

THE  
ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF  
ONTARIO, APPELLATE AND HIGH COURT  
DIVISIONS, FROM MARCH, 1916, TO  
THE END OF JULY, 1916.

2378

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NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY  
OF UPPER CANADA.

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VOL. X.

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Editor :  
Edward B. Brown, K.C.

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1916:  
CANADA LAW BOOK CO., LTD.  
LAW BOOK PUBLISHERS  
TORONTO

FEB 21 1919

THE  
ONTARIO WHEAT YEARS

A HISTORY OF THE  
WHEAT INDUSTRY IN  
ONTARIO FROM 1827 TO  
1892

BY  
J. H. COOPER

EDWIN S. BROWN, PUBLISHER  
TORONTO

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**Ontario Weekly Notes**

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VOL. X.

TORONTO, MARCH 10, 1916.

No. 1

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APPELLATE DIVISION.

FIRST DIVISIONAL COURT.

MARCH 3RD, 1916.

PALANGIO v. AUGUSTINO.

*Fraudulent Conveyance—Action to Set aside—Insolvency of Grantor—Intent to Defraud on Part of Grantor—Failure to Shew Knowledge of Insolvency or Intent to Defraud on Part of Grantee—Finding of Fact of Trial Judge—Appeal.*

Appeal by the plaintiff from the judgment of BRITTON, J., 9 O.W.N. 244.

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

R. McKay, K.C., for the appellant.

J. P. Walsh, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT.

MARCH 3RD, 1916.

\*REX v. LINDSAY.

*Criminal Law—Incest—Sexual Intercourse with Daughter—Evidence—Proof of Marriage—Proof of Penetration and Emission—Comment of Crown Counsel on Failure of Wife of Prisoner to Testify—New Trial.*

The prisoner was tried before MULOCK, C.J.Ex., and a jury, at Peterborough, on an indictment for incest—cohabitation with his daughter—and found “guilty.”

In his address to the jury at the close of the case, counsel for the Crown commented on the fact that the prisoner’s wife had failed to testify.

During the trial no evidence was given to prove the marriage of the accused other than hearsay evidence, evidence of reputa-

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

tion and of cohabitation of the prisoner and his alleged wife; and no evidence was given of penetration or the emission of seed in the alleged act of sexual intercourse between the accused and the girl said to be his daughter, the evidence being that of a witness who swore that she saw the accused having sexual intercourse with the girl.

The learned Chief Justice reserved for the consideration of a Divisional Court of the Appellate Division the following questions:—

(1) Did the comment made by the Crown counsel render the trial and conviction void?

(2) Was formal proof of the marriage of the prisoner with the mother of the girl necessary to sustain the conviction?

(3) Was the evidence relating to the alleged sexual intercourse, without any evidence as to penetration or emission of seed, sufficient to sustain the conviction.

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

D. O'Connell, for the prisoner.

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

THE COURT answered the first question in the affirmative, and directed a new trial. The second question was answered in the negative, and the third in the affirmative.

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### HIGH COURT DIVISION.

CLUTE, J.

MARCH 1ST, 1916.

\*EVANS v. FARAH.

*Vendor and Purchaser—Agreement for Sale of Land—Breach by Purchaser—Damages—Resale by Vendor—Recovery by Vendor of Deficiency on Resale and Expenses Incurred—Application of Deposit—Acquiescence—Reasonable Price on Resale—Items of Expenses—Commission—Interest—Insurance—Taxes—Solicitor's Fees.*

Action to recover \$1,497.03, the balance alleged to be due to the plaintiff in the following circumstances. The plaintiff sold the property to the defendant for \$30,000; the defendant paid \$2,000 as a deposit; the defendant afterwards refused to complete the purchase; the plaintiff resold for \$28,000; the plaintiff alleged that his loss by reason of the sale to the defendant falling through was \$1,497.03, in addition to the \$2,000.

The action was tried without a jury at Toronto.  
W. N. Tilley, K.C., for the plaintiff.  
G. H. Sedgewick, for the defendant.

CLUTE, J., read a judgment in which he stated his finding that the defendant made no objection to the title, on account of building restrictions or otherwise. Had the plaintiff seen fit, he was entitled to enforce specific performance of the agreement.

The defendant took the position that the plaintiff cancelled the contract and sold the property as his own, and contended that, while the plaintiff was entitled to retain the \$2,000 deposit, he was not entitled to claim under the contract, which was put an end to by his own rescission: *Halsbury's Laws of England*, vol. 25, pp. 397, 398, para. 680.

The learned Judge finds that the contract was not in fact rescinded; that the plaintiff did not sell the premises as his own; but that, having a lien upon the property for the unpaid purchase-money, he sold the property, realising what he could out of it; and, not having realised sufficient after applying the \$2,000 to reimburse him for the defendant's breach of contract in not carrying out the sale, he had a right to sue the defendant for that breach and to recover such damages as would arise naturally from the breach; this principle being applicable in the case of a sale of land where the contract is broken by the purchaser: *Halsbury's Laws of England*, vol. 25, p. 409, para. 703; *Laird v. Pim* (1841), 7 M. & W. 474. On a resale at a lower price, he could recover the difference in price and the expenses of the resale: *Noble v. Edwardes* (1877), 5 Ch. D. 378; *Dart on Vendors and Purchasers*, 6th ed., p. 185, 7th ed., p. 179; article in 43 Sol. J. 601, 602; *Davidson's Precedents*, 4th ed., pp. 568-570, 5th ed., p. 476.

There was also strong evidence of acquiescence on the part of the defendant.

The resale was sufficiently advertised and properly conducted, and a reasonable price was obtained.

As to damages, the plaintiff was entitled not only to \$700 paid to agents as commission on the resale, but to charges for interest, insurance, taxes, and solicitor's fees.

Judgment for the plaintiff for \$1,447.03 with costs.

CLUTE, J.

MARCH 1ST, 1916.

T. J. MEDLAND LIMITED v. COWAN.

*Husband and Wife—Promissory Note Signed by Wife at Request of Husband—Absence of Independent Advice—Failure to Shew Misrepresentation or Misconduct.*

Action upon a promissory note made by the defendant Margaret Cowan and her husband and co-defendant R. G. Cowan in favour of the plaintiff company. There was also a claim for the price of goods sold, which was abandoned before the hearing. The defendant R. G. Cowan did not defend the claim upon the note.

The action was tried without a jury at Toronto.

G. W. Mason and S. Rogers, for the plaintiff company.

L. F. Heyd, K.C., for the defendant Margaret Cowan, contended that the facts of the case brought it within the decision in *Bank of Montreal v. Stuart*, [1911] A.C. 120.

CLUTE, J., in a written opinion, summarised the evidence of the wife thus: she signed the note because her husband asked her to; he brought the note home for her to sign, and she signed it; he told her that he owed some money and was giving the note; she had no one to advise her, and she signed it at once, as soon as asked; she thought her husband would pay it; she never received any consideration for herself; she believed that the note was given for merchandise; she knew nothing about her husband's affairs; she knew of an incorporated company of which her husband and another had the controlling interest; she attended a meeting, whereat she was appointed secretary of that company, but she did not know of her appointment until she was examined for discovery in this action.

The learned Judge said that it was now settled law that, in a case like the present, the absence of independent advice was not sufficient in itself to make void a transaction of this kind.

It was not argued, nor would the evidence support a contention, that there was any misrepresentation or misconduct—unless the mere asking the defendant Margaret Cowan to go security for her husband could be called misconduct—on the part of the husband to induce her to sign.

The circumstances bore no relation to the facts in the *Stuart* case.



Reference to Euclid Avenue Trust Co. v. Hohns (1911), 23 O.L.R. 377, 385, 24 O.L.R. 447, 450.

Judgment for the plaintiff company for the amount of the note with interest and costs.

LATCHFORD, J.

MARCH 2ND, 1916.

RE CONN.

*Will — Construction — Devise — Life Estate — Survivorship — Estate in Fee in Certain Events — Merger of Life Estate.*

Motion by Catherine Ann Conn, a devisee named in the will of Samuel Conn, deceased, for an order determining the true construction of the will in so far as it related to the east half of lot 24 in the 2nd concession of Fitzroy.

The motion was heard in the Weekly Court at Ottawa.

Peter White, K.C., for the applicant.

A. Burwash, for certain of the next of kin of the testator.

LATCHFORD, J., said that the east half of lot 24 was, by para. 8 of the will, devised to the testator's two daughters Martha and Catherine Ann (the latter being the applicant) "during their lives respectively or until they marry respectively or during such time as my son James shall continue to live and remain of unsound mind." The form was to be subject to a charge for the maintenance of James during his insanity. Should James recover his reason, the farm was to pass to him in fee. James died without having recovered his reason. All payments for his maintenance seemed to have been made. Martha survived the testator, but died, unmarried, many years before the death of her brother James. The testator's death was in 1897.

"During their lives respectively" must be taken to mean, not only during the life of both daughters, but also during the life of the survivor of them. It conferred upon the sisters a life estate in common. Upon Martha's death, this enured for the sole benefit of the survivor, Catherine Ann: *Heathe v. Heathe* (1740), 2 Atk. 121; *Doe dem. Patrick v. Royle* (1849), 13 Q.B. 100, 112, 114.

Para. 11 of the will, the testator said: "In case my said son James should predecease my said two daughters Martha and Catherine Ann, and without having recovered his reason, and both or one of my said daughters are or is unmarried at the time, then I give and devise the said east half of lot No. 24 unto them or her, as the case may be, in fee simple."

If the life estate now vested in Catherine Ann was not enlarged by para. 11, there was an intestacy as to the estate remaining upon the determination of her life interest; and it was urged by counsel for the next of kin that, as both the daughters did not survive their brother James, para. 11 did not enlarge the life estate of the survivor.

The learned Judge said that it was settled law that an estate limited in terms to commence in a certain specified event fails unless that event happens: *Holmes v. Cradock* (1797), 3 Ves. 317; *Theobald on Wills*, 6th ed., p. 553; *Jarman on Wills*, 5th ed., p. 778. But to "predecease . . . Martha and Catherine Ann" simply meant "die before Martha and Catherine Ann die." It expresses the relationship of the time of his death with the times of the death of both his sisters. As he died before they died—one still lives—the devise in para. 11 became operative; and, in the other existing contingencies, conferred upon Catherine Ann an estate in fee simple in lot 24, in which estate her life estate was merged.

Judgment accordingly. Costs of all parties out of the estate.

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RE ELMIRA INTERIOR WOODWORKING CO.—BRITTON, J., IN CHAMBERS—FEB. 29.

*Company—Winding-up—Compulsory Order under Dominion Act—Insolvency—Discretion—Claims of Creditors.*]—Motion by the Quincy Adams Lumber Company for an order under the Dominion Winding-up Act for the winding-up of the Elmira Interior Woodworking Company. BRITTON, J., said that the only question was, whether the applicant had sufficiently established the insolvency of the Elmira company. If that was established (and the learned Judge thought it was), the applicant was, in the circumstances, entitled to the winding-up order. No doubt the Judge has a discretion; but that discretion should not be exercised against a creditor whose claim may be placed in a worse position than that of other creditors. In a voluntary winding-up, claims may be made preferential that are not strictly entitled to preference or priority. Order made for the winding-up of the company, and appointing Geoffrey T. Clarkson interim liquidator. Reference to the Master in Ordinary. W. Laidlaw, K.C., for the applicant company. J. C. Haight, for the respondent company.

## MOORE V. MOORE—CLUTE, J.—MARCH 1.

*Costs—Reference—Account—Partnership—Death of Partner—Administration—Costs of Reference.*]—Motion by the plaintiffs, the executors of Susan Moore, deceased, for judgment on further directions and as to costs subsequent to the hearing, after the report of a Master upon a reference to take accounts. The questions which arose upon the reference were with regard to a lumber business carried on by the defendant and the plaintiff's testatrix up to the time of her death, and the winding-up of that business by the defendant after her death. The motion was heard in the Weekly Court at Toronto. CLUTE, J., said that the business extended over many years, and it was clear from the nature of the case that administration was necessary except in regard to a few small items aggregating some hundreds of dollars out of accounts exceeding \$70,000. No fraud or misconduct of any kind was found against the defendant; and, but for his management of the business on behalf of himself and the testatrix and her estate, there would have been a heavy loss to both parties. The balance found due had been exhausted, as counsel stated, in the payment of costs directed to be paid by the judgment at the hearing. In all the circumstances, neither party was entitled to costs as against the other. Had there been an estate out of which the costs could have been paid, payment out of that estate would have been ordered; but, there being no estate, each party should bear his own costs subsequent to the hearing. Judgment in terms of the report without costs subsequent to the hearing to either party. A. C. Heighington, for the plaintiffs. T. Johnson, for the defendant.

RE CROWN CHARTERED MINING CO. OF PORCUPINE LAKE LIMITED  
—CHAMBERS V. CROWN CHARTERED MINING CO. OF PORCUPINE  
LAKE LIMITED—SUTHERLAND, J., IN CHAMBERS—MARCH 2.

*Company—Winding-up of Mining Company—Sale of Mining Claims—Offer to Purchase—Approval by Referee—Opposition—Status of Opposants—Appointment and Subpœna for Examination of Assignee of Charges on Mining Claims—Motion to Set aside.*]—The company was, by an order duly made, directed to be wound-up. In the action the plaintiff sued as assignee of certain liens or charges on mining claims. There was a reference and a report. By the latter it was found that the plaintiff was entitled to a lien for a substantial sum, and a sale of the claims

was directed. Finally, it was said, the Official Referee affirmed an option to purchase. After leave obtained from the Referee, a motion was launched at the instance of E. G. O'Kelly and H. Sutherland to set aside the option. No affidavit was filed in support shewing the applicants to have any status either in the winding-up proceedings or the action. It was intimated in the notice of motion, however, that it was proposed to read in support thereof the examination of the plaintiff. An appointment was obtained and a subpoena issued for the purpose of the examination and served on the plaintiff. Thereupon she obtained leave and moved to set aside the appointment and subpoena. No grounds were set out in the notice of motion. On the return of the motion it was enlarged, the parties being severally directed to file such further material as advised. In an affidavit by O'Kelly it was stated that in reality the plaintiff represented a syndicate of which O'Kelly had been, and Sutherland was still, a member. The plaintiff urged that these men had no status to move to set aside the option. The learned Judge said that the Referee had full cognisance of the matter of the option and of all facts which would appear necessary to deal with the motion to set it aside. Before leave was given to move to set it aside, some material definitely disclosing the interests of the applicants should have been filed, or otherwise they should have been left to issue a writ in the ordinary way, and, if necessary, move for an injunction to restrain the proceedings under the option. It was said that the Referee knew that the applicants had such an interest as entitled them to move; but the plaintiff had filed no affidavit in answer to the allegations contained in O'Kelly's affidavit. In the circumstances, the appointment and subpoena should not be set aside. Motion dismissed without costs. W. H. Clipsham, for the plaintiff. H. E. Rose, K.C., for O'Kelly and Sutherland.