

trial in any event. Further directions and subsequent costs reserved. No costs of appeal.

W. L. Payne, solicitor for plaintiff.

R. L. Gosnell, Blenheim, solicitor for defendant.

MEREDITH, C.J.

APRIL 10TH, 1902.

CHAMBERS.

RE PHILLIPS v. HANNA

Division Court—Jurisdiction—Splitting Cause of Action—Mortgage Interest post Diem—Damages—Permissive Clause of Division Courts Act.

Motion by the defendant for prohibition to the 1st Division Court in the united counties of Northumberland and Durham.

The defendant, in 1884, made a mortgage to the plaintiffs' testator securing \$1,300 and interest. The principal was to be repaid in four instalments of \$100 each in 1888-1891, and the remaining \$900 in 1892. The interest was to be paid annually on the unpaid principal till the whole sum secured should be paid in full.

The whole principal sum being unpaid, the plaintiffs sued the defendant in the Division Court for \$81.50, being one year's interest on the principal sum from 1st February, 1900, to 1st February, 1901, and interest thereon from the latter date.

R. McKay, for defendant.

F. E. Hodgins, for plaintiffs.

MEREDITH, C.J.—The interest for which the plaintiffs sue, being interest *post diem*, is not due to them *qua* interest, but is recoverable only by way of damages, and it was not intended by sec. 79, sub-sec. 2, of the Division Courts Act, R. S. O. ch. 60 (which provides that "where a sum for principal and also a sum for interest thereon is due and payable to the same person upon a mortgage . . . he may . . . sue separately for every sum so due"), to qualify the provision (sub-sec. 1) which forbids the dividing of a cause of action, except where the sum claimed for interest is due according to the terms of the instrument sued on. . . . The plaintiffs, if entitled to recover interest from 1st February, 1900, were entitled to recover as their damages interest down to the date of the issue of the summons, so that the sum to which they were entitled, if interest were allowed at 6 per cent., would be about \$140, and this sum is divided for the purpose of suing in the Division Court, and that is forbidden by sec. 79.