ROBERT NICHOLLS AND THOMAS ROBINSON ..... } APPELLANTS;

AND

WILLIAM CUMMING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Notice of assessment—Alteration without notice by Court of Revision—Liability of ratepayer.

The Plaintiffs, being persons liable to assessment, were served by the assessors of a municipality with a notice in the form prescribed by 32 Vic., c. 36, sect. 48, O., and on that notice the amount of the value of their personal property, other than income, was put down at $2,500, but on the column of the assessment roll, as finally revised by the Court of Revision, the amount was put down at $25,000, thereby changing, without giving any further notice to Plaintiffs, the total value of real and personal property and taxable income from $20,900 to $43,400.

Held:—That the Plaintiffs were not liable for the rate calculated on this last-named sum, and that a notice, to be given by the assessor in accordance with the act, is essential to the validity of the tax.

This was an appeal from a judgment of the Court of Appeal for the Province of Ontario, reversing the judgment of the Court of Common Pleas of the said Province. That Court decided on demurrer that the Defendant did not sufficiently justify, by his avowry, the taking of Plaintiffs' goods, which were replevied (1).

The action of replevin was commenced on the 16th December, 1874, to recover forty-one chests of tea that had been seized by the Respondent, as collector of taxes for the town of Peterborough for the year 1874, for taxes assessed against the Plaintiff Nicholls and his Co-Plaintiff Hall, now deceased, in whose possession the property was at the time of the distress.

(1) See case as reported in 25 U. C. C. P., 169, and in 26 U. C. C. P., 323.

PRESENT: The Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, JJ.

The declaration was in the ordinary form for taking and detaining forty-one chests of tea.

The Defendant pleaded: 1st. Not guilty; 2nd. Avowed the taking on the ground that the Plaintiffs were duly assessed by the assessors of the municipality in respect to real and personal property and income, for the year 1874, at the sum of $43,400. That the roll was delivered to the clerk of the municipality, completed and added up, on the 28th April, 1874. That the clerk filed the roll on the 18th June, 1874. That it remained on file in his office, open for inspection of all householders, &c., and on the 24th July it was finally revised by the Court of Revision, and the clerk on that day certified the roll as finally revised. That in respect of such assess ment there was due and owing by the Plaintiffs certain rates and taxes amounting to $672.70. That in the collector's roll of the said municipality for the said year 1874, delivered to the Defendant as being the duly authorized collector of the taxes for the municipality for that year, the Plaintiffs, Nicholls & Hall, appeared duly rated and chargeable with the said sum of $672.70, as their municipal taxes for that year. That Defendant duly demanded payment of the said taxes, and the same remaining unpaid for fourteen days after such demand, he duly seized and took the goods as a distress for the said taxes, and well avowed the same.

The Plaintiffs, for a plea to the said avowry of the Defendant, said that "the said assessors, in pursuance of the statute in that behalf, before the completion of their roll, left for Nicholls & Hall, at their place of business within the said town of Peterborough, a notice of the sum at which their real and personal property had been assessed, whereby they were notified that they had been assessed for the said year in the sum of

$5,400, value of real property; the sum of $2,500, value of personal property other than income; the sum of $13,000 taxable income; $15,500 total value of personal property and taxable income, and the sum of $20,900, total value of real and personal property and taxable income; and the said Nicholls & Hall, being satisfied with the assessment so notified to them, and not receiving any notice, and having no knowledge that they were assessed otherwise than as set out in the said notice until after the said assessment roll became confirmed, as in the said avowry mentioned, were deprived of their right to appeal against the said assessment in the said avowry mentioned, and the Plaintiffs aver that the said Nicholls & Hall were ready and willing to pay their taxes for the said year upon the said sum of $20,900, and before the said distress tendered the sum of $323.95, being the full amount of taxes properly chargeable under the by-laws of the said town of Peterborough in respect of the said sum of $20,900 so notified to them as aforesaid, to the said Defendant, who refused the same."

And for a further plea to the said avowry, that "Nicholls & Hall were assessed, not as in the said avowry mentioned, but for the sum of $20,900, in respect of their real and personal property, and that their being so assessed was, by the said assessors, duly notified to them, in pursuance of the statute in that behalf, and thereafter, without the knowledge of the said Nicholls & Hall, and without any notice to them thereof, the said assessors altered and changed their said assessment from $20,900 to the said sum of $43,400, and returned their said assessment roll so altered and changed to the clerk of the said town of Peterborough, and the said Nicholls & Hall, having no knowledge of

the said alteration until the payment of taxes on the said sum of $43,400 was demanded of them by the said Defendants, were deprived of all opportunity of objecting to the said alteration and change by appeal to the Court of Revision, but were ready and willing to pay taxes under the said by-laws upon the said sum of $20,900 so assessed against and notified to them as aforesaid, being equal to the sum of $323.95, and tendered the said sum before the said distress to the said Defendant, who refused the same."

The Defendant demurred to these pleas on the grounds :

1. That the said pleas are no answer in law. 2. That the said pleas admit that the said assessment roll was finally revised and confirmed as in the said avowry mentioned, and seek to set up a defect or error committed by the assessor in or with regard to the said roll, and that this cannot be done.

The issues of fact were struck out, with liberty to replace them, if necessary, after judgment upon the issues of law had been obtained.

The Court of Common Pleas gave judgment in Easter Term, on the 19th June, 1875, in favor of the Plaintiffs on the demurrer.

The case was appealed to the Court of Appeals for the Province of Ontario, was argued on the 20th March, and judgment was given on the 27th March, 1876, allowing the appeal, reversing the judgment of the Court of Common Pleas and ordering judgment to be entered for the Defendant on the demurrer with costs.

January 19th and 20th, 1877.

Mr. *Christopher Robinson*, Q. C., and Mr. *J. F. Dennistoun*, Q.C., for Appellants:

The decision in the Court of Appeals in this case has reversed,not only the judgment of the Court of Common Pleas, but, in effect, has reversed the decision of the Court of Queen's Bench in the case of *The Municipality of London* v. *The Great Western Railway Company* (1). Both English and American authorities lay down the general principle, that when a statute is passed imposing a tax, its provisions are not merely directory but imperative and require to be strictly complied with. Now, statute 32 Vic. c. 36, O., requires assessors of municipalities to give notice to the ratepayer of the value at which his property is assessed, the whole object of the notice being to inform the party of the amount of his assessment, so that, if dissatisfied, he may appeal ; the notice at the foot of the assessment slip and the one endorsed on the back clearly shew this. Such a provision is compulsory, and a strict substantial compliance with it is a condition precedent to any proceeding to compel payment of the tax.

In this case, moreover, the Appellants rely on the well known rule in the construction of statutes that whenever a particular provision in a statute which has received a judicial construction is subsequently re-enacted in another statute, it is clear the intention of the Legislature was to adopt the construction which the courts had applied. This section 49 of c. 36, 32 Vic. is only a re-enactment of a similar provision which was in 16 Vic. c. 182; the assessment act in force when the case of *The Municipality of London* v. *The Great Western Railway Company* was decided.

The notice is for the benefit of the ratepayer, and if the roll were conclusive when finally passed and certified under section 61, as contended by the Respon-

(1) 16 U. C. Q. B., 500.

dent, then the notice, so carefully provided for by the statute, would not only be useless, but, if erroneous, would mislead the person assessed. The very object of giving him the notice is to enable him to decide whether he will appeal from the assessment mentioned in it. The form of the notice, and of the endorsement upon it, as given in schedule B to the act, shew this clearly. After specifying the sum at which the person has been assessed, it proceeds in effect to say: "Take notice that you are assessed as *above specified.* If you deem *this* an overcharge you may appeal." And the notice which in that case he is directed to give is; "Take notice that I intend to appeal against this assessment." There is nothing in this notice to lead any person receiving it to suppose that he must examine the roll in order to see whether the notice is correct, or that he must appeal or take any other step in order to protect himself against being assessed for any other sum. On the contrary, the words seem to preclude any such idea, and neither upon principle, nor under the language of the act, can such an obligation be imposed upon him. The roll is conclusive when, and only when, it has been made up and finally passed and certified in substantial compliance with the directions of the statute.

What is meant by section 61 is, that the roll is conclusive when made according to law, namely, according to the requirements of the Assessment Act.

The assessment, in order to warrant a distress for the amount, is constituted by the entries on the roll, combined with the proper notice, and the proceeding in question, being in the nature of a judicial proceeding, the ratepayer, the party affected by it, must have notice, unless the Legislature have expressly enacted that notice shall not be necessary.

It is no answer to the Appellants to say that they have their remedy against the assessor, or that he may be punished. It is more just, and more in accordance with principle, to say that the municipality, by which he is appointed and controlled, should be responsible for his negligence (1).

The ratepayer must be bound either by the sum named in the assessment roll, or in the notice of assessment, and after the roll has been finally revised there is no authority or tribunal by which the sum that ought to have been, or to be assessed, can be enquired into or decided. Appellant was entitled to receive another notice when the amount was changed.

The learned counsel also referred to the following points and authorities :—

As to the necessity for proper notice, as a condition precedent to the validity of the assessment :—*The Municipality of London* v. *The Great Western Railway Company* (2); *Regina* v. *Cheshire Lines Committees* (3); *Capel* v. *Child* (4); *Ponton* v. *Bullen* (5); *Noseworthy* v. *Overseers of Buckland* (6); *Maxwell* on Statutes (7); *Regina* v. *Justices of Middlesex* (8); *Sedgwick* on Statutes and Constitutional Law (9); *Dwarris* on Statutes (10); *Dillon* on Municipal Corporations (11); *Lowell* v. *Wentworth* (12); *City of Nashville* v. *Weiser* (13); *In re* Ford (14); *Doughty* v. *Hope* (15); *Sharp* v. *Speir* (16); *Sharp* v. *Johnson* (17); *Striker* v. *Kelley* (18); *Newell* v. *Wheeler* (19); *Cooley* on Taxation (20); *Darling* v. *Gunn* (21); *Cleghorn* v. *Postlewaite* (22); *Patten* v. *Green* (23).

(1) 32 Vict. c. 36, secs. 19, 20, 176; (2) 16 U. C. Q. B., 500; (3) L. R. 8 Q. B., 348; (4) 2 C. & J., 558; (5) 2 Grant, Er. & Ap. Rep., 379; (6) L. R. 9 C. P., 233; (7) Pp. 337, 340; (8) L. R. 7 Q. B., 653; (9) P. 275, *et seq.*; (10) P. 477; (11) 2nd edition, sec. 643; (12) 6 Cush., 221; (13) 54 Ill., 246, 249; (14) 6 Lansing, 94; (15) 3 Denio, 595; (16) 4 Hill, 76; (17) 4 Hill, 92; (18) 7 Hill, 25; (19) 48 N. Y., 486; (20) P. 265; (21) 50 Ill., 424; (22) 43 Ill., 428; (23) 13 Cal., 325, 329.

As to the general construction of such statutes: *Partington* v. *Attorney General* (1); *Brown's* Leg. Max. (2); *Sedgwick* on Statutes and Constitutional Law (3); *Maxwell* on Statutes (4); *Newton* v. *Cowie* (5); *Brooks* v *Cock* (6); *Cooley*, Constitutional Limitations (7); *People* v. *Allen* (8); *Dwarris* on Statutes (9); *Newell* v. *Wheeler* (10); *Hilliard* on Taxation (11); *Torrey* v. *Millburn* (12).

As to the effect of the confirmation under sec. 61: *Maxwell* on Statutes (13); *Reg.* v *Middlesex* (14); *Reg.* v. *Mayor of New Windsor* (15); *Rawlinson* on Municipal Corporations (16); *Newell* v. *Wheeler* (17).

Generally: *Williams* v. *Dobert* (18); *Cooley* on Taxation (19).

As to what constitutes an assessment: *Blackwell* on Tax Titles (20); *Cooley* on Taxation (21).

Mr. *James Bethune*, Q. C., and Mr. *W. H. Scott*, Q. C., for Respondent:

The proceeding in this case is one against a public officer who is not an agent of the municipality, but an independent officer, acting under the authority of sections 93 and 106 of c. 36, 32 Vict. As such he was entitled to a notice. *White* v. *Clark* (22); *Corporation of Kingston* v. *Shaw* (23).

The roll which is given to the collector contains all the rates of the different municipalities, and the rate which has been struck by the Council is calculated on the final revised roll.

(1) L. R. 4 H. L., 100; (2) Edition 1864, Pp. 4-6; (3) 2nd edition, 304; (4) Pp. 333, 340; (5) 4 Bing., 234; (6) 3 A. & E., 141; (7) 3rd edition, Pp. 74-8, 522; (8) 6 Wend., 486, note; (9) P. 477, cited in *Sedgwick* on Statutes and Constitutional Law, 278; (10) 48 N. Y., 486; (11) Pp. 37, 379; (12) 21 Pick., 67; (13) P. 281; (14) L. R. 7 Q. B., 653; (15) 7 Q. B., 908; (16) P. 23; (17) 28 N. Y., 486; (18) 2 Mich., 570; (19) Pp. 248, 547; (20) 2nd edition, p. 108; (21) Pp. 259, 260; (22) 10 U. C. Q. B., 490; (23) 20 U. C. Q. B., 223.

If you hold that the assessment slip is the roll, you would never have a roll complete. The Assessment Act was passed for the benefit of the bondholders as well as of the ratepayers.

The intention of the law was to levy the taxes and rates upon the whole ratable property, real and personal, of the municipality, according to the assessed value, (see section 8 of the Assessment Act) except as to the exceptions enumerated in section 9.

The words "*according to the assessed value*," which are in this section and are not in the old acts, clearly mean the assessed value as appears by the *revised roll.*

The assessment is to be made as directed by section 21, that is, by the preparation of an *assessment roll*, in which is to be set down by the assessors, according to their best information, and in specific columns, the particulars enumerated in the sub-sections. Such assessment roll is the basis of taxation, with which, as the primary roll, all other copies and entries should correspond. *Laughtenborough* v. *McLean* (1).

The object of the Legislature was, that there should be a time when the roll was to be conclusive, namely, when it was finally revised, and should then preclude all further inquiry as to the validity of the assessment in all cases in which there was jurisdiction to make the assessment.

By section 60, sub-section 6, the time of the sitting of the Court of Revision is required to be advertised so that every ratepayer may have notice.

By section 60, sub-section 4, palpable errors on the roll may be corrected by the Court of Revision, for which purpose the time for making complaints may be extended, and the court may adjourn to determine them.

(1) 14 U. C. C. P., 180.

By section 59, the duties of the Court of Revision are to be completed, and the roll *finally passed*, by a specified day.

By section 61, the roll, as so *finally passed* and certified, *shall bind all parties, notwithstanding any defect or error committed in or with regard to such roll*, except as it may be further amended on appeal to the Judge of the County Court.

And the roll is to be amended by the clerk according to the decision of the County Court Judge (section 69), and thereupon a certified copy is to be transmitted to the County Clerk. (Section 70.)

Moreover, by section 48, a non-resident, who has required his name to be entered on the roll, is entitled to the same notice as a resident. Assuming the contention of the Appellants, this notice must constitute the assessment. It is clear, however, from section 64, that the act contemplates the entry on the roll and not the notice as the assessment of such non-resident, inasmuch as that section permits such non-resident, if he has not before appealed to the Court of Revision, to appeal to the Municipal Council when his lands, *in any revised and corrected assessment roll*, have been assessed 25 per centum higher than similar lands of non-residents.

See *Scragg* v. *City of London* (1) and cases there cited. *Earl of Radnor* v. *Reeve* (2). *Reg. ex. rel. Ford* v. *Cottingham* (3).

The assessment roll is also the basis of taxation, and the franchises, both in municipal and parliamentary elections, are based upon it. If the roll is not conclusive but the notice is to govern, in case of any irregularity in the notice the rate struck will be irregular, and

(1) 26 U. C. Q. B., 263. (2) 2 B. & P., 391. (3) 1 U. C. L. J., N. S., 214.

in any sale for taxes the sale on such ground could be objected to. The words of the 61 section are clear and positive, no stronger language could be made use of : " *The roll shall be valid and binding, notwithstanding any defect or error.*" It is quite clear that the roll is to be conclusive, and that the requirements of section 48, as to giving notice, are merely directory.

When the case of *The Municipality of London* v. *The Great Western Railway Company* (1) was decided, no such powers were given to the Court of Revision, and this section was introduced in order to cover every possible case which might arise.

There was jurisdiction in this case to make the assessment, and therefore it was conclusive.

McCarrall v. *Watkins* (2) ; *Niagara Falls Suspension Bridge Company* v. *Gardiner* (3) ; *De Blaquierre* v. *Becker* (4).

The Legislature might even have said that no notice need be given. The authorities cited by the Appellants' Counsel in support of his argument that this provision of the statute was judicially interpreted before being re-enacted in this statute, do not apply; section 8 of this act is entirely new, and the roll, by section 61, is intended to be final, except in so far as the same may be further amended on appeal to the Judge of the County Court. In the act under which the case of *The Municipality of London* v. *Great The Western Railroad Company* was decided, there was not the same right of appeal. These sections impair the effect of section 48. You may read that section as merely directory, so that an assessor who would not do his duty might be amenable to a fine of $200 or imprisonment under sections 177 and 178 of the act.

(1) 16 U. C. Q. B., 500; (2) 19 U. C. Q. B., 248. (3) 29 U. C. Q. B., 194. (4) 8 U. C. C. P., 167.

The assessment roll is also to include the assessment of lands of non-residents who have not required their names to be entered on the roll, though such are to be separated from the other assessments. (Section 34 and sub-sections 1, 2 and 3).

A non-resident whose name is not entered on the roll has the same right of appeal against the assessment of his land as is permitted to a resident. (Section 60, sub-section 1).

No notice of the assessment of these lands is required to be given to any person, and no entry or record of such assessment is required to be made otherwise than by the assessor on his roll.

The roll must, therefore, necessarily constitute the assessment of these lands, and be final and conclusive as to them. Assuming, therefore, the contention of the Appellants, the language of the 61st section would be applicable to a part, though not to the whole of the roll, while making no distinction.

Respondent contends also, that the making of the assessment roll is in the nature of a proceeding *in rem*; and, after passing through the various stages mentioned in the Assessment Act, everything directed to be done is conclusively presumed to be done.

Much more inconvenience will arise in allowing the true and final roll to be affected by a defective notice than in holding that ratepayers cannot rely on the slip and notice as the final roll.

Mr. *Christopher Robinson*, Q. C., in reply :—

The collector is as much an officer and agent of the municipality as the assessor. See section 19. Who appoints him? Who can dismiss him? Has he not

to give security in such manner as the council of the municipality may direct? See sects. 173 and 174.

It was never contended that a party could recover for improper taxation otherwise than by replevin.

The learned counsel referred also to the following points and authorities :—

Notice of action is not required in replevin—*Folger* v. *Minton* (1); *Kennedy* v *Hall* (2); *Applegarth* v. *Graham* (3); *Lewis* v. *Teale* (4).

Instances of replevin brought to test validity of assessments :—*Holcomb* v. *Shaw* (5); *The Great Western Railway Company* v. *Rogers* (6); *Fraser* v. *Page* (7); *Spry* v. *McKenzie* (8); *Sargant* v. *City of Toronto* (9); *The Great Western Railway Company* v. *Ferman* (10); *Barton* v. *Corporation of Dundas* (11).

June 28, 1877.

THE CHIEF JUSTICE :—

Before the statute of the Province of Canada of 1850 (12), the assessors in Upper Canada, by the law then in force, were required to apply to the parties liable to be assessed for a list of their ratable property; it was their duty to enter this on the roll. They had nothing to do with the value to be put on such property; that was fixed by the statute.

Under the statute of 1850, the assessors were to proceed to ascertain, by diligent enquiry, the names of all

(1) 10 U. C. Q. B., 423; (2) 7 U. C. C. P., 218; (3) 7 U. C. C. P., 171; (4) 32 U. C. Q. B., 108; (5) 22 U. C. Q. B., 92; (6) 27 U. C. Q. B., 214; (7) 18 U. C. Q. B., 327; (8) 18 U. C. Q. B., 161; (9) 12 U. C. C. P., 185; (10) 8 U. C. C. P., 221; (11) 24 U. C. Q. B., 273; (12) 13 & 14 Vic., c. 67.

the taxable inhabitants in their townships, &c., and also all the taxable property within the same, its extent, amount and value. They were then to prepare an assessment roll and set down in separate columns the names of the taxable parties in the township, with the extent or amount of property assessable against each. They might demand of parties assessable a statement in writing of all their assessable property verified by oath, but the statement was not binding on the assessors.

By this change in the law, the assessors not only placed on the roll the property for which a party was liable to be assessed, but also fixed a value on it. The effect of this change was virtually to give the assessors power, according to their own unaided judgment, of imposing burthens which might be unjust on any taxpayer, and this might be done by design, or want of care or capacity to form a correct opinion as to value by the assessors. If this could have been done without notice to the parties who might be injured, it would be a proceeding frequently characterized in the books as being against the first principles of natural justice. As a general rule, no man's property or liberty, even in a judicial proceeding, however large the power given to the courts, can be brought in jeopardy, so that he may be said to be bound by it, unless he has had the opportunity of being heard. The framers of the statute of 1850 (1) were not unmindful of this rule, for by the 25th section of the statute it was enacted, that the assessors should, immediately *after* the completion of their roll, leave for every party a notice of the value at which his property had been assessed.

By the 28th section, if any person deemed himself

(1) 13 & 14 Vic., c. 67.

overcharged by the assessors, he might, within six days after he received the notice, notify the clerk of the municipality of the overcharge, and the complaint was then to be heard by the Court of Revision, created under the same section of the statute, which court was to determine the matter, and affirm or amend the roll accordingly ; and if two members of the municipality thought any member assessed too low, after reasonable notice to the party and the assessors, the matter was to be decided in the same manner as complaints by a party assessed.

Looking at these provisions, there can be no doubt they were reasonable ones, intended for the protection of the ratepayer, providing also for the protection of the public, when the amount assessed was too low, but making it necessary that the party should have notice when it was intended to increase the amount of his assessment. Is this proceeding directory, or is it mandatory ? Can any court properly say, that proceedings, which the Legislature has required should be taken to protect tax-payers from unequal or unjust taxation, may be dispensed with, by holding that they are directory, and, therefore, non-essential ? I think not. On the contrary, I think reason and authority shew the proper rule to be, that provisions, intended for the security of the ratepayer, to enable him to know, with reasonable certainty, for what real and personal property he is taxed, and the amount, are essential conditions, and, if not observed, he is not legally taxed.

There are many authorities which shew, that provisions intended to regulate the manner of carrying out the system established by the statute, but which do not affect the rights of the taxpayer, are merely directory ; and not strictly following them would not affect

the validity of an assessment, but I do not think they apply to the case before us.

This notice is the only one which the taxpayer receives. Under the statute of 1850, the copy of the roll was not required to be put up in some public place within the municipality, as it was by the 25th section of the statute of 1853 (1), nor does it appear that any public notice of the sitting of the Court of Revision was required to be given under the former act. Reasonable notice of the sitting of the court is to be given to the complainant.

With these provisions in the act of 1850, I think there would be no doubt it would be held that the notice to be given by the assessor to the taxpayer, was essential to the validity of a tax If it were not, the taxpayer would be in no position to appeal to the Court of Revision ; he had received no notice, and he must give notice of his intention to appeal within six days after receiving notice of his assessment As no public notice was required to be given of the sitting of the Court of Revision, he would not know when that court was to sit. He would be compelled, if a farmer seldom visiting the place where the meeting of the Court of Revision was held, to enquire, from time to time, when this court would sit ; which would impose a burthen, I think, never contemplated by the Legislature.

If two members of the municipality thought any party assessed too low, then the court might revise the assessment. If then the notice of the assessment would be considered necessary to a valid assessment, in the view so far taken of the statute of 1850, would the following words in the 28th section of the act require that it should be held to be only directory and

(1) 16 Vic., c. 182.

not essential to a valid rate, viz : " and the roll, as finally " passed by the said Court and certified by the clerk as " so passed, *shall be valid and shall bind all parties con-* " *cerned, notwithstanding any defect or error committed in* " *or with regard to such roll.*"

These words, it is said, are sufficient to cover all omissions and make the roll so certified absolute.

It has, however, been held, and, undoubtedly, correctly held, that when property is exempt from taxation, the putting of it on the roll and the confirmation of the roll by the Court of Revision, does not bind the party assessed. Nor when the party resides out of the municipality and has not requested his name to be inserted on the roll for unoccupied land (1). These are exceptions, and it seems to me, that the notice to the tax-payer is so essential an element in the imposition of a valid tax that its omission ought to be considered quite as fatal as where there is no jurisdiction to tax at all. Although by that statute notice was not required to be given before the completion of the roll, it was essential to be given before the roll should be held valid and binding on all parties concerned.

It was argued that if the clause requiring notice was essential to the validity of the rate, and would be so held if it stood uncontradicted, yet the section declaring the roll as finally passed to be binding was a subsequent one and the last legislative declaration of the law, and was, therefore, binding and over-rode the former section. We must, if possible, give effect to both sections. We make he revised roll conclusive if we hold, as has been decided (2), that when a party is assessed as owner, who is a tenant or occupier, and who omits to appeal,

(1) *Municipality of Berlin* v. *Grange*, 1 Grant, Er. & Ap. R., 279;
(2) *McCarrall* v. *Watkins et al.*, 19 U. C., Q. B., 248.

yet is bound by the assessment, and when if on an appeal the Court of Revision or County Judge makes an erroneous decision and holds that real estate is personalty, as in the *Niagara Falls Suspension Bridge Co.*, v. *Gardner* (1), yet the roll as finally revised is binding. It is probable the omission to certify the roll by the assessor, or to verify the certificate by affidavits or some mistake in the date of the certificate or affidavit, would not invalidate the roll, if these mistakes, errors or omissions did not deprive the taxpayer of his right to appeal, or of having the reasonable time required by law to do so; they may be properly considered as covered by the words referred to, and so both the sections have proper operative effect.

In 1853 the act of 1850 was repealed (2) and many of its important sections re-enacted and amended. During the same session the statute relating to the registration of votes (3) was passed, and the machinery of the assessment law was adapted to carry that system out, and this rendered alteration necessary in some of the sections to which reference will be made.

The provisions as to the assessors ascertaining the owners and value of the real and personal property and entering the same on a roll were re-enacted. But this important change was made with regard to the time of serving the notice on the party of the assessment of his real and personal property by the assessors; that notice, under section 23, was to be given *before* the completion of the roll, and the certificate appended to the roll was to be verified upon oath, or affirmation, and the certificate, in addition to what was contained in that required by the statute of 1850, was to state that they had entered the names of the freeholders and householders, with the

(1) 29 U. C. Q. B., 194; (2) 16 Vic., c. 182; (3) 16 Vic., c. 153.

true amount of property owned by each, and they had not entered the names of any one they did not truly believe to be a *bonâ-fide* freeholder, householder, &c. Then follows section 25, which required the clerk to make a copy of the roll, arranged in alphabetical order of the names, to be put in some public place in the municipality, there to remain until after the meeting of the Court of Revision.

The 25th section is somewhat altered from that in the former act. It established the Court of Revision and allows any party, who deemed himself wrongfully inserted on or omitted from the roll, or undercharged or overcharged by the assessors, within 14 days after the time fixed for the return of the assessors' roll, to notify the clerk of the municipality, stating that he considered himself aggrieved, and the subject-matter of his complaint would be heard by the Court of Revision, who were, after hearing the complaint, to determine the matter, and confirm or amend the roll, "and if *any* "*municipal elector* shall think a party has been assessed "too low or too high, or has been wrongfully inserted "on, or omitted from, the roll, the clerk is to give notice "to the party and the assessors when the same is "to be tried by the Court, and the matter shall "be decided in the same manner as complaints "by a party assessed." Then the roll, as finally passed, was to be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, except in so far as it might be amended by an appeal to the County Judge, who was to hear the appeals from the Court of Revision, and his decision was final.

By the 45th section, if in any case the taxes payable by any party could not be recovered in any special

manner provided by the act, they might be recovered as a debt due to the city, town, &c., in a competent court, and the production of the copy of so much of the Collector's roll as should relate to the taxes payable by such party, purporting to be certified by the clerk of the municipality, should be *primâ facie* evidence of the debt. A similar provision was contained in the act of 1850.

This was the state of the law when the case of *The Municipality of London* v. *The Great Western Railway Company* (1) was decided. The amendments made by the act of 1853, in my judgment, were not in the direction of withdrawing any protection which the previous statute had given the taxpayers. On the contrary, the compelling the service of the notice on the taxpayer, by the assessors before they completed their roll, indicated, I think, unmistakably, that the giving of the notice was something that must be done before the roll could be considered as completed, and its being certified by the Court of Revision without that being done would not make the roll binding on the ratepayer.

Before the Plaintiffs could maintain their action for the taxes sued for in *The Municipality of London* v. *The Great Western Railway Company*, it was necessary that the assessors should serve the Railway Company with a notice of the amount at which they had assessed the real property of the Company, and that notice was to be held to be the notice required to be served by the 23rd section of the act on the ratepayer of the amount for which he had been assessed.

The learned Chief Justice in that judgment said, "Neither by distress, nor by action, can a ratepayer, we "think, be compelled to pay a tax of which such notice

(1) 16 U. C. Q. B., 500.

" has not been given to him as the law has provided, " in order to give him the opportunity to appeal under " the 26th and subsequent clauses * * It must " be open to the Defendant to deny that such notice was ' given, and to put the Plaintiffs to the proof of it." He refers to the alleged omission of the Railway Company to send a statement of real property to the clerk of the municipality, and concludes " that could not " authorize the assessors of the municipality to impose " any amount they chose and enforce it without having " given notice of the amount required by law in time to " allow of an appeal."

After this judgment was given, the statute of 16 Vic. c. 182 was consolidated (1). Though the arrangement of the sections was changed, it was substantially re-enacted as to matters arising in this case. The law continued in this state until the passing of the Assessment Act by the Legislature of Ontario (2), by which the Consolidated Statute of Canada was repealed. Most of the Consolidated Statute of Upper Canada was re-enacted by it, with some amendments; the general scheme of assessment of real and personal property according to its value being maintained. The assessors, after diligent inquiry, were to set down on the rolls the names of all taxable parties, the description and extent or amount of property assessable against each. They were to state various matters under 26 different columns of the roll, the last column being *the date at which the notice under section* 48 *was delivered*.

Section 48 required the assessor, before the completion of his roll, to serve a notice of the sum at which the taxpayer's real and personal property had been assessed according to schedule B, and that he should enter on

(1) Con. Stat. U. C. c. 55; (2) 32 Vict. c. 36, O.

the roll opposite the name of the party, the time of delivering or transmitting such notice, which entry should be *primâ facie* evidence of such delivery.

The schedule B is apparently the transcript of that part of the assessment roll applicable to the tax-payer, and would contain the total value of his real and personal property, and taxable income.

Then at the bottom—

"Take notice that you are assessed as above specified "for the year 18— under the statutes. If you deem "yourself overcharged, or otherwise improperly assessed, "you, or your agent, may notify the clerk of the munici- "pality, in writing, of such overcharge or improper assess- "ment, within 14 days after this notice has been left with "you, and your complaint shall be tried in conformity "with the provisions of the statute by the Court of Revi- "sion for the municipality of

"[ENDORSED.]"

"Sir,—Take notice that I intend to appeal against "this assessment for the following reasons."

The mode of forming the Court of Revision is defined, and any person complaining of an error or omission with regard to himself, as having been wrongfully inserted on, or omitted from, the roll, or as having been undercharged or overcharged by the assessor, may, within 14 days after the time fixed for the return of the roll, give notice in writing to the clerk of the municipality that he considers himself aggrieved; an elector may also give notice if he thinks any person wrongly inserted on the roll and assessed too high or too low, and after notice given to the parties and the assessors, and hearing upon oath the complainant, witnesses, &c., the Court shall determine the matter and confirm or amend the roll.

The 61st section makes the roll, as finally passed by

the court, binding on all parties, the same as in the other statutes, subject to the appeal to the Judge of the County Court, whose decision is final and binding.

The necessity of giving notice to the tax-payer before the completion of the roll, seems, by this last statute, to be considered of as much importance as under the previous act, for the assessor is obliged to note the time of giving it opposite the name of each taxpayer on his roll, he must verify the correctness of the certificate which states that the date of the delivery or transmitting of the notice is in every case truly and correctly stated in the roll and the taxpayer is expressly told if he deems himself overcharged or otherwise improperly assessed he is to notify the clerk and state his complaint.

If he does not deem himself overcharged, or otherwise improperly assessed, what is he to do? Or if he receives no notice of assessment at all until the time for appealing is passed what can he do?

It is suggested that he is bound to know what he is assessed for, that the roll is open for his examination after its return and that he can inspect it.

Is it reasonable to suppose that the Legislature intended that every taxable inhabitant of a large township should travel to the office of the clerk of the municipality to ascertain whether the assessor had failed to do his duty and properly certify his roll, which he was to verify by affidavit, lest that officer may, through negligence or design have served him with a notice rating his property at what he considered just, but returning it on the roll at a larger amount. If that was the intention of the Legislature it would have been better to dispense with the service of the notice to the taxpayer of the amount at which he was assessed, and which informed him, if he was not satisfied, he might appeal

to the Court of Revision. The reasonable inference being if he was satisfied he need not appeal. I think the proper conclusion to arrive at in this case is that the assessment is good for the amount mentioned in the notice, and it being confirmed for a larger amount would not necessarily destroy it as to the amount for which the taxpayer himself shows it ought to have been confirmed. The fact that if the taxes were sued for, the certified copy of the Collector's roll would only be *primâ facie* evidence of the debt, would seem to indicate that the Defendant might show that the debt was not *due* and, perhaps, go behind the assessment roll. When, however, we consider that the statute, under which these Plaintiffs were rated, was passed after the decision by a Court of competent jurisdiction as to the consequences of an omission to give the notice to the ratepayer required by the 23rd sec. of 16 Vic., c. 182 had been given (and that section was in all its material parts re-enacted by the 48th section of the latter act), we, according to numerous authorities, are bound to hold that the Legislature meant to give the effect to the section which the court that considered it had given to it before it was re-enacted. If so, the notice under the 48th section is essential to a valid assessment, and the payment of the tax cannot be enforced by action or distress when it has not been given.

The notice given to these Plaintiffs was one which did not invite, or require, an appeal at their hands, and the amount could only be properly made or confirmed in accordance with it; otherwise the notice would be the means of lulling the ratepayer into security rather than enabling him to protect his rights.

If the assessor, after giving the ratepayer notice of the amount at which he was rated, discovered that he had

assessed the property too low, he should have notified the party that he had altered the assessment as to him, and have given him another notice. I apprehend he could have done this before the time had elapsed for returning his roll, or, if after the return of the roll he had discovered that the rating was too low, at the instance of any municipal elector, a notice could have been given to the ratepayer under section 60, and then he could have been heard as to any increase of his assessment. In this way any errors could be corrected and the ratepayer be heard; otherwise, he might be made to suffer from the negligence or fraud of the assessor, over whose appointment he had no control, and against whose improper proceedings he could not appeal.

The only case in which, it appears to me, a seeming injustice might be done in the view I take of the effect of the statute, is that an assessor might accidentally, in giving the assessment slip to the taxpayer, omit to insert the full amount of his taxable property and be unaware of the mistake, and so no means of correcting it would be afforded, and the taxpayer would, in that way, escape paying his fair share of taxes. This may occasionally occur, but I think it more consistent with justice that the fundamental rule which ought to prevail is that the provisions that the Legislature has made to guard the subject from unjust or illegal imposition should be carried out and acted on, though, at times, a ratepayer may escape taxation, rather than a single individual should be oppressively taxed without an opportunity of being heard against the illegal imposition.

It is said that the statute provides (1) that the Court of Revision may, when by reason of gross or manifest error in the roll as finally passed, any person has been

(1) Section 62.

overcharged more than 25 per cent. on the sum he ought to be charged, reduce the taxes. This is only permissive; it gives the ratepayer no right to have his case heard and decided on evidence to be adduced with an appeal to the County Judge, and is not the relief from being overcharged which the Legislature clearly intended to give him.

I have arrived at the conclusion that the Legislature required the notice of the amount of his ratable property to be served on the taxpayer by the assessor, in order that he might protect himself against any improper valuation of his property; that being one of the safeguards provided by the Legislature for the protection of the taxpayer, it is essential to the validity of the tax that it should be given and served in time to enable the party assessed to exercise the right of appeal against the rating by the assessors.

That the notice given in this case to the Plaintiffs, so far as it related to the assessed value of their property on the roll as returned, was not the notice required by the statute, and, as to the amount in excess of that mentioned in the notice, the notice is as if no notice had been given, and is void as to any such excess. That the rates and taxes charged against the Plaintiffs on the collector's roll on the amount of the excess of assessment cannot be collected from them.

I think this the proper conclusion to arrive at from the statute itself and the general principles of interpretation applicable to statutes of this nature. If there is any doubt that this is the proper construction of the statute, I think the legislative approval of the interpretation of the sections of the statute of 16 Vic. c. 182, by the judgment of the Court of Queen's Bench referred to, by substantially re-enacting those sections

in the Ontario act, binds us to give the same interpretation of those sections (1).

It was argued before us, though not in the court below, that this action of replevin would not lie against the collector as the goods would be considered in *custodiâ legis.* No authority was shown to sustain that view. The cases referred to by the Plaintiffs shew this form of action has been frequently resorted to in Upper Canada, when it was intended to hold the collector had no right to seize property to satisfy taxes; and it has also been held that the collector in replevin was not entitled to notice of action. (2)

The collector, as well as the assessor, is appointed by the corporation; they are their officers, and though, under some circumstances, the collector might be entitled to notice of action, he is not like a sheriff, bound to execute the writ issued by the court, and for whose protection the writ is a sufficient warrant. If the proceeding is wholly void, and the rate cannot be collected, the corporation must protect their own officers. It is more reasonable that they should do so than that a party should be illegally deprived of his property without remedy.

This appeal must therefore be allowed, the judgment of the Court of Appeal for the Province of Ontario reversed, and that of the Court of Common Pleas for the Plaintiffs on the demurrers affirmed; the Respondents should pay the costs of this appeal, and of the appeal from the judgment of the Court of Common Pleas to the said Court of Appeal.

Since writing the above, the statutes of the Province

(1) *Mansell* v. *Regina*, 8 E. & B., 73. *Ex parte Campbell* L. R. 5 Ch. Ap., 706. *Regina* v. *Whelan*, 28 U. C. Q. B., 43; (2) *George* v. *Chalmers* 11 M. & W., 149.

of Ontario for the year 1877 have come to hand, and I find that by the 56th section of the statutes for the amendments of the law, cap. 8 of the statutes of that session, that the 61st section of the Assessment Act of 1869 is repealed, and another section substituted for it, which makes the final passing of the roll valid and binding on all parties concerned, "notwithstanding any "defect or error committed in or with regard to such "roll, or any defect, error or mistatement in the notice "required by section 48 of this act or the omission to "deliver or transmit a notice."

This amendment will probably prevent actions like the present being brought in future.

RITCHIE, J.:—

I think this is a jurisdictional defect invalidating the tax.

The principle of the Common Law is, that no man shall be condemned in his person or property without an opportunity of being heard. When a statute derogates from a common law right and divests a party of his property, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed. Therefore it has been often held, that acts which impose a charge or a duty upon the subject must be construed strictly, and I think it is equally clear that no provisions for the benefit or protection of the subject can be ignored or rejected. Not to give a proper notice is a clear violation of the statute. To give a proper notice containing the details required by the statute is to place the party in a position, if dissatisfied with the assessment as indicated on the notice, to take the necessary steps which the

notice points out to him for having the amounts put forward investigated and rectified. The right to have such a notice is a substantial privilege and to deprive a taxpayer of it and enrol an assessment against him of which he had no notice is a substantial wrong. To give, as was done in this case, a notice with details and amounts unobjectionable to the taxpayer and subsequently enrolling a different assessment against him, with items different from those furnished, and imposing a much heavier burthen on him, and against which he might and probably would have appealed had he had the notice the law provided he should have, is simply assessing him behind his back in a manner, in my opinion, not authorized by law.

It is a departure not only from the letter but from the spirit of the law. It is even worse than giving no notice at all; for every one must, in this age and country, know that if he has any property, he is bound to be taxed, and, not receiving the usual notice, a party might possibly be led to enquire why he did not receive his notice, but, having received a notice with which he has no reason to be dissatisfied, and which he has a right to assume is the notice to be acted on, he is lulled into a false security and placed in an entirely false position. I think the provision for the giving this notice cannot be considered merely directory. I think it is a condition precedent to the imposition of the tax and the statute required it to be done before the Defendants could become properly chargeable with the tax. As to the inconveniences which appear to have largely influenced the minds of the Appellate Court, I think they should have no weight whatever in a case of this kind. The *argumentum ab inconvenienti*, except in very doubtful cases,

is not of much weight, and certainly in a case such as this should not, I think, be permitted to sweep away a most substantial safeguard conceded by the Legislature to the subject before a burthen is imposed on him. If inconveniences such as have been alluded to would result from giving effect to the statute according to its plain provisions, then it is, in my opinion, for the Legislature to weigh the conveniences and inconveniences of the imposers of taxes on the one hand and the parties respectively to be taxed on the other, and if the taxpayer's privileges under the statute may lead to results too inconvenient, it will be for the Legislature to restrict or take them away altogether, but I do not think rights, substantial rights conferred by the Legislature, can be taken away by the courts.

STRONG, J. :—

The question raised for decision by this appeal, and which depends on the construction to be placed on two clauses of the Assessment Act of Ontario, passed in 1869 (1), is whether the Appellants, who were served with a notice in the form prescribed by sect. 48 of the act, that they were assessed for $20,900, are, by force of the 61st section of the same act, bound by the roll, as finally passed by the Court of Revision, on which the Plaintiffs are entered as assessed for an amount of $43,400. In other words, whether the provision of the 61st section, that the roll, as passed by the Court of Revision, shall be final and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, covers such an irregularity as an omission to give the notice provided for by section 48.

(1) 32 Vic., c. 36.

I am of opinion that the Court of Common Pleas came to a correct conclusion, and that the judgment entered by order of the Court of Appeals should be reversed.

Aside altogether from the grounds on which the judgment of the Court of Common Pleas proceeded, the construction which the Appellants contend for, must, in my judgment, prevail.

It is a cardinal rule in the construction of statutes, that where a particular enactment has received a judicial interpretation, and the Legislature has afterwards re-enacted it, or one *in pari materiâ* with it, in the same terms, it must be considered to have adopted the construction which the Courts had applied. In *Jones* v. *Mersey Docks* (1), *Blackburn*, J., in giving his opinion to the House of Lords, says : "Where an act of "Parliament has received a judicial construction put- "ting a certain meaning on its words, and the Legisla- "lature, in a subsequent act *in pari materiâ*, use the "same words, there is a presumption that the Legisla- "ture used those words intending to express the mean- "ing which it knew had been put upon the same words "before, and, unless there is something to rebut that "presumption, the act should be so construed, even if "the words were such that they might originally have "been construed otherwise." (2)

In the case of *The Municipality of London* v. *The Great Western Railway Company* (3), the Court of Queen's Bench of Upper Canada were called upon to determine the identical point in question here, and it was there held that the omission to give the notice was fatal to

(1) 35 L. J., N.S., Mag. cases, p. 15; (2) See also *Sturgis* v. *Darell* 4 H. & N., 622; Maxwell on Statutes, pp. 234, 277. (3) 16 U. C. Q. B., 500.

the validity of the assessment. This was under the assessment Act of Upper Canada of 1853 (1).

There have, since this decision, been three re-enactments of the same provision, almost in the same words, viz., in the Consolidated Act of 1859 (2), in the Assessment Act of 1866 (3), and in that of 1869 (4), under which the present assessment was made. It is true, that *The Municipality of London* v. *The Great Western Railway Company* arose under section 21 of the act of 1853, and not under section 23 of that act, which corresponded to section 48 of the present act, but this could make no difference, as section 21 expressly provided that the notice required by it should be held to be the notice required by the 23rd section, a provision which has been carried through all the acts down to section 33 of the act of 1869, which refers in the same manner to section 48. This well established and useful rule would, therefore, have precluded any different construction, even if we had been of opinion that *The Municipality of London* v. *The Great Western Railway Company* had been wrongly decided.

I agree, however, in the judgment of the Court of Common Pleas, for the reasons given by Mr. Justice *Gwynne*, for, if the point had been for the first time raised in this case, I should have been of opinion that the clause in question was imperative and the notice required by it essential to the validity of an assessment, and I do not think there is any difficulty in demonstrating the correctness of this conclusion.

No one can deny that if section 61 were out of the way, section 48, standing by itself, must be construed as imposing an essential condition, making a notice indispen-

(1) 16 Vic., c. 182; (2) Cons. St. U. C., c. 55; (3) 29, 30 Vic., c. 53; (4) 32 Vic., c. 36, O.

sable to a valid assessment. The process of assessment is in the nature of a judicial proceeding (1) and, although the scheme of this, and of most other enactments of the same nature, differs from an ordinary judicial proceeding, even of the most summary character, in this, that the assessor first fixes the amount of the assessment, and then calls on the party assessed to bring forward his objections, it is still as much of the essence of the whole proceeding that the party should have an opportunity to object, and notice to enable him to do so, as it is in more formal proceedings, where, according to the usual and natural course of proceeding, the party to be affected is cited in the first instance (2).

Taxation is said to be an exercise by the Sovereign power of the right of eminent domain (3), and, as such, it is to be exercised on the same principles as expropriation for purposes of public utility, which is referable to the same paramount right. Then, it needs no reference to specific authorities to authorize the proposition, that in all cases of interference with private rights of property in order to subserve public interests, the authority conferred by the Sovereign—here the Legislature—must be pursued with the utmost exactitude, as regards the compliance with all pre-requisites introduced for the benefit of parties whose rights are to be affected, in order that they may have an opportunity of defending themselves (4). We find ample illustrations of this principle in the numerous cases which have been decided on acts of Parliament conferring compulsory powers to take lands, the property of private owners, for the purposes of

(1) Cooley on Taxation, p. 265; (2) Cooley on Taxation, p. 266 et seq.; (3) Bowyer's Public Law, p. 227; (4) Cooley on Taxation, *supra;* Maxwell on Statutes, pp., 333, 334, 337, 340; *Noseworthy* v. *Buckland in the Moor* L. R. 9 C. P., 233.

railways, canals and similar works. So far, indeed, has this doctrine been extended, that in cases where a statute has been entirely silent on the subject of notice, the courts have felt justified in implying it as an essential condition precedent. In all cases where a party is to be affected, either in person or property, by anything analogous to a judicial proceeding, the courts, unless shut out from doing so by the most absolute and unequivocal words, invariably apply that sound rule of English law which says that no man shall be condemned unheard (1).

The statute, however, contains internal evidence of the intent of the Legislature, that this provision of section 48 is not to be considered as merely directory, for, in section 49, it requires that the assessor shall attach to his roll a certificate verified by oath, which, amongst other things, is to state "that the date of "the delivery or transmitting the notice required "by section 48 of the Assessment Act, is, in every case, "truly and correctly stated in said roll." Surely, this indicates that the notice is not a mere direction to the assessor, non-compliance with which may be regarded as not affecting the ratepayer's liability, though it may leave the assessor liable to be called to account for neglect of duty. Still more forcible are the concluding words of the section 48: "shall enter on the roll oppo- "site the name of the party, the time of delivering or "transmitting such notice, which entry shall be *primâ facie* evidence of such delivery or transmission."

For what purpose constitute this proof of service of the notice, if that service was a non-essential proceeding?

(1) Maxwell on Statutes, p. 325, and cases there cited; *Re Cheshire Lines Committees*, L. R. 8 Q. B., 344; *Harper's* case, 7 Term R., 270; *Abley* v. *Dale*, 10 C. B., 62.

Against whom but the ratepayer was this record of service to be evidence, and that, too, not conclusive, but only *primâ facie* evidence? And if it was intended, as it must obviously be taken to have been, to conserve evidence against the ratepayer, does not that show in the strongest possible manner that the Legislature considered that it would be in the power of the ratepayer to raise, in answer to an action, or in opposition to a distress, the objection of non-service of notice. It is out of the question to say that this provision as to evidence can have been intended to refer to evidence before the Court of Revision or the County Judge, for there would be no need for such an enactment as regards either of these tribunals, inasmuch as the roll itself, with its sworn certificate attached, is, irrespective altogether of these words at the end of section 48, evidence of the service of notice for their purposes. The words "*primâ facie* evidence," must, therefore, refer to proof before the courts, which implies that the service of notice may be brought in question in actions at law, and that the entry in the roll is not to be conclusive evidence of its having been duly made.

It appears, therefore, to be very clear, that unless the Legislature are to be considered as having reduced this provision of section 48, which, standing by itself, would certainly require notice of the assessment as an indispensable preliminary to the liability of the ratepayer, to a mere direction to the assessor, the appeal must be allowed.

Then section 61 declares, "that the roll shall be valid "and binding upon all parties concerned, notwith-"standing any errors committed in or with regard to "such roll." To hold that this section would cover the omission to give a notice, would be to assume that the

Legislature sanctioned an *ex parte* assessment, leaving the ratepayer to the dilatory and perhaps illusory remedy of an action against the assessor. No doubt it may be in the power of the Legislature to enact such a harsh, oppressive and unusual law, but, in my judgment, their intention to do so must be expressed in language much more precise and absolute than that of the 61st section, before any Court of Justice could assume such an intention. Section 61 is not unequivocal in its terms, and it is, I conceive, the duty of the court, acting on the presumption against *ex parte* proceedings already referred to, to be industrious in finding some mode of reconciling it with section 48 construed as imposing an essential condition; and this there can be little difficulty in doing. The words, taken in their widest sense, would make the roll conclusive, even in cases like *Nickle* v. *Douglas* (1), where, there being clearly no jurisdiction over the property assessed, it was held by the Court of Appeals itself that section 61 was not binding. Then, if the terms are to be limited in cases where the property is beyond the jurisdiction of the assessor, why are they not also to be restricted in cases where there has been a failure to attach the jurisdiction by serving the notice required by section 48? I see no reason for any difference between the two cases. If the words are to be confined in one case to make the clause consistent with other provisions of the statute and with common right and justice, so they ought also to be in the other, and I therefore consider that the vital omission to serve the notice required by section 48, is not one of the "defects or errors" which the confirmation of the Court of Revision can cure. This construction leaves many defects and errors which the passing of the roll by the Court of

(1) 35 U. C. Q. B., 126.

Revision would conclude all objection to; for instance, the assessment in regular form of a person for property which he did not own and which should have been assessed in the name of another (1) is an instance of a most important class of objections, which would be covered by section 61. For the case I have referred to is quite consistent with *Nickle* v. *Douglas*, and is no doubt good law, since the scheme of the assessment law of Ontario, as regards lands, is not to tax the owner in respect of the property, but to lay the tax on the property itself (2).

Therefore, construing section 48 as a provision making notice essential to the validity of the assessment, section 61, limited in its application to a class of objections one of which I have mentioned, can stand quite consistently with it.

I understand Mr. Justice *Patterson* to consider that the Plaintiffs' pleas in bar are defective, for not containing an allegation that the assessment was unjust in the sense of being unfair in amount, and that it was not sufficient to shew the mere absence of notice without also adding an averment that the Plaintiffs were taxed in excess of their liability. I cannot agree in this view; the authorities I have already referred to shew, that without regard to the question of fairness or unfairness, the ratepayer has a right to insist on all essential formalities being complied with before he can be called upon to pay.

Some discussion arose at the Bar as to what constitutes the assessment, whether it is the service of notice or the entry on the roll. I do not see that this is now in any way material; in my opinion, however, neither

(1) *McCarrall* v. *Watkins*, 19 U. C. Q. B., 248; (2) Sections 8 and 9 Assessment Act, 1869.

of these acts constitute the assessment, they are but steps towards it, the process being finally completed when the clerk certifies the roll as having passed the Court of Revision, until which time the assessment is not perfected.

I have dealt with the case as though no notice had been served, but the reasons I have endeavored to state apply with equal, if not greater, force to the actual fact of the service of a notice for an amount less than half of that entered on the roll.

I am of opinion that the judgment of the Court of Appeals should be reversed and the judgment of the Court of Common Pleas, as originally entered for the Appellants, should be restored, with costs to the Appellants in this Court and the Court of Appeals.

Since writing this judgment, I have been informed that pending this appeal the Legislature of Ontario have passed an act, not declaratory in its form but enacting, making, in terms admitting of no question, the roll, as passed, binding.

This, so far from altering my opinion, tends to confirm it.

TASCHEREAU, J., concurred.

FOURNIER, J. :—

La question soumise à la considération de cette Cour ayant été réglée par la 40 Vict. (1), et n'ayant par conséquent plus aucun intérêt pour l'avenir, je crois devoir, surtout après les savantes dissertations de mes honorables collègues, me limiter à indiquer brièvement les motifs pour lesquels je concours dans ce jugement.

(1.) Ch. 81, sec. 56, O.

En 1874, les Appelants reçurent, des cotiseurs de leur municipalité, conformément à la section 48 de la 32 Vict. ch. 36, un avis les informant que leurs propriétés cotisables avaient été évaluées à la somme de $20,900.00. Satisfaits de cette évaluation, ils ne firent aucune démarche pour s'assurer si l'entrée faite sur le rôle de cotisation se trouvait conforme à l'avis qui leur avait été signifié. Plus tard ils apprirent, sans avoir reçu aucun avis à cet effet, que leur cotisation avait été élevée à la somme de $43,400, sur le pied de laquelle leur taxe avait été réglée à la somme de $672.70, au lieu de l'avoir été sur le montant de $20,900 mentionné dans l'avis susdit.

Ils refusèrent de payer cette somme, en offrant de payer $323.95 qu'ils considéraient devoir être le montant de leur taxe, calculé sur l'évaluation dont ils avaient reçu avis. Ce refus donna lieu aux procédés dont un exposé complet a été donné par l'honorable juge en chef. La question qui s'élève est donc de savoir si un contribuable peut être contraint de payer une taxe au sujet de laquelle il n'a pas reçu l'avis requis par la section 48 ci-dessus citée, ou lorsque l'avis donné est défectueux dans une partie essentielle, comme, par exemple, celle du montant de l'évaluation.

La section 48 est ainsi conçue: "Every assessor, be- " fore completion of his Roll, shall leave for every party " named thereon a notice of the sum at which his real " and personal property has been assessed according " to Schedule B, and shall enter on the roll opposite the " name of the party the time of delivery or transmitting " such notice, which entry shall be *primâ facie* evidence " of such delivery or transmission."

Par la 61e sect. du même acte, le rôle d'évaluation, tel que finalement adopté par la Cour de Révision composée de cinq membres du Conseil, est déclaré obliga-

toire pour toutes les parties cotisées, sous la réserve cependant d'un appel au juge de comté.

Cette clause se lit comme suit: "The Roll as finally "passed by the Court, and certified by the Clerk as so "passed, shall be valid and bind all parties concerned, "notwithstanding any defect or error committed in or "with regard to such roll, except in so far as the same "may be further amended, on appeal to the Judge of "the County Court."

Ces deux dispositions sont presque textuellement reproduites des sections 23 et 26 de la 16 Vict., ch. 182. Sous l'opération de ce dernier statut, une question semblable à celle dont il s'agit présentement s'est élevée dans la cause de "*The municipality of the Township of London* vs. *The Great Western Railway Co.*" (1), dans laquelle l'hon. juge en chef Robinson exprime son opinion dans les termes suivants: "And neither by dis-"tress, nor by the action under the 45th clause, can a "ratepayer, we think, be compelled to pay a tax of "which such notice has not been given to him as the "law has provided, in order to give him the opportu-"nity to appeal under the 26th and subsequent clauses."

Lorsque le législateur reproduit textuellement des dispositions qui ont déjà été soumises à l'interprétation judiciaire, il est présumé avoir eu en vue cette interprétation et l'adopter en reproduisant de nouveau le même texte sans l'amender. *Voir*, *Maxwell* on Statutes pp. 234 et 274.

L'avis requis par la 48e sec., étant impérativement exigé pour l'information et la protection du contribuable, je crois qu'il est absolument nécessaire qu'il soit correct dans ses parties essentielles. Si un avis comme celui qui a été donné dans le cas actuel n'était

(1) 16. U. C. Q. B., 500.

pas valable, la loi, chose impossible, se trouverait avoir donné aux cotiseurs le pouvoir, non pas d'informer, mais de tromper les contribuables sur leur véritable position dans une affaire aussi importante que celle de la confection du rôle d'évaluation. La dispense de donner avis serait une bien plus grande protection pour la partie intéressée, car dans ce cas elle ne manquerait pas de se protéger en surveillant elle-même strictement tous les procédés des cotiseurs. L'autorité suivante citée par l'Appelant viz:—*Cooley* On Taxation (1) me parait contenir la véritable doctrine à suivre pour l'interprétation à donner aux clauses du statut qui règle les procédures pour la confection du rôle d'évaluation.

A la page 259: "In making it (the assessment) the "provisions of the statute under which it is to be made "must be observed with particularity."

A la page 260: "But as the course (of assessing) un- "questionably is prescribed in order that it shall be "followed, and as without it the citizen is substan- "tially without protection from unequal and unjust "demands, the necessity for a strict compliance with "all important requirements is manifest."

Et à la page 266: "Notice, or, at least, the means of "knowledge, is an essential element of every just "proceeding, which effects rights of persons or pro- "perty."

Pour ces raisons, je concours dans le jugement prononcé par l'honorable juge en chef.

HENRY, J.:—

I fully concur in the judgment pronounced by the learned Chief Justice, with a trifling, and, in relation to it alone, wholly unimportant exception.

(1) Pp. 259, 260 et 266.

The contention of the Respondent is based solely on the phraseology of section 61, which provides, that the roll, when finally passed by the Court of Revisors, "shall be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, &c." Such contention is that the provision for the notice of assessment necessary to be given by section 48 and schedule B, is only directory, and that, consequently, the ratable inhabitants must each, within fourteen days from the time fixed for the return of the roll, (sub-sec. 1, section 61), which may vary every year between the first of February and the fifteenth of April, as the municipal council may appoint (section 49), make an annual inspection of it to ascertain the amount for which he has been rated, or, in the language so appositely used in the judgment of Mr. Justice *Gwynne*, "to see whether the assessors have not committed the fraud and perjury of returning them upon the roll as assessed at greater amounts than those mentioned in the assessment slips served upon them." If the Legislature intended the mere filing of the roll, the date for which, from year to year, was so subject to fluctuation that each inhabitant would have imposed upon him the additional duty and labour of ascertaining it each year by keeping on the alert as to the action of the municipal council, whose decision there is no provision for publishing, to be a sufficient protection to the ratepayer, I feel bound to conclude that no provision for a notice would be found in the statute.

To arrive at the conclusion, that the notice under section 48 is mandatory, it is enough for us that the statute prescribes a notice so comprehensive and particular in form and *substance* to be given by the assessor to each person rated, and that it requires that, in addition to

the substance to be contained in each column, he is to be informed thus: "If you deem yourself overcharged or otherwise improperly assessed, you or your agent may notify the clerk of the municipality in writing of such overcharge or improper assessment within fourteen days after this notice has been left with you, and your complaint shall be tried in conformity with the provisions of the statute, by the Court of Revision for the Municipality of ————." By schedule B it would appear, that the notice of appeal should be *endorsed* on the notice of assessment, and from this provision the reasonable and natural presumption is that the Legislature intended the provision of the latter to be mandatory and to make it the foundation for proceedings necessary to correct any error in the assessment; for had it been intended that the party should trust altogether to his vigilance in the inspection of the roll filed, why should his attention be directed to the notice served upon him and upon which he was enjoined to *endorse* his notice of appeal.

No one questions the propriety of the general application of the principle, that every one is presumed to know the law, for it is generally a necessity to its proper administration; but, where the Legislature provides a special means of instruction, applicable to particular cases and circumstances created by the statute imposing liabilities, to be given to an individual as to those liabilities and his right and privileges connected therewith, I must conclude, that the general principle applicable to cases where no such provision is made was not intended to be applied; and that the information and intimations contained in the preceding extract from the form of notice prescribed, was intended and required to be given—in substance at all events—by

the party appointed to perform that duty, and for the failure to give which I consider the assessment wholly illegal.

Sub-section 1 of section 60 provides, that "any person complaining of an error or omission in regard to himself &c., may personally, or by his agent, within fourteen days *after the time fixed for the return of the roll*, give notice in writing to the clerk of the municipality, that he considers himself aggrieved, &c." The notice in the schedule provides, that the "fourteen days" notice of appeal shall be *from the date of leaving the notice of assessment.*

The discrepancy apparent here, I do not think of any consequence in this case, but may say, in passing, that I presume the prevailing time for the appeal would be that provided in the sub-section mentioned; nor do I consider it absolutely necessary that the notice of appeal should be endorsed on the notice of assessment, as in the schedule, but that a notice, otherwise sufficiently comprehensive and definite, would be sufficient under that sub-section, and only refer to it as a means of enlightenment as to the proper character of the notice, as to its being mandatory or otherwise. The Legislature clearly, by the very particular wording of the notice of assessment, required that the assessor should substantially say to each person rated: "In the twenty-five columns which I have filled up to the best of my judgment, and upon the best information I have obtained, you will find the result of my action in regard to your assessment; I may have made many mistakes and errors; I may have largely exceeded the value of your property in the different columns; I may have stated you were a hundred years old, and you are not forty; I may have said you have a family of but five,

and you have one of forty; I may have called you a heathen or an atheist, instead of a fervent Christian, and you must put up with all the wrongs I have done you except that in overcharging or improperly assessing you; and I am directed and required by the Legislature to inform you, that in regard at least to the amount to be taken from the means of support of your large family I am not infallible, that there is in relation thereto an appellate tribunal, and that if you give the clerk of the municipality, within fourteen days from this date, a notice of any dissatisfaction you may feel, he will, as he is required by the statute to do, give you further instructions as to the Appellate Court ,and its sitting, whereat you will have a fair opportunity to show, if you can, that I, either from negligence, ignorance or design, have done you wrong."

This, although somewhat playfully expressed, is, in my view, what, in substance, the Legislature required the assessor to communicate in writing to each person rated, and what I consider as necessary to the legality of the rate, and a condition which, being unfulfilled, must affect the finalty and binding effect of the roll, even when confirmed by the Court of Revision.

The statute provides for the giving of the notice by the assessor, and we are to judge of that provision in connection with that by which the roll is made valid and binding. In doing so, it is our duty so to construe the statute as to give effect to the whole of it, or, as far as possible, we must construe one part by light drawn from every other; and, keeping in view the reasonableness and effect of conflicting provisions, determine therefrom the intentions of the Legislature, and, as far as practicable, reconcile the different provisions so as to make the whole act consistent and harmonious. Where

an act directs specific things to be done, and then contains a general prohibitory clause broad enough to cover such things, they will be treated as excepted from the prohibition. The provision for the notice of taxation must, therefore, be excepted from the operation of section 61. Wherever the language admits of two constructions, according to one of which the enactment would be unjust, absurd or mischievous, and, according to the other, it would be reasonable and wholesome, it is obvious that the latter must be adopted as that which the Legislature intended" (1). We are bound also, all things being alike, to give that construction from which the lesser evil or the greater good will result. By requiring the notice no harm can result, and it is prescribed as a part of the assessor's duty, for which he is paid. If a wrong is complained of, the parties will be heard by the proper tribunal, created for the purpose, but by not requiring it we can easily imagine that any amount of injustice might, by mistake, ignorance or design, be perpetrated. The Legislature, therefore, wisely provided against the chance of it, and made it necessary, as one of the means to that end, that the notice of assessment should be given; and, as still further security to the ratepayer, in view, no doubt, of the fact that the Court of Revision was to be composed of the Municipal Council interested in the rates, provided for another appeal to the County Judge. With such legislative provisions for the protection of the ratepayer, how can it be contended that the Legislature, in permitting the heavy, it may be, taxation of the inhabitants of a large township, intended, although prescribing a notice of assessment, relief from injustice to be obtain-

(1) Per Lord *Campbell*, in *R.* v. *Skeen*, 28 L. J. Mag: C., 98; Per *Keating*, *J.*, in *Boon* v. *Howard*, L. R., 9 C. P., 308.

able only by the exercise of a constant viligance, not to be reasonably expected from every one out of five hundred of the ratepayers. We are, however, again reminded that every one is bound to know the law. So it was once laid down, with a trifling reservation. It was said: "Every man in England is presumed to know the law *but the twelve Judges at Westminster*." We are told that the Appellants should be bound, whether they knew it or not. The proposition I admit to be sound, but the great question remains, what is the law? Judges have differed as to it, and we are required to decide between them; and, in resolving the doubts raised as to it, we must, while endeavouring to carry out the intentions of the Legislature, first, of necessity, ascertain what those intentions were; and in doing so, I cannot conceive that the Legislature, in enacting and publishing the provision for a notice of assessment to be so fully and explicitly given before the completion of the roll, meant that it should not be at all necessary to do so, and recklessly enacted it to become only a snare and a trap to all those who would be instructed by reading the statutory provision for it; that he need take no action in regard to any rate likely to be levied upon him, until the notice of it, and the information and intimations to be contained in it, as to the course he should pursue in case he felt aggrieved, should have been given to him. I think, therefore, the appeal should be allowed with costs.

Appeal allowed with costs.

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