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COURT OF APPEAL,

FEBRUARY 28TH, 1911.

*REX v. MENARY.

Criminal Law—Indecent Assault—Conviction for Attempt to Commit—Evidence—Judge's Charge—Question for Jury.

Case stated by DENTON, one of the Junior Judges of the County Court of York, before whom and a jury the prisoner was tried upon a charge of committing an indecent assault, and found guilty of an attempt to commit that offence.

The question reserved was, whether, in view of the facts developed in evidence and set forth in the stated case and appearing on the record, the learned Judge was right in directing the jury that, if they could not find the prisoner guilty of having committed an indecent assault, they might, if they believed the evidence for the Crown, find him guilty of an attempt to commit that offence.

The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

T. C. Robinette, K.C., for the prisoner.

E. Bayly, K.C., for the Crown.

MOSS, C.J.O.:—The instructions to the jury, and indeed the whole charge, must be considered with reference to the evidence appearing on the record, which has been made part of the case.

The principal charge was of committing an indecent assault upon one Virginia Harrison, a girl who was at the time over 14 years of age.

Before he directed the jury as set forth in the special case, the learned Judge told them, in effect, that, if they could find,

*To be reported in the Ontario Law Reports.

upon the evidence, that the accused, having this and another girl in his office, locked both outside doors, putting the other girl in one room and remaining alone with Virginia Harrison in the other room, that he unbuttoned his trousers, that he shoved her against the bed with a view to having connection with her against her will, they might and it was their duty to find him guilty of the crime of indecent assault. These instructions are not open to exception.

These were all the material circumstances. Nothing further occurred before the police effected an entrance and took all parties into custody. The girl made no complaint to the police, at the time, of any indecency, and what is reported as having been said by her later on at the police station does not indicate that what was done or intended to be done was against her will, but, if anything, rather the contrary.

The jury did not find, and upon the evidence could not have safely found, the accused guilty of indecent assault, but did find him guilty of an attempt to commit an indecent assault.

It is difficult to understand how, if, on the evidence and the charge of the learned Judge, they were unable to find the accused guilty of the offence charged, they could, upon the same evidence, find him guilty of an attempt to commit the offence. What was alleged to have been done would, if proved, have rendered the accused guilty of an indecent assault. And upon the verdict of the jury it must be taken that they did not find these facts to be proved.

If the jury believed the evidence, the offence was committed. If they did not, there was nothing left whereon they could base a finding of an attempt.

As the learned Judge instructed the jury in substance, an attempt is an effort to commit an unlawful act that is prevented or frustrated by some event which intervenes before accomplishment.

But here, if the jury believed the evidence, there had been accomplishment of an indecent assault, even though it had been the design of the accused to go further. Nothing further happened, and there was nothing to go to the jury upon the question of attempt, if they found against the principal charge.

In my opinion, the jury should have been so directed; and the direction actually given was erroneous.

The question should be answered in the negative, and the accused discharged.

GARROW, MEREDITH, and MAGEE, JJ.A., concurred; MEREDITH and MAGEE, JJ.A., each stating reasons in writing.

MACLAREN, J.A., dissenting, was of opinion, for reasons stated in writing, that there was a question for the jury, that they were correctly charged and sufficiently directed, and that the conviction should be upheld.

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*MACKENZIE v. MONARCH LIFE ASSURANCE CO.

Company—Shares—Certificate—False Document—Authority of Managing Director—Consideration—Settlement of Action—Agent—Repudiation—Estoppel.

Appeal by the plaintiff from the judgment of RIDDELL, J., ante 45, dismissing without costs an action for a declaration that the plaintiff was the holder of 25 fully paid-up shares of the capital stock of the defendants, and to compel the defendants to register him as the holder, and to issue to him 5 certificates of 5 shares each, in place of a certificate of which he had possession and under which he claimed to be the holder of 25 shares.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. W. Bain, K.C., and M. Lockhart Gordon, for the plaintiff.

M. Wilson, K.C., for the defendants.

MOSS, C.J.O.:— . . . It is true that the plaintiff has in his possession an instrument, purporting to be under the defendants' seal and to be signed by their managing director and countersigned by one of their vice-presidents, certifying that the plaintiff is the owner of 25 fully paid-up shares of the capital stock of the defendant company, upon which $2,500 has been paid, together with $625 on premium. But the defendants say that this certificate is not binding upon them, and that it passed no title to the said shares to the plaintiff. . . .

The plaintiff puts forward and relies upon the certificate, apparently under the impression that it confers a title to the shares mentioned in it. But this is a misapprehension. There

*To be reported in the Ontario Law Reports.

is nothing in the special Act incorporating the defendants, 4 Edw. VII. ch. 96, or in the sections of the Dominion Companies Clauses Act, R.S.C. 1886 ch. 118, which are declared applicable to the defendant company, similar to the provisions contained in the Imperial Act 8 & 9 Vict. ch. 16, amended by various other Acts, requiring the defendants to deliver to a shareholder a certificate of proprietorship which is to be admitted in all Courts as prima facie evidence of the title of the person named in it.

Nor, as far as appears, had the directors availed themselves of the power enabling them to regulate by by-law the issue and registration of certificates of stock. And, so far as shewn, neither by statute nor by by-law has a certificate of shares any special force or efficacy attached to it. Under the Imperial Act a certificate of shares is not a title to shares. It is nothing more than prima facie evidence of title. . . .

[Reference to Simm v. Anglo-American Telegraph Co., 5 Q.B.D. 188; North West Electric Co. v. Walsh, 29 S.C.R. 33, 50.]

No bargain or agreement between the plaintiff and defendants whereby the defendants became bound to hand over to the plaintiff any number of fully paid-up shares, or to recognise him as the owner or holder thereof, has been shewn; in fact, there was no power in the provisional directors to enter into or carry out any such bargain.

It is not even shewn that any person acting under assumed authority from the defendants made such an agreement on their behalf.

It is, perhaps, unfortunate for the plaintiff that the exact position of Mr. J. K. Kerr in the negotiations which apparently led to the consent judgment whereby the plaintiff's action against the present defendants and J. H. Ostrom was dismissed without costs, was not fully shewn. Mr. Bicknell was under the impression that Mr. Kerr was acting on behalf of the present defendants; while Mr. D. C. Ross was apparently under the impression, derived from his client, Ostrom, that Mr. Kerr was acting for the latter. And Mr. Kerr's letter of the 6th March, 1906, to Mr. Bicknell, and his subsequent telegram of the 2nd May, are not wholly inconsistent with either view. It does not appear that Mr. Wilson, who was the solicitor and counsel for the defendants, was ever displaced; and it is certain that he refused to enter into any agreement on behalf of the defendants, except to waive their claim to costs of the action, and he so notified the plaintiff's solicitors.

The plaintiff dealt with Ostrom, and not with the defendants.

The memorandum of settlement which Mr. Wilson refused to sign is dated the 4th May, 1906. It was signed by counsel for the plaintiff and Ostrom, and not by counsel for the present defendants, nor by any one on their behalf; and it was still open to the plaintiff, upon Mr. Wilson declining to be a party to it, to withdraw from the settlement and continue his action. He did not, however, adopt that course, but apparently was satisfied to look to Ostrom. The latter's obligation was to deliver to him 25 fully paid-up shares of stock in the defendant company, but this he could not do unless he was possessed of such shares, and it is undisputed that he was not.

The issue of the certificate was not the act of the defendants, for, although it bore the defendants' seal and the signatures of Ostrom, managing director, and of one of the vice-presidents, they had no authority from the defendants to issue such an instrument, and the defendants had no knowledge that it was issued. Care was even taken that the stub in the certificate-book was left blank. The certificate was (to adopt the expression of Lord Macnaghten in Ruben v. Great Fingall Consolidated, [1906] A.C. 439, at p. 444), concocted and the vice-president's signature to it improperly procured by Ostrom for his own purposes. And, as was asked in that case (p. 444), so it may be in this: "Then how can the company be bound or affected by it?" The directors have never said or done anything to represent or lead to the belief that this was the company's deed. Without such a representation, there can be no estoppel.

This is not a case of a person, claiming under a transfer from a supposed shareholder, being given a certificate of ownership, upon the faith of which he acted to his prejudice. In such a case the giving of the certificate is the act of the company, knowingly done with the intention of enabling the receiver to act upon it, and he does act upon it to his prejudice. These elements are lacking in this case. In the face of Mr. Wilson's attitude, which in itself shewed that the defendants were not proposing to give the plaintiff anything, the plaintiff should not have allowed his action to be dismissed until he was satisfied of the truth of what it is now made plain was untruly stated in the unauthorised certificate.

The appeal should be dismissed.

MEREDITH, J.A., for reasons stated in writing, agreed that the appeal should be dismissed.

GARROW and MACLAREN, JJ.A., also concurred.

MAGEE, J.A., dissented, on the ground that the defendants were estopped (reasons stated in writing).

FEBRUARY 28TH, 1911.

McKEAND v. CANADIAN PACIFIC R.W. CO.

Master and Servant—Injury to and Death of Servant—Negligence—Defect in Way—Absence of Direct Evidence as to Cause of Injury—Findings of Jury—Evidence—Inference—Causal Connection.

Appeal by the defendants from the order of a Divisional Court, 1 O.W.N. 1059, affirming the judgment of MAGEE, J., at the trial, in favour of the plaintiff, upon the findings of a jury.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, JJ.A., and RIDDELL, J.

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for the defendants.

W. M. Douglas, K.C., and G. F. Mahon, for the plaintiff.

MOSS, C.J.O.:—The plaintiff's son, while engaged in the employ of the defendants in wheeling a barrow containing mixed concrete from a platform where it was made up, along a narrow plank-walk or way, spoken of in the evidence as the "north runway," in the direction of an abutment of a bridge over a highway in course of construction by the defendants, fell in some way to the ground below and was killed. The runway in question ran in a north-westerly direction from the platform on which the concrete was mixed, to another runway situate on the east side of the abutment, and west of the platform from which the mixed concrete was being wheeled. From the south end of this latter runway, another runway, spoken of as the "south runway," extended in an easterly direction to the platform on which the concrete was mixed. The north runway was constructed by laying two planks, 10 inches wide and 3 inches thick, alongside each other, thus giving a way of 20 inches in width.

The west runway was from 40 to 58 inches in width, and the south runway had 4 planks and was 40 inches in width. All three runways were 20 feet above the highway underneath. No witness who testified actually saw the deceased fall. He and three others were engaged in the work of wheeling the concrete. Each would in turn leave the mixer platform with his barrow loaded with about 200 pounds of concrete, and proceed along the north runway towards the west runway, from which he would empty his barrow into the excavation for the concrete wall, and then return to the mixer platform by way of the south runway. It was said it would not take more than a minute of time to make the round, but this does not appear to be very accurate.

On this particular occasion the deceased left the mixer platform with his loaded barrow and went along the north runway as usual. Very soon after—how long is not clear, but certainly not more than a minute—an alarm was given that he had fallen, and he was found unconscious on the roadway below. The base of his skull was fractured, and there was an abrasion on his right arm from the wrist to the elbow and towards the shoulder. He never recovered consciousness and died shortly afterwards. As he lay, his feet were about 12 feet out from the north runway. The head was towards the north-east and his feet pointing towards the south-west, that is, partially towards the north runway and partially towards the west runway.

One witness, Bathurst, stated that the barrow was just under the edge of the west runway. The only other witness on this point, McKay, said it was well under the west runway, right against the west abutment. The wheel was "dished" as if it had struck the ground before the frame. In taking his barrow load to the place of dumping there was no occasion for the deceased to turn sharply along the east side of the west runway when he reached it. His course was across it to the west side.

The jury found that he fell from the north runway.

The defendants contend that there was no evidence upon which the jury could reasonably find that the deceased fell from the north runway—that there was nothing upon which they could do more than conjecture. The defendants' own theory is that he fell from the west runway, and they point to the evidence of a bit of concrete being found on the east side of the west runway not far from the junction with the north runway, and over where Bathurst said the barrow was found, as indicating the possibility of the barrow having gone over at that point. But that was for the jury to say. If they ac-

cepted McKay's statement as to the position of the barrow, it could not possibly be that the deceased fell from the west runway. It is not suggested that the death was not due to accident.

The sole question is as to how the accident happened.

It is well-settled that, where there is a conflict or doubt as to the proper inference to be drawn from the facts in proof, or, if the evidence is such that the jury might reasonably come to a conclusion in favour of the plaintiff or might reasonably draw a contrary inference, the case is for the jury to decide. I agree with the Divisional Court that facts were proved from which the jury might reasonably conclude that the cause of death was the fall of the deceased from the north runway. And I have no difficulty in also agreeing that there was in the testimony quite sufficient to justify the jury in finding that the north runway, constructed where and in the manner shewn by the evidence, was dangerous to persons using it for the purposes to which it was put.

It is to be gathered from the evidence of Bathurst, the foreman in charge, that, when the work of putting on the concrete was first begun, the men used the wide south runway for wheeling the loaded barrows, returning to the mixer platform by the narrow north runway. But, as the work progressed from the south end of the abutment further north, the action was reversed, without any corresponding change in the width of the north runway. The jury might very fairly conclude that the original purpose of the north runway was as a return way, and this accounted for its narrowness as compared with the south runway, for it would probably be safe enough as a return way, but the use of it for loaded barrows was an entirely different matter.

And I am unable to see in what respect it was necessary to aid the jury further than they were aided by the evidence of the experience of others in regard to the safety or want of safety of a construction of the nature of the runway in question, when used for the purposes to which it was put.

In my opinion, the judgment of the Divisional Court ought not to be disturbed.

GARROW and MACLAREN, JJ.A., were of opinion, for reasons stated by each in writing, that there was evidence of negligence which could not have been withdrawn from the jury, and that the jury's finding could not be disturbed.

MEREDITH, J.A., and RIDDELL, J., were of opinion, for reasons stated by each in writing, that the case should not have been

left to the jury, and the appeal should be allowed with costs and the action dismissed with costs.

Appeal dismissed with costs; MEREDITH, J.A., and RIDDELL, J., dissenting.

MOSS, C.J.O., IN CHAMBERS. FEBRUARY 28TH, 1911.

FARRELL v. GALLAGHER.

Appeal—Leave to Appeal to Court of Appeal from Order of a Divisional Court—Mechanics' Liens—Contractors—Sub-contractors—Effect of Judgment.

Motion by the plaintiffs for leave to appeal to the Court of Appeal from the order of a Divisional Court, ante 635, varying the judgment of an Official Referee in a proceeding under the Mechanics' Lien Act, and—in the event of leave being granted—to dispense with security for costs and with the printing of appeal books.

F. Erichsen Brown, for the plaintiffs.
Z. Gallagher, for the defendant.

MOSS, C.J.O.:—As regards dispensing with security, no case was shewn or attempted to be shewn for departing from the general rule.

As regards the main application, I think the plaintiffs fail to shew themselves entitled to an order. It is by no means apparent that they have been subjected to any substantial wrong by the judgment of the Divisional Court. It is true that the result is to throw upon them the burden of the costs, but that is the usual result of failure upon the merits. In declining to accept the sum paid into Court by the defendant Mrs. Gallagher, the plaintiffs took the chance of being finally subjected to the costs of the further proceedings.

As bearing on the question of the allowances made to them for work under their contract, there is really no serious question as to the law. As pointed out by the Divisional Court, whether the dismissal was rightly or wrongly made, the result as to the amount to be allowed the plaintiffs would be the same. It could not exceed the contract-price plus the extras; and, upon the findings, the contract was evidently a losing one for the plaintiffs.

The plaintiffs have no locus standi to assert the rights of the sub-contractors against the defendant Mrs. Gallagher. Rightly or wrongly, it has been held that these sub-contractors have no lien against Mrs. Gallagher's land, and consequently she is not liable to pay them. The plaintiffs, who are their primary debtors, have not paid these sub-contractors. Nevertheless, the plaintiffs have been paid or allowed all that they are entitled to claim as against the defendant Mrs. Gallagher.

The effect of the judgment of the Divisional Court is to confine the sub-contractors to their remedies against the plaintiffs, and the lien-holders have not sought to appeal from the judgment.

The motion should be refused with costs.

HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 25TH, 1911.

RE BAILLIE.

Land Titles Act—Motion under sec. 104 *to Discharge Building Condition—Extraordinary Power of Court—Exercise of—Common Building Scheme—Notice to Persons Interested.*

Motion by a land-owner, under sec. 104 of the Land Titles Act, for an order discharging a condition as to building, registered under the same section, upon a sale of the lands in question by W. H. Pike to Chesnut on the 1st February, 1887.

H. H. Shaver, for the applicant.

MIDDLETON, J.:—The condition is indorsed upon a transfer, in the ordinary form, and apparently absolute, in the form of a request by the grantor to the Master of Titles "to register as annexed to" the land transferred this condition: "No buildings are to be erected upon the said lands except residences of the value of at least $1,200 and the necessary outbuildings." To this registration the grantee assents.

The land conveyed was lot 14, part of parcel 42, York. The material before me is the consent of the owners of lot 14, the applicant being owner of part of this lot.

Upon inquiry in the office of the Master of Titles, I find that parcel 42 was subdivided into a large number of lots, and all the deeds from Pike, the owner of the whole parcel, contain a similar provision.

The extraordinary power conferred upon the Court, whereby any condition or covenant running with land may be modified or discharged, is manifestly a power that must be exercised with the greatest caution.

The question as to the validity or effect of this co-called condition—for common law condition it certainly is not—and the question whether it offends against the rule as to perpetuities, are not before me on this application.

I am inclined to think that the fact that this covenant or condition was inserted in all deeds from Pike indicates that there was a common building scheme and that the purchasers may have rights inter se.

On this question (upon which I say nothing) I refer the parties to Formley v. Barker, [1903] 2 Ch. 539; Elliston v. Reacher, [1908] 2 Ch. 665; Ricketts v. Enfield, [1909] 1 Ch. 544; Reid v. Bickerstaff, [1909] 2 Ch. 505; Wiley v. St. John, [1910] 1 Ch. 84, 325.

It would clearly be improper for me to deal with the matter in the manner proposed without notice to Pike and to those claiming under him.

DIVISIONAL COURT. FEBRUARY 28TH, 1911.

*MERRITT v. CITY OF TORONTO.

Marsh Lands—Right of Owner against Adjoining Owner—Access to Deep Water—Proprietary Rights—Riparian Rights—History of Toronto Harbour and Ashbridge's Bay.

Appeal by the plaintiff from the judgment of MAGEE, J., dismissing the action, which was brought by the owner of certain lots on Ashbridge's Bay, for a mandamus to compel the defendants to amend a plan of theirs shewing certain work they intended to perform, and which, in pursuance of the plan, they had performed, thereby obstructing the plaintiff's access to the shore and interfering with his riparian rights, and to compel the defendants to remove the obstructions, and to restrain the defendants from interference with the plaintiff's rights.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

W. Nesbitt, K.C., and H. M. Mowat, K.C., for the plaintiff.

H. L. Drayton, K.C., and W. Johnston, for the defendants.

BOYD, C.:—This action was dismissed by my brother Magee, on the ground that the plaintiff's property was land and not water, and that he was not in any sense a riparian proprietor. My brother Middleton's research has demonstrated that the whole neighbourhood of the land bounded on the south by what is now called Ashbridge's Bay was originally marsh or morass and was so treated by the Government of Canada.

The law of the case is that law which pertains to the ownership of marsh land. The difference between this case and Beatty v. Davis, 20 O.R. 373, is that this place is marsh or swamp land with some intermingled spaces of non-navigable water, and the other was partly marsh and partly land covered by water, practically navigable. The plaintiff's land is now, and always has been within historical memory, marsh and nothing but marsh. Between the plaintiff's land and the artificial channel to which he seeks access, as riparian owner, there is land, of a like marshy character, owned by the defendants, and, to get to that deep water so made, he must pass over the property of the defendants. That he has no right to do by virtue of his proprietary rights, and as to alleged riparian rights he has none. His marsh property is thus bounded on the lake side by another marsh property over which he cannot pass indiscriminately as if his land was on the water's edge. The Crown had the right to deal as it did with this marshy land by treating it as non-navigable and conveying part to the predecessor of the plaintiff in title and part to the city in front of what is owned by the plaintiff: Ross v. Village of Portsmouth, 17 C.P. 195, 202.

There is not much law on this point in our Courts or the English, but the matter has been much considered in the Courts of the States bordering on the great lakes. An interesting series of cases on the ownership of marsh or flat lands may be found in vol. 127 of the Michigan Reports: Brown v. Parker, at p. 391; State v. Lake St. Clair Fishing and Shooting Club, at p. 580; and Baldwin v. Erie Shooting Club, at p. 659.

The case of the plaintiff fails in fact and in law, and the appeal should be dismissed with costs.

*To be reported in the Ontario Law Reports.

MIDDLETON, J., agreed that the appeal should be dismissed with costs. In a written opinion he set forth the history of the locus and discussed the facts and the law.

RIDDELL, J., agreed in the result.

TEETZEL, J., IN CHAMBERS. FEBRUARY 28TH, 1911.

*REX v. BARBER ASPHALT PAVING CO.

Public Health Act—Construction of sec. 72—Ejusdem Generis Rule—Noxious or Offensive Trade—"Such as may Become Offensive"—Conviction—Jurisdiction of Magistrate—Evidence.

The defendants were convicted before a Justice of the Peace for having unlawfully established and carried on, without the consent of the municipal council of the village of Eastview, a certain noxious and offensive trade, business, and manufacture, of heating and preparing asphalt and other paving material.

The conviction was under sec. 72 of the Public Health Act, R.S.O. 1897 ch. 48, which provides that "in case a person establishes, without the consent of the municipal council of the locality, any offensive trade, that is to say, the trade of blood boiling, or bone boiling, or refining of coal oil, or"—specifying a number of trades, but not the one alleged to have been carried on by the defendants—"or any other noxious or offensive trade, business or manufacture, or such as may become offensive, he shall be liable to a penalty. . . . ."

The defendants moved to quash the conviction, on the ground that, upon the evidence, the Justice had no jurisdiction to convict, because: (1) the evidence did not establish that the trade was noxious or offensive, within the meaning of the Act; and (2), even if the trade was noxious or offensive, it did not, upon a proper interpretation of sec. 72, come within the provisions of that section.

E. E. A. DuVernet, K.C., for the defendants.
C. J. Holman, K.C., for the prosecutor.

*To be reported in the Ontario Law Reports.

TEETZEL, J.:—Applying to the word "noxious" its plain, ordinary meaning, *i.e.*, "hurtful, harmful, unwholesome, or causing or liable to cause hurt, harm, or injury" (Encyclopædic Dictionary), I think there was evidence before the Justice sufficient, if believed, to warrant a finding that the defendants' trade, as carried on by them, was necessarily both noxious and offensive, because there was evidence that the fumes arising from the heated mixtures used by the defendants caused the air in the neighbourhood to be tainted with disagreeable odour, which penetrated the houses of some of the witnesses, thereby not only causing discomfort and annoyance to the occupants, but rendering some of them ill.

The defendants called a number of witnesses . . . but . . . the conviction cannot be quashed on the ground that the Justice improperly weighed the evidence, but only upon the ground that there was no evidence to give him jurisdiction to convict. . . .

[Reference to Regina v. Coulson, 27 O.R. 59, 62.]

Then, assuming the trade to have been noxious or offensive, was it within the provisions of sec. 72?

Mr. DuVernet, for the defendants, argued that the trade in question is neither one of those specially prohibited by that section, nor, applying the doctrine of ejusdem generis, can it be embraced within the words "any other noxious or offensive trade. . . ."

[Reference to Regina v. Playter, 1 O.L.R. 360.]

It is by no means . . . clear . . . that the defendants' trade is not ejusdem generis with two of the trades mentioned in sec. 72, namely, "refining coal oil" and "manufacturing of gas." . . . .

[The learned Judge set out the facts with regard to the defendants' processes and the odours caused thereby.]

It seems to me that, applying the doctrine of ejusdem generis, these facts are sufficient to identify the defendants' trade as one within the general words following the specific trades of "refining of coal oil" or "manufacture of gas," because . . . in both these trades the noxious or offensive character of the trade is due to offensive fumes being given off, as the result of applying great heat to bituminous substances.

It is to be observed, however, that the words "or such as may become offensive," which appear in sec. 72, do not appear in the English Act, under which a number of cases cited by Mr. DuVernet were decided, and in which the doctrine of ejusdem generis was strictly applied.

The word "such" in this phrase is, I think, intended to qualify "trade, business, or manufacture;" and, therefore, in my opinion, the legislature intended to embrace any trade, business, or manufacture whatsoever, whether or not analogous to any of these previously mentioned as noxious or offensive trades, which may become offensive, unless in such cases as the carrying on of the business of a hospital for consumptives or persons suffering from other infectious diseases, to which other specific provisions of the Act are applicable, and from which an intention to exclude that business from the operation of sec. 72 is manifest. . . .

[Reference to Hawke v. Dunn, [1897] 1 Q.B. 579, at p. 586, *per* Hawkins, J.]

I am of opinion in this case that, by adding these words to the section, the legislature was seeking to avoid the application of the ejusdem generis rule to the case of any trade, business, or manufacture which, in the usual and necessary course of its operation, might become offensive, and as to which no other specific provision was made in the Act.

Motion dismissed with costs.

TEETZEL, J. MARCH 1ST, 1911.

*FOXWELL v. KENNEDY.

Will—Appointment of Executors and Trustees—Renunciation of Executorship—Right to Exercise Office of Trustee—Duties of Offices not Separable—Powers with Reference to Residuary Estate—Jurisdiction of High Court to Set aside Renunciation—Surrogate Courts Act—Judicature Act—Interest in Residuary Estate.

Motion by the defendant James H. Kennedy for judgment dismissing the action, except as to the claims set forth in paragraphs 15 to 23, inclusive, of the statement of claim, upon questions of law raised in his statement of defence, an order having been obtained, under Con. Rule 259, for the hearing and disposition of the questions of law in the Weekly Court.

The questions for determination were:—

(1) Is the plaintiff entitled to the rights of a trustee under the will of the late David Kennedy?

(2) Has this Court jurisdiction to try and determine in this action the question whether the plaintiff is entitled and should

*To be reported in the Ontario Law Reports.

be allowed to retract her renunciation of the right to probate of the said will?

(3) Has the plaintiff any interest in the residuary estate of the testator which would entitle her to maintain so much of the action as is not embraced in paragraphs 15 to 23?

E. D. Armour, K.C., for the defendant James H. Kennedy.

W. Proudfoot, K.C., and A. J. Russell Snow, K.C., for the plaintiff and the defendants in the same interest.

W. Davidson, K.C., W. A. Proudfoot, W. A. Skeans, and A. J. Anderson, for the other defendants.

TEETZEL, J.:—As to the third question, my brother Latchford, in Kennedy v. Kennedy, ante 626, determined that the plaintiff in that action, whose status in reference to the residuary estate is the same as that of the plaintiff here, had no interest in the residuary estate, and could not maintain an action similar to this.

It was agreed upon the argument that upon this question I should pro forma follow the decision of my learned brother, and declare that the plaintiff, and those defendants who, like the plaintiff, are pecuniary legatees under the will, are not entitled to any interest in the residuary estate, and are not entitled to make the claims in reference thereto which the plaintiff is making in this action.

As to the first question, the testator by his will appointed his executors, in this language: "I appoint my son James Harold Kennedy and my grand-daughters Gertrude Maud Foxwell" (the plaintiff) "and Annie Maud Hamilton, of the city of Toronto, spinsters, hereinafter called my trustees, to be the executors and executrices of this my will;" and in the subsequent parts of his will he refers to them as follows: (first) in the devise of property known as "the Foxwell estate" and the goods and chattels thereon, "to my said trustees in trust" for the benefit of his son Joseph Hilton Kennedy, to permit him to use, occupy, and enjoy the same for his natural life, "or as they in their discretion may see fit," etc.; (second) in a gift of two pictures of the late Mr. Howard, he directs that they shall be sent or given "by my executors and trustees aforesaid" to his sons, etc.; (third) in the gift of his personal clothing, he directs "my executor and executrices" to divide them; and (fourth) in the disposition of his residuary estate, the subject matter of this action, where his language is: "The rest residue and remainder of my estate both real and personal I give devise and bequeath to

my executor executrices and trustees aforesaid to be used and employed by them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son James Harold Kennedy with full power and authority to them to make sales of my real estate upon such terms and conditions and otherwise as may be expedient and to execute all deeds documents and other papers necessary for the sale of same and to make title thereto to any purchaser thereof and the proceeds of such sales to devote as in their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained and if for any reason it should be necessary that the said residence should be sold and disposed of, I direct upon any such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will."

The will contains no provision for the payment of debts, and in the several gifts of pecuniary legacies he does not, except as above, expressly mention his executors or trustees, or indicate out of what fund the legacies are to be paid, except as to an annuity to David Kennedy, which he charges upon his estate, and he provides that the legacies shall be free from succession duty.

Having regard to the words in the appointing clause, "hereinafter called my trustees to be the executor and executrices of this my will," and having regard also to the somewhat indiscriminate use of the words "executors," "executor," "executrices," and "trustees," in the subsequent clauses of his will, I think the testator did not contemplate creating two distinct offices in the sense that either of those named could elect to reject the executorial rights and responsibilities and accept only the office of trustee. In other words, I think, taking the will as a whole, that the testator constituted the persons named, or those of them who might accept the whole of the burden, his representatives to perform the combined duties of a trustee-executor.

The plaintiff, as did also Annie Maud Hamilton, by renunciation filed in the Surrogate Court, renounced her right to probate of the will, the effect of which, under the Surrogate Courts Act, R.S.O. 1897 ch. 59, sec. 65, was to cause her rights in respect of the executorship wholly to cease; and the question now is, whether or not such renunciation also deprives her of the

right to exercise any of the privileges of a trustee, and divests her of any estate which she would have had in the testator's property if she had accepted probate of the will. . . .

[Reference to In re Gordon, Roberts v. Gordon, 6 Ch.D. 531, 534.]

In considering the applicability of this case to the present, it is to be borne in mind that, under the Devolution of Estates Act, R.S.O. 1897 ch. 127, sec. 7, the real and personal property comprising the residuary estate is applicable ratably, according to their respective values, to the payment of the testator's debts; and by 10 Edw. VII. ch. 56, sec. 6, this liability is extended to the payment of funeral and testamentary expenses, and the costs and expenses of administration. It would be in the line of the defendant J. H. Kennedy's duty, therefore, as executor, and not as trustee, to realise upon any real property forming part of the residuary estate for the purpose of paying debts, and succession duty under sec. 18 of 9 Edw. VII. ch. 12; so that we have here, as in In re Gordon, a mixed fund provided for payment of debts and succession duty. . . .

[Reference to In re Birchell, Birchell v. Ashton, 40 Ch.D. 436, 438.]

I also think that the powers conferred with reference to the residuary estate in the last clause of the will were not intended by the testator to be personal to the representatives named in the appointing clause, but were intended to be annexed to the office of executor and trustee, and that those who have renounced cannot interfere. . . . I follow the reasoning in Crawford v. Crawshaw, [1891] 2 Ch. 261, and In re Smith, Eastwick v. Smith, [1904] 1 Ch. 139.

As to the first question, therefore, I find that the plaintiff is not entitled to any of the rights of a trustee under the said will.

Then as to the second question, the plaintiff alleges that, when she executed the renunciation of probate, she resided with and was greatly under the influence and control of the defendant James H. Kennedy, and that, without any legal or independent advice and in ignorance of her rights and interests, she was induced to sign the renunciation, and claims a judgment setting aside the renunciation.

All jurisdiction and authority in matters testamentary is, by the Surrogate Courts Act, R.S.O. 1897 ch. 59, secs. 17 and 18, now 10 Edw. VII. ch. 31, secs. 19 and 20, declared to be vested in the Surrogate Courts, subject to the provisions of the Judicature Act.

Whatever jurisdiction the High Court has in such matters is purely statutory and is to be found in secs. 38, 39, and 40 of the Judicature Act and in the Surrogate Courts Act. . . .

I think it is impossible to say that either in the Judicature Act or in the Surrogate Courts Act jurisdiction is given to the High Court, in an action such as this, to adjudicate upon a claim to set aside a renunciation of probate, or to allow a retractation by a plaintiff who was named in the will as executor and who has filed a renunciation.

In such a case I think the plaintiff must go for relief to the Court in which the renunciation was filed and out of which probate issued.

I therefore decide the above questions of law in favour of the defendant James H. Kennedy, and direct that the action, except as to the claims set forth in paragraphs 15 to 23, inclusive, of the statement of claim, be dismissed with costs, and that the caution filed in the Land Titles office be vacated.

DIVISIONAL COURT. MARCH 1ST, 1911.

*EUCLID AVENUE TRUSTS CO. v. HOHS.

Husband and Wife—Mortgage Given by Wife to Secure Debt of Husband—Wife Acting on Importunity of Husband—Absence of Independent Advice—Undue Influence—Onus—Evidence—Validity of Mortgage—Foreign Banking Corporation—Authority to Take Security—63 Vict. ch. 24, secs. 6, 14—License to Do Business in Canada.

Appeal by the plaintiffs from the judgment of MULOCK, C.J.Ex.D., 13 O.W.R. 1050, dismissing the action, which was brought by the plaintiffs, as mortgagees, against Agnes Hohs and her husband Edgar Hohs, to recover possession of the mortgaged lands, situate in the city of Toronto.

The appeal was heard by TEETZEL, CLUTE, and SUTHERLAND, JJ.

M. H. Ludwig, K.C., for the plaintiffs.

R. S. Robertson, for the defendants.

The judgment of the Court was delivered by CLUTE, J.:—

*To be reported in the Ontario Law Reports.

. . . Mulock, C.J., . . . held that the case fell within the principle laid down in Cox v. Adams, 35 S.C.R. 393, followed in Stuart v. Bank of Montreal, 41 S.C.R. 516, that "the wife having become surety for her husband without having independent advice, the transaction is assumed to have been brought about by the husband's undue influence, and is, therefore, void." . . .

It is contended on behalf of the plaintiffs that the above cases are now overruled by the decision of the Privy Council in Bank of Montreal v. Stuart, 103 L.T.R. 641. . . .

This case is governed, so far as the main question is concerned, by Bank of Montreal v. Stuart, 103 L.T.R. 641. The effect of that decision is to overrule . . . Cox v. Adams. . . .

[Reference to Nedby v. Nedby, 5 DeG. & Sm. 377; Boyse v. Rossborough, 6 H.L.C. 2, 48; Willis v. Barron, 86 L.T.R. 805, [1902] A.C. 271.]

Applying these cases to the question of undue influence, I am unable to reach the conclusion that the defendant Agnes E. Hohs has succeeded in proving it. The lack of independent advice is not sufficient. The onus is upon her to establish the charge of undue influence.

After a careful review of the evidence, I do not think that she has succeeded in doing so. . . .

There was not here any "overpowering influence," nor was the transaction "immoderate and irrational," nor do I think it established that any unfair advantage was taken of Mrs. Hohs's confidence so as to bring the facts within Bank of Montreal v. Stuart. . . .

[Reference to Chaplin & Co. v. Brammall, [1908] 1 K.B. 233; Bischoff's Trustee v. Frank, 89 L.T.R. 188; Turnbull v. Duval, [1902] A.C. 429.]

A further point was taken, namely, that the plaintiffs were a banking corporation, and were not authorised to take security beyond the State, and the mortgage taken was, therefore, void. . . .

[Reference to Case v. Kelly, 133 U.S. 21; 10 Cyc. 1133, 1135.]

It will be observed that in the present case the plaintiffs do not ask to have their title perfected . . . what they ask is possession. . . .

[Reference to McDiarmid v. Hughes, 16 O.R. 570; Ayers v. South Australian Banking Co., L.R. 3 P.C. 548; Halsbury's Laws of England, vol. 8, sec. 817.]

This objection, I think, fails.

A further point was raised under 63 Vict. ch. 24, secs. 6

and 14, . . . that the plaintiffs had not taken out a license to do business in Canada.

The plaintiffs did, in fact, take out a license subsequent to the mortgage and after action brought. I do not, however, think that the point is well taken, as what was done here was not a carrying on of their business within the meaning of the statute. The note and mortgage had been prepared in Cleveland and the mortgage sent on for registration. It transpired that it could not be registered owing to lack of form, and a new mortgage was then prepared and signed by the defendants for the purpose of registration and by way of confirmation of the imperfect instrument executed at Cleveland.

The judgment for the defendants should be set aside, and judgment entered for the plaintiffs, with costs here and below.

MIDDLETON, J., IN CHAMBERS. MARCH 2ND, 1911.

*RE BOLTON AND COUNTY OF WENTWORTH.

Contempt of Court—Disobedience of Mandatory Order—County Corporation—Erection of House of Refuge—Motion for Attachment or Committal of Corporation and Councillors—Con. Rule 853—Appropriate Remedy—Service on Councillors—Dispensing with—Knowledge of Order—Compliance with Order after Delay—Remission of Punishment—Undertaking—Costs.

Motion by William Bolton for an order for attachment against certain councillors of the county of Wentworth for contempt in not obeying a mandatory order made by MEREDITH, C.J.C.P., on the 18th March, 1910, by which it was directed that the "Corporation of the County of Wentworth and the municipal council of the same do proceed forthwith and complete without delay the erection of a House of Refuge for the said county, pursuant to the statute in such cases made and provided," or for an order committing the said councillors to the common gaol for their said contempt. Upon the argument this was amended by adding, "or for such further or other order against the said councillors or the said corporation as may be deemed proper in the premises."

*To be reported in the Ontario Law Reports.

Kirwan Martin, for the applicant.

W. A. H. Duff and W. W. Osborne, for certain of the councillors.

J. L. Counsell, for the county corporation.

MIDDLETON, J.:—At the argument, after I had expressed my views upon the duty of the council and the councillors, judgment was, at their request, reserved to allow obedience to be yielded to the order, and the time allowed has been from time to time enlarged to permit of compliance with the order and the statute upon which it is based, and the applicant has now expressed himself as satisfied that the county corporation have taken such steps as indicate an intention to discharge the duty imposed by the legislature, and the material before me satisfies me that this is the case.

This, however, does not relieve me from dealing with the motion, as the delay has been without prejudice to the position taken by the respondents, that there never was in fact any contempt or any foundation for the motion, which, according to their view, is entirely misconceived.

By the Municipal Act, 1903, sec. 524, the municipality is given power to establish a House of Refuge, and this power is undoubtedly one which the council might either exercise or refrain from exercising as it might see fit. . . .

By R.S.O. 1897 ch. 312, the Province, upon compliance with certain requirements, undertook to make a grant of $4,000 in aid of the local municipality.

By 3 Edw. VII. ch. 38, the corporation of every county was directed to erect before the 1st January, 1906, a House of Refuge. . . . By this statute, that which had theretofore been optional became an imperative duty. As ancillary to this statute, power was given to the council by 4 Edw. VII. ch. 37, sec. 4, to borrow upon debentures, without the assent of the ratepayers, $40,000 for the purpose in question. The time limited by 3 Edw. VII. ch. 38 was extended to the 1st January, 1910. . . .

It is not denied that all the respondents knew of the terms of the order of the 18th March, 1910.

This motion was launched on the 22nd September, 1910, and was heard on the 4th November. At that time obedience had not been yielded to the order, and counsel for the individual respondents sought to reargue the case on the merits. I declined to permit this. . . .

Apart from this, in my humble opinion, the order is very clearly right. . . .

I quite acquit all the members of the council from any intention to act improperly: yet the position of affairs quite warranted the making of this motion.

Has the applicant taken the right course? He has not made all the councillors parties to this motion, and justifies this course by saying that he is satisfied that these could shew that they had endeavoured to comply with the order.

The proper mode of enforcing obedience to an order against a corporation or company is not free from difficulty. . . .

[Reference to English Rule 609; Con. Rules 856, 857; Hurlburt v. Cathcart, [1894] 1 Q.B. 244; London and Canadian Loan and Agency Co. v. Merritt, 32 C.P. 375.]

One remedy is, I think, by attachment or committal, and this is adequately provided by Con. Rules 853-5.

A judgment requiring a corporation to do or abstain from doing an act is an injunction that must be obeyed by all officers of the corporation. The corporation can act only through its officers, and, when the corporation is required to act, all the officers of the corporation upon whom devolves the duty of acting as and for the corporation are in substance and in effect called upon to do what is necessary to carry the decree of the Court into operation. . . . The officers and agents must each and all do his and their part, and if, knowing the mandate of the Court, and their duty to obey, they fail to discharge this duty, they are guilty of contempt. . . .

[Reference to Demorest v. Midland R.W. Co., 10 P.R. 85; Regina v. Ledyard, 1 Q.B. 623.]

Where the act to be done is a "corporate function," the mandamus must be directed to the corporation. Where the duty appertains to the officer of the corporation in his official capacity, then the mandamus must be to the officer himself. This distinction kept in mind reconciles the cases.

A mandamus against a corporation is, then, a judgment requiring the officers of the corporation to do an act, within Con. Rule 853, so as to render them liable to attachment for disobedience.

Demorest v. Midland R.W. Co. is relied upon as establishing that an attachment cannot be granted unless the mandamus has been served upon the officer. There is here an order for substitutional service, and, as it is admitted that all had knowledge of the order, this service is, I think, sufficient.

I am not prepared to accept the statement that service is necessary. . . .

[Reference to Rex v. Edyvean, 3 T.R. 352.]

Formerly, in order to found proceedings for contempt, great strictness in proof of service was required, but it is now well established that knowledge is all that is necessary. This is more consistent with reason and principle. See, for example, United Telephone Co. v. Dale, 25 Ch. D. 778.

Upon another line of cases, the same general conclusion would have been reached. The officers of the corporation knew of the obligation imposed upon the corporation by the mandatory order in question; they have by their conduct, not only aided and abetted, but have actively brought about the disobedience of the corporation. Seaward v. Paterson, [1897] 1 Ch. 545, and Stancombe v. Trowbridge, [1910] 2 Ch. 190, shew that this is such an obstruction to the due administration of justice as to amount to contempt.

The jurisdiction to punish for contempt is one that should be most sparingly exercised, and in cases such as this should be regarded as coercive and not punitive; and, the due exercise of the corporation function being now assured, no further order need be now made than to dispose of costs.

In any case I would not have awarded either attachment or committal. The common law power to fine would be the more appropriate remedy.

As the power of the Court is invoked to punish for contempt, the applicant can proceed against as many or as few of the offenders as he may choose.

With regard to costs: I think the proper order is to award costs against the county and to make no order against the individuals. I cannot, on this motion, deal with any question between the county and the individual councillors, but, as between the applicant and these, there will be no order as to costs. The applicant is to have his full costs against the corporation.

This order is now made upon the faith of the undertaking given by council that the erection of the House of Refuge will be pushed to completion without delay—and is without prejudice to any substantive motion that may be made by reason of any failure to comply with the order or this undertaking hereafter.

RE RAVEN LAKE AND PORTLAND CEMENT CO.—NATIONAL TRUST CO. v. TRUSTS AND GUARANTEE CO.—TEETZEL, J.—FEB. 24.

Appeal—Leave to Appeal to Court of Appeal—Dominion Winding-up Act—Claim by Mortgagee—Leave to Bring Action against Liquidators.]—Motion by the Trusts and Guarantee Co.,

liquidators, for leave to appeal to the Court of Appeal, under sec. 101 of the Dominion Winding-up Act, from the order of SUTHERLAND, J., ante 761. TEETZEL, J.:—Having grave doubts whether an action lies against the liquidators, in the absence of fraud, mala fides, or personal misconduct; also whether for the relief the plaintiffs seek they are not restricted to procedure under sec. 133 of the Act; and there being no express provision in the Act for obtaining leave to bring an action except against the insolvent company under sec. 22; and considering the questions involved sufficiently important to warrant an appeal; I grant the leave. The appeal to be perfected within ten days. Costs in the appeal. W. Laidlaw, K.C., for the liquidators. Glyn Osler, for the National Trust Co., claimants.

SMITH v. LENNOX—MASTER IN CHAMBERS.—FEB. 28.

Trial—Postponement—Illness of Witness—Terms.]—Motion by the defendant to postpone the trial until the September sittings on account of the illness of the defendant's wife, said to be a necessary and material witness on his behalf. The action was brought to recover damages for injury to the plaintiff by the defendant's motor-car in October, 1909. The defendant's wife was in the car at the time. The action was begun in June, 1910, and the trial had already been twice postponed on account of the illness of Mrs. Lennox. Her medical attendant certified that she would be unable to give evidence at the Toronto jury sittings, to begin on the 6th March, and that he thought she would be able to do so in September. The plaintiff suggested that she might be examined de bene esse at her own house or that her evidence given in the Toronto Police Court, upon a charge made against her son in respect of the injury to the plaintiff, might be read at the trial. The plaintiff did not accept the suggestion that the action might be tried without a jury. The Master was of opinion that in order to have a fair trial there should be a postponement. The plaintiff should have the opportunity of a trial at the sittings about to commence, but no earlier than the week of the 10th April. If then the sittings have ended, or Mrs. Lennox is still too unwell to appear, it should be left to the plaintiff to move to change the place of trial to Brampton, for the purpose of trial at the sittings to begin there on the 9th May. If the medical attendant of Mrs. Lennox should then be of opinion that she cannot safely give

evidence, the plaintiff will have to wait until September. Costs of the motion to be costs in the cause. H. E. Rose, K.C., for the defendant. T. N. Phelan, for the plaintiff.

DEAN v. CORBY DISTILLERY CO.—BOYD, C.—MARCH 1.

Contract—Breach—Damages—Leases—Rent—Reference.]—Action for damages for breach of contracts. The Chancellor said that the real and essential meaning of the contracts or leases sued upon was that the defendants were to supply slop-food sufficient for the proper nourishment of 1,200 cattle during the period in question in the action. He proceeded on two principles: (1) that the amount of the rent is not to be treated as fixed, but to be ascertained on the footing of the quantum of slop supplied; and (2) that the failure to supply the amount of slop engaged to be furnished for the food of the cattle resulted in direct damage to the plaintiff in the deterioration of the stock in weight and saleable value. Judgment for the plaintiff for $666, the amount brought into Court by the defendants, in respect of rent, and for $7,500 damages. Counterclaim dismissed with costs. If either party is dissatisfied with the amount, it may be referred to the Master to go more minutely into the items with further evidence: in which case costs of the reference will be reserved. I. F. Hellmuth, K.C., and D. Urquhart, for the plaintiff. D. L. McCarthy, K.C., and Frank McCarthy, for the defendants.

DICKENSON v. TORONTO R.W. CO.—MASTER IN CHAMBERS—MARCH 2.

Venue—Change—Witnesses—Expense—Convenience.]—Motion by the defendants to change the venue from Hamilton, where the plaintiff lived, to Toronto, where the defendants operated an electric street railway, and the cause of action arose. The action was brought to recover damages for the loss of a team of horses occasioned by a collision between the plaintiff's waggon and a car of the defendants. The defendants stated that they had ten witnesses in Toronto, but their names were not given, nor was it shewn what they would prove. The Master said that this weakened the statement: Cameron v. Driscoll, 2 O.W.N. 338. The plaintiff said he would have only four wit-

nesses, two of whom lived in Toronto. The Master said that the increased expense in witness fees by reason of a trial at Hamilton, instead of Toronto, would be only $20—and that was not sufficient to take away from the plaintiff his right to have the trial at Hamilton. There are, besides, serious objections to bringing a case from outside to Toronto; to do so almost inevitably increases the expense: Saskatchewan Land and Investment Co. v. Leadlay, 9 O.L.R. 526. Motion dismissed; costs in the cause. Frank McCarthy, for the defendants. H. E. Rose, K.C., for the plaintiff.

BROOKS v. CATHOLIC ORDER OF FORESTERS—SUTHERLAND, J.—MARCH 2.

Costs.]—In the note of this case, ante 771, it is stated that the costs of all parties were ordered to be paid out of the fund. The judgment was afterwards varied as to costs by the learned Judge. The plaintiffs' costs to be payable out of the fund; no costs to the defendants.

TELFORD v. SOVEREIGN BANK OF CANADA—TEETZEL, J.—MARCH 2.

Contract—Construction—Sale of Business—Covenant of Purchasers to Make Annual Payments—Proviso as to Reduction in one Event—Average of Deposits in Bank.]—Motion by the defendants (the plaintiffs consenting to the motion being entertained) for an adjudication upon a question overlooked by the defendants upon the trial of this action, after which the plaintiffs were awarded a judgment for $1,750: 1 O.W.N. 822. The defendants asserted that the judgment should have been for only $1,400, that is, a payment to each of the plaintiffs of $200, instead of $250, under the agreement between the plaintiffs and defendants whereby the plaintiffs sold and transferred their private banking business at Owen Sound to the defendants. The question arose under a clause in the agreement by which the defendants undertook to pay each of the members of the firm of Telford & Co. $250 per annum for ten years, provided that if the deposits to the credit of the customers of the branch bank at Owen Sound should not amount to the steady average of $400,000 on or before the 1st June, 1908, the amount should be

reduced to $200, on and from the 1st June, 1906. The defendants became embarrassed, and on the 18th January, 1908, ceased to carry on business, and transferred their business at Owen Sound to another bank. It was shewn that between the 1st June, 1906, and the 18th January, 1908, the average deposits at the defendants' Owen Sound branch were somewhat less than $400,000, and that during only three months of that term were the deposits as high as $400,000. TEETZEL, J., said that his interpretation of the proviso was not that the defendants would be relieved from paying the greater sum if during the two years before the 1st June, 1908, the average deposits, monthly or otherwise, were less than $400,000; but that, if on that date the deposits for two years prior thereto were only such as would enable a reasonable man honestly to say that the deposit business did not then amount to a steady average of $400,000, the defendants would be relieved. If the defendants had continued business to the 1st June, 1908, and if on that date, having reference to a reasonable time prior thereto, the books had shewn deposits in the ordinary course of business amounting to a steady average of $400,000, the defendants would not have been relieved from paying the larger sum. There was nothing to shew that the parties contemplated that the average should be computed for the whole term or for any certain number of months. The circumstance that the defendants were compelled to give up the business at this branch before the time fixed for determining whether they should be relieved under the proviso was a misfortune, the consequences of which they must suffer. They contracted to pay the plaintiffs $250 per annum, and the proviso was introduced for their relief in a certain event, and by their own act in closing the branch, and without any default in the plaintiffs, the defendants had made it impossible to apply the terms of the proviso. The judgment stands as originally pronounced. Costs of the motion to be paid by the defendants. H. S. White, for the plaintiffs. J. F. Boland, for the defendants.

BROWN v. CANADIAN PACIFIC R.W. CO.—GARROW, J.A., IN CHAMBERS—MARCH 2.

Appeal—Leave to Appeal to Court of Appeal from Order of Divisional Court—Absence of Special Circumstances.]—Motion by the defendants for leave to appeal to the Court of Ap-

peal from the order of a Divisional Court, ante 773, dismissing an appeal from the judgment of TEETZEL, J., upon the findings of a jury, at the second trial of the action. The learned Judge said that he was quite unable to see any principle upon which a prolongation of the litigation could be justified. No question of law was involved. Whatever was said in the judgment granting a new trial (13 O.W.R. 879) was based upon the facts and the findings which then appeared, but the new trial was granted generally. Nothing was to be taken as res adjudicata. And now the only question must be, was there reasonable evidence for the jury on the second trial sufficient to justify the findings then made? The evidence was conflicting, and, at the best, not strong or convincing—particularly as regards the reasonableness of the plaintiff's apprehension of violence if he did not at once alight. But there was certainly evidence which could not have been withdrawn from the jury—and that seemed insuperable on this motion, which must be dismissed with costs. I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for the defendants. L. F. Heyd, K.C., for the plaintiff.