the case as one of accounting by the plaintiff and surcharging and falsifying by the defendant.

It was the manager's duty to have had proper accounts kept, and balance sheets, and other information as to such accounts and the business generally, rendered to each partner; and it was equally the right and duty of each partner to see that this was done; and there is no good reason for assuming that it was not. How then can the plaintiff be treated as if he alone had managed the whole business of the co-partnership, and were chargeable and accountable as if he were a sole trustee; even if there were need for accounting in the manner in which the Master, from the first, seems to have thought to be, in form at all events, imperative? If further accounts be needed, why should not the manager yet prepare them, and prepare them at the cost of the firm? But I cannot think that anything of the sort is really necessary.

It is said that the plaintiff has already gone to an outlay of $1,000 in having the partnership books and accounts examined and audited, and a comprehensive balance sheet made, by accountants. But that may be necessary, on both sides, if there really be substantial differences between the parties as to all or any of the few general items I have mentioned. The plaintiff must prove his case, if it be not admitted; and, he having proved it prima facie, the defendant must meet it with like or other evidence.

The balance sheet is in the Master's office on file; and, if the plaintiff's witnesses prove that, according to the partner-

ship books, it is correct, then the plaintiff's case is established prima facie: and surely that is enough without further waste of time and money in accounts which would be only transcriptions of the books in whole or in part; enough at all events until some real difficulty arises. So too, I cannot but think, would be a simple account of the amount of loss on each of the three contracts and of the amounts paid in by, and paid out to, each of the partners, proved by the manager, by the books and in fact, or by competent accountants, from the books. If any question really arises as to improper entries in the books, that too, of course, is a matter of evidence easily dealt with.

It is not made quite plain just what accounts the plaintiff was directed to bring in. If they were to be merely, or substantially, a copy of the manager's books, that would be a very costly and quite unnecessary undertaking; and quite unnecessary too if it were a somewhat condensed rendering of the same accounts. The books themselves are available, and competent witnesses ought to be able to make plain to the Master, in not many words, whether they shew a profit or loss in each of the three contracts.

I cannot but think that the better way to deal with the matter now is to discharge the order now standing against the plaintiff as to furnishing further accounts; and direct the Master to proceed with the hearing of the matters referred; without in any way restricting his power to direct such further accounts to be brought in as he may find necessary, if any, as the reference proceeds.

I shall not make any order as to the costs of this appeal or as to the proceedings which have given rise to it.

MEREDITH, C.J.C.P. MARCH 26TH, 1913.

SCOTT v. GOVERNORS OF UNIVERSITY OF TORONTO.

Master and Servant—Injury to Servant—Negligence of Master at Common Law not Shewn—Negligence of Fellow-servant—Person to whose Orders Plaintiff Bound to Conform—Injury by Reason of Conforming—Workmen's Compensation for Injuries Act, sec. 3, sub-secs. 1, 2—Contributory Negligence—Finding against—Damages—Costs—Liability of University Board of Governors for Injury to Workman at University Press—Position of Governors—Corporate Body—Crown.

Action by a printer employed by the defendants at the University press for damages for injuries sustained by him while at

work for the defendants by reason of the negligence of the defendants or their servants, as the plaintiff alleged.

The action was tried before MEREDITH, C.J.C.P., without a jury, at Toronto, on the 25th March, 1913.

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

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

MEREDITH, C.J.C.P.:—I retained this case yesterday afternoon for the purposes of further consideration of one or two of the points respecting the legal character of the defendants and of the University, urged very fully, and with much force, by Mr. Paterson in the interests of the defendants.

Under the later legislation affecting the University and creating "The Governors of the University of Toronto"—called "The Board" in such legislation—they are made a legal entity—a corporate body; differing in that respect from the council of a municipal corporation and from any ordinary board of directors of any ordinary corporation; and being so incorporated, and having expressly conferred upon them capacity to sue and be sued; and admitting, as they do, that the work in which the plaintiff was injured was their work, and was under their contract; and that the persons engaged in it were their servants; this action is, I think, quite properly brought against them, in their corporate capacity, instead of against the University.

The contention that the rule that the King can do no wrong applies to the wrongs of "The Governors of the University of Toronto" was ruled against upon the argument. The mere fact that the Lieutenant-Governor in Council of the Province appoints most—not all—of the Governors does not confer upon them the character of Crown officers. Such an appointment, in itself, has no such extraordinary effect; and indeed is not even extremely unusual. I mentioned, during the argument, two other instances: one being the appointment of a member of a municipal hospital board; and the King in council, I believe, appoints the members of a University board in England. There is no reason why the Lieutenant-Governor in Council might not appoint members of a board of directors, or of management, of any concern; I mean there is no legal reason; and, if that were done, the effect in law would be none other than the effect of a like appointment made in any other valid manner.

Nor do the other powers, respecting the university, which the Lieutenant-Governor in Council has, under the enactments

mentioned, bring to the Governors the character of Crown officers governing Crown property for the use or benefit of the Crown. They are but officers of the University, having power to deal with the property under their control for the uses and benefit of the University only.

The case of the Niagara Falls Parks Commission is quite different; there the Commissioners are Crown officers, dealing with Crown lands in the right of the Crown, and in the public interests only. The University of Toronto is a body having its own separate and independent rights and interests, upon which the Crown cannot infringe; and the University press, in the carrying on of the work in which the accident which is the subject-matter of this litigation happened, is one of those things.

The fiat of the Attorney-General for the Province, giving leave to bring this action, does not confer any right of action; it merely removes the legislative bar to the commencement of any action without such leave. But such legislation shews plainly that the Legislature deemed that actions at law would be against the Governors, as a corporate body and individually; though that will not help the plaintiff if the Legislature were mistaken in that respect. A like legislative bar applies to the Hydro-Electric Commissioners; and, though there is more reason for contending that the rule that the King can do no wrong applies to them than to the Governors, I have never heard of it being contended that there is no remedy in law, applicable to them, for their misdeeds; and they have been, and at one time not infrequently, sued.

Upon the merits of the case, I can but repeat that which I said during the argument.

There is no liability at common law. There was no failure on the part of "The Board" to supply proper machinery, or to take any other reasonable precaution to insure the safety from injury, in their employment, of their servants. A foot-board was not a usual, or indeed a proper, part of a small machine such as that in which the plaintiff was hurt; nor would it have prevented such an accident as that in which he was injured; nor was a switch, to cut off the electric power; the controller was all that was needed for putting, and keeping, the machine in, and out of, operation; nor, if there had been such a switch, would it have availed at all in preventing the accident. These two things really have nothing to do with the case.

But, under the Workmen's Compensation for Injuries enactments, the plaintiff has, as I find, a good cause of action against the defendants, as such corporate body.

The witness Edwards was a person, employed by the defendants, to whose orders the plaintiff, in the same employment, was bound to conform: the plaintiff was ordered, by Edwards, to oil the tympan of the press, and, while conforming to that order, and by reason of conforming to it, was injured through the negligence of Edwards in setting the machine in motion without first giving the plaintiff some warning of his intention to do so. Both sub-secs. 1 and 2 of sec. 3 of the Workmen's Compensation for Injuries Act seem to me to apply to the case.

I cannot accept the statement of Edwards that his order was not to oil the machine, but was only to get ready to oil it. Such an order is improbable; and it is also improbable that if it, and not the order to do the work, had been given, the plaintiff would have gone at once to do the work without waiting for a later order to do that for which Edwards now asserts he should have awaited another order.

The one difficulty on this branch of the case affects only the question of contributory negligence; and that is a very substantial difficulty; but, upon the whole evidence, my conclusion is, that the defendants have not proved contributory negligence.

I have no doubt that the plaintiff knew that the machine had to be put in motion, in order to turn the tympan so that that part of it to be oiled would be towards him, before he could do the oiling; and that there was no need for him to put his hand over the end of the air-chamber, which was the only place of danger; but the question is not, could he have avoided the accident? it is, could he, exercising ordinary care, have avoided it? not the care of the skilled and careful, for he is yet but a youth, and but a pressman's assistant. My conclusion is, that, exercising such care as such persons ordinarily would, he might have done as he did depending upon a warning from the pressman to him before any danger from the machine in motion could arise.

Then what is, in money, reasonable compensation, under all the circumstances of the case, for the injury which the plaintiff sustained? In all substantial things that injury was the cutting off of three fingers of the left hand—the little finger and the next two. It was a painful injury; it disabled him for three months; and he must always remain maimed in that way. It prevents him doing the finer work of the trade he was learning; but there are, of course, many other callings and trades in which it would not be any such drawback; and in his work

of assistant pressman it has not yet caused any reduction in wages, and but little, if any, loss of time after the three months.

Under all the circumstances of the case, I assess the damages at $600; being satisfied that that is reasonable compensation under all the circumstances of the case.

There will be judgment for the plaintiff and $600 damages, with costs on the High Court scale, and without any set-off of costs. The action was commenced in the County Court, and was brought up to this Court by the defendants; and so, as against them, should be treated as if properly a High Court case.

LENNOX, J. MARCH 27TH, 1913.

PROWD v. SPENCE.

Marriage—Invalidity—Declaratory Judgment—Jurisdiction of Supreme Court of Ontario.

Action for a declaration of the invalidity of a contract of marriage made in 1908 between Wilson Prowd, the plaintiff, and Margaret Spence, the defendant.

The action was tried before LENNOX, J., without a jury, at Owen Sound.

W. H. Wright, for the plaintiff.

The defendant did not appear and was not represented.

LENNOX, J.:—The plaintiff asks the Court to declare that what purported to be a marriage, celebrated between him and the defendant on the 19th November, 1908, was not in law a marriage—was "null and void." The plaintiff also asks that "the said alleged marriage be set aside."

I have power, in a proper case, to pronounce a declaratory judgment and to make binding declarations of right, whether consequential relief is or could be claimed or not: Ontario Judicature Act, sec. 57, sub-sec. 5. But this power should be exercised cautiously and sparingly: Austin v. Collins, 54 L.T.R. 903; Toronto R.W. Co. v. City of Toronto, 13 O.L.R. 532; Bunnell v. Gordon, 20 O.R. 281.

The further question, as to whether the statute in effect creates a new jurisdiction, that is, whether the power to declare extends to a class of cases "in which, whether before or after the Judicature Act, no relief could be given by the Court," was

raised in Grand Junction Waterworks Co. v. Hampton Urban District Council, [1898] 2 Ch. 331, and A. v. B., 23 O.L.R. 261, but not determined. But for the doubt entertained by the eminent Judges who disposed of these actions, I should have considered it clear that the field of jurisdiction is not extended.

But, at all events, here the plaintiff asks me to "set aside" the marriage, and the other prayer is for immediate relief too; for a declaration that the marriage "was and is null and void" is a doing away with the contract of marriage just as effectively, if it has any effect, as a like declaration as to a contract to purchase land.

When I heard the evidence at Owen Sound on the 18th instant, I had great doubt, as I then stated, as to having jurisdiction at all. Reflection and a re-perusal of the authorities confirm me in the opinion that the Judges of the Supreme Court of Ontario have no power in civil actions, except incidentally or collaterally, to pronounce judgments purporting to affect the conjugal relations or legal status as regards each other of persons who have entered into a *de facto* or *de jure* marriage contract. Matters directly pertaining to the status of husband and wife and *de facto* marriages, had been relegated to the Ecclesiastical Courts before our adoption of English law; and the contention, sometimes set up, that a concurrent jurisdiction may have been retained by the English Chancery Court, although *not exercised*, down to and beyond 1837, is not *supported* by any clear English authority, and appears to be in direct conflict with the opinion of Sir John P. Wilde, who said in A. v. B. (1868), L.R. 1 P. & D. 559, at p. 561: "The gradual declension of spiritual authority in matters temporal has brought it about that all questions as to the intrinsic validity of a marriage, if arising collaterally in a suit instituted for other objects, are determined in any of the temporal Courts in which they may chance to arise. Though, at the same time, a suit for the purpose of obtaining a definitive decree declaring a marriage void which shall be universally binding, and which shall ascertain and determine the status of the parties once for all, has, from all time up to the present, been maintainable in the Ecclesiastical Courts or the Divorce Court alone."

In our own Courts, May v. May, 22 O.L.R. 559, Hodgins v. McNeil, 9 Gr. 305, Lawless v. Chamberlain, 18 O.R. 296, T. v. B., 15 O.L.R. 224, and A. v. B., 23 O.L.R. 261, may be referred to.

And, holding the opinion expressed, I make no order herein.

SINGER v. PROSKY—FALCONBRIDGE, C.J.K.B.—MARCH 22.

Buildings—Encroachment—Evidence—Deprivation of Light—Nominal Damages—Costs.]—Action by the trustees of a synagogue for a mandatory injunction to the defendant to remove from the plaintiffs' property a portion of a brick building, and for damages for trespass and an injunction against further trespasses. The learned Chief Justice said that the evidence produced by the defendant was overwhelmingly preponderating as to the distance between the church and the old buildings and fences. The encroachment was quite negligible, both as to value of land and alleged deprivation of light. The Chief Justice visited the premises, and saw that the latter alleged element of damage was inappreciable; and it was not even mentioned in argument. Judgment for the plaintiffs for $2 without costs. The defendant would have been allowed at least a set-off of High Court costs, but that he could have avoided all this trouble by giving notice to the plaintiffs when he was going to take his measurements and make his excavations which destroyed or covered up the ancient landmarks. R. J. McLaughlin, K.C., for the plaintiffs. W. Proudfoot, K.C., for the defendant.

GRIP LIMITED v. DRAKE—MASTER IN CHAMBERS—MARCH 26.

Pleading — Statement of Claim — Conspiracy to Commit Breaches of Several Agreements—Separate Breaches by Different Defendants — Separate Trials.] — The plaintiff company claimed $5,000 damages from the eight defendants, who, in paragraphs 3 to 10 inclusive of the statement of claim, were said to have agreed in writing to serve the plaintiff company for terms, none of which have as yet expired. In paragraphs 11 and 12 it was stated that the above agreements were observed by the several defendants until on or about the 27th January, 1913; when the defendants induced each other and conspired together to refuse to continue to work for the plaintiff company, and have accordingly absented themselves from the plaintiff company's premises. The defendants moved, before pleading, for an order directing separate trials of the actions against the several defendants, and that the writ of summons and statement of claim be amended, or to strike out paragraphs 4 to 12 inclusive as embarrassing. The Master said that the real issue, as stated on the argument, was that of conspiracy. The allegations as to

the separate engagements of the defendants stated material facts which were relevant to the conspiracy charged and in respect of which the plaintiff company claimed damages. If the plaintiff company were content to limit the claim to the alleged conspiracy, there could be no possible objection to the statement of claim as it stood—as was conceded on the argument. Unless the conspiracy is proved, the action must fail. But the plaintiff company were entitled to have the case laid before the Court in the shape which their advisers thought most beneficial, unless there was something in the Rules which prevented this being done. Here there did not seem to be any bar of that kind. Paragraph 12 concluded with these words: "By reason of the premises the plaintiff has sustained great loss and damages and has been put to heavy charges and expenses." The judgment in Walters v. Green, [1897] 2 Ch. 696, at p. 791, seemed to shew that the whole matter must be left to the trial Judge when the evidence is given on both sides. This was allowed in Devaney v. World Newspaper Co., 1 O.W.N. 547, in reliance on Walters v. Green, supra—which went very much further than the present statement of claim. Here the plaintiff company alleged a conspiracy to commit a breach of the several agreements, and those breaches were alleged as acts done as part of the conspiracy and in pursuance thereof—and, very likely, were relied on by the plaintiff company as being the most cogent evidence of the conspiracy. In view of the authorities, the motion must be dismissed with costs to the plaintiff company in the cause. J. G. O'Donoughue, for the defendants. George Wilkie, for the plaintiffs.

CHWAYKA v. CANADIAN BRIDGE CO.—BRITTON, J., IN CHAMBERS—MARCH 26.

Venue—Application by Plaintiff to Change—Discretion—Onus—Speedy Trial.]—Appeal by the plaintiff from the order of the Master in Chambers, ante 980, dismissing the application of the plaintiff to change the place of trial from that named by the plaintiff to either Sarnia or Chatham. The learned Judge said that the matter of changing the place of trial from that named by the plaintiff is largely in the discretion of the Court or a Judge; but the exercise of that discretion is, in almost every case, subject to this, "Where can the action most conveniently be tried?" And the onus is upon the applicant to shew the preponderance of convenience. Generally the application is by the defendant, and the change will not be made on account of a

trifling difference of expense. See Holmested and Langton's Judicature Act, 3rd ed., pp. 738, 739. But, even when the application is by the plaintiff, and notwithstanding the plaintiff's right to name the place, having named it, the onus is upon him to shew reasons for change, if he seeks a change. The reason here is not one of balance of convenience, not as to fair trial, but is solely for the benefit of the plaintiff by speeding the trial. The fact that, if there is no change, the trial will be delayed is a circumstance to be considered—not sufficient of itself to warrant the change. The convenience of witnesses or of counsel is not a sufficient reason for a change. The learned Judge said that he was bound by the authorities to give effect to the objection that the onus upon the plaintiff had not been satisfied. It might well be supposed that, in the present case, it could not be a matter of moment to the defendants to delay the plaintiff in getting to trial. Whether the plaintiff had a good cause of action or not, it was of considerable importance to him to have his claim disposed of without unnecessary delay; and it was to be regretted that the defendants did not see their way to consenting to a change that apparently would do no more than expedite the trial. Appeal dismissed; costs in the cause to the defendants. E. C. Cattanach, for the plaintiff. Featherston Aylesworth, for the defendants.

STANZEL v. J. I. CASE THRESHING MACHINE CO.—BRITTON, J., IN CHAMBERS—MARCH 26.

Jury Notice—Motion to Strike out—Con. Rule 1322—*Claim and Counterclaim—Proper Case for Trial without a Jury.*]—Motion by the defendants, under Con. Rule 1322, to strike out a jury notice filed and served by the plaintiffs. BRITTON, J., said that, upon reading the pleadings, it appeared perfectly plain that the issues tendered by the plaintiffs, and by the defendants in their defence and counterclaim, were such as should be tried by a Judge, and not by a jury. The action was a complicated one involving important questions of law and fact. It would be very inconvenient, to say the least of it, to have the plaintiffs' claim tried by a jury and the defendants' counterclaim tried by a Judge—and the counterclaim was one that, in the learned Judge's opinion, a Judge would not submit to a jury. He agreed with the decision in Bissett v. Knights of the Maccabees, 3 O.W.N. 1280. Order made striking out the jury notice and directing that the action be tried without a jury. Costs in the cause, unless otherwise ordered by the trial Judge. J. D. Falconbridge, for the defendants. Grayson Smith, for the plaintiffs.

SCULLY v. MADIGAN—BRITTON, J., IN CHAMBERS—MARCH 27.

Attachment of Debts—Judgment Debt—Entry of Judgment Stayed—Discharge of Attaching Order.]—Appeal by the judgment creditor from the order of the Master in Chambers, ante 981, discharging the attaching order which had been made against the garnishee attaching an alleged debt due by him to the judgment debtor. BRITTON, J., said that the appeal could not succeed. The so-called debt, said to be due by the garnishee to the judgment debtor, was only in reference to a judgment recovered, which was not yet final—a judgment on which, prior to the attaching order, proceedings had been stayed, and the stay was on when the attaching order was made. This stay was in order to allow the garnishee to appeal against the judgment; and an appeal had since been launched. The judgment, as it stood on the date of the order, was no more than the verdict of a jury—it might stand, it might not. The rule is correctly laid down in 20 Cyc. 983: "In order that a creditor may maintain garnishment proceedings, there must be a subsisting right of action at law by the defendant in his own name and for his own use against the garnishee. . . . A garnishee cannot be held liable unless it can be shewn that he is indebted to the defendant at the time of the institution of the garnishment proceedings. The establishment of his liability afterwards is not enough." A judgment on which proceedings are stayed for the purpose of appeal is not proof of a right of action. The debt to be garnished must be due absolutely and beyond contingency. Such a debt may be evidenced by a final judgment; this judgment was not final. Appeal dismissed with costs, fixed at $15 for the judgment debtor and garnishee each. The costs of the judgment debtor to be set off against the judgment which the judgment creditor holds. The costs of the garnishee to be paid to him by the judgment creditor.

CANADA CO. v. GOLDTHORPE—CLUTE, J.—MARCH 29.

Landlord and Tenant—Lease—Right of Lessee to Purchase Demised Lands—Forfeiture by Non-payment of Rent—Recovery of Amount of Rent.]—Motion by the plaintiffs for judgment on the statement of claim, upon noted default of defence, in an action for a declaration that the defendants had forfeited the right to purchase the lands demised by a certain indenture of lease, and to recover the amount of rent due under the lease,

with interest at six per cent. from maturity, the plaintiffs alleging default in payment of rent and breach of covenants. The learned Judge, in a written memorandum, set out the material portions of the statement of claim, and pronounced judgment for the plaintiffs as prayed, with costs. S. S. Mills, for the plaintiffs.

CORRECTION.

In Brown v. Grand Trunk R.W. Co., ante 942, at p. 944, line 16, the clause after the colon should read: "the oldest six, the next eight, the next nine, and the youngest eleven, all thirty-fourth parts of the fund."