WILLIAM C. KRUMM (PLAINTIFF).....APPELLANT;

AND

MUNICIPAL DISTRICT OF SHEPARD No. 220 AND WILLIAM HINDE (DEFENDANTS) ..... } RESPONDENTS.

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*Feb. 8, 10.
*May 18.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Municipal corporation—Taxation—Sale of land for taxes—Action for damages—Land assessed to son of owner—Son instructed by owner to pay taxes—Inference of owner's knowledge of wrongful assessment—Estoppel—Rural Municipality Act, (1911-12), s. 290.

The appellant's testator, residing at Philo, Illinois, was the registered owner of a half section of land, upon which he had been paying taxes for many years. On the 9th of May, 1919, he wrote the respondent Hinde, who was the secretary-treasurer of the respondent municipality, asking for the amount due for taxes. Notice of the assessment for 1919 and the taxation notice were subsequently sent to the deceased. In the admission of facts by the parties, it is stated that the father instructed his son "to pay the taxes on said land and (the son) did pay same pursuant to the said instructions for the years 1919 and 1920, and intended to pay the taxes for the year 1921 but overlooked doing so." The taxes for 1919 were remitted by the son in his own name and an official receipt in the same name was sent to the son, whose post office address was the same as the father's. Assuming that the son had become the owner of the land, the respondent Hinde made

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

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up the 1920 assessment (which carried five years) in the name of the son, prepared and sent the assessment and taxation notices for that year in the name of and to the latter and received payment of those taxes from him. For the succeeding years, the requisite taxation notices in the name of the son were sent to him. No further taxes having been paid, the land was sold under the *Tax Recovery Act*, R.S.A., 1922, c. 122. The appellant brought an action in damages for the loss of the land by reason of the alleged wrongful acts of the respondents.

Held, Mignault J. dissenting, that the respondents were not liable.

Per Duff, Lamont and Smith JJ.—The respondent Hinde's delinquency in omitting the father's name from the assessment roll falls wholly within the intendment of the words "error committed in or with regard to such roll" comprised in section 290 of the *Rural Municipality Act* and this curative section applies and has the effect of validating the roll. Mignault and Newcombe JJ. *contra.*

Per Duff and Smith JJ.—The facts admitted afford sufficient evidence to establish, at least *prima facie,* that the act of the son in paying the taxes of 1920, as demanded from him, that is to say, as taxes payable by him as the person assessed as owner of the land, was the act of the father. That again appears, in the absence of explanation, to be sufficient evidence of the assent of the father to the assessment of the land in the name of his son. Either the father assured himself personally in the usual way, by inspection of the notices, of the accuracy of the assessor's calculation, and instructed the son specifically to pay "pursuant to the notice," or he left that business to the son. The son in either case would know, while, in the first case, both would have actual knowledge that the son was the person assessed. The son's knowledge being knowledge acquired in the course of the execution of his duty in this particular transaction, and being material to the transaction, it must, for the purpose of considering the legal effect of the transaction itself, be imputed to the father (Story par. 140). Mignault and Lamont JJ. *contra.*

Per Newcombe J.—The taxes for 1920 were paid upon the assessment of the son, and they were paid by the father as owner of the land, although assessed in the name of the son, because the latter was acting as his father's agent, and therefore it may be inferred, there being nothing to the contrary, with his father's knowledge of the facts relating to the assessment, which had come into the son's possession in the course of his agency; and if the owner intended to question the assessment or taxation, that was surely the time to raise the objection; but no exception was taken, and not unnaturally the municipality proceeded upon the assessment in the following years in the manner which it had adopted in 1920; and the facts which are admitted or in proof should be held to justify a finding of acquiescence, or of leave and license of the respondents to do the acts complained of. The act is not injurious, and the proof constitutes a defence according to the maxim *volenti non fit injuria.* Not only is it to be inferred that the owner paid the taxes of 1920 with the knowledge that the assessment, which was a continuing assessment, was against his agent, to whom the statutory notices had been sent, but it would appear from the admission that his instructions continued to extend also to subse-

quent years covered by the assessment of 1920, or at least to 1921. Therefore the municipality was entitled to proceed on the faith of the owner's acquiescence and consent. Mignault and Lamont JJ. *contra.*

Per Mignault J.—The appellant is not estopped from objecting to the wrongful assessment. The father did nothing which could in any way lead the assessor to believe that the son had become the owner of the land. Any agency which may have existed between the father and the son did not go further than an instruction to pay the taxes, which presupposed an assessment of the father rendering him liable to municipal taxation. There was no such assessment, and moreover the respondent Hinde never dealt with the son as an agent of his father, but as the owner of the land, which the respondent Hinde gratuitously assumed him to be. No knowledge by the father of the assessment of his son has been established, nor can such knowledge be inferred, the more so as the respondents took no steps to secure the testimony of the son, the onus of proving knowledge, as a basis for estoppel, being on them.

Per Lamont J.—According to the admission of facts, the son received instructions to pay the taxes in 1919, and "pursuant to said instructions" he paid in 1919 and 1920. The construction to be placed upon the language of this admission is that prior to the time he paid the taxes in 1919, the son had received general instructions from his father to pay the taxes on the land, and that, pursuant thereto, he paid them for two years. The admission does not justify the inference that the father gave instructions each year to pay the taxes, or that he had any knowledge that the land was assessed to his son in 1920. If the parties had intended by this admission to state that the father had given fresh instructions to his son each year, the admission would have been couched in different language.

Judgment of the Appellate Division (23 Alta. L.R. 113) aff. Mignault J. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Walsh J. (2) and dismissing the appellant's action in damages.

R. B. Bennett K.C. and *H. G. Nolan* for the appellant.

C. S. Ford K.C. for the respondents.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

(1) (1927) 23 Alta. L.R. 113; [1927] 2 W.W.R. 330.

(2) [1927] 1 W.W.R. 586.

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DUFF J.—The basis of the appellant's claim is that the lands in question were never assessed, that the sale was consequently a wrongful sale, and he claims reparation by way of damages.

The cardinal point in controversy concerns the validity of the assessment. Has the appellant established that there was no assessment upon which, under the statutory law of Alberta, the taxation of the testator's land could validly proceed?

The facts pertinent to this dispute about the assessment are these. The lands were assessed in the name of John F. Krumm for the year 1919 and for many years preceding. The assessor, the respondent, William Hind, in that year, having in response to a tax notice, in the usual form, addressed to John F. Krumm, received payment of the sum demanded, from Herbert Krumm, who was in fact a son of John F. Krumm, assumed from the form in which the payment was made (the particulars of which are not before us), that there had been a change of ownership; and in the following year, 1920, in course of a five-year (so called) assessment made in that year, the assessor, without further inquiry, changed the entry in the assessment roll, striking out the name of John F. Krumm as owner, and substituting therefor the name of Herbert Krumm. The roll containing this entry was finally completed by the assessor, and certified by the secretary, pursuant to the requirements of section 290, and no appeal was taken in respect of this assessment.

In point of fact there had been no change of ownership. John F. Krumm was still the owner, and Herbert Krumm possessed no interest in the property.

By reason of this erroneous statement of the fact of ownership, and of the circumstances in which the entry of the name of Herbert Krumm was made, the purported assessment is alleged to be in point of law no assessment at all, within the provisions of the assessment law of Alberta. More precisely, the purported assessment is impeached in this way. John F. Krumm had, as already mentioned, for many years been assessed as owner, had received the assessment notices and the tax notices, and in response thereto, had duly paid his taxes. The owner, for the present purpose, within the meaning of the *Rural Municipality*

Act, is a person possessing a registered interest or an interest under an agreement for purchase expressed in writing.

The law, it is argued, requires that land be assessed in the name of the person who is the owner in the statutory sense, and this, it is said, is an essential condition of a valid assessment. It follows, it is contended, that the entry of the name of Herbert Krumm as owner, is, in law, no entry at all, and that the purported assessment, lacking one of the essential ingredients of an assessment, is void.

Further, it is contended that, before striking the name of John F. Krumm from the roll, the assessor was bound, it was his duty as assessor, at least to take the usual measures for ascertaining whether or not he was no longer interested as owner in the statutory sense. Common prudence would have suggested, it is argued, a search in the land registry office or communication with John F. Krumm himself. Neither of these obvious steps was taken. The assessor, in effecting the change under an impression produced by the communication from Herbert Krumm, was palpably departing from his statutory duty, it is argued, to investigate the facts before doing so.

The court below have held that this contention in both branches of it is completely answered by the terms of Section 290, already alluded to, and I come at once to an examination of that Section, in its bearing upon the facts in evidence. It is in these words.

> 290. When the roll is finally completed the secretary shall over his signature, enter at the foot of the last page of the roll the following certificate filling in the date of such entry: "Roll finally completed this * * * day of * * * 19 * *, and the roll as thus finally completed and certified to shall be valid and bind all parties concerned subject to amendment on appeal to the court of revision and to further amendment on appeal to the District Court Judge notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in any notice required by this Act or any omission to deliver or to transmit any such notice.

This section, of course, only takes effect where there is an assessment roll within the meaning of the section, and where the impeached assessment is something which can be described as an assessment recorded in the roll. As to the roll, it is not disputed that it was prepared by a legally competent assessor professing to act generally in compliance with the requirements of the law, and that *ex facie*

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it does conform to those requirements. In form, it was duly completed by the assessor, and it was certified by the secretary, pursuant to section 290. It is, therefore, the assessment roll, within the meaning of section 274, and within the contemplation of section 290. The impugned entries constitute, *ex facie,* the record of an assessment which is part of the roll.

These being the facts, what is the effect of section 290? " The roll," as thus finally completed and certified, and including the impeached assessment,

shall be valid and bind all parties concerned subject to amendment on appeal, notwithstanding any defect or error committed in or with regard to the roll.

There is, I think, little or no doubt as to the force of these words. As regards any such " defect or error," the conditions prescribed being fulfilled, the roll, as well as the assessments recorded in the roll, are to be deemed to be valid, and, among all parties concerned, the roll is to be taken as the unimpeachable record of those assessments.

Was the deviation from the statutory directions which this case presents, a

defect or error committed in or with regard to the roll?

Or, was it, on the contrary, as is contended, a deflection of a kind to which the protection of this enactment does not extend? That it involved such an " error," hardly admits of dispute. Error, for our present purpose, cannot be better defined than in the words of the Oxford Dictionary.

Something incorrectly done through ignorance or inadvertence; a mistake, in calculation, judgment, speech, writings, action, etc.

The assessor's act in substituting Herbert Krumm's name for that of John F. Krumm seems to fall, in this sense, within the description " error committed in or with regard to such roll." Nor can I agree that the facts in evidence impart to the assessor's act such a character as to remove the assessment from the ambit of section 290.

First, it is to be observed that, in order to place a particular assessment beyond the operation of the section, it is not sufficient to establish that the blemish is of a kind which, but for the section, would have vitiated it in point of law. That is decided in the *City of Wetaskiwin* v. C. *& E. Townsites Ltd.* (1).

(1) (1919) 59 Can. S.C.R. 578.

Nor is it enough, for this purpose, to show that the names of the persons interested in the property assessed have been omitted from the roll, and that the person whose name has been placed there has no interest in the property. Obviously, since everybody possessing an interest under a written agreement for purchase falls within the category of owner, such a rule would be impracticable; and section 261, which in such cases provides for an appeal by the same procedure as that prescribed where the complaint is against the valuation, shows that the statute does not so treat such a misstatement of the facts of ownership. A misstatement concerning those facts, may, of course, be specially noxious, inasmuch as the owner interested may, by reason of it, be deprived of the benefit of notice. But section 290, by explicit terms, embraces cases in which no notice has been sent, and the grievance arising from absence of notice may be just as serious where the omission of the true owner's name is natural or almost inevitable, as when it is due to culpable neglect. The fact that omission to transmit notice is a result or a concomitant of the error complained of, cannot, therefore, be a ground for holding the municipality disentitled to the benefit of section 290.

Nor can I discern any reason, founded in legal principle, for holding that this result accrues from the fact that the assessor's error arises from a palpable mistake of judgment or from negligence—gross negligence, if you will. We are told that the entry must be regarded as non-existent. I cannot agree. Both in intent and in deed, in making the entry, the assessor was officially engaged in preparing the assessment roll. His bona fides, the genuineness of his belief that it was his duty to make the change, is not assailed. Besides, as already observed, the assessment forms part of the roll, which, by the express enactment of section 274, is the assessment roll of the municipality. Beyond doubt an appeal would have been competent, under section 261.

I cannot understand upon what principle we can affirm that this assessment is so destitute of substance that there is nothing upon which section 290 can take effect. The assessor's act, to borrow an expression from the law af agency, was done in the course of his employment, and it was one of the class of acts which it was his official duty to do; and if he had been the agent of the municipality, the munici-

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pality would be responsible for his negligence. On this point we may perhaps receive some enlightenment from the decision of the Privy Council in the *Shannon Realties Case* (1). The assessment authorities of a municipality, who were required by statute to value land, for assessment purposes, at its real value, had, during a series of years, disregarded the statutory rule, and had, designedly, as the trial judge found, assessed the lands in the municipality upon a different principle, and according to a scale which had no relation to their real value. The statutory rule had been deliberately discarded by the municipality. On that ground the assessment rolls for the years in question were attacked, in an action claiming a declaration of nullity, and in the courts of Quebec the assessments were set aside. In this court, the judgment of the Quebec courts was reversed, on the ground that there was a statutory remedy by way of appeal for grievances in respect of valuation, and that, as this remedy was available, notwithstanding the intentional departure from the statutory principle, the assessments could not be treated as nullities. The Quebec legislation, which was there applied, contains no curative provision such as section 290, but the decision illustrates the distinction between nullity, resulting from incompetency, and mere illegality, in the sense of a culpable failure to observe a statutory direction in the performance of official duty. The decision of this court was confirmed by the Judicial Committee.

I am not quite convinced that, in testing the appellant's contention, one can admit any real distinction between an error in the identification of the owner and an error consisting in a departure from the statutory rule governing valuation. Section 252 of the Alberta Act prescribes this rule,

> Land shall be assessed at its actual cash value as it would be appraised in payment of a just debt from a short debtor.

The right of appeal in respect of a misstatement in relation to ownership is given in the same section (Sec. 261), and *uno flatu,* with the right of appeal in respect of excessive or insufficient valuation; and the procedure in appeal is identical in the two classes of cases. If error

(1) [1924] A.C. 185.

springing from negligence, gross negligence, if you like, when it relates to the first matter, is a good ground for affirming non-existence of the assessment, and for holding that the rehabilitating operation of section 290 does not come into play, there is at least no patently necessary reason for affirming that, in the matter of valuation, violation of the statutory rule, originating in similar derelictions, is entirely without effect upon the legal validity of the assessor's proceedings. Absence of notice is not important here, because, as we have observed, in the scheme of section 290, absence of notice is immaterial.

It would not be suggested that an excessive valuation in deliberate disregard of the rule of sec. 252, or due to the assessor's indifference to his duty, or to his rash acceptance of some erroneous and unjustifiable assumption of fact, would not be appealable under section 261 *et seq.* Neither would it be suggested that a person aggrieved by an assessment so effected, could, on that ground alone, permit the opportunity of appealing to pass, and then successfully attack the assessment as a nullity, in, for example, an action against him for taxes. The admission of a right of attack in such circumstances might—it is self-evident—reduce the system of municipal taxation and the municipal finances associated therewith to a state of disorder.

Nor do I observe any ground for holding that, superadded to the error committed by the assessor, there was any other element, the presence of which has the effect of removing the case from the operation of section 290. Fraud is not alleged or suggested. I am unable to escape the conclusion that the assessor's delinquency falls wholly within the intendment of the words " error committed in or with regard to such roll."

But there is another answer to the appellant's claim, Herbert Krumm must have become aware of the change in the assessment, in consequence of the assessment notice and the tax notice which he received in 1920. Indeed the tax notice, itself, would inform him that the taxes were due by him as the person assessed (section 298). In the admissions of facts, it is stated that he

> paid the taxes on the said lands for the year 1920 pursuant to the said tax notice;

that is to say, he paid the taxes, as the person from whom

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they had been demanded, and by whom they were due. From paragraph 20 of the admissions, it appears that this payment was made "pursuant to the instructions" of John F. Krumm. This last statement may mean that the act of paying the taxes according to the notice was performed under the specific instructions of the father, or, and this seems the preferable reading, that the son had instructions to pay the taxes for the year 1920, and that his act in paying them, in the circumstances, was within the scope of the authority conveyed by those instructions. On either construction, the son was acting within the scope of his employment in doing the very thing it is admitted he did; that is to say paying the taxes for the year 1920 "pursuant to the tax notice" for that year. In either view, the conclusion necessarily results, that the very act of the son in paying the taxes for 1920, as the person liable to pay them, as the person assessed, was the act of the father.

There is another way of putting it. Either the father assured himself personally in the usual way, by inspection of the notices, of the accuracy of the assessor's calculation, and instructed the son specifically to pay "pursuant to the notice," or, as paragraph 20 would seem to suggest, he left that business to the son. The son in either case would know, while, in the first case, both would have actual knowledge that the son was the person assessed. The son's knowledge being knowledge acquired in the course of the execution of his duty in this particular transaction, and being material to the transaction, it must, for the purpose of considering the legal effect of the transaction itself, be imputed to the father (Story par. 140).

Before passing to the effect of this on the present controversy, it should be noticed that, as between the appellant and the respondents, the appellant's opportunities of knowledge, in relation to these things, are peculiar, if not exclusive, and this circumstance must be considered in determining the sufficiency of the facts proved to establish a *prima facie* case (Stephen, Evidence Act. 96d). I think the rule by which courts govern themselves, in practice, is thus correctly stated by the editors of the last edition of Taylor on Evidence;

> Where the facts lie peculiarly within the knowledge of one of the parties very slight evidence may be sufficient to discharge the burden of proof resting upon the other party (2 Taylor, on Evidence 285).

My conclusion, then is, that the facts admitted afford sufficient evidence to establish, at least *prima facie,* that the act of Herbert Krumm in paying the taxes of 1920, as demanded from him, that is to say, as taxes payable by him as the person assessed as owner of the land, was the act of John F. Krumm.

That again appears, in the absence of explanation, to be sufficient evidence of the assent of John F. Krumm to the assessment of the land in the name of the son. Such conduct must be considered from the point of view, neither of the Krumms exclusively, nor of the assessor exclusively. It must be regarded from both points of view. The question is, what interpretation ought a reasonable man in the Krumms' situation, engaged in transacting such business, to have anticipated, as that likely to be ascribed by the assessment authorities to Herbert Krumm's act in paying the taxes, as he did, pursuant to the tax notice? The question seems to admit of only one answer. There can be no doubt there was here sufficient evidence of assent (See *Rullell* v. *Toronto* (1) and *Ewing* v. *Dominion Bank* (2).

The appeal should be dismissed with costs.

MIGNAULT J. (dissenting).—This is an action brought by the appellant as executor of the late John F. Krumm, claiming damages for the loss, through the negligence of the respondents, of a property belonging to the deceased, and which was sold at a municipal tax sale. The plaintiff apparently considered that he could not impeach the sale as against the purchaser, so his action, which is an action in damages for the loss of his land by reason of the wrongful acts of the respondents, is for the value of the property and his expenses.

John F. Krumm, who died on July 19th, 1925, was the registered owner of a half section of unoccupied land in the municipal district of Shepard, no. 220. His address was Philo, Illinois, U.S.A. From 1907 until 1919, he was assessed, under his own name and with that address, by the respondent municipality, or its predecessor in interest, for this land, and tax notices were mailed to him, addressed to Philo, Illinois. Herbert Krumm, the son of John F. Krumm, paid the taxes on the land for 1919 and 1920, and

(1) [1908] A.C. at p. . (2) [1904] A.C. 806.

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the tax receipts were sent to him. In 1920, the respondent Hinde, secretary-treasurer and assessor of the municipality, assessed " H. Krumm, Philo, Ill., U.S.A." as the owner of the land in question. Hinde made no inquiries at the land titles office to ascertain who was the registered owner of the half section, but assumed, when he received the money for the taxes of 1919 from Herbert Krumm, that the latter had become the owner of the land, either by succession or otherwise. From and including 1920, the assessment and tax notices were sent to Herbert Krumm.

The 1921 taxes were not paid. Tax sale proceedings with respect to this land were taken under the provisions of chapter 122 of the Statutes of Alberta, 1922, a caveat having been lodged by the municipality in the land titles office. On December 31, 1924, the certificate of title in the name of John F. Krumm was cancelled, and a new certificate of title in the name of the municipal district of Shepard, no. 220, was issued by the registrar. Finally the land was sold by the municipal district to one Chas. Horrill for $5,476.72, the sale agreement bearing date the 5th of May, 1925.

To complete the statement of pertinent facts, reference must be made to some correspondence which was placed in the record at the trial. There is first a letter by John F. Krumm to Hinde, dated May 9, 1919, asking that an account of taxes due on this land be sent to him, to which Hinde answered on May 17, 1919, that the assessment was not yet quite complete, but that notices would be sent out within the next week or so. Then Herbert Krumm having paid the 1919 taxes, a receipt was mailed to him on October 1, 1919, marked " Received from Herbert Krumm (change initial to H ".) A similar receipt, save the entry " change initial to H ", was sent to Herbert Krumm on December 1, 1920, for the 1920 taxes. Then we find a letter from Hinde to " Mr. H. Krumm, Philo, Illinois, U.S.A.", dated October 29, 1924, stating that the land was on the municipality's caveat list for arrears of taxes for the years 1921 to 1923, that the caveat had expired and that the council had passed a resolution to take title to the land unless the taxes, amounting to $590.47, were paid before December 15. Apparently this letter was not answered, and on February 10, 1925, Hinde wrote to H. Krumm that the land would

be offered for sale on the 28th of that month, unless the arrears of taxes and costs to the amount of $796.52 were paid. The final letter from Hinde was sent on March 26, 1925, to "Mrs. Effie Krumm, Philo, Illinois, U.S.A." (Hinde took her to be the widow of John F. Krumm), saying that an offer of $17 per acre for the land had been received, payable by instalments, and asking whether that offer, which would leave a substantial balance for the owner after payment of taxes, should be accepted. Herbert Krumm answered this letter, on March 31, 1925, saying that the offer would be accepted.

As above stated, John F. Krumm died on the 19th of July, 1925. The only witness called at the trial was Hinde, the secretary-treasurer and assessor. The parties, however, made some written admissions, the last of which is that John F. Krumm instructed Herbert Krumm to pay the taxes on the lands, and that the latter paid the same for 1919 and 1920,

and intended to pay the taxes for the year 1921 but overlooked doing so.

It may be added that under section 251 of the *Municipal District Act* (chapter 3 of the Statutes of Alberta, 1911 and 1912, and amendments), the assessment made in 1920 stood for the five year period beginning in that year, subject to sending out tax notices each year to every person whose name appeared on the assessment roll (sect. 298).

It will not be necessary to deal in any detail with the provisions of the *Municipal District Act* (1) with respect to municipal assessment for taxes. The assessment is of the owner or occupant of land in the municipality (sect. 251), and "owner" means and includes any person who appears by the records of the land titles office to have any right, title or interest in the land, other than that of a mortgagee, lessee or encumbrancee (subsect. 8 of sect. 2). The name of the owner and his post office address, if known, are entered upon the assessment roll (sect. 251), and upon completion of the roll the assessor is directed to forthwith mail to each person whose name appears on the roll a notice of his assessment (sect. 257). If the name of the

(1) The 1911-1912 enactment was called *The Rural Municipality Act*. The name is now *The Municipal District Act*, c. 110, R.S.A. The numbering of the sections here is that of the 1911-1912 statute under which the assessment was made.

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owner is not known and cannot after reasonable inquiry be ascertained, the land is deemed to be duly assessed if entered on the roll with a note stating that such owner is unknown (sect. 255). Assessment notices are issued only in the years in which an assessment is made (sect. 257), but tax notices are sent each year (sect. 298).

When this assessment was made in 1920, there was no intention whatever to assess John F. Krumm, the registered owner of the land. Hinde, the assessor, quite frankly states that upon receiving the 1919 taxes from Herbert Krumm, he assumed that the latter was owner of the land and that John F. Krumm was dead. He never dealt with Herbert Krumm as agent for John F. Krumm, and it was Herbert Krumm alone whom he intended to assess and who in fact was assessed for the land belonging to his father. Hinde could easily have found out who was the real owner of the land by inspecting the records of the land titles office, but he neglected doing so until the land was sold and it was desired to give a title to the purchaser. This is all the more remarkable as for some twelve years John F. Krumm had been assessed as owner, and as late as May 9, 1919, had written to Hinde, asking for an account of taxes due on his land. The good faith of Hinde is not in question; the mistake he made, however, was in no way induced by John F. Krumm, and he was negligent in not having made an inquiry before assessing the land in the name of another.

Under these circumstances, the decisions and the enactments relied on by the respondents have no application. This is not the case of a mistake made in the name of the person intended to be assessed, or of the effect of the curative section of the statute (sect. 290) validating the roll, notwithstanding any defect, error or misstatement. The assessor did here what he intended to do, and negligently assessed a third person as the owner of John F. Krumm's land. As far as John F. Krumm was concerned, there was no assessment whatever.

The respondent relies on subsection 3 of section 12 of the *Tax Recovery Act,* 1922 (c. 25 of the Alberta statutes for 1922), which states that a duplicate certificate of title purporting to be issued under the authority of that Act, shall be conclusive evidence of the compliance with all conditions precedent to the issue of such certificate, and its

validity shall not be questioned in any court of law or equity.

But this action is not based on the illegality of the certificate of title. The plaintiff does not seek to recover his land for which the certificate of title issued, and which was sold by the municipal district. He recognizes that he cannot get the land back, but he claims damages for the wrongful act of Hinde in negligently assessing a third person as owner of his land, by reason of which, and of the subsequent sale, his land was lost. No question arises as to the liability of the municipal district for these damages, for counsel for the municipality, at the hearing, assumed responsibility for what Hinde had done.

I see no basis for the contention of the respondents founded on estoppel. John F. Krumm did nothing which could in any way lead the assessor to believe that Herbert Krumm had become the owner of the land. Any agency which may have existed between John F. Krumm and Herbert Krumm did not go further than an instruction to pay the taxes, which presupposed an assessment of John F. Krumm rendering him liable to municipal taxation. There was no such assessment, and moreover Hinde never dealt with Herbert Krumm as an agent of John F. Krumm, but as the owner of the land, which Hinde gratuitously assumed him to be. No knowledge by John F. Krumm of the assessment of Herbert Krumm has been established, nor can such knowledge be inferred, the more so as the respondents took no steps to secure the testimony of Herbert Krumm, the onus of proving knowledge, as a basis for estoppel, being on them. With great respect, I think the judgments of the courts below cannot be supported.

I would allow the appeal with costs throughout and remit the case to the trial court for the assessment of damages.

NEWCOMBE J.—The deceased, who resided at Philo, Illinois, was the registered owner of unoccupied waste land in the province of Alberta, upon which he had been paying taxes for many years. On 9th May, 1919, he wrote the respondent Hinde, who was the secretary-treasurer of the respondent municipality, within the limits of which the land lies, asking for a statement of the amount due for taxes on the "S. ½ Sec. 5, Lot 28, Block 23, Rge. 28, Mer. 4,"

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the land in question. The answer was that the assessment was not then quite complete, but that the writer, the respondent, Hinde, hoped to send out notices within the next week or so. Subsequently notice of the assessment for 1919 was sent to the deceased, also the taxation notice, and he instructed his son Herbert Krumm, who also lived at Philo, Illinois, to pay the taxes. There is no evidence of any further communication, from or to, between the deceased, who died in 1925, and the municipality or its officers. It is admitted that none was sent by or for the municipality. The subsequent proceedings with regard to the lands are, in these circumstances, somewhat remarkable. Herbert Krumm paid the taxes in 1919 in due course, but the respondent, Hinde, who conducted the business of the municipality, and whose probity is not questioned, supposing, apparently because Herbert had paid the taxes, that he must therefore have become the owner of the property, but, without consulting the registry to ascertain the fact, made up the assessment of 1920 in the name of Herbert, prepared and sent the assessment and taxation notices for that year in the name of and to the latter, and received payment of those taxes from him. That assessment became by statute the governing assessment for five years. No further taxes were paid, although, for the succeeding years, the requisite taxation notices in the name of Herbert were sent to him. Tax recovery proceedings were consequently taken under the *Tax Recovery Act*, R.S.A., 1922, c. 122, resulting, on 31st October, 1924, in the existing certificate of title of the deceased being cancelled and a new certificate issued in the name of the respondent municipality. Section 12 of the Act provides as follows:

12. (1) If any parcel of land is not redeemed within one year from the filing of a caveat in respect thereof the treasurer shall issue a transfer to the municipality within whose area the parcel of land is situated and file a memorandum of such issue in the proper Land Titles Office, whereupon the Registrar shall cancel the certificate of title to such parcel and register the municipality as owner of such parcel and issue a new duplicate certificate of title to it.

(2) A memorandum shall be entered upon the certificate of title and also upon any new duplicate certificate reserving the privilege of redemption in accordance with the terms of this Act.

(3) A duplicate certificate of title purporting to be issued under the authority of this Act shall be conclusive evidence of the compliance with all conditions precedent to the issue of such certificate and its validity shall not be questioned in any court of law or equity.

The municipality assumes responsibility for what was done, or neglected to be done, by its secretary-treasurer, the respondent, Hinde.

In these circumstances the appellant, the executor of the deceased John F. Krumm, claims to recover the value of the land, which was lost to the estate by reason of the alleged illegal and unauthorized proceedings of the municipality, and its secretary-treasurer, in subjecting the land to the provisions of the *Tax Recovery Act,* without any assessment of the owner or notice to him, and it would appear that the vesting of the land in the municipality was a direct and natural consequence of the proceedings which were taken.

So far as the case has been stated, it would seem that the municipality has adopted a course which deprived the owner of any notice or chance of notice which the law contemplates or requires for his protection. It is not a mere irregularity, oversight or omission in the matter of procedure or detail of which the appellant complains; it is the initial act of assessment, which, not only did not operate against the owner, but directed the course of the proceedings in a manner inevitably to escape all contact with the owner—a deliberate *ex parte* proceeding, and I am not satisfied to accept an interpretation of the statute which holds him nevertheless bound.

It is extraordinary however that no explanation comes from Philo, Illinois, except as stated in the admissions, and the last of these is very significant. It reads:

> That the said John F. Krumm instructed the said Herbert Krumm to pay the taxes on said lands and said Herbert Krumm did pay same pursuant to the said instructions for the years 1919 and 1920, and intended to pay the taxes for the year 1921 but overlooked doing so.

Now the taxes for 1920 were paid upon the assessment of Herbert Krumm, and they were paid by John F. Krumm, as owner of the land, although assessed in the name of Herbert, because the latter was acting as his father's agent, and therefore I think it may be inferred, there being nothing to the contrary, with his father's knowledge of the facts relating to the assessment, which had come into Herbert's possession in the course of his agency; and if the owner intended to question the assessment or taxation, that was surely the time to raise the objection; but no exception

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was taken, and not unnaturally the municipality proceeded upon the assessment in the following years in the manner which it had adopted in 1920; and now, when the facts are presented which are admitted or in proof, I think they should be held to justify a finding of acquiescence, or of leave and license of the defendants to do the acts complained of. The fact is that the act is not injurious, and the proof constitutes a defence according to the maxim *volenti non fit injuria.* Not only is it to be inferred that the owner paid the taxes of 1920 with the knowledge that the assessment, which was a continuing assessment, was against his agent, to whom the statutory notices had been sent, but it would appear from the admission that his instructions continued to extend also to subsequent years covered by the assessment of 1920, or at least to 1921, because it is admitted that the agent

> intended to pay the taxes for the year 1921, but overlooked doing so.

Therefore, in the circumstances I think the municipality was entitled to proceed on the faith of the owner's acquiescence and consent. It may aptly be said in the language of Willes J., in *Davies* v. *Marshall* (1), upon the evidence as it stands, that either the owner

> actually gave his consent to the doing of the acts complained of, or that he so conducted himself that a reasonable man might fairly conclude that he did give that consent. Conduct in a court of common law often does amount to an estoppel, and is evidence of leave and license which is incapable of being controverted.

I would for this reason dismiss the appeal.

LAMONT J.—The facts in this case are not in dispute. With the exception of the evidence of the defendant, William Hinde, and certain documents, the case was tried on admissions of fact made by the parties. Briefly the facts are that at all times material John F. Krumm was the registered owner of the lands in question (322 acres); that from 1907 to 1919 inclusive, he was assessed as owner thereof by the defendant District and its predecessor, the Local Improvement District. On May 9, 1919, John F. Krumm wrote to the defendant Hinde, who was secretary-treasurer of the defendant District, asking for the amount of the taxes due on his land. On August 26, 1919, Hinde sent him

(1) 10 C.B., N.S., at 711.

the tax notice and on October 1 Herbert Krumm forwarded to Hinde $137.55, the amount of taxes claimed in the notice. A receipt for the money was sent to Herbert Krumm and on the stub of the receipt kept in his book Hinde made a note to "change the initial to H." When making up the assessment roll for 1920, Hinde dropped the name John F. Krumm as assessed owner of the land in question and inserted that of Herbert Krumm, and thereafter all notices and communications were sent to Herbert Krumm.

The reason given by Hinde for making the change was that John F. Krumm had always been very punctual in the payment of his taxes and as he had written in 1919 for his tax notice and a few months later the taxes were forwarded by Herbert Krumm in his own name, he assumed that John F. Krumm was no longer living and that Herbert Krumm had become the owner. Herbert paid the taxes for 1920, but thereafter no taxes were paid in respect of the land. The taxes for 1921 not being paid the district, in October, 1922, commenced proceedings to have the land forfeited for taxes and, on December 1, 1924, the certificate of title of the said land in the name of John F. Krumm was cancelled and a new certificate was issued to the district. On July 5, 1925, the District sold the land for some $2,000 less than its assessed value. In July, 1925, John F. Krumm died, and in the following October his executor brought this action in which he claims damages for the illegal sale of the land.

The argument on behalf of the plaintiff is that the taxes for which the land was sold had not been legally imposed, in that the defendant Hinde, who was the assessor of the District as well as its secretary-treasurer, in making the assessment roll for the year 1920, assessed the land to Herbert Krumm; that he did this without any request to do so and without making inquiry as required by the statute to ascertain who was the real owner; that this breach of the statutory provision rendered the assessment not merely erroneous and defective, but prevented it being an assessment at all because an essential constituent of an assessment—namely the name of the owner as ascertained by inquiry—was entirely lacking.

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The argument on behalf of the defendants is twofold:

1. That on the facts admitted, John F. Krumm knew that the land was assessed to Herbert Krumm in 1920, and, knowing that, he instructed Herbert to pay the taxes for that year, and is therefore estopped from objecting to the assessment in Herbert's name.

2. That in any event the curative section of the Municipal District Act (s. 290) applies and has the effect of validating the assessment roll withstanding any error or defect therein.

If either of these contentions made by the defendants be upheld, the plaintiff's action must fail.

The first contention, in my opinion, cannot be upheld. The admission which is relied upon as establishing knowledge on the part of John F. Krumm that the land was assessed to his son Herbert in 1920, is as follows:—

> 20. That the said John F. Krumm instructed the said Herbert Krumm to pay the taxes on said lands and said Herbert Krumm did pay same pursuant to the said instructions for the years 1919 and 1920, and intended to pay the taxes for the year 1921 but overlooked doing so.

According to this admission Herbert Krumm received instructions to pay the taxes in 1919, and " pursuant to said instructions " he paid in 1919 and 1920. The construction which, in my opinion, should be placed upon the language of this admission is that prior to the time he paid the taxes in 1919, Herbert Krumm had received general instructions from his father to pay the taxes on this land, and that, pursuant thereto, he paid them for two years. I cannot read the admission as justifying the inference that John F. Krumm gave instructions each year to pay the taxes, or that he had any knowledge that the land was assessed to his son in 1920. If the parties had intended by this admission to state that John F. Krumm had given fresh instructions to his son each year, I think the admission would have been couched in different language.

It was also suggested that in view of the fact that Herbert Krumm and his father lived in the same town and were members of the same family, and of the fact that Herbert who could have given definite evidence on the point, did not appear at the trial, very slight evidence would justify the inference of knowledge on the part of the father that

the land had been assessed to Herbert. The short answer to this suggestion, in my opinion, is, that the onus of establishing knowledge on the part of John F. Krumm was on the defendants and that they chose to go to trial without the evidence of Herbert Krumm, and on admissions made on behalf of the plaintiff. If the admissions are not sufficient to establish a point material to the defence, the defendants have only themselves to blame for not having the point clearly covered by the admissions.

The next question is: Does s. 290 apply so as to validate the assessment of the land in the name of Herbert Krumm for the year 1920, without any inquiry by the assessor as to whether or not there had been any change in ownership. S. 290 reads as follows:—

> When the roll is finally completed the Secretary shall over his signature enter at the foot of the last page of the roll the the following Certicate, filling in the date of such entry: Roll finally completed this * * day of * * *, 19 * , and the Roll as thus finally completed and certified to shall be valid and binding on all parties concerned, subject to amendment on appeal to the Court of Revision and to further Amendment on appeal to the District Court Judge, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in any notice required by this Act, or any omission to deliver or transmit any such notice.

The roll which by this section is made binding upon all parties concerned is the roll which the Act contemplated the assessor would make. If in that roll there appears an assessment which was beyond the jurisdiction of the assessor to make, s. 290 cannot be invoked to validate that assessment. *City of Wetaskiwin* v. *C. & E. Townsites Limited* (1). To ascertain therefore, whether it was competent for the assessor to place the name of Herbert Krumm on the roll as owner of the land in question without inquiring if there had been a change of ownership, necessitates an examination of the statutory provisions authorizing the assessor to make the assessment.

The Act provides that all land not exempt shall be liable to assessment and taxation and that it shall be the duty of the assessor to make the assessment of such land in the manner hereinafter provided. The manner provided is set out in sections 251, 254 and 255 of the Act, which read as follows:

(1) 59 Can. S.C.R. 578.

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251. As soon as may be in each year but not later than the first day of July the assessor shall assess every person the owner or occupant of land in the municipality and shall prepare an assessment roll in which shall be set out as accurately as may be,

(*a*) The name of the owner of every lot or parcel of land in the municipality which is liable to assessment * * *.

(*b*) A brief description of each such lot or parcel of land, the number of acres which it contains and the assessed value thereof. * * *

254. It shall be the duty of every person whose land is assessable to give to the assessor all information necessary to enable him to make up the roll; but no statement made by any such person shall bind the assessor or shall excuse him from making inquiry as to its correctness. * * *.

255. If the assessor does not know and cannot after reasonable inquiry ascertain the name of the owner of any unoccupied lot or parcel of land in the municipality the same shall be deemed to be duly assessed if entered on the roll with a note stating that such owner is unknown.

To be an assessment within the contemplation of the statute the property assessed must be taxable, otherwise there is no subject matter upon which s. 290 can operate. *Toronto Railway* v. *City of Toronto* (1).

Given taxable property an assessment to be valid, as was pointed out by the present Chief Justice of this court in the *Wetaskiwin Case* (2), must possess two essential constituents (1) Designation of owner, and (2) Description of property. With the former of these only are we concerned here. Under the above quoted sections the statutory duty of the assessor is to set down the name of the owner " as accurately as may be." That implies diligent inquiry on his part as is shewn by sections 254 and 255. That such is the assessor's duty cannot, in my opinion, be doubted, but the question is: Does a failure to make reasonable inquiry go to the assessor's jurisdiction so as to make him incompetent to enter any name on the roll as owner until after inquiry, or would an entry without inquiry be simply a failure to observe a statutory procedure for performing a duty wholly within his jurisdiction? If the former the entry would be null *ab initio;* if the latter it would be an irregularity which s. 290 would cure. Upon this point my brother Duff, in *La Ville St. Michel* v. *Shannon Realties Limited* (3), expressed an opinion which is very apposite here. At page 435 he said:—

(1) [1904] A.C. 809. (2) 59 S.C.R. 579.
(3) 64 Can. S.C.R. 420.

Where you have authority to do a certain class of acts coupled with a rule prescribing the manner in which the act is to be done or prohibiting the doing of it in a given way, you may always have the question whether the rule imports a limitation of authority; and whether it does or does not import a limitation of authority is a question to be decided on the construction of the instrument creating the authority viewed in light of the circumstances and the object and purpose for which the authority is given.

In that case the statutory mandate which had not been observed was that taxable property "shall be assessed according to its real value"; and this court held that notwithstanding the failure of the assessor to observe this statutory direction in making the assessment, the roll had been made within the powers of the municipal corporation. That decision was affirmed by the Privy Council (1). In the judgment given by their Lordships the rule was laid down that

where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.

Their Lordships, at page 193, further said:

In this view it is of cardinal importance to consider what is the remedy provided for the situation in which a ratepayer or body of ratepayers has been put by a valuation roll which is said to be illegal and invalid by reason either of error in its particular items, or by reason of fundamental error in principle. Once such a roll appears, the statute steps in to provide a remedy to "every person who, personally or as representing another person, deems himself aggrieved by the roll as drawn up," and the appeal is to state "the grounds of his complaint." What the Act provides by way of prescription of appeal is to give by that means a remedy for a grievance which is complained of.

In the present case, we have a failure to observe the statutory direction for ascertaining the owner of the property assessed. Can such a failure affect the jurisdiction of the assessor to make the roll to any greater extent than a failure to follow the statutory direction in valuing the property? In my opinion it cannot. Yet the above mentioned cases shew that a failure to follow the statutory direction as to valuation does not deprive the assessor of jurisdiction where the statute provides a remedy by way of appeal for improper valuation.

S. 258 of the Act provides that it shall be the duty of the assessor, within two weeks after the completion of the roll,

(1) [1924] A.C. 185.

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to post up a notice that the roll is open for inspection and that any ratepayer desiring to object to the assessment of himself or any other person must lodge his complaint within twenty days. S. 261 provides that if any person thinks his name or the name of any other person has been wrongfully inserted in or omitted from the roll, he may, within the said twenty days, lodge a complaint with the secretary. Such a complaint constitutes an appeal to the Court of Revision, and from a decision of the Court of Revision the statute provides a further appeal to the District Court Judge. Although he might have appealed against the substitution of Herbert Krumm's name for his own, John F. Krumm did not do so. He would, therefore, appear to come within the principle of the above mentioned decisions.

It was argued on his behalf that his failure to appeal did not bring him within these decisions because in those cases the persons who failed to appeal had received notice of assessment, whereas in the present case it is admitted that no notice had been sent to John F. Krumm. The fact that no notice was sent to him does not, in my opinion, affect the validity of the assessment, for by s. 290 the roll is declared to be binding notwithstanding any omission to deliver or transmit any notice required by the Act.

The roll shews an assessable person, Herbert Krumm, designated as owner. It also shews the land properly described. The posting up of a notice by the assessor informing every ratepayer that the roll was open for inspection, and that he had a right of appeal if he was not satisfied with the assessment, gave John F. Krumm an efficient remedy for the grievance of which his executor now complains.

It was also urged upon us that if the assessor could validly enter the name of Herbert Krumm on the roll without making any inquiry as to his ownership of the land for which he was assessed, he could, with equal validity, do the same for every parcel of land on the roll. In my opinion that does not follow. If the assessor set down a series of names as owners, without inquiry and without a belief that they had any interest in the property of which he designated them owners, he would not be preparing the roll contemplated by the statute and his action in so doing

might, it seems to me, be considered a fraudulent exercise of his powers. That question, however, does not arise here. It is not suggested that in assessing the land to Herbert Krumm, Assessor Hinde had any other motive than that of carrying out the duty which, under the statute, devolved upon him. His alteration of the assessment was an error which he made through drawing a wrong inference from certain facts before him, but in making that alteration he was endeavouring to compile the roll called for by the statute.

The object of the legislation was to make provision for the distribution of the burden of the municipality's financial obligations over the taxable lands of the municipality according to their respective values. To attain that object it was necessary to have a time fixed beyond which the legality of the assessment could not be questioned, so as to insure that each parcel of land would bear its proper share of the burden.

It was also necessary once an assessment was made, that no uncertainty should exist as to the right of the municipality to obtain the taxes levied (if unpaid) out of the land by forfeiture proceedings. That forfeiture proceedings are drastic and in some cases work hardship is beside the question. The Legislature in passing the Act no doubt foresaw the possibility of an owner being deprived of his land through non-payment of the taxes levied against it by reason of forgetfulness or inattention on his part, but it evidently concluded that a want of finality in reference to the assessment or a want of certainty as to the municipality's right to recover the taxes out of the land, with its consequent derangement of the municipal finances, would be a much greater evil.

An owner of taxable land in a municipality is supposed to know that his land is liable to such taxation as the municipality under the law may impose. If he does not receive notice of what has been assessed against him he is not, in my opinion, justified in concluding that no taxes have been levied against his land,. The language of sections 258, 260 and 261, would seem to indicate that the Legislature in passing the Act did not consider an owner free from all responsibility for the correct assessment of his land. Knowing that his land is subject to taxation he is

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presumed to know what may follow if the taxes are not paid.

In view of the object and purposes of the Act and the necessity of securing finality in the assessment to prevent confusion in the municipal finances, I am of opinion that the statutory mandate to set down the name of the owner "as accurately as may be" should be construed as a direction to the assessor relating to the procedure to be adopted and not as a limitation on his competence to make the assessment. The assessor's failure to observe this statutory procedure was no doubt an error on his part, but, in my opinion, it was error in regard to the roll, which s. 290 was intended to cure.

I would, therefore, dismiss the appeal.

SMITH J.—I concur with Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Bennett, Hannah & Sanford.*

Solicitors for the respondents: *Ford, Miller & Harvie.*