The
# Ontario Weekly Notes

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## HIGH COURT DIVISION.

SUTHERLAND, J. JULY 8TH, 1915.

### SHILTON WALLBRIDGE & CO. v. MICHIE.

*Husband and Wife—Promissory Notes Made by Wife as Security for Loan to Husband—Knowledge of Wife of Nature of Transaction—Absence of Undue Influence — Want of Independent Advice.*

Action against E. R. Michie and Mabel G. Michie, his wife, upon two promissory notes, made by them, the consideration being money lent by the plaintiffs to E. R. Michie.

The defendant E. R. Michie did not defend, and judgment by default was entered against him.

The defendant Mabel G. Michie set up that she received no consideration for signing the notes, was not at the time aware of the nature of the documents which she signed, and never received any independent legal advice nor advice of any kind with respect to her signature to the documents.

The action was tried without a jury at Toronto.

R. J. McLaughlin, K.C., for the plaintiffs.

E. B. Ryckman, K.C., for the defendant Mabel G. Michie.

SUTHERLAND, J., reviewed the evidence in a considered judgment, and said that the defendant Mabel G. Michie was an unusually bright, well-educated, and intelligent woman; and, so far from it being shewn by the evidence that there was any concealment from her of the real facts or any undue influence exercised over her on the part of her husband, it was shewn that she was not only fully aware, by the explanations given and what happened at the times, that he was getting the loans, and that she was rendering herself and her property liable to repayment, but that she too was anxious that the plaintiffs should

make the loans and grateful to them for doing so. There was nothing to indicate that she was in any way under her husband's influence or was deceived or misled by him or by any one else. These being the facts, Mrs. Michie could not be relieved of liability on the ground that she had no independent advice.

Reference to Stuart v. Bank of Montreal, [1911] A.C. 120; Chaplin & Co. Limited v. Brammall, [1908] 1 K.B. 233; Howes v. Bishop, [1902] 2 K.B. 390; Euclid Avenue Trusts Co. v. Hohs (1911), 23 O.L.R. 377, 24 O.L.R. 447; and other cases.

Judgment for the plaintiffs against the defendant Mabel G. Michie for $5,000, with suitable interest as asked, and costs.

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SUTHERLAND, J. JULY 8TH, 1915.

## RE CATHCART.

*Will—Construction—Devise—Gift over—Repugnancy — Estate in Fee Simple.*

Application by the widow and executrix of the will of John Cathcart, deceased, for an order determining a question of construction arising upon the terms of the will.

The testator directed his executrix to pay his debts and funeral and testamentary expenses, and gave the residue to her in trust: (1) for the sole use and benefit of herself and her daughter Nettie Mabel "for and during their lives and the life of the survivor of them in fee simple;" (2) "in case my said daughter dies without leaving issue her surviving and on the death of my said wife, my estate then remaining shall go to and for the use of Eva Frizell . . . and I direct my said estate or what remains thereof to be in that case conveyed and transferred unto the said Eva Frizell if then living and if not then unto her heirs at law in equal shares;" and (3) he gave his executrix power to sell and convert any part of his estate, and to invest and reinvest etc.

The motion was heard in the London Weekly Court.

J. B. Davidson, for the widow and the daughter of the testator.

T. J. Murphy, for Eva Frizell.

A. A. Ingram, for the Solicitor for the Treasury.

SUTHERLAND, J., said that, having regard to the language used in clause (1), ending with the words "in fee simple," the true principle of construction was that given in such cases as In re Walker, [1898] 1 I.R. 5, and In re Jones, [1898] 1 Ch. 438, lately followed in Re Miller (1914), 6 O.W.N. 665, 666; and upon that principle the gift to the wife and daughter was an absolute one.

Order declaring accordingly; costs of all parties out of the estate.

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SUTHERLAND, J. JULY 9TH, 1915.

## *RE MULHOLLAND AND VAN DEN BERG.

*Will—Attempted Revocation—Invalidity—Title to Land—Vendor and Purchaser.*

Motion by the intending purchaser, under the Vendors and Purchasers Act, for an order determining an objection to the title to land the subject of a contract of sale and purchase.

D. Urquhart, for the purchaser.
Grayson Smith, for the vendor.

SUTHERLAND, J., said that the sole question was whether the vendor had shewn a good title to the land in question under the will of John Clark Burnham, who died in 1901—whether the will was or was not revoked by the testator. The will was dated the 28th May, 1885. Some time after its execution, the testator, in the presence of his wife, to whom he had by the will devised and bequeathed all his real and personal property, ran his pen through his signature to the will, and wrote below it: "Hamilton Tp., Jany. 30th, 1894. I hereby revoke this will made by me May 28th 1885;" and wrote, below the words, his initials. Below this, he wrote, "Witness to revoke," and his wife signed her name below these words. Nothing more was done; and, notwithstanding the pen-mark through the signature, it was still plainly legible. Letters probate of the will were granted.

The learned Judge referred to secs. 22 and 23 of the Wills Act in force at the death of the testator, R.S.O. 1897 ch. 128;

*This case and all others so marked to be reported in the Ontario Law Reports.

and said that, under sec. 22, it was apparent that the writing suggesting an intention to revoke was not executed in the manner in which a will is required to be executed, and that the "obliteration" was not validly done so as to come under sec. 23; nor was what was done to be considered as "otherwise destroying the will."

Reference to Jarman on Wills, 5th ed., p. 116, and 6th ed., p. 155; Re Drury's Will (1882), 22 N.B.R. 318; In the Goods of Morton (1887), 12 P.D. 141; In the Goods of Godfrey (1893), 69 L.T.R. 22.

The will was properly admitted to probate, and it must be declared that title passed thereunder, and that the vendor had shewn a good title.

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SUTHERLAND, J. JULY 9TH, 1915.

## *HUTH v. CITY OF WINDSOR.

*Highway—Injury to Person Lawfully Using Cement Sidewalk with Corrugated Surface Worn Smooth — Neglect to Roughen—Dangerous Condition—Notice to Municipal Corporation—Knowledge of Person Injured—Reasonable Care —Findings of Fact of Trial Judge—Damages.*

Action against the Corporation of the City of Windsor to recover damages for personal injuries sustained by the plaintiff by a fall upon the sidewalk in front of his own house and shop upon a city street, while he was engaged in transferring goods from a vehicle to his shop. The plaintiff alleged that the sidewalk was improperly constructed, and was in a defective and dangerous condition and very slippery on the 22nd December, 1914, when the injury was sustained.

The action was tried without a jury at Sandwich.

A. R. Bartlet, for the plaintiff.

F. D. Davis, for the defendant corporation.

SUTHERLAND, J., said that the sidewalk was a cement one, laid down in 1900. The plaintiff knew its condition, and made no complaint to the defendant corporation. When the walk was laid, the surface was roughened by corrugation so as to ensure safety to pedestrians. There was some evidence that this

was not effectively done, and for that reason, or because the corrugated surface became worn by use, the walk was, at the place referred to, so smooth at the time of the accident as to be dangerous in wet or frosty weather. The defendant corporation, having originally corrugated it, must be taken to have recognised that if it should become smooth it would be dangerous unless further corrugated or roughened. The walk was in the condition described for a period long enough to impute notice to the defendant corporation, if its smoothness and consequent danger in wet and frosty weather could be considered non-repair.

Upon a review of the circumstances, the learned Judge found that the walk was so out of repair as to be dangerous; that notice was to be imputed to the corporation; and that it was this want of repair that was the cause of the accident.

Reference to the Municipal Act, R.S.O. 1914 ch. 192, sec. 398, sub-sec. 29; Caswell v. St. Mary's and Proof Line Junction Road Co. (1869), 28 U.C.R. 247, 254; Hutton v. Town of Windsor (1874), 34 U.C.R. 487, 496; Ewing v. City of Toronto (1898), 29 O.R. 197, 201; Ince v. City of Toronto (1900), 27 A.R. 410, 416.

The plaintiff was entitled to use the sidewalk although it was out of repair; but, as he knew its condition, he was bound to exercise care commensurate with his knowledge: Gordon v. City of Belleville (1887), 15 O.R. 26, 31. There was no want of care on the plaintiff's part—he was taking reasonable care at the time of his injury.

Damages assessed at $800; and judgment to be entered for the plaintiff for that sum with costs.

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BRADEN v. VARLOW FOUNDRIES LIMITED—SUTHERLAND, J.—JULY 7.

*Contract—Construction—Scope of Sub-contract for Ventilating and Heating of Building—Temporary Heating during Progress of Work — Breach of Contract — Damages.*]—The plaintiff had a contract in writing with the Dominion Government for the construction of the Fort William Examining Warehouse, according to certain plans and specifications. The defendants contracted with the plaintiff to install the heating and ventilating apparatus in the building for $15,000. Disputes arose between the plaintiff and the defendants; and the plaintiff,

after notice, put the defendants off the work, and proceeded to complete it himself. This action was brought to restrain the defendants from entering upon the premises, and an interim injunction was obtained. The plaintiff also claimed $6,500 as damages for the breach of the contract, made up of the cost of completing the contract, the cost of temporary heating of the building, and damages for unreasonable delay in connection with the progress of the work. The defendants asked for a dissolution of the injunction, a declaration of the rights of the parties under the contract, and $6,000 for damages. The action was tried without a jury at Port Arthur. The learned Judge stated the facts and reviewed the evidence in a considered judgment. His conclusion was, that the plaintiff was in fault in insisting upon the defendants doing the temporary heating and because of their refusal turning them off the job; the contract between the parties did not call for the supply of temporary heating by the defendants, and no provision therefor was reasonably to be implied. Interim injunction dissolved and action dismissed with costs. Judgment for the defendants for damages with costs. Reference to the Local Master at Port Arthur to assess the damages. G. F. Henderson, K.C., and R. J. Byrnes, for the plaintiff. J. A. Dyke, for the defendants.

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LOVELAND v. SALE—SUTHERLAND, J.—JULY 8.

*Trust—Declaration with Regard to Land—Notice—Account—Winding-up—Reference—Costs.*] — Action by Blanche B. Loveland and John L. Murphy against John Sale, Dora M. Sale, Alfred A. Little, Victor Williamson, the Windsor Realty Company Limited, and Edwin F. Parker, executor of the will of Frederick Parker, deceased, to set aside conveyances of land to the defendant company and to the defendant Little, for an accounting by the defendant Sale in respect of his dealings with the property and for payment over to each of the plaintiffs of one-third of the moneys in his hands derived from the property before and since the sale; for a declaration that the defendant Sale holds the property, subject to the mortgage interest therein of the Parker estate, as trustee for himself and the plaintiffs and the defendant Williamson; for a declaration of the true amount of the mortgage-claim of the Parker estate; for redemption; and for payment of the costs of the action by the defendant

Sale. The action was tried without a jury at Sandwich. SUTHERLAND, J., reviewed the evidence in a considered judgment, and made certain findings of fact, upon which he directed that judgment should be entered as follows: (1) declaring that the defendant Sale held the lands in question as trustee for himself and Ralph Loveland and the plaintiff Murphy and the defendant Williamson, in the following proportions, viz., Loveland and Murphy one-third each and Williamson and Sale one-sixth each; (2) that Sale acquired the share or interest of Loveland, and is now, subject to the claim of the defendant company, entitled to three-sixths; (3) that the defendant company acquired its interest in the land with notice of and subject to the trust in favour of Murphy and Williamson; (4) dismissing the claim of the plaintiff Blanche B. Loveland without costs; (5) directing a reference to the Local Master at Windsor to take all necessary accounts and make all necessary inquiries for ascertaining what, if anything, is due to Murphy and Williamson, having regard to the declaration aforesaid, and for winding up the affairs of the trust; (6) reserving further directions and costs until after report. M. Sheppard, for the plaintiff Blanche B. Loveland. The plaintiff Murphy, in person. M. K. Cowan, K.C., for the defendant Sale. T. G. McHugh, for the other defendants.

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HULL v. ALLEN—SUTHERLAND, J., IN CHAMBERS—JULY 9.

*Stay of Proceedings—Delay in Prosecution of Reference and in Bringing on Pending Interlocutory Motions for Determination—Death of Plaintiff—Failure of Executor to Revive Action—Locus Pœnitentiæ.*]—Motion by the defendant by revivor for an order appointing an administrator ad litem of the estate and effects of the deceased plaintiff, so that his estate might be represented for the purposes of this action, and for a perpetual stay of proceedings in the action. The original judgment in the action was pronounced in 1902; it directed a reference to take accounts. There was a report in 1904, and there were appeals therefrom, and a reference back was directed. The original defendant died on the 8th March, 1910, and the action was revived in the name of the present defendant. The original plaintiff died in 1913. Two interlocutory motions were pending and undisposed of. The reference had not been proceeded with.

The deceased plaintiff left a will, but no application had been made for letters probate thereof. The notice of the present application was directed to the solicitor for the original plaintiff and to the person named as executor in the unproved will of the deceased plaintiff. The learned Judge said that there had been great delay, for which both sides were partly responsible. Order that the executor of the plaintiff have 15 days in which to take out an order reviving the action in his name and to bring on the undisposed of motions for determination. If this is done, costs of the present motion will be costs in the reference. If the executors fails to do this within the time limited, further proceedings in the action will be stayed. J. T. Small, K.C., for the applicant. W. N. Ferguson, K.C., for the executor of the deceased plaintiff.

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PURVIS v. SHEPHERD—SUTHERLAND, J.—JULY 9.

*Landlord and Tenant—Lease—Assertion of Right of Way through Demised Premises—Eviction—Termination of Lease—Trespass—Destruction of Barrier to Use of Way—Action for Rent—Defence—Counterclaim.*]—Action for three months' rent of premises leased to the defendant by the plaintiffs' testator. The defendant answered that the plaintiffs had interfered with his possession under the lease by taking down or authorising the taking down of a barrier which he had put up to prevent Kirk Brothers, tenants under the plaintiffs of adjoining premises, from passing through his premises in the assertion of a right of way. The defendant had quitted possession of part of the premises leased to him, and set up that he had been evicted therefrom or that the lease had been terminated by the plaintiffs; and he counterclaimed for a refund of a year's rent paid by him. The action and counterclaim were tried without a jury at North Bay. SUTHERLAND, J., said that he was unable to find from the evidence that there was any actual eviction by the plaintiffs of the defendant from any part of the demised premises. The acts done by Kirk Brothers were in the nature of acts of trespass of a temporary kind, and the defendant might have an action against Kirk Brothers for trespass, and they might have recourse over against their landlords, the plaintiffs. The plaintiffs should have judgment for the instalments of rent claimed, with costs of action on the scale of the Supreme Court, into which the action had been removed from an inferior Court. The

lease was a valid and subsisting one, and the defendant's counterclaim must be dismissed. This disposition of the case is without prejudice to any claim for trespass which the defendant may be advised to make. Reference to Halsbury's Laws of England, vol. 18, p. 523; Clarke's Landlord and Tenant, p. 442; Salmon v. Smith (1669), 1 Wms. Saund. 206, 209; Ferguson v. Troop (1890), 17 S.C.R. 527. M. G. V. Gould, for the plaintiffs. G. H. Kilmer, K.C., and J. M. McNamara, K.C., for the defendant.