

was given to the plaintiff and other parties intended to be affected by the formation of the Union School Section, of the intended formation thereof, or of any alteration in the boundaries of existing school sections in the said townships or either of them: that the inspector of public schools of the said county of Kent has not transmitted to the respective clerks of the said municipalities of Raleigh and Tilbury East any copy of the resolution for the formation of the alleged Union School Section, nor have the reeves of the said townships, with the inspector or otherwise, equalized the assessment on the rateable property within the said Union School Section.

Demurrer to the fifth and sixth replications: that in an action of this nature the plaintiff cannot contest the validity of the formation of the said Union School Section.

November 22, 1875, the case was argued before Wilson, J., sitting for the full Court.

J. K. Kerr, for the demurrer. The statutes relating to the subject are Consol. Stat. U. C. ch. 64, secs. 40—45; 23 Vic. ch. 49; 34 Vic. ch. 33, O. The acts of the trustees are to be maintained. If the school section be not rightly established it may be remedied by special proceedings. Sec. 16 of the last named Act shows the remedy was by appeal to the County Court Judge. It does not appear the plaintiff was a resident of the School Section at the time of the formation of the Union. He referred to *Re Gill and Jackson*, 14 U. C. R. 119; *Coleman v. Kerr*, 27 U. C. R. 5, 10; *Patterson and the Corporation of the Township of Hope*, 30 U. C. R. 484; *Craig v. Rankin*, 10 C. P. 186; *Gillies v. Wood*, 13 U. C. R. 367; *McGregor v. Pratt*, 6 C. P. 173; *Forbes v. School Trustees of Plympton*, 8 C. P. 73.

F. Osler, contra. The last objection, if it had been relied upon, could have been amended in chambers. The plaintiff's liability depends on whether the union section has been duly formed. The 34 Vic. ch. 33 sec. 16, O., does not apply to the union of school sections from parts of different townships: *Re Proper and the Corporation of the Township of Oakland*, 34 U. C. R. 266. The following cases shew that the legality of the formation of the union section may be disputed in an action: *Williams v. School Trustees of section 8 of Plympton*, 7 C. P. 559; *Harling v. Mayville*, 21 C. P. 499; *Free v. McHugh*, 24 C. P. 13, 19; *Coleman v. Kerr*, 27 U. C. R. 5; *Haacke v. Marr*, 8 C. P. 441; *Re Hart and Municipality of Vespra and Sunnidale*, 16 U. C. R. 32; *Re Ley and the Municipality of the Township of Clarke*, 13 U. C. R. 433; *Griffiths v. The Municipality of Graham*, 6 C. P. 274; *Malone v. Faulkner*, 11 U. C. R. 116.

The want of notice to the clerk is a material defect, because without it no rate can be made or levied. The assessments must first be equalized.

J. K. Kerr, in reply, referred to 23 Vic. ch. 49, secs. 13, 14; *Re Ness and the Municipality of the Township of Saltfleet*, 13 U. C. R. 108.

February 15, 1876. WILSON, J.—It is necessary to see what the legislation on the subject has been, for it is by it the rights of the parties must be determined.

The Consol. Stat. U. C. ch. 64, enacts: Sec. 40: In case it clearly appears that all parties to be effected by a proposed alteration in the boundaries of a school section have been duly notified of the intended step or application, the township council may alter such boundaries, to take effect on the 25th of December next after the alteration has been made.

Section 45, as amended by 23 Vic. ch. 49, sec. 5: Under the conditions prescribed in the 40th section in respect to alterations of other school sections, union school sections consisting of parts of two or more townships or parts of a township, * * may be formed and altered by the reeves and local superintendent or superintendents of the townships out of parts of which such sections are proposed to be formed * * at a meeting appointed for that purpose by any two of such reeves * * of which meeting the other parties authorized to act with them shall be duly notified.

34 Vic. ch. 33, sec. 18, declares that on the formation or alteration of a union school section or division under 23 Vic. ch. 49, sec. 5, the county inspector concerned shall forthwith transmit a copy of the resolution by which the formation or alteration was made, to the clerk of the municipality affected by such resolution.

It shall be competent for the county inspector to call a meeting of the parties authorized to form and alter union school sections, and it shall be the duty of the reeves of the townships out of which the section is formed, with the county inspector, to equalize the assessment.

The plaintiff says the union of school sections which he says was pretended to be formed on the 24th December, 1873, he had no notice of; nor had other parties, all of whom were affected by the intended formation of the union, notice of such intended formation.

And the defendants say that may have been or may be a cause for rescinding the resolution adopted for forming the union and for

dissolving the union, but it is no answer to a levy made for a rate which has been imposed under and by virtue of the resolution by the corporation which has been created under it, so long as the corporation is in existence.

The first and main question then is, whether the want of a notice to the plaintiff and the other parties intended to be affected by the formation of the union school section of the intended formation thereof, can be shewn in this action for the purpose of avoiding and invalidating the proceedings taken to effect the union, and of putting an end to the existence of the corporation which was formed.

The 40th sec. of the Consol. Stat. ch. 64, to which the 5th sec. of the 23 Vic. ch. 49 refers, is very plainly worded "In case it clearly appears that all parties to be affected * * have been duly notified of the intended step or application," the reeves and local superintendent of the townships out of parts of which the section is to be formed may, at a meeting appointed for the purpose, by resolution be formed: 34 Vic. ch. 33 sec. 18.

The notice is a condition precedent to be given before the change can be made. If it be not given the action of the parties taken to alter the old sectional boundaries, and to form a new school section, must be voidable and remediable.

I do not say the proceedings would be absolutely void, because if that were so they could not be confirmed. And I am of opinion that either by subsequent ratification or by acquiescence they could be adopted and become binding. But they were at least voidable for the purpose of enabling any one to apply to have them vacated: *Regina v. Thomas*, 8 A. & E. 183; *Rex v. Harris*, 1 B. & Ad. 936; *Regina v. Grimshaw*, 10 Q. B. 747.

In *Penney v. Skade*, 5 Bing. N. C. 319, an overseer was appointed by a minority of magistrates present at the meeting—the majority not observing at the time what was being done. When they discovered it they attempted to undo what had been done. The overseer appointed by the minority distrained on a warrant signed by two of the minority as justices of the peace, on the plaintiff for a rate. The plaintiff brought trespass against two of the magistrates and it was left to the jury to say whether the appointment by the minority was fraudulent or not. They found it not fraudulent.

In disposing of the rule nisi for a new trial Tindal, C. J., said, at p. 331, "Here is a judicial act performed without fraud, at a meeting which was competent in point of jurisdiction to perform it, and that act verified by a sufficient number of signatures to satisfy the requisitions of the statute which directs the appointment to be made. We think, therefore, that it cannot be questioned in this collateral way on the ground of an irregularity or miscarriage in ascertaining the sentiments of the meeting. We have the less hesitation in coming to this conclusion, because the law has provided appropriate methods of settling such a question * * * It is obviously a much more convenient course that the validity of the appointment should be brought into controversy in a direct way immediately upon the appointment, than that a party should lie by until a rate had been made and levied, and should then be allowed to revert back to some miscarriage in the appointment. No objection arising in such a way ought to prevail, unless it rests on the most solid ground, which in our judgment the present objection does not.

A rate levied by the churchwardens *de facto*, although not duly elected, is valid: *Scadding v. Lorant*, 13 Q. B. 687, in Ex. Ch. 1b. 706, in H. L. 15 Jur. 955.

The validity of a charter of incorporation was not allowed to be raised on a *certiorari*, to quash a rate which had been levied, on the ground that there had been no petition for incorporation by the whole or by the majority of the inhabitant householders; or that the grant of Quarter Sessions had been made on a representation to the Crown that there was a gaol in Birmingham when in fact there was not one: *Regina v. Boucher*, 3 Q. B. 641. See also *The Company of Proprietors of the Monmouthshire Canal Navigation v. Kendall*, 4 B. & A. 453; *Re Gill and Jackson*, 14 U. C. R. 119; *Regina v. Taylor*, 11 A. & E. 949; *The Attorney-General v. The Port-reeve, Aldermen, and Burgesses of Avon*, 9 Jur. N. S. 1117.

In *Regina v. Jones*, 8 L. T. N. S. 503, the Court refused to grant a *quo warranto* information against an individual to try the legality of a character of a municipal corporation.

Cockburn, C. J., said: "You are seeking to repeal a charter not in a question directed to the charter, but in a proceeding against an individual." And when *Lloyd v. The Queen*, 31 L. J. Q. B. 207 was cited, Cockburn, C. J. said, "There was no pretence for saying that there was any existing corporation."

In *The Attorney-General v. The Corporation of Avon*, 33 Beav. 67, it was held that the Court of Chancery will not, in a suit relating to the property of a corporation, determine on the validity of a charter of corporation.

The cases of *Hart and the Municipality of Vespra and Sunnidale*,