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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. APRIL 1ST, 1919.

*REAMSBOTTOM v. TOWN OF HAILEYBURY.

Assessment and Taxes—Assessment of Land—Omission from Assessment Roll of Value of Buildings on Land—Entry in Next Collector's Roll—Correction of Error—Application of sec. 54 of Assessment Act, R.S.O. 1914 ch. 195—"Land Liable to Assessment"—Secs. 2 (h), 22 (3), and 40 of Act.

Appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Temiskaming dismissing an action brought to obtain a declaration that certain taxes for 1913 in respect of a lot in the town of Haileybury were not owing, and formed no charge nor lien upon the lot.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

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

J. M. Ferguson, for the defendants, respondents.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.C.P., who said that the Assessment Act, R.S.O. 1914 ch. 195, sec. 22 (3), requires that the assessor shall set down in one column of the assessment roll the actual value of the real property assessed exclusive of the buildings thereon; in another column, the value of the buildings as determined under sec. 40; in another column, the total actual value of the lands; and, in another, the total amount of taxable land.

The provisions of the Act had been complied with for years before 1913: the buildings on the plaintiff's lot had been assessed,

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

and put down in the proper column, at $3,800, the land at $400, and the total at $4,200; on which sum taxes had been paid without objection.

In 1913, through clerical error, or other obvious mistake, the value of the buildings, $3,800, was left out of the roll and out of the notice of assessment.

The mistake having been observed by the clerk of the municipality, he made an entry in the next collector's roll, in manner provided by sec. 54, and so, if that section was applicable, corrected the error.

The one contention of counsel for the plaintiff was, that the omission of the value of the buildings was not such a mistake as might be cured by sec. 54, which covers only cases of "land liable to assessment" which "has not been assessed."

The members of the Court were all of opinion, agreeing with the District Court Judge, that sec. 54 was applicable. The buildings were "land liable to assessment," apart from any provisions of the Act, as well as expressly under it: sec. 2 (*h*); and not only so but land which must be separately valued; and it would be quite too narrow a view of the section to confine its beneficial operation to cases in which there had been a total omission to tax; neither its words nor its purposes warranted that.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. APRIL 4TH, 1919

*BURTON v. HOOKWITH.

Mechanics' Liens — Claims of Material-men — Building not Finished by Contractor—Overpayment by Owner—Contract to Do Entire Work for Stipulated Price—Lump-sum Payable on Completion — Owner not Obliged to Retain Percentage for Benefit of Lien-holders—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 12.

Appeal by the defendants Milton J. Hookwith and Florence M. Hookwith, the owners, from the judgment of MacWatt, Co. C.J. of Lambton, in favour of the plaintiffs in three actions by material-men against the same defendants, brought to enforce the plaintiffs' liens, under the Mechanics and Wage-Earners Lien Act, and consolidated and tried together.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

A. Weir, for the appellants.

J. M. Bullen, for the plaintiffs, respondents.

MIDDLETON, J., read a judgment in which he said that the contractor had not finished his work and had been overpaid by the owners. The contract was to do the entire work for a stipulated price; and the contractor, as he did not complete the building, in one view might not have the right to recover anything; but that was not of importance, as the owners had paid him more than would be recoverable in any event.

There seemed to be a curious misunderstanding as to the effect of the decided cases—Farrell v. Gallagher (1911), 23 O.L.R. 130; McManus v. Rothschild (1911), 25 O.L.R. 138; Rice Lewis & Son Limited v. George Rathbone Limited (1913), 27 O.L.R. 630; Russell v. French (1897), 28 O.R. 215.

Where, as in this case, there is but one payment called for by the contract, general lien-holders must take the situation as it is found to be, for there is no provision requiring the creation of a "statutory" fund for the protection of the lien-holders. Such a fund is created (sec. 12 of the Act) by deducting 20 per cent. by the owner "from any payments to be made by him in respect of the contract." When there is a lump-sum to be paid upon the completion of the contract, and the work is not done, nothing is payable.

Where the case can be brought within the modern relaxation of the strict rule as to entire contracts, now recognised in H. Dakin & Co. Limited v. Lee, [1916] 1 K.B. 566, and upon the taking of accounts upon the footing there recognised there is a balance due the contractor, the owner must retain 20 per cent. of this sum for possible lien-holders.

The appeal should be allowed and the actions dismissed with costs, to be taxed with due regard to the limitation found in the statute.

MEREDITH, C.J.C.P., agreed in the result, for reasons briefly stated in writing.

BRITTON and LATCHFORD, JJ., agreed with MIDDLETON, J.

Appeal allowed.

SECOND DIVISIONAL COURT. APRIL 4TH, 1919.

*RE MASSEY-HARRIS CO. LIMITED AND CITY OF TORONTO.

Assessment and Taxes—Assessment of Industrial Company in Respect of Income Derived from Investment in Dominion Bonds—Proper Amount of Assessment—Amount actually Received as Interest—Discount Allowed upon Payment in Cash for Bonds—Capital or Income—Deduction for "Carrying Charges"—Loss of Capital on Resale of Bonds—Assessment Act, sec. 11 (b).

Appeal by the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board reversing the order of the Judge of the County Court of the County of York, upon an assessment appeal, and reducing the amount of the company's assessment in respect of income.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

C. M. Colquhoun, for the appellant corporation.

J. M. Hossack, for the company, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that the company, the business of which was the manufacture of agricultural implements, bought "Dominion Victory Bonds of 1917." The company was assessed, for municipal taxation, as a manufacturing concern in respect of its business as such; and also for income upon its investments in these Victory bonds; and necessarily so assessed in compliance with the provisions of sec. 11 (*b*) of the Assessment Act; so that the only question there could be was as to the proper amount of such assessment.

The amount actually received as interest upon the company's investment in these bonds was found by the County Court Judge to have been $49,393.47; and that sum had been treated throughout as the proper amount.

But the company contended that a greater amount should be set off against that sum, rendering the company not liable to assessment for any sum, though its actual income from the bonds was in fact the $49,393.47.

The bonds were purchased, under the common terms, from the Dominion: the terms were: all purchases at par; payment by instalments extending over the first 6 months of the life of the bonds; with, however, a right to pay the full price on the day fixed for payment of the first instalment, and to be allowed a dis-

count on that payment, which would put the purchaser in the same position, in regard to the investment, as if he had paid by instalments; no better and no worse off in regard to income or interest.

The company paid for part of their bonds in one way and the rest in the other: and seemed to have wasted a good deal of time, and many words, upon a contention that the discount received, for the payment in cash, should be credited to capital not to income, and that, to that extent, the $49,393.47, actually received as income, should, as item number 1, be reduced. But neither in form nor in substance was the discount anything but interest: interest paid by the Dominion in advance for the use of the company's money from the time it was paid until the time when it must have been paid under the ordinary, the instalment, plan.

Then, as item number 2, it was contended that there should be a deduction for "carrying charges" of $38,861, if the company had not the capital but was obliged to borrow the money to pay for the bonds; but there was no evidence of any such need or any such borrowing; if there had been, and especially if the bonds had been pledged for repayment of it, a necessary item of that kind might have been allowed, and might yet be allowed if there were anything before the Court to shew that it could be proved. Borrowing by the company in carrying on its manufacturing business would not do; and it was hardly likely that this great concern had not capital of its own enough to carry the transaction.

Then, as item number 3, it was contended that a loss of capital on a resale of the bonds—said to amount to $5,461.97—should be also set off against the income actually received—not because it was in any sense a loss of income, but because it was a loss on the whole transaction; a contention which would have some merit if the assessment was on capital as well as income, but entirely without merit and without weight, when the power to tax and the assessment were on income only.

It was said that, if the company were a financial concern continually engaged in buying and selling bonds in this way, its net earnings on all transactions might be considered its income; but it was not; and, for want of sufficient capital, no company could be continuously engaged in such transactions; one was enough for this company; nor could the nature or extent of the business done turn a loss or gain of capital into a loss or gain of income. If this contention were right, all appreciation of value in stocks and bonds should be assessed as income; it could not make any difference whether they were sold or retained by the company—it was so much gain.

The appeal should be allowed and the assessment made by the

County Court Judge restored. The question was really one of interpretation of the Assessment Act.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

LATCHFORD, J., agreed in the result, for reasons stated in writing.

MIDDLETON, J., also agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. APRIL 4TH, 1919.

HAWLEY v. OTTAWA GAS CO.

Negligence—Injury to Person by Explosion of Gas—Subsequent Death from Pneumonia—Cause of Death—Fault of Deceased—Evidence—Findings of Jury—Nonsuit.

Appeal by the plaintiff from the judgment of LENNOX, J., 15 O.W.N. 454.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

A. E. Fripp, K.C., for the appellant.

G. F. Henderson, K.C., for the defendants, respondents.

MEREDITH, C.J.C.P., reading the judgment of the Court, said, after stating the facts, that the testimony of the plaintiff, the widow of a man whose death was alleged to have been caused by an explosion of gas in the cellar of his house by reason of the negligence of the defendants, was that the gas had been escaping in the afternoon, after the meter was put in, and continued to do so in the evening, as of course it must have done if the stop-cock were left open by the man who put the meter in; that the husband went into the cellar to discover the cause of it and lighted a match in the cellar, whereupon the explosion took place.

To search with a lighted match for the cause of escaping gas is a thing so obviously dangerous that no reasonable man could say that, upon the plaintiff's own theory, her husband was not the author of his own injury. He was courting disaster.

Then, upon the defendants' theory, the plaintiff likewise failed. If her husband opened the stop-cock himself, whether to see if the gas was "on," or whether the meter or the stop-cock was in

good working order, or for any other purpose, he alone caused his own injury: see Holden v. Liverpool New Gas and Coke Co. (1846), 3 C.B. 1, in which the plaintiff was nonsuited; and Burrows v. March Gas and Coke Co. (1870), L.R. 5 Ex. 67.

And, if this were not so, reasonable men could not, upon the evidence adduced at the trial, say—and the jury, if they meant it, did not expressly say—that the stop-cock was left open by the defendants' workmen. The evidence of competent witnesses for the defence proved—that which the learned Chief Justice thought obvious—that, the explosion having occurred in the meter, and, even in that small space, five parts at least must have been air to one part of gas, it was practically impossible that the stop-cock could have been left open for three hours and more; if it had been, the whole place would have been full of gas; and, the air being expelled from the meter, no explosion could have taken place in it; and no witness for the plaintiff gave any testimony to the contrary.

Appeal dismissed with costs.

HIGH COURT DIVISION.

ROSE, J., IN CHAMBERS. MARCH 31ST, 1919.

*REX v. BERLIN LION BREWERY LIMITED.

Ontario Temperance Act—Magistrate's Conviction of Licensed Brewer for Unlawful Sale of Intoxicating Liquor—Order for Forfeiture of License—Dominion Act in Aid of Provincial Prohibitory Legislation, 6 & 7 Geo. V. ch. 19, sec. 2—Jurisdiction of Magistrate—Proof of Previous Convictions—"Third Offence"—Secs. 58, 59, 96, 97 of Temperance Act.

Motion by the defendants to quash an order made by the Police Magistrate for the City of Guelph on the 28th January, 1919, whereby it was found that the defendants had become liable, under the Act in Aid of Provincial Legislation prohibiting or restricting the Sale or Use of Intoxicating Liquors, 6 & 7 Geo. V. ch. 19 (D.), to the forfeiture of their brewer's license issued under the Inland Revenue Act, and whereby it was ordered that the license should be forfeited.

J. M. Ferguson, for the defendants.

J. R. Cartwright, K.C., for the magistrate and informant.

ROSE, J., in a written judgment, said that the order in question purported to be made under sec. 2 of the Act; and it was argued

that, upon the true reading of the whole of that section, no jurisdiction to forfeit the license is conferred upon the magistrate except upon the trial of a charge of an offence against sec. 1; but that point did not appear to be well taken.

The charge upon which the defendants were tried was that they did, on a certain day and at a certain place, "unlawfully sell liquor in contravention of the Ontario Temperance Act" to a person named in the information.

Before the trial, the informant served upon the defendants a notice that upon the hearing he would apply to the magistrate for an order under sec. 2 of 6 & 7 Geo. V. ch. 19, cancelling the license issued to the defendants under the Inland Revenue Act, upon the ground that the defendants had been "three times convicted of selling intoxicating liquor since the 19th day of May, 1916, in violation of the Ontario Temperance Act."

When the matter came before the magistrate, the defendants pleaded "not guilty" to the charge laid. Thereupon counsel for the prosecution proceeded to put in evidence, which was objected to, that the defendants held a brewer's license issued under the Inland Revenue Act, and (also in the face of objection) writings signed by the Police Magistrates for the Cities of Brantford and Kitchener certifying to the three convictions. After this, evidence was given in support of the charge to which the defendants had pleaded; and there was an adjournment for a week to enable the magistrate to consider his judgment. On the appointed day the magistrate found the defendants guilty of the offence charged, and gave reasons in writing for holding that the prior convictions had been duly proved, and for construing sec. 2 of 6 & 7 Geo. V. ch. 19 as providing that once three convictions of a licensee are proved, in the manner provided by sec. 96 of the Ontario Temperance Act, the license is to be forfeited. The defendants were, therefore, formally convicted of the offence charged and fined $200, and an order was made for forfeiture of the defendants' license, as above stated.

Section 2 could not be read as conferring upon the magistrate jurisdiction to proceed as he did. His jurisdiction to forfeit the license existed only "in any prosecution" under the Dominion Act or under a Provincial law, and "on conviction for a third offence." "Third offence" must be given the meaning which it bears in the Province under the law of which the prosecution takes place; and in Ontario a conviction for a "third offence" means a conviction for an offence which is charged as a third offence: see secs. 58, 59, 96, 97, of the Ontario Temperance Act, and the forms in schedule F.

There was no prosecution for a third offence; and the proceedings before the magistrate would have been wrong if the

prosecution had been for a third offence: sec. 96 of the Ontario Temperance Act; Rex v. Mercier (1919), ante 33.

There was thus no such conviction, or valid conviction, for a third offence as conferred upon the magistrate jurisdiction to forfeit the license; and, for that reason, the declaration of liability to forfeiture and the order of forfeiture must be quashed.

Again, there was no evidence that the defendants had been three times convicted. The certificates of the magistrates were not evidence of the facts stated in them. The convictions should have been proved by the production of the records or examined copies: Hartley v. Hindmarsh (1866), L.R. 1 C.P. 553. Section 96 (*b*) of the Ontario Temperance Act had no application, for the proceeding was not for a second or subsequent offence.

There should be the usual order for the protection of the magistrate and officers concerned; no order as to costs.

KELLY, J. APRIL 2ND, 1919.

CATALANO & SANSONE v. CUNEO FRUIT AND IMPORTING CO.

Sale of Goods—Contract for Supply of Fresh Fruit of Specified Size and Quality—Delivery of Fruit of Inferior Size and Quality—Action for Price—Finding of Fact of Trial Judge—Sale of Goods by Vendees as Agents for Vendors—Deduction from Price—Counterclaim for Loss of Profits—Payment into Court—Costs.

Action for the price of goods sold and delivered. Counterclaim for damages for loss of profits.

The action and counterclaim were tried without a jury at a London sittings.

R. S. Robertson, for the plaintiffs.

D. R. Goodman, for the defendants.

KELLY, J., in a written judgment, said that on the 30th August, 1918, the plaintiffs, whose business was in London, Ontario, sold to the defendants, who carried on business in Toronto as wholesale fruit-dealers, 700 crates of peaches at $1.67 per crate, f.o.b. London. This was part of a car-load of peaches which the plaintiffs purchased in Detroit a day or two previously. Sansone, of the plaintiff firm, was in Toronto on the 30th August, and there made the sale to the defendants.

The action was to recover $1,169, the price of the consignment. The defendants set up that the goods were not as represented and agreed—that the plaintiffs failed to deliver peaches of the size and quality represented and contracted for.

The learned Judge found that the plaintiffs represented and agreed that the goods were of a specified size and quality, and that what was delivered did not meet the specifications of the contract in these respects. A very substantial part of the consignment was inferior in size; the fruit was black inside and of poor quality; and otherwise was so defective as to detract from its value and render it unsaleable to advantage.

The defence could not rest on the want of protection in not properly supporting the crates in the car. The condition of the fruit was not due to that cause On the day the car arrived in Toronto (Saturday the 31st August) the defendants sold several crates of the fruit to a customer, who took delivery from the car. On Monday a smaller number was sold in a similar manner; and on the two days following other sales were made. The inferior quality and condition, not to speak of the objectionable size, became apparent as customers attempted to make use of their purchases, and from several quarters came demands upon the defendants to accept a return of the goods or to make an allowance for the inferior quality. The defendants then communicated to the plaintiffs at London their own dissatisfaction and threatened to return the goods: they were met by a request not to do so, and an offer of an allowance was made, which the defendants considered inadequate. The goods were of perishable quality, and the defendants continued to dispose of the remaining part of the consignment as best they could, treating themselves as the plaintiffs' agents for sale, and charging a commission for effecting sales. In their defence they alleged that they were indebted in respect of this transaction to the extent of $813.08 only; and, being entitled to a credit of $32 from the plaintiffs in respect of another transaction (which the plaintiffs at the trial admitted to be correct), they brought into Court with their defence $781.08 in full satisfaction of the plaintiffs' claim. The charges on which this sum was arrived at were made on the basis of the defendants having acted simply as the plaintiffs' agents for the sale of the goods; and by way of counterclaim they claimed damages for profit they would have made had the goods answered in quality and size what was represented by defendants. They could not consistently play the double role of agents for sale and entitled to a commission for making sales, and purchasers entitled to damages for loss of profits they would have made had the goods been according to contract.

On the evidence, their statement at the trial fairly represented

their liability; and this was borne out by the evidence of the various sales and of the prices they procured from purchasers.

There should be judgment in the plaintiffs' favour for $746.37 and interest from the time of payment in by the defendants and costs of the action to that time: the defendants to have costs against the plaintiffs from that time, to be set off against the plaintiffs' judgment. The moneys in Court and any interest accrued thereon to be paid out on the plaintiffs' judgment, and the balance, if any, to the defendants.

KELLY, J. APRIL 2ND, 1919.

RE McCALLUM.

Will—Construction—Devise of Farm Subject to Charges in Favour of Legatees—Disclaimer by Legatees—Intestacy—Realisation of Charges—Duty of Executor—Registration of Caution under Devolution of Estates Act—Allowance to Widow in Lieu of Board and Lodging—Amount Fixed by Court—Motion upon Originating Notice—Costs.

Motion by the executor of the will of Peter McCallum, deceased, upon originating notice, for an order determining certain questions as to the disposition of the testator's estate arising upon the terms of the will and a codicil thereto.

The motion was heard in the Weekly Court, London.

C. St. Clair Leitch, for the executor.

W. R. Meredith, for the widow.

J. D. Shaw, for Duncan McCallum and Elizabeth and Jane McNabb.

KELLY, J., in a written judgment, said that the testator by his will disposed of his farm by devising it to his two nephews equally, subject to charges in favour of his two nieces of two legacies of $500 each, to be paid "out of my real estate within one year from the date of my death;" he also directed that his nephews should pay to his wife $175 a year during her life and allow her the use of the dwelling-house on the farm during her life, and he made these legacies a charge upon his real estate. The farm appeared to be the only real estate of which he died seised. By the codicil he directed that his wife should be provided by his nephews with a home with themselves in lieu of her having the house on the farm for life; and, if his wife should prefer to live elsewhere, she should be allowed to do so, and the nephews should pay her board and lodging in a place satisfactory to her; and this he made a charge upon his lands. He directed that his debts and funeral and testa-

mentary expenses should be paid by his executor, and gave his personal estate to his wife, with an attempted further disposition of any household goods and furniture and money remaining undisposed of by her at her death.

By order of Lennox, J., of the 9th April, 1918 (Re McCallum, 14 O.W.N. 111), it was declared that the widow was not entitled to dower out of the real estate in addition to the provision made for her by the will and codicil.

At that time the two nephews had not entered into possession of the farm, and had not accepted or asserted any rights as devisees. By a written instrument of the 12th December, 1918, they elected to disclaim their rights as devisees, reserving their rights under the remaining provisions of the will and codicil and also as heirs at law of their uncle.

The will and codicil contained no residuary devise applicable to the lands. If effect were given to the disclaimer, there was an intestacy as to the beneficial interest which the nephews disclaimed.

The widow had expressed her willingness to accept annually $250 in lieu of board and lodging. An arrangement to that effect should be carried out—no serious objection being made by any one interested in the estate. This was in addition to the annual payment to her of $175—both payments being expressly charged on the land.

On the 11th December, 1918, the executor registered a caution under the Devolution of Estates Act. It was not shewn that any of the ordinary duties of the executor, such as payment of debts, had not been fulfilled; and no duties other than the ordinary ones had been imposed upon him by the will or codicil. The lands were not devised to him, and whatever estate was now in him was only by virtue of the statute and the registration of the caution—there was nothing to call for his intervention in the realisation of the bequests charged upon the land; all those who had any right to share in the estate were sui juris and within the jurisdiction, and those who had charges upon the land could realise them without calling in the executor to do so.

The application had not answered any purpose except to obtain approval of the annual allowance to the widow in lieu of board and lodging; if an arrangement to that effect be carried out, the costs of the motion will be payable out of any moneys in the executor's hands derived from the real estate or from the income thereof; if there be no such moneys or not sufficient moneys in his hands for that purpose, the costs or such part of the costs as is necessary will be payable out of the real estate and charged against it until paid. If the arrangement be not carried out, there will be no order as to costs.

ROSE, J. APRIL 3RD, 1919.

RE HELLIWELL.

Will—Construction—Trust for Children of Testator—Income of Estate Payable to Children during their Lives—Power of Appointment by Will as to Principal—In Default of Appointment Principal to Go to "Right Heirs" of Children—Whole Estate Vested immediately in Children.

Motion by the children of W. P. Helliwell, deceased, for an order determining a question arising as to the construction of his will, and declaring that the applicants are entitled to have the estate divided among them and paid to them forthwith.

The motion was heard in the Weekly Court, Toronto.

Norman Sommerville, for the children of the testator.

J. T. Richardson, for the trustees.

F. W. Harcourt, K.C., Official Guardian, for the "right heirs" of the children.

ROSE, J., in a written judgment, said that, by the will, made in 1889, the whole of the testator's property, real and personal, was given to trustees upon trust, after paying the debts, to invest in mortgages or Government securities. The widow was to have the income during her life; and, after her death, which had happened, the estate was to be divided into 8 equal shares. The trustees were to hold one of such shares for each of the testator's 8 children; to invest each share and pay the income "to the child to whom such share belongs," during his life; and the principal of each share is "to be disposed of in such manner as may be directed by the last will and testament of the child entitled to the same or in default of any such direction to the right heirs of such child."

The children were all living, and joned in this application.

The expression "right heirs," when used almost exactly as in this will, was held to be equivalent to "executors and administrators:" Powell v. Boggis (1866), 14 W.R. 670, in which a portion of the proceeds of the sale of real and personal property was given to trustees for a niece of the testator, the interest to be paid to her for life, and after her decease "to her heirs as she should give it by will," and if she should make no will, "to her right heirs for ever."

That being so, there seemed to be no escape from the conclusion that the case fell within the rule referred to by Middleton, J., in Re Hooper (1914), 7 O.W.N. 104, that where a life-estate is

given and a power of disposition by will added, and there is a provision that in default of appointment the property shall go if realty to the heirs and if personalty to the executor of the beneficiary, the whole estate at once vests in the beneficiary.

Declaration accordingly; costs of all parties out of the estate.

FALCONBRIDGE, C.J.K.B. APRIL 4TH, 1919.

HUTCHINSON v. TOWN OF SANDWICH.

Municipal Corporations—By-law Authorising Closing of Lane and Sale of Locus—Lane Shewn on Registered Plan—Evidence of Dedication—Failure to Shew Acceptance—Cul de Sac—By-law not in Public Interest Set aside—Town-planning—Injunction—Damages—Amendment Necessitating Taking of Further Evidence—Costs.

Action for an injunction restraining the defendants, the Municipal Corporation of the Town of Sandwich, from closing a lane in the town and conveying the land forming the lane, and to set aside a by-law passed by the defendants' council authorising the closing and conveying, and for damages.

The action was tried without a jury at Sandwich.

T. Mercer Morton, for the plaintiff.

J. H. Rodd and John Sale, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff was the owner of a lot fronting upon Bedford street, in the town of Sandwich, as particularly shewn on plan 45. The plaintiff purchased the lot in November, 1897, and forthwith went into possession. During the whole period since that time he had used a certain lane, shewn on plan 45, running from his lot south to Chippewa street—a cul de sac or blind alley, 20 feet wide by 161¼ feet long, ending at the plaintiff's lot.

At the trial the plaintiff asked leave to amend his pleading by setting up that the by-law was not passed in good faith, in the public interest, but at the instigation and request of the owners of abutting lots, to whom the defendants proposed to convey the land. This amendment was allowed, and further evidence was taken at a subsequent date before the Local Registrar.

There was no evidence as to dedication of the lane by the owner save such as might be inferred from its being laid out on

the plan; and much more than mere public user was required to establish it as a highway. A cul de sac may be a highway, but dedication will not be presumed from mere public user: Armour on Real Property, 2nd ed., p. 29.

There was no satisfactory evidence of the acceptance of the lane by the defendants—no satisfactory evidence that the defendants had ever done any work on the lane.

Two of the petitioners for the by-law, who were called as witnesses, admitted that it was not the petitioners' intention to close the alley and take over the land, but rather to keep it open for their own use and shut out the plaintiff. It appeared also that the petitioners indemnified the defendants as to costs, and employed counsel to guard their interests.

The by-law was not in the public interest. See Jones v. Township of Tuckersmith (1915), 33 O.L.R. 634. The only suggestion of public interest was in the testimony of the defendants' solicitor, who considered the closing of the lane to be of value in the interests of town-planning. The learned Chief Justice went over the locus, with the consent of the parties, and he was unable to see what town-planning had to do with the position of the lane.

The plaintiff was entitled to judgment as prayed with $5 damages. He should also have his general costs; but the adjourned hearing was necessitated by the amendment, and the defendants should be allowed to set off pro tanto the costs of taking the evidence before the Local Registrar.

ROSE, J. APRIL 4TH, 1919.

*ELLIOTT v. COLTER.

Executors—Breach of Trust—Direction in Will to Create Trust Fund in Part by Sale of Company-shares—Sale not Made because Sale not in Interest of Estate—Fund Created by Sale of other Securities and Accumulation of Dividends—Agreement between Executors and Beneficiaries of Fund—Ratification of Course Taken by Executors—Construction of Agreement and of Will—Executors Acting "Honestly and Reasonably"—Trustee Act, sec. 37.

Action by Jane A. Elliott and Eliza M. Tomlinson against the executors of the will of William George Elliott, deceased, and other persons interested in the estate of the testator, for an account of the executors' dealings with the estate and for administration.

The action was tried without a jury at Brantford.

H. A. Burbidge, for the plaintiffs.

W. S. Brewster, K.C., for the defendants the executors.

W. T. Henderson, K.C., for the defendants Bridgman and others, residuary legatees.

A. M. Harley, for the defendants Dunster and others, also residuary legatees.

ROSE, J., in a written judgment, said that the testator, some years before his death, formed a company, called the Ontario Portland Cement Company Limited, for the purpose of manufacturing cement from marl to be taken from land acquired by him. The authorised capital stock was $450,000, of which $225,000 was issued to the testator as payment for the property and $157,000 to various subscribers, for cash. At the time of his death, the testator held stock of the par value of $155,000, and other shareholders had $228,000. The executors still held the $155,000, less $4,000 which they had transferred to legatees under the will.

In 1906, at the time of the making of the will, the company was apparently prosperous, and the testator, who thought that the supply of marl was good for many years, attached a high value to the shares. But before his death, in September, 1908, the situation had changed; the price of cement had fallen, and a merger of cement companies, not including this Ontario company, had taken place.

Soon after the death of the testator, the executors, who, pursuant to the will, had joined the board of the Ontario company, learned that the supply of marl was nearing exhaustion. In 1910, 1911, and 1912, better prices could be obtained for cement, and the company was able to sell at a profit and to pay dividends. Perhaps, during those years, the executors might have sold some of the shares held by them, if they concealed what they had learned about the impending exhaustion of their supply of marl, but no one could complain of their having declined to act dishonestly; and it was abundantly proved, not only that during the whole of the time that had elapsed since the death of the testator they honestly held the opinion that to throw on the market any large number of shares would cause the ruin of the company, but also that their belief was well-founded. They had pursued the course which was most in the interest of the estate; and, if they had committed a breach of trust in not selling, they had acted honestly and reasonably and ought fairly to be excused: sec. 37 of the Trustee Act, R.S.O. 1914 ch. 121.

By his will, the testator, after providing for some legacies, gave the residue of his estate to the executors in trust, amongst other things, "as soon as they can conveniently do so . . . to

realise by the sale of sufficient of the capital stock of the" company "a sum that together with the value of any bank stocks or other good and sufficient securities held by" the testator "will make the sum of $100,000," and to invest the fund and pay the income quarterly to the plaintiffs during their lives, the first of the payments of income to be made within three months after the death of the testator.

The assets of the estate, other than the shares of the cement company's stock, were of the value of about $64,000. When the company resumed the payment of dividends, the executors invested and added to the capital the dividends they received, and so brought the fund up to something over $91,500 by October, 1914, when a certain agreement was entered into by the executors with the plaintiffs. The fund amounted, at the time of the trial, to $97,000.

The real meaning of the agreement was that the plaintiffs ratified and confirmed the course that the executors had followed.

The words of the will, "the first of such payments to be made within three months after my decease," should be treated as merely requiring the executors to pay within the three months such income as might be derived within that period from the fund as then constituted—not as requiring the executors to sell within the three months.

The conclusion then was, that there had been no breach of trust; or, even if there had been a breach, it had been condoned by the agreement of 1914; or, if the construction given both to the will and the agreement were wrong, that the executors ought fairly to be excused. Upon this finding, it was impossible to direct an account to be taken on the footing of a wilful default.

No sufficient reason had been shewn for taking the management of the estate out of the hands of the executors. See Re McCully (1911), 23 O.L.R. 156, 162; Rule 612.

The trial of the action was in March, 1918; judgment was withheld, by an understanding with the counsel, until it should be ascertained whether the fund of $100,000 was completed or likely to be completed.

In February, 1919, it was announced that the fund had been made up to $100,000; but counsel for the plaintiffs then suggested that the estate was still indebted to them in respect of income—that the moneys now in the hands of the executors, over and above the $100,000, should be so distributed between the life-tenants and the residuary legatees as to compensate the former for the loss of income due to the deferred conversion of the shares, the accounts to be taken upon the footing of the rule laid down in In re Cameron (1901), 2 O.L.R. 756.

The learned Judge thought it better not to deal with this ques-

tion, but to confine his judgment to the issue raised at the trial, leaving open all other questions which there may be between the parties and declaring that the judgment is without prejudice to the right to have those questions determined in such proceedings as may be appropriate.

Action dismissed with costs.

BRIGMAN v. RUBIN—FALCONBRIDGE, C.J.K.B.—APRIL 2.

Damages—Personal Injuries in Automobile Accident—Negligence of Defendant—Assessment of Plaintiff's Damages—Loss of Profits of Business—Other Elements of Damage.]—Assessment of damages for personal injuries sustained by the plaintiff when knocked down in a highway by the defendant's automobile. Evidence was heard by FALCONBRIDGE, C.J.K.B., without a jury, at a Toronto sittings. The learned Chief Justice, in a written judgment, said that the plaintiff was a pedlar—carrying his wares about from house to house in rural districts. It was difficult to believe that his net profits amounted to $2,500 a year. He kept no books and said that he could not read or write. He submitted no statements of his purchases from the houses where he bought his goods. He was 32 years old and not married—with the frugal instincts of his race he would have something substantial to shew in the way of money or property as the result of that large income accruing year by year. The extent of his injuries and the probability of his recovery were hard to estimate—his symptoms both as to the impairment of his shoulder and as to his alleged neurasthenic condition were necessarily largely subjective. But he had suffered and was still suffering as the result of the defendant's negligence. His actual money outlay was about $200. In the exercise of the best opinion which the learned Chief Justice was able to form upon the material before him, he awarded the plaintiff $2,200—and this was entirely without reference to the question whether the defendant should prove to be protected by an insurance company. Judgment for $2,200 and costs. W. W. Vickers, for the plaintiff. R. S. Robertson, for the defendant.

RE HAMILTON—KELLY, J.—APRIL 4.

Limitation of Actions—Title to Land by Possession—Evidence—Finding of Local Master—Appeal.]—An appeal by Emma E. Hamilton from the report of the Local Master at Ottawa by which he found against her claim to an interest in certain land in the city of Ottawa. The appeal was heard in the Weekly Court, Ottawa. KELLY, J., in a written judgment, said that a part of the history of the title to this land was to be found in the report of Hamilton v. The King (1917), 54 Can. S.C.R. 331. The question was, whether the respondents had acquired a title by length of possession under the Limitations Act to the land. The Local Master reached the conclusion that James J. Hamilton (the father of the respondents) abandoned the property shortly after the death of his wife. The evidence was open to that interpretation and amply supported the Master's view in that respect, and his conclusion was that the respondents had acquired a good title as against the appellant. On the evidence, no other conclusion could reasonably have been reached. The appeal should be dismissed with costs. J P. Ebbs, for the appellant. A. E. Fripp, K.C., for the respondents.

CORRECTION.

In ROBSON v. WILSON, ante 54, at p. 55, at the end of the note, it is said that "the *plaintiffs* should have their costs"—it should be *defendants*.