Divisional Court.] [June 29.

ROBINSON *v.* TOWN OF OWEN SOUND.

Building contract—Final certificate of engineer of completion of work—Necessity for—Condition precedent.

The plaintiff entered into a contract with the defendants for the construction of certain main sewers. The contract provided that the work and materials should in all things be performed and provided according to the plans and specifications, by a named date, and to the entire satisfaction of the engineer in charge of the work. The specifications provided that the contractor should on the first day of each month hand in to the engineer his account for work during the preceding month, and be paid on the certificate of the engineer at the rate of 85 per cent. of work done during the previous month, an additional ten per cent. when the work was finished, and the balance of five per cent. at the expiration of three months from the date of the completion of the contract, etc. No final certificate was obtained from the engineer of the completion of the work, nor was the work completed to his satisfaction. In an action to recover the balance alleged to be due under the contract,

Held, that the certificate of the engineer as to the completion of the work, was a condition precedent to the right to recover, and therefore the plaintiff must fail.

McCarthy, Q.C., and *Masson*, Q.C., for plaintiff.

Lash, Q.C., and *Reesor*, Q.C., for defendants.

Divisional Court.] [June 29.

GOWER *v.* LUSSE.

Malicious prosecution—Questions to jury—Judgment on specific findings—Waiver of right to general verdict.

By ss. 263-4 of the C. L. P. Act, R. S. O. (1877), c. 50, except in certain actions, including malicious prosecution, the judge may require the jury to answer questions, and in such case the jury shall answer such questions, and shall not give any verdict; and by s. 252, the parties in person, or by their attorneys or counsel, may waive trial by jury.

In this case, which was malicious prosecution, the learned judge, without objection left certain questions to the jury, which they answered; but at the foot thereof wrote that their verdict was for the plaintiff. The learned judge disregarded the general verdict, and entered judgment on the answers to the questions for the defendant.

Held, that the learned judge acted properly; for the parties must be assumed to have waived their right to a general verdict, and assented to the learned judge entering judgment on the specific findings of fact; for if they can waive trial by jury altogether, there is no reason why they could not agree to the waiver as in this case.

The jury, therefore, in finding a general verdict, were doing what it was agreed they should not do, and what the parties had dispensed with their doing.

G. Lynch Staunton, for plaintiff.

J. W. Nesbitt, contra.

Divisional Court.] [June 29.

STILLMAN *v.* AGRICULTURAL INS. CO.

Insurance—Fire—Title—Fraud and false statement—1st and 15th statutory conditions—Threshing machine covered while in any outbuilding—Outbuildings insured in another company—Liability.

In an action on a fire insurance policy, application was made at the trial to set up the 1st statutory condition as a defence, in that a threshing machine insured as the plaintiff's own property was partnership property; and also to set up the 15th condition in that there was fraud and false statement, for the like reason in the proofs of loss.

Held, that the application must be refused; the 1st condition having no reference to title, and as to the 15th, the statement was not proved to be wilfully false and fradulent, and the fact that the threshing machine was partnership property was not material, no question as to title having been asked. Persons in possession of goods may insure them to their full value though not the actual owners.

The plaintiff had two barns, Nos. 1 and 2. The threshing machine was insured as "in No. 1 barn." The machine was in No. 2 barn, though the horse-power was outside. The plaintiff applied to the company, and an indorsement was made in the policy stating that