

directed to be turned into a motion for judgment under rule 323, or on the pleadings and admissions under rules 315 and 321.

The plaintiff and defendant, her husband, were married in February, 1865, the plaintiff then owning the lands in question in fee simple. The defendant was then carrying on business, which, at his wife's request, he sold out for \$2,000, which he expended in improving the said lands. The plaintiff and defendant resided together on the lands until April, 1886, when they disagreed and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The plaintiff brought an action for possession and for use and occupation. No demand was made prior to service of the writ.

Held, following *Donnelly v. Donnelly*, 9 O. R. 673, that the plaintiff was entitled to possession, but she was only entitled to recover for the use and occupation since the service of the writ.

Held, also, that the defendant could not claim for the moneys expended on the land.

J. b. Hand, for plaintiff.

A. Murphy, for defendant.

Rose, J.]

REGINA v. EDGAR.

Canada Temperance Act, 1878—Conviction for second offence—Enquiry as to previous conviction—Necessity for first dealing with subsequent offence, s. 115—Peremptory effect of—Certificate of previous conviction—Mode of drawing conviction.

Sec. 15 of the Canada Temperance Act, 1878, which provides for the case of a previous conviction, requires that the magistrate "shall in the first instance inquire concerning such subsequent offence only, and if the accused is found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted."

Held, that the language of the section is peremptory; and, therefore, to give a magistrate jurisdiction thereunder to enquire as to a previous conviction, he must first find the accused guilty of the alleged subsequent offence.

In this case, which was a conviction for a second offence, this was not done, and the conviction was therefore quashed.

Quare, whether a certificate of a previous conviction is sufficient *prima facie* evidence of the identity of the accused with the person of the same name previously convicted. Convictions should be drawn with care so as to specify that the offences are against the second part of the statute.

Aylesworth, for defendant.

Delamere, contra.

Rose, J.]

BOOK v. BOOK.

Probate—Validity of—Right to question.

The plaintiffs sued as executors under the last will and testament of B., deceased, alleging that the will was duly proved in the proper Surrogate Court. The defendant denied the validity of the probate, by reason of the mode of proof and the invalidity of the will.

Held, on demurrer, that the defence was bad; that when it is desired to attack the validity of a probate issued by a Surrogate Court having jurisdiction, and when the person on whose death the administration was issued is really dead, it must be done in an independent proceeding with the proper parties before the court.

Irwin v. Bank of Montreal, 38 U. C. R. 375, followed.

Quare, whether the application must be to the Surrogate Court or not.

Lash, Q.C., for plaintiffs.

Moss, Q.C., contra.

Divisional Court.]

HEINTZMAN v. GRAHAM.

New trial—Weight of evidence—Costs.

Replevin for a piano delivered to defendant, as alleged by plaintiffs, under an agreement that the piano was received by defendant on hire for twenty-four months, at \$5 a month, with right of purchase at \$265—\$15 cash and balance by instalment, and until the purchase money was paid, the piano to remain the plaintiff's property; that default was made in the payments, and that plaintiffs were entitled to take possession of same. The defendant stated that she purchased the piano, no mention being then made of the agreement, which was subsequently signed without defendant's