The
Ontario Weekly Notes

VOL. XII. TORONTO, JULY 20, 1917. No. 18

HIGH COURT DIVISION.

SUTHERLAND, J., IN CHAMBERS. JULY 11TH, 1917.

DOUBLEDEE v. DOMINION SECURITIES CORPORATION LIMITED.

Judgment—Summary Judgment—Rule 57—Action on Bond—Suggested Defence—Tender of Bond before Action a Condition Precedent.

Appeal by the defendants from an order of the Master in Chambers, upon a motion under Rule 57, allowing the plaintiffs to sign judgment for the amount claimed by the special endorsement on the writ of summons.

H. H. Davis, for the defendants.
W. Proudfoot, K.C., for the plaintiffs.

SUTHERLAND, J., in a written judgment, said that the action was brought by the executors of the will of Frederick Doubledee, deceased, to recover $1,000, the amount which the defendants, by a bond issued by them on the 14th June, 1913, promised to pay to the deceased, and interest. The defence suggested was, that the plaintiffs had not, before action, tendered to the defendants, for payment, the bond sued upon, and had no right of action.

The learned Judge said that the cases cited for the defendants —Ward v. Plumbley (1889), 6 Times L.R. 198; Jacobs v. Booth's Distillery Co. (1901), 85 L.T.R. 262; and Fell v. Williams (1883), 3 C.L.T. 358—had no real application. It was obvious from the affidavit and the examination of the defendants' secretary that they had no defence. It was apparent that the defence was a mere afterthought, put forward not because the defendants wished to take due precaution before payment, but because they desired to defer payment. Presentation of the bond was not necessary in view of its terms and of the position taken by the defendants in their letters before action.

Appeal dismissed with costs.

SUTHERLAND, J. JULY 11TH, 1917.

*VILLAGE OF MERRITTON v. COUNTY OF LINCOLN.

Highway—Village Street—Assumption by By-law of County Corporation—Highway Improvement Act, R.S.O. 1914 ch. 40, secs. 4 (1), 5 (1), 12—Approval of By-law by Lieutenant-Governor in Council—Action to Set aside By-law.

Action for a declaration that a by-law of the defendant county corporation of the 3rd February, 1917, being a by-law to adopt a plan for the improvement of highways throughout the county, under the provisions of the Highway Improvement Act and amendments thereto, was illegal, ultra vires, and invalid.

The action was tried without a jury at St. Catharines.

A. C. Kingstone, for the plaintiff corporation.

A. W. Marquis, for the defendant corporation.

SUTHERLAND, J., in a written judgment, said that the by-law purported to enact that certain roads mentioned in a schedule were assumed as county roads, to be improved and maintained under the provisions of the Act; and that one of the roads so mentioned, it was admitted, included a street within the corporate limits of the plaintiff corporation.

After quoting secs. 4 (1) and 5 (1) of the Act, R.S.O. 1914 ch. 40, the learned Judge said that, while sec. 4 (1) spoke of assuming highways in any municipality in the county, the remainder of the section expressly referred to townships only; and he was of opinion, looking at the whole Act (especially sec. 5 (1)), and dealing only with the question of the assumption of a highway by the county in connection with a plan for the improvement of highways, that townships only are intended to be referred to.

Section 12 of the Act is not to be construed to mean that, if the approval of the Lieutenant-Governor in Council is given to an invalid by-law, a plaintiff is estopped from contesting its validity in an action—particularly if no appropriate opportunity is afforded to the plaintiff to object to the approval being given.

Judgment for the plaintiff corporation setting aside the by-law in so far as it assumes the street of the plaintiff corporation, and restraining the defendant corporation from assessing or taxing the

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

plaintiff corporation with any part of the cost or expenditure incurred under or by reason of the by-law.

The plaintiff corporation's costs of the action, including the costs of the application to restrain the defendant corporation from acting on the by-law pending the delivery of judgment, must be paid by the defendant corporation.

BRITTON, J. JULY 13TH, 1917.

RE MUNRO.

Succession Duty—Succession Duty Act, R.S.O. 1914 ch. 24, secs. 5, 9, 10, 11, 18—Duty Paid elsewhere on Part of Estate—Duty Chargeable against Specific Legacies, and not against Residue.

Motion on behalf of the executors and trustees under the will of William Munro, deceased, for an order declaring whether the succession duties payable by the estate of the deceased should be charged against and paid out of the specific legacies given by the will of the deceased, or charged against and paid out of the residuary estate.

The motion was heard in the Weekly Court at Toronto.

McGregor Young, K.C., for the executors, the Royal Trust Company Limited.

J. A. Worrell, K.C., for the specific legatees.

R. H. Parmenter, for the residuary legatees.

BRITTON, J., in a written judgment, said that the testator made his will on the 24th September, 1910, and died on the 27th February, 1916, leaving an estate of the value of $168,000. He did not by his will give any instructions or direction in any way regarding succession duties.

Succession duty is not included in what are ordinarily termed testamentary expenses.

Of the estate of the deceased, the personal estate and effects were of the value of about $167,000.

The deceased, at and for some time before his death, styled himself of London, England, but he died at Bournemouth, England, where he resided temporarily. The deceased had not changed his domicile—which was the Province of Ontario. His assets were widely scattered, and, in respect of these, succession duty was payable by the estate.

Reference to the Succession Duty Act, R.S.O. 1914 ch. 24, secs. 5, 9, 10, 11, 18.

Where duty has been paid elsewhere on part of the estate, as in the present case, provision is made by secs. 5 and 9 for an allowance of the amount so paid elsewhere from the amount payable in Ontario.

Payment of succession duty out of the particular property passing under and by the will of a testator is what is contemplated by the Act, unless otherwise provided for.

Reference to Kennedy v. Protestant Orphans' Home (1894), 25 O.R. 235; Manning v. Robinson (1898), 29 O.R. 483; Re Holland (1902), 3 O.L.R. 406. These cases are conclusive on the point that succession duties payable by the estate should be charged against and payable out of the specific legacies, and not out of the residue. In short, the statute contemplates the payment of succession duties out of the particular property disposed of, as passing to particular persons.

Order declaring that the succession duties payable by the estate shall be charged against and paid out of the specific legacies given by the will. Costs of all parties out of the residuary estate.

SUTHERLAND, J. JULY 14TH, 1917.

EASTVIEW PUBLIC SCHOOL BOARD v. TOWNSHIP OF GLOUCESTER.

Schools—Public Schools—Union School Section—Requisition of Board for Sum of Money for School Purposes—Apportionment between two Municipalities out of which Section Formed—Proportions Fixed by Assessors—Powers of Assessors—Public Schools Act, R.S.O. 1914 ch. 266, sec. 29 (1), (8), (9)—Assessment Act, R.S.O. 1914 ch. 195, sec. 50.

Action to recover $2,650, the proportion alleged to be payable by the defendants, the Municipal Corporation of the Township of Gloucester, of the sum of $5,000, the amount requisitioned by the plaintiffs, a union school board, for school purposes for the year 1917.

The union school section was made up of the town of Eastview and part of the township of Gloucester; and the proportions were fixed by the assessors for the town and township respectively, on the 13th May, 1916, at 47 per cent. for the town and 53 per cent. for the township.

The defendants disputed the validity of the determination of the assessors.

The action was tried without a jury at Ottawa.

A. H. Armstrong, for the plaintiffs.

G. McLaurin, for the defendants.

SUTHERLAND, J., in a written judgment, referred to the Public Schools Act, R.S.O. 1914 ch. 266, sec. 29 (1), (8), (9), and the Assessment Act, R.S.O. 1914 ch. 195, sec. 50; and said that he saw no warrant for the assessors to do other than take the two completed assessments for the one year, and, from the total of these and a comparison of the proportion which each bore to the whole, figure and estimate the proportion of the annual requisition made by the Board for school purposes to be levied upon and collected from each respectively. There was no warrant for one assessor assuming that he had the right to ignore the proper amount of the assessment in the municipality represented by him and admitting and allowing it to be trebled, or for the other assessor acquiescing in such a course. It was not intended that the Act should clothe the assessors with any such discretion or power.

The determination of the assessors was therefore invalid.

The course of the defendants in connection with the matter was an extraordinary one; and there should be no costs to either party.

Action dismissed without costs; the plaintiffs to be at liberty to take out of Court a sum of $1,500 paid in by the defendants.

MATHIEU v. LALONDE.—SUTHERLAND, J.—JULY 9.

Limitation of Actions—Possession of Land—Payment of Taxes —Absence of Agreement.]—An action to recover possession of land; tried without a jury at Ottawa. The defence was that the plaintiff's claim was barred by the Limitations Act. SUTHERLAND, J., in a written judgment, after setting out the facts, said that the plaintiff relied upon East v. Clarke (1915), 33 O.L.R. 624; but in that case it was held that there was an express agreement by the defendant to pay the taxes as rent; while in this case no such express agreement was proved, nor was it proved that the taxes were paid as rent within the meaning of the statute. The defendant had enjoyed such continuous, uninterrupted, and adverse possession, as to extinguish the paper-title of the plaintiff. Action dismissed with costs. R. A. Pringle, K.C., for the plaintiff. M. J. Gorman, K.C., for the defendant.

McNAIRN v. GOODMAN—CLUTE, J.—JULY 14.

Fraudulent Conveyance—Action to Set aside—Evidence—Findings of Fact of Trial Judge—Intent—Knowledge of Grantee—Claims of Creditors—Costs—Interest—Oppressive Bargain.]—Action to recover from the defendants Gabriel Goodman, Samuel Lichman, and Annie Lichman, $5,579.01, being the amount due upon a certain mortgage made by the Lichmans on the 15th October, 1913, to Gabriel Goodman, and assigned by Goodman to the plaintiff on the 17th February, 1914; Goodman guaranteeing payment thereof. This part of the claim was not disputed. The plaintiff further alleged that a certain grant and transfer by Gabriel Goodman to the defendant Rachael Goodman, his wife, without consideration, dated the 1st December, 1914, of a half interest in certain land, was illegal, fraudulent, and void as against the plaintiff and other creditors of Goodman, and asked an injunction restraining the defendants the Goodmans from transferring or incumbering the same. The action was tried without a jury at Toronto. CLUTE J., in a written judgment, after setting out the facts, found that the deed of the 1st December, 1914, was voluntary, wrongful, illegal, and fraudulent as against the plaintiff and other creditors of the defendant Gabriel Goodman—the plaintiff suing on behalf of all other creditors as well as himself; also, that the defendant Rachael Goodman had knowledge of the financial condition of her husband's business, and knew that the effect of the conveyance would be to hinder, defeat, and delay the plaintiff and other creditors of her husband in the recovery of their claims against him, and that the conveyance was made by the husband for that express purpose, with her knowledge and consent. The plaintiff should have judgment declaring the deed void and consequent relief. As to costs, the plaintiff charged 15 per cent. for the money he advanced to Gabriel Goodman; that was harsh and oppressive conduct; and the plaintiff should be deprived of his costs of the action. This ruling was without prejudice to creditors or others disputing any claim which the plaintiff might make for interest in the distribution of the proceeds of the property among the creditors of Gabriel Goodman. But, the plaintiff now undertaking not to claim more than 6 per cent. interest, he is to have costs against the defendant Gabriel Goodman, the said costs to be a first claim against that defendant's interest in the land. G. H. Watson, K.C., for the plaintiff. R. McKay, K.C., for the defendant Rachael Goodman. A. Singer, for the defendant Gabriel Goodman. The other defendants did not appear.