1889
*Oct. 22,23.
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*June 12.

MICHAEL O'BRIEN AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

CHARLES COGSWELL (PLAINTIFF).... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assessments and taxes—Lien—Priority of mortgage made before statute—Construction of act—Healing clauses—Effect and application of.

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in said city a first lien thereon except as against the crown.

Held, affirming the judgment of the court below, that such lien attached on a lot assessed under the act in preference to a mortgage made before the act was passed.

The act provided that in case of non-payment of taxes assessed upon any lands thereunder the City Collector should submit to the mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the mayor should affix his signature and the seal of the corporation; one of such statements should then be filed with the city clerk and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on any real estate therein mentioned, any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessment, &c. In a suit to foreclosure a mortgage on land which had been sold for taxes under this act the legality of the assessment and sale was attacked.

Held, per Strong, Taschereau and Gwynne JJ., that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section it was necessary for the defendants to show, affirmatively, that the statements had been signed and sealed in duplicate and filed as required by the act, and the production and proof of one of such statements was not sufficient.

Per Ritchie C.J. and Patterson J., that it was sufficient to produce the statement returned to the collector signed and sealed as required,

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PRESENT: Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

and with the necessary warrant annexed, and in the absence of evidence to the contrary it must be assumed that all the proceedings were regular and that the provisions of the statute requiring duplicate statements had been complied with.

The act also provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with.

Held, per Strong, Taschereau and Gwynne JJ., that this provision could only operate to make the deed available to cure defects in the proceedings connected with the sale and would not cover the failure to give notice of assessment required before the taxes could be imposed.

Held, per Ritchie C.J. and Patterson J., that the deed could not be invoked in the present case to cure any defects in the proceedings as it was not delivered to the purchaser until after the suit commenced; therefore a failure to give notice that the land was liable to be sold for taxes, which notice was required by the act, rendered the sale void.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming a judgment in favor of the plaintiff for a decree of foreclosure and an injunction restraining the defendants from interfering with the lands described in the mortgage foreclosed.

The facts of the case, which are more fully stated in the judgments hereinafter given, are as follows:

The action in this case was one for foreclosure of a mortgage made by the defendant John Holland to the plaintiff. After the mortgage was executed an act was passed by the legislature of Nova Scotia (46 Vic. ch. 28) relating to assessments on property in the City of Halifax where the land was situated. Section 13 of that act provided that "the rates and taxes levied * * on real estate shall be a special lien on said real estate, having preference over any claim, lien, privileges or incumbrances of any party except the crown," etc.

Under this act the property described in the mortgage was sold for unpaid taxes, and one John Meagher became the purchaser at such sale. The defendants

(1) 21 N. S. Rep. 155, 279 *sub nomine Cogswell* v. *Holland*.

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O'Brien and Brooks are the administrators for said Meagher, who died pending the action, and the defendant Theakston is the collector of rates and taxes for the City of Halifax.

In the foreclosure suit the plaintiff claimed that the sale for taxes only operated as a sale of the equity of redemption; that the act, having been passed after the mortgage was made, could not affect his rights; that if it could the act must be followed strictly, and there were irregularities in the assessment that made the sale void as against the mortgagees.

On the first trial of the cause judgment was given for the plaintiff, the trial judge holding that the lien created by the assessment act did not take precedence of the mortgage (1). The full court, on appeal, held that it did, but on the ground that a regular assessment had not been proved, or any justification for the sale, a new trial was ordered. On the second trial, judgment was given for the plaintiff and affirmed by the full court, on the ground that the proceedings under the act were irregular and void. The defendants appealed to the Supreme Court of Canada.

Sedgewick Q.C. and *Lyons* for the appellants.

The court below styles this "unheard of legislation" but the "Encumbered Estates Act, Ireland," (12–13 V. c. 77) contains a similar provision, and Lord Cranworth speaks of it with approval. *Rorke* v. *Errington* (2).

Lash Q.C and *Macdonald* for the respondent referred to *McKay* v. *Chrysler* (3) as to the effect of irregularities in tax sales and *Mills* v. *McKay* (4) as to necessity of the City of Halifax being a party to the action.

The sale was void for want of registry of the deed in the time limited by the statute; *Hazeley* v. *Somers*

(1) 21 N. S. Rep. 155. And see judgment of Mr. Justice Gwynne *post*.
(2) 7 H. L. Cas. 617.
(3) 3 Can. S. C. R. 449.
(4) 14 Gr. 602.

(1); Blackwell on Tax Titles (2); and that the mortgagees acted in good faith, see *Goodnight* v. *Moses* (3).

The deed being made *pendente lite* it could not affect the rights of the plaintiff. *Winchester* v. *Payne* (4); *Bellamy* v. *Sabine* (5); *Turner* v. *Wight* (6).

SIR W. J. RITCHIE C.J.—I entirely agree with the judgment prepared by Mr. Justice Patterson in this case and think the appeal should be dismissed.

STRONG J.—This action as originally framed was brought by the present respondent Charles Cogswell and Francis Duncan, trustees under the will of Isabella Cogswell, deceased, as mortgagees, against John Holland their mortgagor, John Meagher who assumed to be the purchaser of the mortgaged property at a sale for taxes claimed to be due to the City of Halifax, and William C. Hamilton the collector of the city who had made the sale; and it sought to have the plaintiffs declared entitled to priority over the city in respect of the lien for taxes, and over the purchaser at the tax sale, by reason of the prior date of the plaintiff's mortgage, and prayed for an injunction restraining the city from completing the sale, and for foreclosure. All the defendants, except Holland the mortgagor (who has taken no part in any of the proceedings), having filed statements of defence the action came on for trial befor Mr. Justice Weatherbee, without a jury, who gave judgment for the plaintiffs, holding that the mortgage had priority over the city's lien for taxes and that the plaintiffs were entitled to an injunction and to foreclosure as prayed. This judgment was, on appeal to the Supreme Court in banc, set aside and a new trial was ordered. Pending the proceedings, Francis Dun-

(1) 13 O. R. 600.
(2) 4 Ed. p. 314.
(3) 2 W. Bl. 1019.
(4) 11 Ves. 194.
(5) 1 De G. & J. 566.
(6) 4 Beav. 40.

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can, one of the plaintiffs, and the original defendants, John Meagher and William C. Hamilton, had all died. On the 19th October, 1888, the Chief Justice made an order in chambers permitting the surviving plaintiff Cogswell to amend the statement of claim, which he did by adding as defendants the appellants O'Brien and Brooks, the executors and devisees in trust of Meagher, as representing any interest which he might have acquired under the tax sale, also by substituting Theakston, who had succeeded Hamilton as city collector, as a defendant in his stead, and by making an entirely new case impeaching the validity of the assessment and the sale for taxes, and insisting upon the consequent nullity of the deed carrying out the sale which had been executed by the mayor and city collector on the 13th of October, 1888, before the leave to amend was given. To this amended statement of claim defences were put in by the new defendants, to which replies were filed, and the action was again tried before the Chief Justice, who found a verdict and entered judgment for the plaintiff upon the ground that the assessment of the tax and the sale were both void by reason of failure to comply with the requirements of the statutes governing those proceedings. From this judgment there was a second appeal to the Supreme Court of Nova Scotia in banc, and that court composed of five judges unanimously sustained the judgment pronounced at the trial. From this latter judgment the defendants the trustees of Meagher and the collector of the city, have now appealed to this court.

The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise

that construction is to be adopted which is most favorable to the subject. Further, all steps prescribed by the statute to be taken in the process either of imposing or levying the tax are to be considered essential and indispensable unless the statute expressly provides that their omission shall not be fatal to the legal validity of the proceedings; in other words, the provisions requiring notices to be given and other formalities to be observed are to be construed as imperative, and not as merely directory, unless the contrary is explicitly declared.

The statute under which the city officers assumed to act in making the assessment and sale now called in question is the statute of Nova Scotia entitled "The Halifax City Assessment Act of 1883" as amended by an act passed in May, 1886.

This statute conforming to the scheme generally followed in legislation of this kind, provides for two distinct processes in the imposition and enforcement of the tax to be carried out by two distinct sets of officers—the assessors and the collectors. Applying the principles already referred to it is plain that if any of the formalities or requirements prescribed by the act have been omitted by any of the officers in question the sale and the deed executed for the purpose of carrying it out are absolute nullities, unless it is indicated in the statute itself that the step which has been omitted is to be regarded as a non-essential proceeding, or unless the case comes within the terms of some provision enacted for the purpose of covering defects caused by failure to observe the procedure laid down by the statute.

The defects in the proceedings which are relied on as vitiating the sale are the omission by the assessor and Board of Assessors to give the notices required by sections 37 and 93 respectively, and the neglect

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of the collector to give the notice prescribed by section 57. It may at once be said that nothing is to be found in the statute which would warrant us in holding that the provisions requiring these three notices to be given are to be regarded as directory, or otherwise than as imperative. Failure to give any one of them must therefore be regarded as fatal to the sale, unless some healing clause can be pointed out sufficient to cover such an omission.

Section 37 is as follows:

As soon as the whole amount of real and personal property, on which any person, company or corporation is to be assessed within any ward of the city, is determined, the chief assessor shall serve, or cause to be served, a notice of such valuation upon the person assessed, or his agent, or on the company or corporation, their officer, clerk or agent, by delivering the same personally, or by leaving it on the property so assessed, or by mailing the said notice through the post office duly registered. This notice shall be in the following form, in print, or ink, or both:

Ward No.	Name, No. and Description of Property.	Value of Real Estate.	Value of Personal Property.	Total Amount on which Assessm't is to be Levied.

I hereby give you notice that the Board of City Assessors, to the best of their judgment, have made the above valuation of your real and personal estate within Ward No. —, of the City of Halifax, on which assessment for the year 18— is to be levied. If you wish to object thereto you are hereby notified to furnish me at my office, in the City Court House, within fourteen days from this date, with a written statement, under oath, according to the form herewith served upon you.

To Mr. ——

Chief Assessor.

Dated at Halifax, day of 188

These notices are to bear date on the days on which they are respectively served or mailed.

The material importance of the notice thus required

is shown by the following section (38) which is in these words:

After service of the notice, fourteen days shall be allowed to the parties, to be rated, or their agents, to furnish the Board of City Assessors with a written statement, under oath, of the real and personal estate in the following form:

The Chief Justice before whom the action was tried has found that the notice thus required by section 37 was not served, and the court in banc have concurred in that finding. That the attempt to prove the service of this notice by the witness Brown was, for the reasons given by the learned Chief Justice in his judgment, entirely abortive, is so clear that I consider it sufficient to refer to what he says (which I entirely adopt), without any further examination of the evidence.

It is said, however, that the omission to serve this notice is covered by the provisions of section 95 as amended. Sec. 94 and sec. 95 as amended are as follows:

94. In case the taxes upon any of the lands mentioned in said list have not been paid to the City Collector, with interest from the time they were due, before the 1st day of September following the delivery of said list by the Board of City Assessors to the City Collector of Rates and Taxes, the City Collector shall submit to the Mayor a statement in duplicate of all the lands liable, under the provisions of this Act, to be sold for taxes, which shall contain a definite description of each lot, with the amount of arrears of taxes set opposite to the same, and the Mayor shall authenticate each of said statements by affixing thereunto the Seal of the Corporation and his signature, and one of said statements shall be deposited with the City Clerk, and the other shall be returned to the Collector, with a warrant thereto annexed under the hand of the Mayor and the seal of the City in the following form:

Sec. 95.—Any statements or lists so signed by the Mayor and sealed with the Seal of the City, or a copy thereof, or of any portion thereof, certified under the hand of the City Clerk, shall in any suit or other proceeding relating to the assessment on the real estate therein mentioned, or at which it may be questioned, be received in any Court in this Province as conclusive evidence of the legality of the assessment, and that the same is due and unpaid, and that each lot of land in said

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statement mentioned is legally liable for the amount of taxes set opposite the same, with interest and expenses, and that said amount forms a lien on said land.

It is obvious that it is a condition precedent to the applicability of this section 95 for the purpose of covering defects in the assessment proceedings, such as the want of the notice required by section 37, that the lists provided for by section 94 shall be in duplicate and authenticated by the mayor affixing to each of such duplicates his signature and the city seal. This was not found to have been done. The Chief Justice as to this finds that "no evidence was adduced on the trial that any such statement was so authenticated in duplicate by the mayor, nor was there any evidence that a copy of the list or statement annexed to the warrant to the collector was ever filed in the office of the city clerk." This is an incontrovertible conclusion from the evidence—and it thus appears that sec. 95 is wholly ineffectual for the purpose for which it was relied on by the defendants. It is said, however, that sec. 110 (as amended) covers the want of notice required by sec. 37. As this amended sec. 110, is also relied on as an answer to the objections raised for non-compliance with sec. 57 and 93, I defer the consideration of it until I have stated the secs. last mentioned.

Sec. 57 is in these words:

As soon as the assessment book shall be deposited with the Collector, he shall cause each person or company rated, or their agents, to be served with a notice in the following form, the said notice to be made out by the Board of City Assessors, as provided by the preceding section:—

And sec. 93 is as follows:—

It shall be the duty of the City Board of Assessors carefully to examine said list and ascertain if the lands therein mentioned are properly described, and they shall notify the occupants of said lands, if any, and the owners thereof, if known, upon their respective assessment notice for the current year, that the land is liable to be sold for arrears of taxes, and said Board of Assessors shall, before the 31st day

of May in each year, return said list, or a corrected copy thereof in case any error is discovered therein, to the City Collector, signed by the City Assessors, or any two of them, and said list shall be filed in the office of the City Collector for public use.

There is no proof whatever that either of the two notices required by these sections 57 and 93 was served.

The case is therefore narrowed down to the single question: Is the want of all these essential preliminaries covered by section 110 as amended? That amended section is to be read as follows.—

The deed shall be under the seal of the city in the form or to the same effect as in schedule A to this Act, and shall particularly and fully describe the land conveyed. Said deed shall be conclusive evidence that all the provisions of this Act with reference to the sale of the land therein described have been fully complied with, and every act and thing necessary for the legal perfecting of such sale have been duly performed, and shall have the effect of vesting said land in the grantee or purchaser, his heirs or assigns, in fee simple, free and discharged from all incumbrances whatsoever, whether registered or not; except in the case of land in which the fee is in the city of Halifax, when the deed shall give the purchaser the same rights in respect of the land as the original lessee.

And except as aforesaid, any deed in the form or to the same effect as in the said schedule, purporting to be executed under the Seal of the City of Halifax, by the Mayor and City Collector, shall vest in the grantee therein named, his heirs and assigns, a full, absolute and indefeasible estate in fee simple to the land therein described.

I am of opinion that in order to give effect to this section 110 we must hold that the omission to give the notices required by sections 57 and 93 was covered by it upon the deed being executed. These notices are preliminaries required by the act with reference to the sale and have nothing to do with the imposition or assessment of the tax. They come, therefore, within the words of the 110th section which provide that "the deed shall be conclusive evidence that all the provisions of the act with reference to the sale of the land have been complied with," and, in my judgment,

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cover the objections to the title which have been rested on the failure of the City Collector to comply with the requirements of section 57 and with the failure of the Board of Assessors to give the notice required by section 93, the notices mentioned in both these sections being provided for as preliminaries of the sale and not of the assessment. This, however, leaves the objection founded on section 37, which relates not to the sale but to the assessment and imposition of the tax, wholly untouched. I have already pointed out that there is no proof that this very important notice required by section 37 was given and that the Chief Justice expressly found that the attempt to prove it wholly failed. I have further shown that the objection founded on this omission was not covered by sections 94 and 95 inasmuch as the defendants had not shown that the conditions precedent required to make these sections operative had been complied with. The consequence must be that the court below were perfectly right in adjudicating as they did that the alleged assessment was a nullity, rendering all subsequent proceedings void unless this radical defect in the proceedings is covered by the 110th section. This is, indeed, the cardinal point in the case. Does then the 110th section cure defects and omissions in the assessments and make the deed a cover for all such, as well as for failures to comply with the provisions relating to the enforcement of the tax? First, it is to be observed that there is a very great difference between the relative importance of the two sets of objections—those relating to the sale and those relating to the assessment. As regards the latter, the omission to give all notices such as that called for by section 37 renders all the proceedings *ex parte* and is equivalent to an omission to serve any process in the case of an ordinary action at law.

The very first principles of justice such as that embodied in the maxim "*audi alteram partem*" require a most rigorous performance by the city officers of the duty to give this notice of section 37. The omission to observe the requirements as to preliminaries of sale either as to the notices or as to the advertisements does not go to the legality of the tax itself but merely relates to proceedings for its enforcement. It is obvious that between these two objects there is a very wide difference. If the legislature has in unequivocal words said that a man's property may be sold for taxes and his title divested, although the tax for which it was sold was illegally imposed, and although the owner never had any notice of its imposition, the courts are bound to give effect to what the lawgiver has so enacted, and the gross hardship and flagrant injustice of such a law is no answer to an action invoking its judicial enforcement and application. These considerations do, however, constitute grounds for very carefully and strictly construing an enactment relied upon as warranting such a harsh and unreasonable conclusion and for so restricting its operation as to avoid injustice, if the language will possibly admit of such a construction.

I am prepared to concede that the deed was properly in evidence and that the case must be dealt with entirely on the effect which we can attribute to it upon the facts in evidence according to the true construction of the terms of the 110th section. Then to come to the language of that section—I am clear that the words "said deed shall be conclusive evidence that all the particulars of the act with reference to the sale of the land therein described have been fully complied with and every act and thing necessary for the legal perfecting of such sale have been fully performed," are according to the *primâ facie* meaning of the words themselves confined to proceedings preliminary to the sale not to

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proceedings relating to the assessment or levying of the tax, that is to proceedings which are to be taken after the roll goes into the hands of the executive officer, the collector, for the collection and enforcement of the tax—and not to proceedings connected with the quasi adjudication which according to the machinery of the act is the result of the act of the assessors and the omission of the party rated to object to it. The words "legally perfecting of the sale, "obviously relate to proceedings after the sale and intervening between that act and the actual execution of the deed. The results so far indicated follow as the plain natural construction of the words used according to their primary meaning. The words immediately following "shall have the effect of vesting said land in the grantee or purchaser his heirs or assigns in fee simple free and discharged from all encumbrances whatsoever " are obviously added to indicate that the sale and conveyance shall pass not only the interest of the land owner whose property has been sold but (as is said in so many words) shall pass that interest and confer a title paramount to any incumbrances created by the landowner whether prior or subsequent to the imposition of the tax.

There remain however the concluding words of the section "any deed in the form or to the same effect as in the said schedule purporting to be executed under the seal of the City of Halifax by the Mayor and City Collector shall vest in the grantee therein named his heirs and assigns, a full absolute and indefeasible estate, in fee simple to the land therein described."

In the first place it is to be remarked that we are bound, by well settled principles governing the construction of statutes already adverted to, to construe these words if possible in such a way as not to give them the violent and unjust operation contended for,

according to which land which may have been illegally assessed for taxes might be sold and conveyed behind the back of the owner without the slightest notice having been given to him. If it is possible then to find any reasonable application of the language used which will avoid this the court is bound to adopt it, and it is also bound to be astute to find such an alternative construction and thus avoid doing a great wrong and violating the first principles of natural justice under a form of law. I am of opinion that keeping in mind these guiding principles it is not difficult to find an explanation of this clause which will avoid doing injustice to any one. Adverting to the context we find that the conclusive effect which the prior words, according to the exposition of them already given, were designed to give to the deed only applied to cure defects in the preliminaries of the sale; it is reasonable, therefore, that we should read these words "full, absolute and indefeasible estate," as subservient to the preceding part of the section and not as intended to give any enlarged operation to the deed beyond that which the legislature manifestly intended to attribute to it when declaring and defining its "conclusive effect;" therefore we are to read this latter part of the section in connection with the preceding one, and thus to read the words "all the provisions of the act with reference to the sale of land," as governing the whole section, in which way a reasonable interpretation of this last clause is reached, and one by which the great injustice of the violent construction contended for is avoided. Further, these words "a full, absolute and indefeasible estate in fee simple," may well be construed as only intended to indicate the quantity of estate to be taken by the grantee in a tax deed, and as declaring that the land is from thenceforth irredeemable; and, therefore, to be only applicable to the case of a regular sale and

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a legal deed, and not as having any reference at all to the effect of a deed following a void sale made upon a void or irregular assessment. For such a purpose much stronger and more apposite and precise terms would have been indispensable.

The conclusion is, that the appeal fails and the judgment of the Supreme Court of Nova Scotia must be sustained as regards the question principally involved. I am of opinion, however, that the City Collector is not, on any recognized rule as to parties, a proper party defendant to the action, and as to him the appeal should be allowed and the action dismissed with costs in both courts; in other respects the appeal should be dismissed with costs.

TASCHEREAU J.—I agree with my brother Gwynne, and for the reasons by him given I think this appeal should be dismissed with costs.

GWYNNE J.—On the 15th of August, 1882, one John Holland, being then seized in fee of a piece of land in the city of Halifax in the Province of Nova Scotia, by an indenture of mortgage of that date conveyed to Charles Cogswell and Francis Duncan in fee simple, as trustees by way of security for payment of the sum of $3,000, the said piece of land by the following description:—

All that certain piece or parcel of land, situate in the City of Halifax, being a certain proportion of property belonging to or known as Doctor Jennings' field, joining fields situate on the Studley or Cobourg Road and Oxford Street, being three lots numbered five, six and seven on a plan of said field, made on the 16th of June, 1870, and filed in the office of Registry of Deeds for the County of Halifax, which said lots are bounded, &c.

This indenture of mortgage was recorded in the office for the registry of deeds on the 26th day of September, 1882.

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The monies secured by this indenture of mortgage being unpaid, contrary to the terms and conditions of the said indenture, the mortgagees upon the 6th day of April, 1887, commenced an action in the Supreme Court for Nova Scotia against the mortgagor, John Holland, for foreclosure of the said indenture of mortgage. In this action one Alexander C. Hamilton, as collector of taxes for the City of Halifax, and one John Meagher, were made parties, defendants, upon the ground that the defendant Hamilton as such collector of taxes, claiming to have a lien on the said land for certain alleged arrears of taxes, had wrongfully, upon the 21st December, 1886, offered for sale, and assumed to sell to the defendant Meagher, the said land as for such arrears of taxes, but that no deed had as yet been executed; and the plaintiffs prayed, among other things, that it might be declared that the defendant Meagher had no right in or to the said mortgaged land and premises, or to any part thereof, in priority to the plaintiffs' claim for the principal and interest comprised in the said indenture of mortgage and secured thereby but that the rights of the said Meagher, if any he had, are subject to the rights of the plaintiffs. And they further prayed that the defendant Hamilton might be enjoined and restrained, as such collector of taxes, from signing, executing, or delivering to the said defendant Meagher or to any other person or persons any deed which should convey, or purport to convey, the said mortgaged lands and premises in priority to the said mortgage debt thereon, unless or until the said mortgage debt should have been first duly paid to the plaintiffs. And the plaintiffs charged and claimed that any right or interest which the said defendants, or either of them, have or hold in the said mortgaged lands and premises, if any such there be, are not prior to the said indenture

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of mortgage made to the said plaintiffs, and the registry thereof in the office for the registry of deeds in the County of Halifax. And the plaintiffs prayed for payment of their said mortgage debt or, in default, for foreclosure or sale of the said mortgaged lands and premises; and that the plaintiffs should have such other and further relief in the premises as to right and justice appertains. Now this action was simply an action for foreclosure of the mortgage and to which the defendants, Hamilton and Meagher, were made parties as being persons who claimed to have an interest or estate in the mortgaged lands and premises, which interest or estate if they, or either of them, had any, the plaintiffs did not admit, but insisted was an interest in the equity of redemption and that, therefore, they were necessary parties to the action for foreclosure of the mortgaged premises.

To this action, the defendant Holland offered no defence. The defendant Meagher filed a statement of defence, and therein insisted that the said mortgaged lands and premises, after the date of the said alleged mortgage, and while in the possession and occupation of the said John Holland, having been duly assessed and rated for taxes and rates due by law to the City of Halifax for the civic years 1883 and 1884, and for subsequent years, such rates and taxes remaining unpaid became a special lien and charge on said land under the Halifax City Assessment Act of 1883, and that proceedings were duly taken under the said act by the City of Halifax to enforce said lien, and that on the 21st day of December, 1886, the said land and premises were duly sold at public auction by the city collector under said act, and in compliance with the provisions of said act and amending acts, to satisfy said taxes so in arrear and interest and expenses, and that the said defendant (Meagher) became the purchaser at the said sale

for $290, and that the defendant thereupon paid said sum to the city collector and obtained a certificate of said sale from said collector under said act, by virtue of which the defendant claims to hold said land, and to receive the rents and profits free and clear from the plaintiffs alleged mortgage and all other incumbrances. And the defendant (Meagher) further claimed to have a title to the said land in priority to the plaintiffs' alleged mortgage under the provisions of the Halifax City Assessment Act of 1883, and as holder of a certificate from the city collector, made and given to the defendant on the 21st day of December, 1886, under the 101st section of said act. The defendant Hamilton also filed a statement of defence, in which he insisted that the sale of the said land to the defendant Meagher and the certificate thereof were good and valid under the Halifax City Assessment Acts of 1883 and 1886, but it is unnecessary to set out at large the matters pleaded by him, because all that is material to the case is comprised in the above extracts from the defence of the defendant Meagher. To the defence of the defendant Meagher the plaintiffs, besides joining issue with him upon the allegations in his defence contained, replied, among other things, that the said lands were not assessed to the said John Holland, and that none of the notices of assessment and liability for taxes in respect of said lands were served upon or given to the said John Holland, as by law required, and no notices of said assessment or liability for taxes in respect of said land were given to any one liable therefor, and the said rates and taxes did not become a special lien and a charge on said lands under the City of Halifax Assessment Act of 1883, as alleged, in preference and in priority to the previously vested rights therein of the plaintiffs, and by virtue of the mortgages thereon in the statement of claim mentioned, and further, that

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the said lands were not duly assessed and rated for taxes due by the said John Holland as alleged, and further, that the certificate of the city collector, under which the said defendant Meagher claims to hold the said lands free and clear from the plaintiffs' mortgage, is illegal and void; and further, that the City Assessment Act of 1883, and chapter 60 of the acts of 1886, in amendment thereof, are not retrospective so as to deprive the plaintiffs of their previously registered and vested rights in the said lands referred to in the plaintiffs' claim which the said John Meagher alleges that he purchased at said tax sale.

This special replication to the defence of the defendant Meagher does not appear to have been at all necessary, for the plaintiffs' joinder in issue to the defendant's statement of defence put in issue everything that was material, and cast upon Meagher the whole onus of proving everything necessary to his establishing the title pleaded by him and upon which he relied, and sufficiently raised all questions of law which might present themselves upon the facts which should be proved for the purpose of establishing the title which he had pleaded. The whole onus of proving such title rested upon him; the plaintiffs had nothing to do but produce and prove their mortgage.

Issue having been in like manner joined upon the statement of defence of the defendant Hamilton, the case came down for trial in the month of December, 1887, before Mr. Justice Weatherbe, without a jury.

The learned judge was of opinion that the Halifax Assessment Act of 1883 did not operate against mortgagees out of possession at the date of the act and, moreover, that if it did still the defence authorising a sale of the lands in question had not been made out—that no justification of the tax sale had been established, and that so the defendant Meagher had failed to

establish the title he had pleaded; and he therefore gave judgment for the plaintiffs and pronounced a decree for foreclosure and sale, with a declaration that no lien exists upon the lands for taxes, and awarding an injunction to issue to restrain the defendants as prayed for in the plaintiffs' statement of claim. In the month of December, 1887, the defendant Hamilton died, and in the month of February, 1888, the defendant Meagher died. On the 31st day of March, 1888, Robert Theakston, the successor in office of the said Hamilton, as collector of the City of Halifax was, by an order of the Supreme Court, substituted and made a party defendant in the place of the said Hamilton deceased, and by an order of the court of the same date Michael O'Brien and James Brooks, as executors and devisees under the last will and testament of the said John Meagher, deceased, were substituted and made parties defendants in the place and stead of the said Meagher deceased.

Thereupon, the defendants upon the record so constituted appealed from the judgment and decree of Mr. Justice Weatherbe to the Supreme Court of Nova Scotia. That court differed from Mr. Justice Weatherbe as to the effect of the Halifax Assessment Act, holding that the liability for taxes upon real estate thereby created took precedence of mortgages although made before the passing of the act, but they agreed with Mr. Justice Weatherbe in the opinion that no proof had been given of any assessment upon the lands in mortgage, or of any justification of the sale to Meagher, as set up by him, and upon which the defendants O'Brien and Brooks, as representing him, relied; the court was, however, of opinion that the plaintiffs' replication, although putting in issue the matters alleged by Meagher in support of the title upon which he relied and upon which such title as set up by him

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was rested, amounted to a new case set up by the plaintiffs, which, in the opinion of the court, should have been pleaded in the statement of claim, and they held, therefore, that the matters which had been decided, invalidating the sale, were not properly in issue before the court, and they, therefore, in the month of July, 1888, gave judgment setting aside the judgment and decree pronounced by Mr. Justice Weatherbe and granted a rule for a new trial to enable the plaintiffs to set out in their statement of claim the matters stated in their replication by way of negation of the facts upon which the title as set up by Meagher rested.

In arriving at this conclusion the Supreme Court of Nova Scotia, in my opinion, wholly misconceived the nature of the case, and the matters put in issue upon the record. The action, as I have already pointed out, was simply one for the foreclosure of a mortgage to which certain persons were made defendants who claimed to have an interest in the mortgaged lands, which interest, if the said defendants had any, which the plaintiffs did not admit, the plaintiffs insisted was an interest only in the equity of redemption in the mortgaged premises, and that, therefore, these defendants were proper parties to be brought before the court in a foreclosure suit to enable them to assert whatever title, if any, they had.

Now, the defendants so made parties having pleaded their title, and the facts upon which they relied as supporting it, and having insisted that it was a title superior to that of the plaintiffs, the latter, by joining issue upon the facts upon the existence of which the title, as so set up, rested, had, in a perfectly sufficient and in the customary mode of pleading, put in issue everything which was material to the final determination of the case, and cast upon the defendants the burthen of proving the existence of every single thing

necessary to exist in order to support the title as set up by the defendants, and the Supreme Court of Nova Scotia having concurred with Mr. Justice Weatherbe that the defendants had failed to adduce the necessary proof, should have confirmed his judgment and decree. In pronouncing the judgment which they did the Supreme Court proceeded upon their view of the judgment in the case of *Hall* v. *Eve* (1), but that case, in reality, instead of supporting is adverse to the above conclusion as arrived at by the Supreme Court.

The plaintiff there claimed specific performance of an agreement for the sale of certain lands entered into between the defendants Eve and Whiffin, with one Lane who was also made a defendant, and who has assigned his interest in the land under the agreement and in the agreement to the plaintiff; the defendants Eve and Whiffin, in their statement of defence, alleged that before the transfer of the agreement to the plaintiff the defendant Lane had committed certain breaches of his contract, which gave the defendants Eve and Whiffin a right to put an end to the agreement which they had accordingly done.

The plaintiff in his reply admitted some of the paragraphs in the statement of defence and denied others. He, moreover, pleaded that if, which he did not admit but denied, there had been any breach of the agreement on the part of Lane the defendants Eve and Whiffin had waived it; and as to the provision which was alleged to have been broken by Lane, that the defendants Eve and Whiffin were not entitled by reason of such breach to determine the agreement for reasons which he stated. The defendants Eve and Whiffin moved before V. C. Bacon that the reply of the plaintiffs might be set aside as irregular and erroneous in form and pleading. That learned judge was of opinion

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that the new matter set up in the reply should have appeared in the statement of claim, and he accordingly made an order setting aside the reply and giving leave to the plaintiff to amend his statement of claim.

Now, first, it is to be observed that the reply contained new matter setting up a new case which the plaintiff relied upon as entitling him to the relief prayed, whereas in the present case the special matter replied was nothing but a negation of the existence of matters the onus of proving the existence of which already rested on the defendants by the joinder in issue — thus disputing simply the validity of the title in Meagher which was pleaded by the defendants, and upon which they relied as defeating the plaintiffs' claim to the relief prayed by them, and

2nd. That the question was raised upon a motion made by the defendants before trial to strike out the reply not upon the suggestion of a Court of Appeal after the issues raised by the pleadings had been fully entered upon and tried and judgment thereon pronounced and a decree made. However, upon appeal to the Court of Appeal the learned Vice Chancellor's order was set aside, and the pleading reinstated, Lord Justice James saying that he could see no limit as to what might be said in reply, except that it must not be scandalous or irrelevant, and that in the case before him the reply was the proper place to meet the defence set up by the defendants, and Lord Justice Bramwell said that, in his opinion, a plaintiff might traverse allegations made in a defence or confess and avoid them or both.

In accordance, however, with the judgment of the Supreme Court of Nova Scotia the plaintiffs inserted in their statement of claim the matters which had been set out in their reply.

In the statement of claim as so altered the defen-

dant Theakston, with very unnecessary prolixity, repeated the defence which had been pleaded by Hamilton deceased, and the defendants, O'Brien and Brooks, with like prolixity, repeated the defence which had been pleaded by Meagher deceased, with this addition that they set up a deed executed to them by the mayor for the time being of the City of Halifax, and the defendant Theakston, as collector, during the pendency of the suit, and after two courts had pronounced the sale, in pursuance of which the deed purports to have been executed, to have been illegal and void, their object being to set up a contention that, by reason of a clause in the statute, however illegal and void the sale may have been a deed so executed had the effect of making the void sale perfectly good and free from objection.

If the statute in question could have such an effect the court below were well justified in characterising such legislation as extraordinary in the extreme, and without parallel in any country in which legislation is conducted upon the principles of justice as understood in legislatures deriving their authority from the British Constitution, and it is not surprising that the court refused to receive in evidence a deed so executed *pendente lite*, and after the sale, the validity of which was the material question in issue, had been pronounced to be invalid.

The case accordingly was tried again upon precisely the same issues as had been tried before, and upon precisely the same evidence, from which latter circumstance it may justly be concluded that the defects in the sale which had been pointed out could not be removed, and judgment accordingly, as before, was rendered in favor of the plaintiffs, from which this appeal is taken.

In view of what appears to me to be the very

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extraordinary construction of two of the clauses of the statute insisted upon by the learned counsel for the defendants in his argument before us, I propose now to consider the act not in the light alone of the two clauses in question but, regarding the whole scope and object of the act in connection with such matters as appeared in evidence as well as those which did not so appear, endeavor to ascertain whether a construction cannot be put upon the two clauses particularly relied upon by the defendants which will be more in accordance with what is just and rational than that insisted upon; for if a statute is open to two constructions, one of which accords with common sense and justice and the other is an outrage upon both, the former must be accepted and the latter rejected.

By the 4th section of the statute under consideration it is enacted that

> All property real and personal within the city of Halifax not expressly exempted by law shall be subject to taxation as hereinafter provided by this act.

By the 5th section that

> The city of Halifax shall have a permanent Board of Assessors consisting of a chief assessor and two assistant assessors.

By the 8th section

> The Board of Assessors shall as soon as possible make a complete register for each ward of all real estate within the city, giving a description of each property sufficient to designate it, and the street or locality in which it is situated and the number thereof if any, and the names of the owner or owners if the same can be ascertained, and the same can be filed as a permanent record in the office of the Board of City Assessors but the same shall be amended and corrected from time to time as occasion requires.

There was no evidence that any such register had been provided for the purposes of an assessment of the assessable property in the city for the year 1884.

By the 10th section it was enacted that

> The Board of City Assessors, as hereinafter directed, shall proceed to make an assessment upon the respective wards of the city.

By the 11th Section.

The assessment shall be rated on the owners of real property.

And it was enacted by this section that mortgagees in possession should, for the purposes of the act, be deemed to be the owners of the lands mortgaged, but that when the mortgagee of real estate is not in possession the person entitled to the equity of redemption shall be deemed the owner.

It was enacted by the 12th section that

All real estate shall be assessed at its actual value at the time of the assessment, so far as the same can be ascertained.

The manner referred to in the 10th section in which the assessments authorized by the act should be effected is provided for in the sections numbering from 35 to 42 both inclusive.

It was by the 35th section enacted that

The Board of City Assessors, before proceeding to the assessment of the respective wards, shall be provided by the city with a sufficient number of blanks to form valuation books, ruled in four columns, headed as in the act is provided.

By the 36th section,

The Board of Assessors shall enter the name of each person to be assessed with a description of the property on the first or left hand column—the value of real estate in the next column—of the personal property in the third—and the sum total on which the assessment is to be levied in the last column opposite to each name.

By the 37th section.

As soon as the whole amount of real and personal property on which any person is to be assessed within any ward is determined, the chief assessor shall serve, or cause to be served, a notice of such valuation upon the person assessed, or his agent, by delivering the same personally, or by leaving it on the property so assessed, or by mailing the notice in the form prescribed in the act, through the post office, duly registered.

The prescribed notice contains a copy of the form filled in as prescribed in the 35th section with the following added :

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I hereby give you notice that the Board of City Assessors, to the best of their judgment, have made the above valuation of your real and personal estate within Ward No. ———, of the City of Halifax, on which assessment for the year 18—, is to be levied. If you wish to object thereto, you are hereby notified to furnish me, at my office, in the City Court House, within fourteen days from this date, with a written statement, under oath, according to the form herewith served upon you.

To Mr. ———,

———————,
Chief Assessor.

Dated at Halifax, day of 188

The 38th section provided a form of a statement to be made under oath by any person served with one of the above notices objecting to the valuation made on him

By the 39th section it is enacted that

The Board of City Assessors shall complete the valuation annually within one hundred and twenty days from the date of commencement, and having duly delivered the notices of valuation above directed, and the 14 days allowed for the affidavits having expired, shall then proceed without delay to make up one general book of assessment for the city, in which there shall be distinctly shown the amount of the rate upon each individual, firm, estate, or company, and the assessment book being so made up and signed by the Board of City Assessors shall be handed to the City Collector of rates and taxes.

By the 40th section:

The members of the Board of City Assessors, or any two of them shall, after they have completed the assessment, each subscribe and take an oath.

In the form set out in the section verifying the list containing the assessment, and declaring that

The real and personal estate contained in said list and assessed upon each individual in said list, is a full and accurate assessment upon all property of each individual liable to taxation, at its full and fair cash value, according to our best knowledge and belief.

Then the 41st and 42nd sections provided a court of appeals, whose decisions should be final, authorized to

Hear all objections of ratepayers who shall have duly appealed, to the valuations, rates or assessments which have been made upon such

ratepayers and their properties, and such court shall finally determine and decide the rates and assessments to be paid, by each person who appears before the court ; and the decision of the court shall be final.

Provision is also made in other sections, not necessary to be set forth, for enabling the court of appeals to correct errors, whether of omission or commission, or purely clerical errors, made by the board of City assessors in making up the assessment or valuation book.

Now, from the above sections it is, I think, very apparent that the object of the legislature in enacting them was to prescribe the manner in which alone a legal assessment, binding upon the owners of real property, and upon such their property, should be made, and that the intention of the legislature was, that a legal assessment of real property could only be effected by assessing the owners of realty in respect of such realty owned by them, and that no person or his real property could be held to be assessed within the meaning of the act, or chargeable with any amount by way of tax or rate in any year unless the owner's name should be inserted in the assessment or valuation book made as prescribed by the act for that year, set opposite to the property in respect of which such owner is assessed, sufficiently described so as to designate it; nor unless notice of such assessment should be served upon the person so assessed in the manner prescribed in the act.

By the 64th section it is enacted that

The lien mentioned in this act on all real and personal property shall attach and operate on the same from the date of the oath subscribed on the completion of the assessment for the city as hereinbefore provided.

That is in the 40th section; the lien here referred to is that mentioned in the 13th section, which enacts that

The rates and taxes levied on said assessment on real estate shall be a special lien on said real estate, &c.

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Now the words, "said assessment on real estate," in this section, can only refer to the only assessment which was authorized by the act, namely, the assessment rated on the owners of real estate as provided for in the 11th section. From these sections taken together it clearly, I think, appears that there is no lien created by the act upon any real estate not legally assessed as directed in the act, and entered in the assessment or valuation book, verified as required by the 40th section. There is no lien declared except upon real estate assessed to the owner thereof; there is no other assessment recognized by the act; so that in order to establish a lien upon any particular piece of land for a certain amount as for rates and taxes in a particular year, it is essentially necessary to prove that the land upon which it is sought to attach a lien for the amount was legally assessed as directed by the act.

Then by the 28th section it was enacted that

> No error, informality or irregularity, on the part of the City Council, the Board of City Assessors, or other civic officers, has affected, or shall affect, or prejudice the validity of any general assessment made, or hereafter to be made and levied in such city; and no individual rate or assessment has been, or shall be, prejudiced or affected by any error or irregularity which does not affect the amount of such rate. The invalidity, illegality or irregularity of any individual rate or assessment has not extended to and shall not extend or affect the general assessment, or any other individual rate or assessment.

The first part of this section seems to be for the purpose of providing (whether it was necessary or not we need not enquire,) that no error, informality or irregularity on the part of the City Council, as for example their neglecting to prepare and pass the estimates for the year by the 31st December in each year, as directed in the 9th section, or any mistake or informality in the valuation blanks directed to be furnished by the 33rd section; nor any error, informality or irregularity on the part of the Board of City Assess-

ors, as for example, in relation to the register to be made by them as directed in the 8th section; or any error, informality or irregularity as to the times when, or the manner in which, the matters directed by 39th and 56th sections to be done should be done, or as to the time and manner of making the assessments—of giving the notices required, or the like, should have the effect of invalidating the general assessment in any year. Then the second part of this section seems to have been inserted with the object of providing against any individual assessed under the act being able to defeat the assessment made upon him and his property, by reason of any error or irregularity in such assessment, not affecting the amount of the rate assessed upon him; the 42nd section seems to be supplemental to this second part of the 28th section for it prescribes how and before what court, namely, the court of appeal on assessments, all objections of persons assessed to the amount of the rate assessed upon them respectively shall be made and finally disposed of. It is only in the court of appeal on assessments that an objection as to the amount assessed can be taken; and the only person who can take such objection is the person assessed; so that it seems clear that this second part of the 28th section refers to such an objection. The section clearly does not profess to say that an assessment can not be avoided as illegal and invalid for the last clause of the section provides, rather unnecessarily it would seem, that neither the illegality, invalidity or irregularity of an individual assessment (clearly implying that an individual assessment may be illegal and invalid apart from any objection as to irregularity) shall extend to or affect the general assessment or any other individual rate or assessment. The section does not affect to restrict the rights of property vested in

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any person not assessed at all or who has not been legally assessed.

Upon the valuation book being completed and verified and handed to the city collector as provided in the 39th section, it is enacted by the 57th section that the collector, before any property assessed shall be liable to be sold for the purpose of realizing thereby any rates assessed thereon, shall cause each person rated to be served with a notice made out by the Board of Assessors as directed in the 56th section in the following form.

You are hereby notified that you are rated and assessed for the year 18— to pay the sum of ——— dollars and —— cents for city, county school and poor rates. Unless the amount be paid within thirty days from the 1st day of May next, proceedings will be taken to enforce payment, together with all charges and costs of collection.

To ——— A ——— B ———

Chief Assessor.

Then by the 65th it is enacted that

All rates and taxes shall become due the 31st day of May in each year. It shall be the duty of the City Collector immediately thereafter to take proceedings to recover the amounts due for city, county school rates and poll tax, and to enforce the payment thereof either by the issue of warrants of distress or by action at law, or both (the action to be in the name of the city as in case of debt), the City Collector's certificate in writing shall in all cases be presumptive evidence of the rate being due and unpaid, and shall be sufficient to entitle the city to a judgment without further proofs unless a good and just defence can be made thereto.

From this section it would seem to have been the intention of the act that the action directed in this section to be brought against the person assessed should be brought and should fail to realize the amount of the rates assessed upon such person before ever the real estate assessed therefor should be liable to be sold. In the present case no such action could have been brought, but that was because there was no valid assessment—no person assessed could have been sued;

the particular lots in question, if ever entered upon the assessment or valuation book at all, not having been assessed to any person, but erroneously entered, by what description does not clearly appear but would seem to have been simply "property situate on the Cobourg road," set opposite the words "estate of William Holland," the said William Holland being dead. But it is apparent from this section that no such injustice was contemplated as that to an action brought under the section the defendant should not be permitted to show, either

1. That the certificate of the city collector was untrue, for that the defendant had, in point of fact, paid to him the amount of rates sued for and held his receipt therefor; or,

2. That the property assessed to the defendant belonged, not to the defendant but to another person not assessed for it; or,

3. That the land assessed to the defendant was, in reality, land exempt from taxation. If a defendant sued in an action brought under the above section should obtain judgment therein for any of the above reasons, it surely could not be contended upon any principle of justice, and could not be held by any court that the land for which such defendant had been so assessed could become liable to be sold under the provisions of the statute, and could be legally sold for the same rates and taxes, so as to transfer the estate absolutely to a purchaser by the city collector, either intentionally or by mistake, signing under the 94th section, and procuring to be signed by the mayor of the city, with the city seal attached, statements in duplicate of lands which the city collector declared to be liable under the provisions of the act to be sold, which statements should contain therein the lands so assessed to the defendant.

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Yet the contention of the learned counsel for the defendants is, that a sale in such case and a deed executed in pursuance thereof would pass absolutely to the purchaser named in the deed the fee simple estate in such land.

We come, therefore, to the considerations of sections 92, 93, 94 and 95 of the act to which, in the interest of the defendants, a construction is pressed upon us which is utterly subversive of every principle of justice.

The 92nd section enacts that

> The City Collector of Rates and taxes shall, on or before the 31st day of December, in each year, furnish to the City Board of Assessors a list and description, sufficient to identify the same, of all the lands in the City of Halifax in respect of which any taxes have been due and unpaid since the first day of June in the year preceding with the amount of taxes payable in respect of each, which list shall be headed "List of lands in the City of Halifax liable to be sold for arrears of taxes for the year 188—.
>
> 93. It shall be the duty of the City Board of Assessors carefully to examine said list and ascertain if the lands therein mentioned are properly described, and they shall notify the occupants of said lands, if any, and the owners thereof, if known, upon their respective assessment notice for the current year, that the land is liable to be sold for arrears of taxes, and said Board of Assessors shall, before the 31st day of May, in each year, return said list, or a corrected copy thereof in case any error is discovered therein, to the City Collector, signed by the City Assessors or any two of them, and said list shall be filed in the office of the City Collector for public use.

The provisions of this section do not appear to have been complied with.

John Holland, who, as owner of the equity of redemption in the lots 5, 6 and 7 in the registered plan of 1870, mentioned in the mortgage to the plaintiffs, was the person liable to be assessed, was not assessed therefor. In the spring of 1886 John Holland was confined as a patient in an insane asylum; his wife did not live upon the mortgaged premises, but a family named Murphy did. A witness named Laidlaw

was called, who swore that in May, 1886, he served upon John Holland's wife, at her residence, which, as already said, was not on the premises in question, and while John Holland was so, as aforesaid, confined in the insane asylum, a notice of which he kept no copy or original, so that its precise contents could not be determined. This notice, he said, however, was to the effect that certain property mentioned therein was liable to be sold for the taxes of 1884. The land was not described in the notice otherwise than, as I understand his evidence, as "property situate on the Cobourg road," and he would not undertake to say that it was not entered as belonging to "the estate of William Holland." There was also property on Argyle street mentioned in the notice. This notice, whatever may have been its precise contents, so served on Mrs. Holland was the only attempt made, so far as appeared, to comply with the provisions of the 93rd section. Neither Murphy, who lived upon the premises, nor the plaintiffs, who, although not "owners" for the purposes of assessment, were the registered owners of the legal estate in fee subject to redemption and deeply interested in knowing whether the land was liable to be sold for taxes, had any notice whatever served on them. Whatever were the contents of the notice, there was no sufficient evidence that it related to the lots 5, 6 and 7, mortgaged to the plaintiffs. It is obvious, therefore, that there was no sufficient legal evidence of the provisions of this 93rd section having been complied with.

94th section:

In case the taxes upon any of the lands mentioned in the said list have not been paid to the city collector with interest from the time they were due before the 1st day of September following the delivery of the said list by the board of City Assessors to the city collector of rates and taxes the city collector shall submit to the mayor a statement in duplicate of all the lands liable under the provisions of this act to

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be sold for taxes which shall contain a definite description of each lot with the amount of arrears of taxes set opposite the same, and the Mayor shall authenticate each of said statements by affixing thereunto the seal of the Corporation and his signature, and one of said statements shall be deposited with the City Clerk, and the other shall be returned to the collector with a warrant thereto annexed under the hand of the mayor and the seal of the city.

95. Any statements or lists so signed by the mayor and signed with the seal of the city, or a copy thereof, or of any portion thereof, certified under the hand of the city clerk, shall in any suit or other proceeding relating to the assessment on the real estate therein mentioned, or at which it may be questioned, be received in any court in this Province as conclusive evidence of the legality of the assessment, and that the same is due and unpaid; and that each lot of land in said statement mentioned is legally liable for the amount of taxes set opposite the same, with interest and expenses, and that said amount forms a lien on said land.

Sections to which is attributed a construction so unjust and arbitrary as that insisted upon by the defendants, the effect of which is to work a forfeiture of the title of persons seized of real estate as for default in the payment of taxes which may never have been imposed at all according to the provisions of law in that behalf, or of the imposition of which, if attempted to be imposed, they may never have had any of the notices required by law to be given, should be criticised with the utmost possible acumen, so as to prevent such a construction being given to them, and to find a construction more conformable to justice. With this view it is important to state precisely what is the construction insisted upon by the defendants and its necessary effect, namely, that if the city collector, as directed in the 94th section, should prepare a statement in duplicate of lands as liable under the provisions of law to be sold for taxes, and in such statements or lists should, through ignorance, negligence, or the merest accident and mistake insert therein — 1st a lot of land which by the 18th section of the act was exempt from taxation but was by error assessed to some person as

owner who knowing that he did not own the land did not trouble himself to take any notice of the error, or 2nd a lot of land which, in truth, belonged to A., but was assessed to B. who took no notice of assessment papers served upon him, or, 3rd, a lot of land not on the assessment books at all as assessed to any one but which the city collector by mistake inserted in his statements instead of a lot which was assessed and was on the assessment book; and if the collector should submit these erroneous statements to the mayor and if he should affix his signature and the seal of the city thereto without taking any steps to satisfy himself, by reference to the assessment book as verified by the board of city assessors, or otherwise, of the correctness of the statements submitted to him by the collector, such erroneous statements when so signed and sealed with the city seal by the mayor must nevertheless, under the provisions of the 95th section, be received and taken as containing absolute verity and as conclusive evidence that all the lots of land mentioned therein have been duly assessed under the provisions of the law to the owners thereof, and are liable to be sold for taxes duly rated thereon, and that a sale of them by the city collector under a warrant signed by the mayor, and to which the seal of the city is affixed, will be a good and valid sale of the fee simple estate therein, although the owner of the piece of land so sold may never have been assessed therefor and may have been perfectly ignorant of the sale so purported to be effected of his land; in short, that such statements of the city collector, when so signed and sealed by the mayor, must be accepted as conclusive evidence of the truth of a lie.

Now, what is to be taken as meant in the 94th section by the mayor authenticating the statements

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prepared by the city collector, reasonably, I think should be that he shall, by comparison of the lists submitted to him with the authentic list prepared by the board of city assessors, and mentioned in the 93rd section, and with the original assessment or valuation book for the year (the taxes of which are alleged to be in default) verified as is provided in the 40th section, satisfy himself that the lands mentioned in the lists submitted by the city collector were duly assessed according to the provisions of the law before he should set his name and the seal of the city to documents of such serious import as to be conclusive evidence that the lands therein mentioned were all duly assessed, and were liable to be sold for arrears of taxes, and that the owners were liable to be divested of their estates therein. The intention of the legislature could scarcely, I think, have been that the mayor should, in the formal manner prescribed, simply certify that the lists to which the mayor should set the seal of the city and his own signature were the same lists which the city collector had submitted to him; and which is substantially the utmost professed to be done in the present case although, in other respects, not done in accordance with the requirements of the 94th section, as the courts below upon both trials have expressly found; what the legislature intended was, as it appears to me, that the mayor should verify the statements submitted by the collector and authenticate them as true, a thing which has not been done or attempted to be done in the present case; moreover the intention of the legislature, I think, must have been that the statements required by the 94th section should be verified by the mayor before ever a warrant for sale of the lands mentioned therein should be executed, for the warrant, which in order to effect a sale of the lands therein mentioned he is required to execute

under his hand and the seal of the city, contains an averment that by a rate of assessment made in conformity with law the lots of land and premises mentioned in the statement annexed to the warrant, which is one of the duplicate statements required by the 94th section to be made, have become liable to pay the several sums set opposite thereto, &c.

Before signing and executing under the seal of the city a warrant containing this averment it is but reasonable to infer that he should first have satisfied himself of its truth. Nothing of the kind appears to have been done in the present case; all that appears to have been done was, that a warrant for the sale of lands mentioned in a list annexed thereto was, upon the 9th day of November, 1886, presented to the mayor for his signature; the warrant with the list attached thereto contained about 120 pages; on the first page was the warrant; the list had a heading upon a page between the warrant and the first page of the list, all being got up in book shape as follows:—

List of lands in the City of Halifax liable to be sold for arrears of taxes for the year 1884, under provisions of the Halifax City Assessment Act, 1883.

On the last page of the book was written a certificate prepared for signature by the mayor, to the effect that

The foregoing statement of all the lands liable to be sold for taxes in respect of such lands for the year commencing on the first day of May, A.D. 1884, pursuant to the provisions of the Halifax Assessment Act of 1883, and the amendments thereto, was, on the ninth day of November, 1886, submitted to me by William C. Hamilton, City Collector of the City of Halifax, and I hereby, in pursuance of section 94 of said Act, authenticate the said statement and a duplicate thereof by affixing thereunto the seal of the City of Halifax and my signature, the day and year first aforesaid.

The warrant and the list with this form of certificate prepared for execution by the mayor were all presented to him together for his signature on the 9th day of

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November, 1886. Whether the seal of the city was attached to the warrant and certificate before they were presented to the mayor for his signature, or after they had been signed by him, did not appear, but the mayor did not appear to have had anything to do with the affixing of the seal, either to the warrant or the certificate on the list attached thereto, or even to have been present when it was so affixed.

A clerk in the collector's office where the warrant and the list and certificate would seem to have been prepared says that he was present and saw the city clerk affix the city seal to both the warrant and the list attached thereto at the same time, and the mayor appears to have set his signature to both warrant and certificate without any verification of the correctness of the list. Although the certificate on the list attached to the warrant purports to represent that a duplicate of the list was, at the same time, and in the same manner, authenticated, the court upon both trials found that in point of fact no duplicate ever was authenticated, even in the manner that the list attached to the warrant purports to have been. However, I am of opinion that even if certificates had been signed in duplicate in the manner that the one attached to the warrant appears to have been, that would not have been the authentication contemplated by the legislature as competent to make the statements conclusive evidence of the liability of persons to be divested of their estates. The signing of his name by the mayor to the certificates in such a very perfunctory manner cannot, I think, have been what the legislature had in contemplation as the authentication of documents intended to have such an incontrovertible effect as purports to be given by the 95th section to the documents, which, as appears by the 94th section, the legislature had in view.

However, the main point still remains, and, to my mind, it is conclusive against the 95th section having any application in the present case. The whole scope and object of the act is solely to make persons assessed under the provisions of the act, and the lands in respect of which they, as the owners thereof, are so assessed, liable for the amounts for which such persons should be respectively assessed on the valuation book in each year, and subject to the provisions of the act as to the realization of such amounts.

The act subjects the lands mentioned in such book, if they be the lands of the persons assessed therefor as owners and the lands be sufficiently designated in the book, to a lien, to operate from the date of the verification of the book as provided in the 40th section, for the amount assessed upon such owners in respect of such lands, and makes such lands of persons so assessed liable to be sold to realize such amounts if the amounts should not be otherwise paid. It is only with such persons so assessed that the act professes to deal at all. It does not either in the 95th section nor in any other section profess to prejudice or affect any person not assessed under the provisions of the act, or to divest of their estates any such person. The provisions of the law as to the mode of assessing the persons to be charged, and as to the mode of fixing them with a liability to be divested of their estates for default in payment of the amounts assessed upon them, are so very precise that the legislature having made such careful provision that the persons assessed should have abundant notice of the assessment made upon them, no doubt thought that provision having been made that the persons assessed, in order to be assessed under the provisions of the law, should receive the notice provided in the 36th and 37th sections, and after the opportunity thus given of appealing to the court

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of appeal under the 42nd section, and provision having been made also for their receiving the notices mentioned in the 57th and 93rd sections, if the parties so assessed should still remain in default, it was not unreasonable to provide that statements such as are required to be prepared by the 94th section should be sufficient evidence of the legality of the assessment as against the assessed person in any suit relating to the assessment on his real estate, or at which such assessment should be questioned. The assessed person was the only person competent to call in question the assessment in any suit or other proceeding. By construing the 95th section (consistently with all the other clauses of the act) as having application only to persons assessed under the provisions of the act, and to the properties in respect of which they are so assessed, we can give a construction to the section consistent with the rest of the act, and more consonant with justice and common sense than the construction insisted upon by the defendants, which is to the effect that the 95th section makes the statements prepared by the city collector, when authenticated in the manner required by the 94th section, however erroneous they may in point of fact be, conclusive evidence of the liability of a person who is an utter stranger to the assessment to be divested of his estate at the caprice of the city collector and mayor, or through their carelessness or misconduct, by a sale by them as for arrears of taxes which never had been assessed on such person. Before, then, the 95th section can be appealed to in the case of assertion of title to land made by a person claiming under a sale by civic authorities as for arrears of taxes, if it can be at all appealed to in such a case, it must appear that the person whose lands are claimed to have been sold is not a stranger to the assessment for default in payment of which the lands were sold, but on the

contrary is the person who was assessed for the taxes alleged to have been in arrear, and to realize which the sale took place, or a person claiming title under the person so assessed.

In the *Caledonian Railway Co.* v. *North British Railway Co.* (1), Lord Blackburn, as to the construction of statutes says:

> The matter turns upon the construction of an Act of Parliament, which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing we are to consider what the facts were in respect of which it was framed, and the object as appearing from the instrument, and taking all these together we are to see what is the intention appearing from the language when used with reference to such facts, and with such an object.

Applying this test to the act under consideration it is impossible to hold that anything in the act authorizes or confirms the sale of the land of any person who had not been duly assessed under the provisions of the act in respect of such land. This is a point as to which evidence can never be excluded. In the present case the evidence of the defendants shows that the land in question never had been so assessed.

But further it is only

> In a suit or other proceeding relating to the assessment on the real estate mentioned in the statements prepared by the city collector under the 94th section, or at which it may be questioned

that the collector's statements are rendered admissible as evidence. Now the word "assessment" as used in the 95th section plainly, as it appears to me, is used to represent the amount of taxes rated to the person assessed; the context seems to show this—the section provides that the statements shall be received as conclusive evidence of the legality of the "assessment" and "that the same is due and unpaid." Now the amount or rate charged to the person who is assessed is the only thing which can be said to be "due and

(1) 6 App. Cas. at p. 126.

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unpaid" and this the section declares to be the same thing as the "assessment" as the latter word is used in the section. This word is used in a precisely similar sense in other sections of the act. Thus in the 36th section "the sum total on which the assessment is to be levied" shall be inserted in the last column of the valuation forms. In the 42nd section it is used as identical with the word "rate" where it is provided that the court of appeal shall hear all objections of ratepayers to the valuations, rates or assessments which have been made on such ratepayers; and shall have power to reduce or increase the valuations, and to alter the rates and assessments of any ratepayer—and finally determine the rates and assessments to be paid by each person—so, likewise, in the 59th section where it is provided that any such assessment or taxes may be recovered as a debt in an action at suit of the city—so, likewise in the 68th section "in case an individual from whom assessment or taxes are due to the city" &c., and, again in the 69th section, "the assessments annually levied thereon shall"—and again "and taxes and assessment due on such estates, if not duly paid, may be sued for as a debt in the name of the city," &c.

Now when a purchaser at a tax sale brings an action to recover possession of the lands purported to be sold to him against the person who is seized of an estate in fee simple in the land unless divested thereof by the tax sale, it is necessary for him to prove his title in order to succeed; the defendant in such an action has nothing to do but rest upon his title until it is displaced by legal evidence of the title asserted by the plaintiff—the defendant simply rests upon his title and questions nothing. He simply leaves the plaintiff to proof of title in himself. Such an action cannot, I think, be said to be within the meaning of the 95th section one

"relating to the assessment on the real estate therein mentioned or at which it may be questioned." The 95th section, therefore, in my opinion, has no application to such an action. A plaintiff's failure to prove what he has undertaken to prove, and it is necessary for him to prove in order to establish his title, namely, a valid assessment made under the provisions of law, because of there never having been any such, is a very different thing from the questioning, within the meaning of the 95th section, the assessment which has been made "in a suit, or other proceeding, relating to the assessment on the lands therein mentioned, or at which it may be questioned."

So, likewise, if a person seized in fee bring an action of trespass against a defendant for entering upon plaintiff's land and the defendant justifies as the real owner in fee of the land in question and, at the trial, proceeds to establish his defence under a sale made to him as for arrears of taxes assessed upon the plaintiff in respect of the land, the plaintiff has nothing to do—nothing to prove—nothing to question. He has simply to rest upon his title, which entitles him to judgment unless the defendant prove the title which he has undertaken to prove, which he can only do by showing that the plaintiff was assessed according to the provisions of the law for the year in respect of which the taxes for which the land was sold were claimed. Such an action cannot, in my opinion, be said to be one relating to the assessment on the real estate, for trespass on which the action is brought or at which it is questioned, and the 95th section, therefore, has no application to such an action; and so for the reasons already given, as well as for that relied upon in the courts below, namely, that the requirements of the 94th section as to authenticating the collector's statements were not complied with, I am of opinion that

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the defendants cannot appeal to the 95th section as removing the defects apparent in the title which they have pleaded and undertaken to prove. And as the defendants have not only failed to prove that John Holland, the plaintiff's mortgagor of the lands in question, who was the only person assessable under the provisions of the law in that behalf for the year 1884, was ever so assessed for that year, but on the contrary have proved, by the list annexed to the warrant to sell under which the defendants claim, that he was not, the sale under which Meagher, and the defendants O'Brien and Brooks as his devisees, claim was absolutely illegal, null, and void; the appeal must, therefore be dismissed and the judgment of the Chief Justice of the Supreme Court of Nova Scotia, made at the last trial, affirmed in every particular. As John Holland, the mortgagor, was not assessed in the year 1884, in respect of the lands, no sum of money as for rates of that year could be a lien upon his lands.

As to the 110th section I concur with the Chief Justice of the Supreme Court of Nova Scotia that it only refers to acts done subsequently to the issuing of the warrants towards effecting the sale under it, and that it has not the extraordinary effect contended for by the defendants, namely, to make good a sale absolutely null and void by reason of the non-fulfilment of conditions precedent to the coming into existence of any right to issue a warrant to sell the particular lands in question. It is only to a deed executed in pursuance of a valid sale that the section can be regarded as referring.

PATTERSON J.—Cogswell, the plaintiff, who is respondent in this appeal, brings this action for the foreclosure of a mortgage made to him and another, on the 15th of August, 1882, by one John Holland, upon three

building lots in the City of Halifax, numbered 5, 6 and 7, in a plan filed in the registry office for the city, to secure the sum of $3,600. The action was brought against John Holland the mortgagor, against John Meagher who had bought the lands at a sale for taxes in December, 1886, and against William C. Hamilton the collector of taxes for Halifax. Meagher died, and his executors, O'Brien and Brooks, were made defendants in his place. Hamilton also died, and Theakstone, his successor in the office of collector, was substituted on the record for him.

The plaintiff had judgment in the court below, and this appeal is by O'Brien and Brooks, and by Theakston.

The contest relates to the validity and the effect of the sale for taxes.

The Assessment Act under which the sale took place was passed by the legislature of Nova Scotia on the 19th of April, 1883. It is chapter 28 of the acts of that year. Some amendments to it, made by an act (ch. 60) passed on the 11th of May, 1886, will have to be noticed.

The action was commenced on the 6th of April, 1887.

The plaintiff contends that the tax sale is not operative by reason of failure to comply with certain requirements of the statute, and he takes the further ground that, inasmuch as his charge upon the land was created before the assessment, and in fact before the passing of the act, he has a title superior to that of the purchaser; in other words, that the equity of redemption only, and not the corpus of the land, passed by the sale.

Those points, together with others, will be noticed as we proceed with an examination of the history of what was done in connection with some of the provisions of the statute.

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Section 4 contains the general provision that all property, real and personal, within the city of Halifax, not expressly exempted by law, shall be subject to taxation as provided by the act.

By section 11 the assessment shall be rated on the owners of real and personal property by an equal dollar rate upon the value; and amongst those to be deemed owners are persons entitled to the equity of redemption of mortgaged lands when the mortgagee is not in possession. If the mortgagee is in possession he is deemed to be the owner.

Then section 13 makes the rates and taxes levied on an assessment of real estate a special lien on the real estate having preference over any claims, lien, privileges or incumbrances of any party except the crown.

It is apparent from these provisions that the land itself and not any particular estate or interest in it is what is taxed, and that the plaintiff must rely upon his objections to the proceedings under the statute and not upon the priority in date of his mortgage to the assessment, or even upon the fact that the mortgage was made before the assessment act was passed.

That was the view acted upon by the Supreme Court of Nova Scotia, and although it is now formally questioned the objections urged against it are not supported by any arguments that require further discussion.

The taxes for which the land was sold amounted to no more than $22, and with interest and costs added the amount was still under $50.

The property is variously estimated by witnesses at values running from under $1,000 to upwards of $2,000.

It is plain that the purchase price of $290 was very much below the real value, though probably not more so than in numberless cases of sales in the United States and in Ontario under similar statutes.

The disproportion so frequently, and perhaps as a rule, found between the value of land sold for taxes and the price brought at the sale is apt to shock one's sense of justice, yet I cannot say that in the present case I should pity the plaintiff on that score.

He knew all about the sale. He had a notice given warning purchasers that he objected, not to the right to sell for the taxes, but to the power under the statute to sell more than the equity of redemption. The act gave a year after the sale to redeem the land but the plaintiff began his action within four months, preferring to litigate the equity of redemption question, which was all he seems at that time to have thought of, to paying $50 or thereabouts for taxes and charges which, as he was then advised, the city was entitled to receive from some one.

During the progress of the action the plaintiff obtained leave to attack the validity of the tax sale in addition to advancing his untenable claim to a superior title by virtue of his mortgage over the statutable lien given to the city for the taxes, and the question for determination is whether his attack, which has been upheld in the court below, ought to succeed.

Great reliance is placed by the defendants on sections 95 and 110 of the statute, which seem to be intended to make it difficult, if not impossible, to question sales for taxes on the ground of failure to follow the statutory directions concerning assessments, &c.

The sections preceding section 95 prescribe, amongst other things, what the officers who have to make the assessments and collect the taxes are to do. One duty of the collector is (by section 92) to furnish on or before the 31st December in each year, to the City Board of Assessors, a list of all lands in the city in respect of which taxes have been due and unpaid since the first of June in the preceding year, with certain

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particulars; then the board of assessors, after examining the list and giving certain notices, are (by section 93), on or before the 31st of May, to return the list or a corrected copy, signed by them, to the collector, and the list is to be filed in the collector's office for public use. If the taxes are not paid before the first of September the collector is (by section 94) to submit to the mayor a statement in duplicate of all the lands liable under the provisions of the act to be sold for taxes. The statement is to contain a definite description of each lot, with the amount of taxes set opposite the same, "and the mayor shall authenticate each of said statements by affixing thereunto the seal of the corporation and his signature, and one of said statements shall be deposited with the city clerk, and the other shall be returned to the collector, with a warrant thereto annexed under the hand of the mayor and the seal of the city in following form:"

Then comes section 95, which reads thus:

95.—Any statements or lists so signed by the mayor and sealed with the seal of the city, or a copy thereof, or of any portion thereof, certified under the hand of the city clerk, shall in any suit or other proceeding relating to the assessment on the real estate therein mentioned, or at which it may be questioned, be received in any court in this Province as [conclusive] evidence of the legality of the assessment, and that the same is due and unpaid, and that each lot of land in said statement mentioned is legally liable for the amount of taxes set opposite the same, with interest and expenses, and that said amount forms a lien on said land.

The word "conclusive" was introduced as an amendment by the act of 1886.

This section makes something, whatever it is, conclusive evidence of certain things which are essential to the liability of the land to be sold for taxes, but something further remains to be done before the land can be sold. Those further proceedings, together with the mode of conducting the sale, the right to redeem

within a year, and the giving of a deed of the land in case it is not redeemed, are the subjects of various sections on to section 109 and including or partly including section 93. Then section 110 provides as follows:

110.—The deed shall be under the seal of the city in the form or to the same effect as in schedule A to this act, and shall particularly and fully describe the land conveyed. Said deed shall be [conclusive] evidence that all the provisions of this act with reference to the sale of the land therein described have been fully complied with, and every act and thing necessary for the legal perfecting of such sale have been duly performed, and shall have the effect of vesting said land in the grantee or purchaser, his heirs or assigns, in fee simple, free and discharged from all incumbrances whatsoever, whether registered or not; except in the case of land in which the fee is in the city of Halifax, when the deed shall give the purchaser the same rights in respect of the land as the original lessee.

The word "conclusive" in this section, as in section 95, comes from the amending act of 1886. It takes the place of "presumptive" which was the original expression.

The legislation goes a long way, in cases that come within it, towards making tax sales in Halifax unimpeachable. I shall say nothing by way of criticism of the policy indicated, which may doubtless be supported as well as attacked by forcible arguments. But far as the legislation goes, it does not go so far as the defendants ask us to carry its effect. Section 110 is plainly the complement of section 95—the one saying how the liability of the land to the lien for taxes may be proved, but stopping short of the sale itself; the other taking up the thread and assuming to provide a short and easy method of proving that the sale was properly conducted, or rather of dispensing with proof of the steps by which the sale was effected.

The language of the first half of the section makes this plain, and affords one clear ground of distinction between its provisions and those of the Encumbered

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Estates Act on which the case of *Rooke* v. *Errington* (1) was decided.

The second part of the section which declares the effect of the deed as a conveyance in fee is explanatory of the point, already touched upon, that the purchaser acquires the land itself and not any estate in it less than a fee simple, unless the land is the property of the city.

There are two particulars in which the defendants might hope to be aided by section 110 if that section could properly enter into the discussion. The plaintiff objects to the absence of a notice required to be given by section 93, informing the tax payer that his land is liable to be sold, and he also contends that more land was sold than was necessary for the payment of the taxes. These are two of the steps connected with the sale which are to be taken as conclusively proved by the deed, under section 110. The other objections are touched by section 95 and not by section 110.

But the deed was not in existence until a year and a half after this action was in progress. It was made on the 13th of October, 1888; the earliest date at which the purchaser could have demanded the deed, or the mayor and collector have made it, was the 21st of December, 1887, a year after the sale, and that was three weeks after the first trial of the action. Under these circumstances the decision of the court below that the deed was not properly receivable in this action as evidence against the plaintiff must be held to be correct, and the validity of the sale must be tested without respect to section 110.

The proof offered by the defendants under section 95 consisted of one of the statements submitted, in pursuance of section 94, by the city collector to the

(1) 7 H. L. Cas. 617.

mayor. It was authenticated by the mayor by affixing thereunto the seal of the corporation and his signature, and had annexed to it a warrant as directed by section 94, being the warrant under which the land had been sold. The section requires that the statement shall be in duplicate; that the mayor shall authenticate each of the statements by annexing thereto the seal of the corporation and his signature; and that one of the statements shall be deposited with the city clerk, and the other returned to the collector with the warrant annexed. The latter, which was the one put in evidence, followed the directions of the section both in form and substance, but it was not proved that a duplicate had been deposited with the city clerk authenticated as required. I do not understand that the existence of a regular and sufficient duplicate was disproved, I understand merely that, as stated by the learned Chief Justice in his judgment after the trial, "no evidence was adduced on the trial that any such statement was so authenticated in duplicate by the mayor, nor was there any evidence that a copy of the list or statement annexed to the warrant to the collector was ever filed in the office of the city clerk."

I am of opinion that sufficient proof was given at the trial to give full operation to section 95. It is true that the language being put in the plural form—"any statements or lists so signed"—may suggest the idea that more than one statement or list is intended to be proved, and the expression "so signed" may easily be understood to mean signed in duplicate; but to hold that the production of one of the duplicates is insufficient without formal proof of the other, when nothing appears to create any doubt of the due making, authentication, and deposit in the city clerk's office of the other, is, in my judgment, to apply to this section a strict rule of interpretation that could not be applied

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to statutes in general without occasioning embarrassment. Nor do I perceive anything in the purpose of the enactment to require us so to construe it.

The statement submitted to the mayor by the city collector under section 94 is made in duplicate in order that one part may be deposited as a record, or to be accessible for reference, in the office of the city clerk, and that the other may go to the collector with the warrant to authorize the sale of such lands as have not the taxes ultimately paid. The statement is one statement though made in duplicate. If it should appear that no duplicate was deposited with the city clerk, or that the one deposited was not properly authenticated, the question whether the omission vitiated every sale made under the warrant, or whether the requirement was not directory only, might require careful consideration; but nothing appearing to suggest any such omission I do not see why the due performance of their duty by the officials concerned should not be presumed. *Omnia presumuntur rite esse acta donec probetur in contrarium.* The city clerk was a witness at the trial. He deposed to having attached the corporate seal to the statement produced and to the warrant annexed to it, by direction of the city collector.

Another witness was a clerk of the city collector who had been present when the seal was affixed to the warrant and the annexed list. If there were any doubt about the duplicate in the city clerk's office a word from one of these witnesses would have cleared it away. But nothing was asked either of them about it, and counsel for the defendants, when he objected to certain things in connection with the warrant and list, is not reported to have made any allusion to the absence of specific proof of the duplicate. We may safely assume that the solicitors for the parties informed themselves on the subject of all the formalities essential to the

regular sale for taxes, and that the presumption of regularity with respect to the duplicate accorded with the knowledge of all parties concerned at the trial. It would, in my opinion, be proper to find as a fact, as well from the conduct of the trial as from the presumption of *omnia rite esse acta*, that the duplicate was duly made, authenticated and deposited in the office of the city clerk. At the same time I do not think it essential to the operation of section 95 to do more than prove one of the statements, or in place of it a copy of the statement or of a portion, (which must mean so much as relates to the particular land or tax in controversy), certified by the city clerk. The phrase with which the section commences: " any statements or lists so signed," I take to be equivalent to " any of the statements or lists so signed," or " any one of the statements, &c."

With great respect, therefore, for the opinions of the learned Chief Justice of the court below, and of the judges who concurred with him, I am compelled to hold that by the effect of section 95 it is conclusively established that the taxes in question were a lien on the land.

The section thus construed is, no doubt, capable of leading to some startling results, and, in supposable cases, of working injustice. This has been forcibly pointed out by my brother Gwynne. I do not enter upon a discussion of these possibilities which may or may not have been foreseen when the clause was framed in the act of 1883, and when the policy was emphatically affirmed in 1886 by the amendment which introduced the word " conclusive." I take the declaration that the statements shall be conclusive evidence of the four things: the legality of the assessment; that it is due and unpaid; that each lot of land mentioned is legally liable for the amount of taxes

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noted against it; and that the amount forms a lien on the land; to be too precise to leave room for qualification by reference to the possibly unexpected consequences which may seem calculated to produce hardship in certain situations.

It is objected that the city is not a party to the action. How does that circumstance concern the present defendants? If the sale is held to be valid, the action must be dismissed, and no question of parties can arise. If held to be invalid the plaintiff will succeed against the purchaser, though his judgment may not technically bind the city. If the city's lien has not lapsed by the three years' limitation under section 112, it may perhaps remain as a charge which has a statutory precedence over the plaintiff's mortgage, but we are not required to discuss these matters at the instance of the present defendants.

Two objections are urged against the validity of the sale, viz.: that a notice required by section 93 was not duly given, and that more land was sold than was necessary.

Section 93 makes it the duty of the City Board of Assessors to notify the occupants, if any, of lands which the collector includes in his report of 31st December as lands in respect of which any taxes have been due and unpaid since the first of June in the year preceding, and the owners thereof, if known, upon their respective assessment notices for the current year, that the land is liable to be sold for arrears of taxes.

John Holland, the mortgagor, is proved to have acquired the land by deed from the sheriff of Halifax, dated the 29th July, 1882, and he made the mortgage to the plaintiff on the 26th of September in the same year.

He lived on the land and had a tenant on part of it.

Section 2 of the Assessment Act provided that the assessment shall be rated on the owners of real and personal property, and that when the mortgagee of real estate is not in possession the person entitled to the equity of redemption shall be deemed the owner of such land.

The taxes in question are those for 1884, and the notice under section 93 was therefore to be given with the assessment notice for 1886.

At that time John Holland was in a lunatic asylum, but his family were on the land. He was, for the purposes of the statute, both owner and occupant.

The land had belonged to William Holland a brother of John. William died in 1882, before the month of July. The assessors seem to have treated the land as belonging to William's estate, and it is alleged in the pleadings of the defendants, but is not proved, that John held as trustee for the estate of William.

The title shown by the evidence is the title in fee taken by John under the sheriff's deed of July, 1882.

The land was assessed in 1884, and at least one year after that, as owned by the estate of William Holland, and in the transactions of the city officials, including the list attached to the warrant for sale, the taxes are put down as due by the estate of William Holland. John's name does not appear.

The evidence on the subject of the notice under section 93 is that of James Laidlaw, which is thus noted:

James Laidlaw, sworn :—I am one of the sub-collectors of the city in the office since 1883 ; in the spring of 1886 I served tax notices with notice of lien that the property charged would be sold for arrears of taxes. I know John Holland, of Halifax, a brother of William Holland, deceased. I had a notice for John Holland in the spring of 1886, which I served on his wife at his residence on Argyle Street. Served this 18th May, 1886. This is the book in which I made the memorandum of service. There was a notice for the amount of taxes

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for 1886, and also the notice of lien that the property was liable to be sold. There were two properties mentioned in the notice. This notice of sale was for the taxes for 1884.

Cross-examined—I understood John Holland was confined in the insane asylum at this time as a patient. I have no copy of the notice which I made at the time. The land was not described in the notice except where the property was situate. It stated that the property was situate at the Cobourg Road. Also the Argyle Street property. It also stated the property was liable to be sold for arrears. John Holland's name was on it. I would not undertake to say it was not Holland estate of William. My duty principally was to collect water rates. A family named Murphy was living on a part of the Holland property, Cobourg Road, 1886.

I see no escape from the conclusion that the notice under section 93 is essential to the right and power to sell lands for taxes.

The warrant issues under section 94 only for the sale of the lands mentioned in the list returned by the assessors to the collector before the last day of May, on which the taxes remain unpaid on the 1st September. It will be remembered that the duty of the Board of Assessors, under section 93, after receiving from the collector on or before the 31st December a list and description of the lands in respect of which taxes are overdue since the 1st June in the preceding year, *e.g.*, a list in December, 1885, of the unpaid taxes due at the first of June, 1884, is to ascertain if the lands are properly described on the list and to notify the occupants, if any, and the owners, if known, upon their respective assessment notices for the current year, that the land is liable to be sold for arrears of taxes, and then before the 31st of May to return the list to the collector. Thus in September, 1886, a warrant may issue to levy the taxes due on the 1st of June, 1884, after the Board of Assessors have, in May, 1886, served the notice under section 93. At least four months' time is given for the payment of the taxes after service of the notice and before the warrant can issue. The notice

is clearly a condition precedent to the right to sell, and it is particularly important to hold to the statutory prescription respecting it in a case like that before us, where the person chiefly interested receives no direct notice of the assessment of the land or its liability to be sold, but is bound by notices given to and even by acts done or omitted by his mortgagor, if the mortgagor continues in possession of the land. We must be careful, also, when adjudicating upon the extent to which a mortgagee out of possession is affected by a notice said to have been given to his mortgagor, to see exactly what is proved to have been done, adding nothing by inferences that do not necessarily arise from the facts proved.

The facts, then, to be gathered from Mr. Laidlaw's evidence are that in May, 1886, when serving John Holland's notice of assessment for that year, he served with it, on John Holland's wife, a notice that some property at the Cobourg Road, assessed against the estate of William Holland, was liable to be sold for taxes. The notice did not describe the property as it was described in the list by the collector and the assessors, where there was a detailed description. I am not prepared to say that the full description from the list must of necessity be inserted in the notice. A shorter description would, in most cases, convey to the owner all the necessary information. We may surmise that the fact conveyed was that the same property mentioned in the new assessment notice for 1886 was liable to be sold for arrears; but we have no right to speculate about it. One would think it not improbable that with a little fuller investigation of the assessment rolls, or in some other way, more precise information could have been furnished, but taking the evidence as we find it it cannot be said that the learned Chief Justice at the trial, or the court in banc, ought

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to have found as a fact that a sufficient notice to satisfy section 93 had been given.

The onus of establishing a valid sale was clearly upon the defendants. There is no presumption in its favor.

The other objection to the sale, founded on the allegation that the officer did not obey section 98 by selling only so much of the land as would have been sufficient to pay the taxes with interest and expenses, raises a question of fact which has not been pronounced upon by the court below, and which I am not disposed to find in the plaintiff's favor. He attended at the sale, either in person or by his agent, and gave a formal notice which, if paid attention to, would have deterred purchasers from bidding, even for the whole property, any substantial sum, and he gave no warning that too much land was being offered for sale.

His action was originally only in assertion of the claim put forward by his notice, that his mortgage was a prior charge to the city's lien for taxes. It is only by crediting him with having had faith in that claim that his plunging into litigation in place of paying the small sum demanded for the taxes and expenses can be excused.

On the one ground of insufficient notice under section 93 I think the appeal should be dismissed, and I do not see sufficient reason to depart from the general rule to dismiss it with costs.

Appeal dismissed with costs.

Solicitor for appellant Theakston: *James A. Sedgewick.*

Solicitor for other appellants: *P. C. C. Mooney.*

Solicitor for respondent: *Wallace MacDonald.*