

FALCONBRIDGE, C.J.K.B.

AUGUST 30TH, 1916.

BENDER v. TORONTO GENERAL TRUSTS CORPORATION.

*Evidence—Action against Executors of Deceased Mortgagee—
Attempt to Establish Payment Made on Account of Mortgage—
Corroboration—Evidence Act, R.S.O. 1914 ch. 76, sec. 12.*

Action by Hiram Bender and wife against the executors and trustees under the will of James A. Lowell, deceased, to recover \$1,000 alleged to have been overpaid to the deceased upon a mortgage made by the plaintiff Hiram Bender and his brother to the deceased, covering lands the title to which is now in the plaintiff the wife of Hiram.

The action was tried without a jury at St. Catharines.

D. B. White, for the plaintiffs.

A. C. Kingstone, for the defendants.

FALCONBRIDGE, C.J.K.B., in a considered judgment, said that the case was a curious one. The plaintiffs alleged that the mortgage was made in July, 1889; that the amount was \$4,000; that in September, 1895, the deceased Lowell requested the plaintiff Hiram to pay \$1,000 on account of the mortgage; that a promissory note was made by Hiram, dated the 19th September, 1895, and payable, three months after date, to the order of Lowell; that the note was paid by Hiram on or about the 23rd December, 1895; that Lowell died about the 5th April, 1900, having failed to make any credit entry in his books in respect of the alleged payment. On the 29th April, 1915, the defendants were paid a large sum of money in full of the claim under the mortgage. No allowance was made on account of the alleged payment, the defendants desiring that it should be proved.

The learned Chief Justice said that at the trial he entertained an opinion favourable to Hiram Bender as to the honesty of his claim, but reserved judgment principally to see if there was any corroboration, as required by sec. 12 of the Evidence Act, R.S.O. 1914 ch. 76. The case illustrated the wisdom of the provision requiring corroboration, in view of the long neglect of the plaintiff Hiram to see that he got credit for the \$1,000 payment in the lifetime of the testator. The fact that Lowell had several thousand dollars invested in promissory notes, representing money lent,