The
# Ontario Weekly Notes

Vol. XV. TORONTO, DECEMBER 6, 1918. No. 13

## APPELLATE DIVISION.

Second Divisional Court. November 25th, 1918.

### *GALLAGHER v. WOODMAN.

*Will—Action to Set aside Letters Probate—Onus—Evidence—Testamentary Capacity—Undue Influence—Finding of Trial Judge—Reversal on Appeal.*

Appeal by the defendant from the judgment of Meredith, C.J.C.P., at the trial, in favour of the plaintiff, in an action to set aside the will of Robert Smith as having been procured by duress and undue influence.

The appeal was heard by Mulock, C.J.Ex., Riddell, Latchford, Sutherland, and Kelly, JJ.

J. L. Whiting, K.C., for the appellant.

U. A. Buchner, for the plaintiff, respondent.

Sutherland, J., reading the judgment of the Court, said that Mary Ann Gallagher, the plaintiff, was the sister of Robert Smith, who died on the 23rd December, 1916, having executed a will 5 days before, whereby he appointed W. G. Woodman, the defendant, executor, and gave to Woodman all his estate after payment of debts, funeral and testamentary expenses, and a legacy of $1,000 to the plaintiff. The estate consisted of a farm, valued at $2,250, and personal estate of the value of about $1,900. Letters probate were granted to the defendant on the 4th January, 1917. The testator was unmarried and lived alone on the farm; the defendant was a neighbour and friend. The testator was very ill with cancer of the stomach when he made the will, and was cared

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

for by the defendant and the defendant's son. The will was drawn by the medical man who attended the testator.

The plaintiff's allegation was that the defendant was the confidential adviser of the testator, that the testator was wholly under the influence of the defendant, and acted without independent advice.

The trial Judge came to the conclusion that the document executed was really not the will of the deceased.

After a review of the evidence, the learned Judge said the letters probate were primâ facie evidence of testamentary capacity, and that the onus was on the plaintiff, the person attacking the will: Badenach v. Inglis (1913), 29 O.L.R. 165, 172, 189. If the circumstances were such as to shift the onus to the defendant, he had satisfied it. The testimony of the medical man who drew the will put it beyond doubt that the testator was competent to give sufficiently definite and explicit instructions for the will; that he did so; and that it was drawn in accordance with his instructions.

There was nothing in the evidence to lead to any reasonable conclusion that the defendant had such influence over the testator as would have enabled him to persuade or compel the testator to make a will not in accordance with his own views or intentions, or that he sought to use or did use any such influence over him in connection with the will. There was no evidence that the defendant procured the will to be made or that it was other than the voluntary act of the testator.

The document propounded by the defendant should be upheld as the true last will and testament of the testator.

There should be no costs of the trial, but the plaintiff should pay the costs of the appeal.

*Appeal allowed.*

SECOND DIVISIONAL COURT. NOVEMBER 25TH, 1918.

## *WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

*Negligence—Death of Plaintiff's Husband by Falling from Railway Bridge—Evidence—Findings of Jury—Duty Owing to Deceased—Common Law Duty—Railway Act, 1903, sec. 180 (d)—Orders of Dominion Board of Railway Commissioners—Statutory Duty.*

Appeal by the defendants from the judgment of LENNOX, J., 13 O.W.N. 411, upon the findings of a jury, in favour of the plaintiff.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. N. Tilley, K.C., for the appellants.

R. T. Harding and C. R. Fitch, for the plaintiff, respondent.

CLUTE, J., in a written judgment, said that the plaintiff was the widow of William Walsh, who came to his death on the 27th March, 1917, by falling through the railway bridge at Fort Frances. She sued on behalf of herself and three infant children. The jury found negligence on the part of the defendants, and assessed the damages at $5,000, for which amount the trial Judge pronounced judgment in the plaintiff's favour.

After stating the facts, the learned Judge (CLUTE, J.) said that the Dominion Board of Railway Commissioners, on the application of the defendants under sec. 251 of the Railway Act, made an order, on the 22nd January, 1912, giving the defendants leave to construct and operate the bridge and railway, and giving directions as to grade and protection by gates etc. On the 8th March, 1915, the Board made a further order, reciting that there was to be a re-arrangement of the tracks, and directing the placing of watchmen to protect the crossing, pending the re-arrangement. It was said that nothing was done towards re-arrangement; but it was not by reason of the defendants' neglect of duty in that regard that the plaintiff's husband met his death.

The defendants were incorporated by 4 & 5 Edw. VII., ch. 108 (D.), sec. 16 of which provides that the Companies Clauses Act shall not apply; sec. 17 provides that certain sections of the Railway Act of 1903 shall apply.

The facts in this case did not create a duty towards the deceased. He had no right to go on the railway portion of the bridge. Section 180 (*d*) of the Railway Act of 1903 was passed "to prevent anything falling from the railway into such canal or water or upon the boats, vessels, or persons navigating such canal or water," and not to ensure safety to any one straying by mistake or otherwise on the bridge.

Reference to Gorris v. Scott (1874), L.R. 9 Ex. 125, and other cases.

The appeal should be allowed and the action dismissed; it was not a case for costs.

MULOCK, C.J.Ex., agreed with CLUTE, J.

RIDDELL, J., read a judgment in which he discussed the law and facts at some length, and concluded that there was no breach of any statutory or common law duty for which an action would lie. The appeal should be allowed.

SUTHERLAND, J., agreed in the result.

KELLY, J., read a judgment, in which, after a full discussion of the facts and the law, he stated his conclusion that the findings of the jury did not support the judgment in the plaintiff's favour.

*Appeal allowed.*

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SECOND DIVISIONAL COURT. NOVEMBER 25TH, 1918.

## DAVIS v. WHITTINGTON.

*Vendor and Purchaser—Agreement for Sale of Land—Action for Instalment of Purchase-money—Misrepresentations by Agent of Vendor—Failure to Prove—Undertaking to Resell—Acquiescence—Ratification—Evidence.*

Appeal by the plaintiff from the judgment of the County Court of the Counties of Lennox and Addington dismissing the action and allowing the counterclaim of the defendant.

The action was by the vendor of land in Saskatchewan to recover an instalment of the purchase-money and interest; and the counterclaim was for cancellation of the agreement of sale and purchase and the return of all money paid by the defendant under the agreement.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. N. Tilley, K.C., and W. S. Herrington, K.C., for the appellant.

J. W. Payne, for the defendant, respondent.

SUTHERLAND, J., read a judgment in which he said that the agreement was entered into in November, 1912. The defendant made the cash payment and also paid instalments and interest in 1913 and 1914. This action was brought to recover the final instalment, payable in 1915. The defence was based upon alleged misrepresentations as to the situation of the land, its nature and characteristics, said to have been made by one Davis, the agent of the plaintiff.

After reviewing the evidence, the learned Judge said that he had come to the conclusion that the reasonable inference from it was that the defendant had failed to make good by proper proof the allegations of misrepresentation. It also seemed clear, from the payments made under the contract by the defendant and the length of time that elapsed during which the defendant might easily have obtained all necessary information about the property, that he acquiesced in and ratified the agreement in such a way as to cause one to hesitate to grant the relief sought by him. Even after he had suspicions and was put upon inquiry, he took no action. It was his duty, immediately on, or at least within a reasonable time after, the discovery of the alleged fraud or misrepresentation which had been practised upon him, to have elected to avoid the agreement and to have repudiated it: United Shoe Machinery Co. of Canada v. Brunet, [1909] A.C. 330, 338, 339.

In the end, his chief and only complaint was as to the failure of the agent to resell.

The judgment should be set aside, and judgment entered for the plaintiff for the amount sued for with interest and costs, and dismissing the counterclaim with costs.

MULOCK, C.J.Ex., and CLUTE, J., agreed with SUTHERLAND, J.

KELLY, J., read a judgment in which, after reviewing the evidence, he stated his conclusion that the defendant had failed to satisfy the onus that was upon him of proving the misrepresentations alleged.

RIDDELL, J., agreed with KELLY, J.

*Appeal allowed.*

SECOND DIVISIONAL COURT. NOVEMBER 26TH, 1918.

## HETTING v. SMEETH.

*Vendor and Purchaser—Agreement for Sale of Land—Authority of Agent of Vendor—Statute of Frauds—Specific Performance—Discretion—Appeal.*

Appeal by the plaintiff from the judgment of BRITTON, J., 14 O.W.N. 326.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

R. T. Harding. for the appellant.

Frank Denton, K.C., for the defendant, respondent.

THE COURT dismissed the appeal with costs.

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SECOND DIVISIONAL COURT. NOVEMBER 27TH, 1918.

## PILKEY v. PYNE.

*Vendor and Purchaser—Agreement for Sale of Land—Breach by Vendors—Conveyance to another Purchaser—Damages for Breach.*

Appeal by the plaintiff from the judgment of BRITTON, J., 14 O.W.N. 308.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

R. T. Harding, for the appellant.

Frank Denton, K.C., for the defendants, respondents.

THE COURT allowed the appeal with costs, and directed that judgment for the plaintiff for $400 damages and costs be entered against the defendant Robert Pyne.

## HIGH COURT DIVISION.

LENNOX, J. NOVEMBER 25TH, 1918.

## REX v. DUNCAN.

*Criminal Law—Committal of Prisoner for Trial on Charge of Manslaughter—Indictment for Murder at Assizes with Consent of Presiding Judge—Criminal Code, secs. 872, 873—Depositions at Preliminary Inquiry not Signed by Deponents—Use Made of Depositions at Trial—Supposed Comments of Crown Counsel on Failure of Accused to Testify—Explanation of—Canada Evidence Act, sec. 4 (5)—Refusal of Trial Judge to State Case for Court of Appeal.*

The accused was tried for murder at the Brantford Assizes on the 13th, 14th, and 15th November, 1918, found guilty of manslaughter, and sentenced to imprisonment for 18 years.

The trial Judge, LENNOX, J., was asked to state a case for the opinion of the Court of Appeal upon the following questions:—

1. Was the accused entitled to have the indictment for murder quashed, the accused, with the concurrence of the County Crown Attorney, acting at the preliminary inquiry, having been committed for trial for manslaughter, and the indictment for murder having been preferred with the trial Judge's consent endorsed thereon?

2. Was the accused properly and legally tried, the depositions of the witnesses upon the preliminary proceedings in the Police Court not being signed by the deponents?

3. Was the trial improper or illegal by reason of comments of counsel for the Crown addressed to the jury?

The accused was arraigned and pleaded not guilty on the 12th November. The motion to quash the indictment was made after plea, to wit, on the 13th November, when the case came on for trial, and was then refused.

After the evidence was all in and the jury had retired, W. E. Kelly, K.C., for the accused, asked the trial Judge to reserve the first and second questions.

The third question was raised after the verdict of the jury had been rendered, recorded, and confirmed in open court.

N. F. Davidson, K.C., for the Crown.

LENNOX, J., in a written judgment, said, as to the first point, that "the facts and evidence disclosed in the depositions," if true—

and in the absence of mitigating or justifying circumstances which might be disclosed at the trial—amounted to murder.

He was clearly of opinion that the indictment was legally and properly preferred within the provisions of secs. 872 and 873 of the Criminal Code.

The second question was not even plausible. The depositions of Mrs. Duncan, a witness called for the defence, were not put in, even for the purpose of shewing previous statements made by her, for she admitted what she said on the preliminary inquiry in the Police Court; and, even if it had been otherwise, the learned Judge carefully pointed out to the jury—in connection with other matters arising upon the trial—that evidence of statements made out of Court, or on any other occasion than on the trial, were not to be taken as proof of the truth of the allegations previously made, and only went to the credibility of the witness: and counsel for the accused cross-examined the principal witness for the Crown, Mrs. Gerrard, on the same unsigned depositions.

As to the third point. Before imposing the sentence, the learned Judge said:—

"Mr. Kelly, is there anything you would like to say on behalf of the prisoner?"

Mr. Kelly: "Before doing that I would like to ask for a stated case upon another ground—the comment of the learned counsel for the Crown to the jury with reference to the failure of the accused to testify, *if his comment did go that far*. I wish that included in my request for a stated case."

In the opinion of the learned Judge, counsel for the Crown did not comment upon "the failure of the person charged . . . to testify," or in any way contravene the provisions of sec. 4 (5) of the Canada Evidence Act. He did not in any way suggest that the accused could give evidence on his own behalf, nor did counsel for the accused understand that he did, as was manifest from the qualified, tentative way in which he referred to it. In his address to the jury he insisted that the Crown was "bound to shew, bound to clear up, just what happened upstairs;" and dwelling and "ringing the changes" upon this argument, clearly intended the jury to infer that the Crown was *keeping back* something that if disclosed would tell in favour of the accused. If counsel for the Crown had not explained the position of the Crown, it would have become the Judge's duty to refer to the matter. From first to last there were only three people upstairs: Isaacs, who was dead; George Duncan, the accused; and Mrs. Duncan, his reputed wife. Mrs. Duncan was called by the defence, and disclosed, or professed to disclose, all she knew about the matter.

Isaacs was dead, and there was no one else who could speak of what occurred upstairs except the accused. Referring to the suggestion that the Crown was keeping back the truth, counsel for the Crown stated that he had done all that he could do to inform the jury of the occurrences—that the Crown could not put the accused in the witness-box.

As to all the points, the application for a stated case should be refused.

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LENNOX, J. NOVEMBER 25TH, 1918.

## RE ST. AMAND.

*Will—Charitable Gifts—Estate of Testatrix Consisting Solely of Mortgage on Land—Mortgage Declared to be Personalty—Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, sec. 2 (1) (c)—"Money Secured on Land"—Representation of Estate of Absentee.*

Motion by the administrator de bonis non, with the will annexed, of the estate of Ellen Jane St. Amand, deceased, for an order determining a question arising in the administration of the estate, viz., whether the only property which the deceased possessed, a mortgage of land, was real or personal property.

The motion was heard in the Weekly Court, Ottawa.

W. L. Scott, for the applicant and for Peter Walsh, a residuary legatee and one of the heirs of law.

E. J. Daly, for two beneficiaries under the will.

LENNOX, J., in a written judgment, said that Lizzie St. Amand, to whom a legacy of $100 was given in the will, could not be found, and he declared that her interest was sufficiently represented by Peter Walsh.

The mortgage was upon land in the city of Ottawa. The amount due upon it at the date of the death of the testatrix was $2,016.36, and since then payments had been made on account of it.

There were bequests to charities; Peter Walsh was the ultimate residuary legatee; and he was the only person who could be prejudiced by payment of the charitable bequests.

The mortgage, although a charge on land, was personal property: Halsbury's Laws of England, vol. 21, paras. 339, 340, 343, pp. 182, 183 and 185, and cases noted. It has long been held that a mortgage of land is personal property, because the principal right of the mortgagee is payment of the mortgage-money, and the estate in the land is primarily for securing payment: Thornborough v. Baker (1675), 3 Swanst. 628; Canning v. Hicks (1686), 1 Vern. 412; Tabor v. Grover (1699), 2 Vern. 367; Re Dods (1901), 1 O.L.R. 7; Re McMillan (1902), 4 O.L.R. 415.

Notwithstanding the decisions in the English Courts that mortgages were personal property, yet, by reason of the definition of land in the Mortmain Acts, prior to 1891, as extending to any estate or interest in land, mortgages of land could not be bequeathed to charitable uses. This was changed by the Mortmain and Charitable Uses Act, 1891, 54 & 55 Vict. ch. 73, sec. 3: Halsbury's Laws of England, vol. 4, pp. 124, 125, paras. 192, 193, and foot-notes, "thereby rendering obsolete a long series of cases decided upon the former law." "Mortgages can (now) be bequeathed for charitable purposes" in England; op. cit., vol. 21, para. 340, above referred to.

Under the Ontario Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, sec. 2 (1) (*c*), " 'Land' shall include tenements and hereditaments corporeal and incorporeal of whatever tenure, but not money secured on land, or other personal estate arising from or connected with land." This Act is a re-enactment of 9 Edw. VII. ch. 58, assented to on the 13th April, 1909. The testatrix died in 1911, and, if it were important, the will was made on the 3rd August, 1909. It was not a new law in 1909. The same provision was in R.S.O. 1897 ch. 333, not to trace the origin of the definition of "land" in relation to charitable gifts further back.

There should be no difficulty in administering this estate. The administrator de bonis non with the will annexed has only to follow out the terms of the will as they are therein expressed.

Costs out of the estate.

ROSE, J. NOVEMBER 30TH, 1918.

## *GRANT v. GRANT.

*Will—Two Testamentary Documents Executed by Testatrix in Existence at Death—Alterations Made in Earlier Document after Execution without Re-execution—Reference in Later Document to Earlier Document—"If the Stroked one Stands Take it"—Later Document alone Admitted to Probate.*

Action for a declaration as to which of two testamentary documents executed by Elizabeth Grant, deceased, should be admitted to probate, or whether both.

The action was tried without a jury at Cornwall.

R. Smith, K.C., for the plaintiff.

Hamilton Cassels, K.C., for the defendants the Board of Trustees of the Presbyterian Church in Canada.

A. I. Macdonell, for the Corporation of the United Counties of Stormont Dundas and Glengarry.

A. M. Denovan, for the British and Foreign Bible Society.

J. E. Harkness, for Duncan Grant.

R. S. Cassels, K.C., for Margaret O'Hara and Percy C. Leslie.

ROSE, J., in a written judgment, said that in 1910 the testatrix made a will disposing of all her property. At a later time or times, she made many alterations in the document by striking out words and interlining others; and then, in 1916, she wrote by her own hand and duly executed a new will, beginning: "This is the last will of Elizabeth Grant if the one stroked over will not stand. If the stroked one stands take it."

The new will also disposed of all the property of the testatrix, but it materially differed from that of 1910, both as first written and as subsequently altered.

The learned Judge said that it seemed clear that the two could not stand together. The words, "If the stroked one stands take it," did not seem to be equivalent to, "I direct that the stroked one shall stand and be taken as my last will;" they seemed rather to mean: "I do not know what the law is. If it is that the will formerly executed by me and 'stroked over' is a valid will, well and good, I shall not make another. But, if that will is invalid, I declare this present writing to be my will."

In re Hay, Kerr v. Stinnear, [1904] 1 Ch. 317, distinguished.

The alterations in the first will were not made with the formalities requisite to the valid execution of a will.

If the testatrix meant that the will of 1910 was to stand if it was valid as altered, the will of 1916 must be admitted to probate; for the earlier will was not valid as altered, and the conditions upon which the second will was to come into operation was fulfilled—"the one stroked over will not stand." An instrument can validly be made which is to take effect as a will only on the happening of a contingency named in it: Damon v. Damon (1864), 8 Allen (Mass.) 192.

In its natural signification, the expression "the stroked one" described the original will as "stroked," and not the original will without the alterations; and it seemed to be reasonably clear that the testatrix used the expression in this natural sense.

There should be judgment declaring that the will of 1916 was the true last will of the testatrix and directing that it be admitted to probate; costs of all parties to be paid out of the estate.

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LATCHFORD V. CHARTRAND—LENNOX, J.—NOV. 25.

*Contempt of Court—Committal of Defendant—Purging Contempt—Undertaking—Discharge from Custody.*]—Motion by the defendant for his discharge from custody, upon the ground that he had purged the contempt for which he was committed to gaol on the 9th September, 1918, and had undertaken to refrain from interfering with the plaintiff's property and be of good behaviour in the future. The motion was heard in the Weekly Court, Ottawa. LENNOX, J., in a written judgment, said that the defendant had not only greatly depreciated the value of the plaintiff's property by destroying valuable timber and trees thereon, but had also put the plaintiff to a considerable outlay in money for legal proceedings and otherwise, which the defendant was not financially in a position to make good. He was examined before the learned Judge in open Court; he appeared to regret his unjustifiable and unlawful conduct; he distinctly promised to keep absolutely away from the property of the plaintiff, and had filed an undertaking to that effect. He was warned by the learned Judge, at the hearing of the motion, and was now again warned, that if, after regaining his liberty, he should misconduct himself, he would not be so leniently dealt with. Relying upon the defendant's apparent penitence and his oral and written undertaking, the learned Judge directed the issue of an order for the discharge of the defendant from the common gaol of the County of Carleton on Monday the 2nd December, 1918. J. W. Gauvreau, for the defendant. E. J. Daly, for the plaintiff.

LÉONARD V. LÉONARD—LATCHFORD, J.—NOV. 25.

*Landlord and Tenant—Lease of Farm by Mother to Son—Action for Breaches of Covenants—Failure to Prove Breaches—Improvements—Findings of Fact of Trial Judge.*]—Action by a woman against her son for damages for breach of covenants in agreements under which the defendant worked the plaintiff's farm and for depreciation of the farm and the farming implements. The action was tried without a jury at an Ottawa sittings. LATCHFORD, J., in a written judgment, said that under the first agreement, made in 1912, the sum of $300 was made payable by the defendant to the plaintiff for the first year of his tenancy of the plaintiff's farm. The defendant laboured energetically during that year, but there was a short crop. Whatever there was, the plaintiff received, and she determined not to exact from the defendant any rent. He became disheartened, and, with the concurrence of the plaintiff, surrendered the agreement, returned the farm and the stock and implements, and went, in 1913, to one of the western Provinces. The plaintiff resumed possession of the farm and chattels, and made a lease of the farm to another person, who, after a few months, threw it back on her hands. She then communicated with the defendant; and, upon her urging, he returned. The old agreement was then renewed and supplemented; and, as renewed and supplemented, was now binding on the parties. Its provisions had been substantially complied with except in so far as compliance had been prevented by the unreasonable demand of the plaintiff that a hot water system of heating should be installed in the farm-house. The system which the defendant was willing to install, and which he was prevented by the plaintiff from installing—a hot air system—was that which was proper in the circumstances. All rent due was paid before action brought. Apart from using to his mother language which no provocation could excuse, no impropriety could be attributed to the defendant. There had been no breach of the agreement on his part; and the improvements which he had made rendered it impossible that he should be relegated to his original position. The agreements, therefore, should stand. Action dismissed with costs, if exacted. Gordon Henderson, for the plaintiff. C. A. Seguin, for the defendant.

HAWLEY V. HAND—FALCONBRIDGE, C.J.K.B.—NOV. 30.

*Fraud and Misrepresentation—Sale of Shares—Evidence—Damages for Deceit—Delivery up of Promissory Note.*]—Action for damages for false representations whereby the plaintiff was induced to purchase stock and for delivery up or indemnity in respect of a promissory note made by the plaintiff. The action was tried without a jury at a Toronto sittings. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the defendant had died since the trial, and by order the action was continued against his executrix. The plaintiff had proved his case. Exhibit 2, in the defendant's handwriting, was a most damning document, and the attempted explanation of it was not satisfactory. The representations were in fact untrue, and, if not false to the knowledge of the defendant, they were made recklessly with the purpose of inducing the plaintiff to purchase the stock, and they did so induce him. Judgment against the executrix as such for $4,050 and costs and for the delivery up of the promissory note or indemnity from liability thereon. R. S. Robertson, for the plaintiff. J. M. Ferguson, for the defendant.