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*April 1.
*May 6.

THE MUNICIPAL CORPORATION OF THE TOWN OF TRENTON (PLAINTIFF) ..... APPELLANT;

AND

JOHN S. DYER AND OTHERS (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute—Directory or imperative requirement—Municipal corporation—Collection of taxes—Delivery of roll to collector—55 V. c. 48 (O).

By s. 119 of the Ontario Assessment Act (55 V. c. 48) provision is made for the preparation every year by the clerk of each municipality of a "collector's roll" containing a statement of all assessments to be made for municipal purposes in the year, and s. 120 provides for a similar roll with respect to taxes payable to the treasurer of the province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first day of October." * * *

Held, affirming the decision of the Court of Appeal, that the provision as to delivery of the roll to the collector was imperative and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes.

Held also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as to that for provincial taxes.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment at the trial in favour of the plaintiff.

The action in this case was brought by the corporation of the town of Trenton against the defendant Dyer, collector of taxes for the town, and his sureties, the other defendants, to recover the amount alleged to be due the town for taxes which Dyer should have

*PRESENT:—Sir Henry Strong C.J. and Fournier, Taschereau, Sedgewick and King JJ.

(1) 21 Ont. App. R. 379.

collected but failed to do so. The defence was that no collector's roll had been delivered to Dyer as required by section 120 of the Assessment Act, 55 Vic. ch. 48. This section and the construction claimed for it by the respective parties appear in the judgments given on this appeal.

The case was tried before Armour C.J. who gave judgment in favour of the corporation, which judgment was reversed by the Court of Appeal. The corporation then appealed to this court.

Marsh Q.C. and *Delaney* for the appellant. The provision as to delivery of the roll is grammatically a part of sec. 120, which deals with provincial taxes only and by no rule of construction can it be held to apply to the taxes mentioned in the previous section.

The provision is directory, not imperative. *Caldow* v. *Pixell* (1); *Lewis* v. *Brady* (2); *Parish* v. *Golden* (3).

Chute Q.C. and *O'Rourke* for the respondents sureties of the collector, and *Abbott* for the respondent Dyer referred to *Welland* v. *Brown* (4); *Whitby* v. *Flint* (5), and *Vienna* v. *Mair* (6), in support of their contention that the provision as to delivery of the roll was imperative. They were not required to argue the other point as the court was satisfied that the provision applied to local as well as provincial taxes.

THE CHIEF JUSTICE.—The only question for decision in this appeal relates to the proper construction of the concluding paragraph of the 120th section of the Ontario Assessment Act (now 55 Vic. cap. 48, formerly R. S. O. 1887, cap. 193). The respondent Dyer was in 1891 the collector for the town of Trenton and his co-respondents were his sureties. This action was

(1) 2 C. P. D. 562.
(2) 17 O. R. 377.
(3) 35 N. Y. 462.
(4) 4 O. R. 217.
(5) 9 U. C. C. P. 449.
(6) 9 U. C. L. J. (O. S.) 301.

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brought to make him liable for the taxes which it was alleged he ought to have collected but had failed to collect.

The defence, so far as it is now material on this appeal, was that he had not been furnished by the town clerk with a properly certified roll. This action was tried before Chief Justice Armour without a jury, when judgment was entered for the appellants. On appeal this judgment was reversed by the Court of Appeal. Mr. Justice Burton dissented from the majority of the court.

The 120th section is as follows:

> All moneys assessed, levied and collected under any Act by which the same are made payable to the treasurer of this province, or other public officer for the public uses of the province, or for any special purpose or use mentioned in the Act, shall be assessed, levied and collected in the same manner as local rates, and shall be similarly calculated upon the assessments as finally revised, and shall be entered in the collector's rolls in separate columns in the heading whereof shall be designated the purpose of the rate; and the clerk shall deliver the roll, certified under his hand, to the collector on or before the 1st day of October, or such other day as may be prescribed by a by-law of the local municipality.

It was argued before us that this section had no reference to the roll for purposes of local taxation, and that the requirement that the roll should be certified by the clerk was only for the purpose of collecting provincial taxes. This contention we disposed of at the conclusion of the argument of the learned counsel for the appellant, the court holding that such was not the true legal construction of the clause in question, but that the requirement that the roll should be certified under the hand of the clerk applied as well to municipal as to provincial taxes. The sole question which remains is, therefore, whether the words "shall deliver the roll certified under his hand to the collector" are imperative or directory only. The *primâ facie* presump-

tion, as well under the Interpretation Act as without it, is that they are imperative. It is for the appellant to demonstrate that they are directory merely. This has not in my opinion been done. I see a great distinction between the provision as to the time of the delivery of the roll and that as to the certificate of the clerk. The first may well be directory. A failure to comply with it is in the power of the municipality to remedy and the omission does not affect the ratepayers. Such is not the case, in my opinion, as regards the want of authentication. If the object of requiring a certificate only concerned the municipality itself and its officer, and could be regarded as a mere direction to the clerk as to the course he was to pursue in performing his duty to the municipality, I should have no difficulty in holding it to be not obligatory. But is this so? Clearly not, for it concerns the taxpayers that the person to whom they pay their taxes, and who may distrain on their goods in case of non-payment, should be in possession of, and able to produce to them, proper authority for those purposes. An unauthenticated list of taxes, however formally made out in other respects, would not be such an authority, and if on such a list taxes could be collected the ratepayers might be called upon by a fraudulent collector to pay money as and for taxes never legally imposed. The roll in effect operates as a warrant, and usage and convenience alike require that such a document should bear upon its face some authentication or certificate to show that it was regular, and that it emanated from the official who had authority to issue it. I think therefore we must consider the provision as one introduced for the protection of the ratepayers and therefore obligatory. The cases of *Whitby* v. *Harrison* (1) and *Whitby* v. *Flint* (2), referred to in the judgment of the learned Chief Justice of Ontario,

(1) 18 U.C.Q.B. 603. (2) 9 U.C.C.P. 453.

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are both authorities in support of this view, though in neither of them was the point now raised actually decided. It was, however, decided by these cases that the authority of the collector to collect the taxes did not depend on his appointment but on the receipt of such a roll as the statute requires, and the language of both the Chief Justices who gave the judgments in those cases certainly implies that they considered that the roll to be valid should be certified. Then a roll not authenticated by the signature of the clerk is not such a roll as the statute requires. The case of *Vienna* v. *Marr* (1) was in my opinion well decided, and shows that the collector was not bound to act under an uncertificated roll. The case of *Welland* v. *Brown* (2), on which it was determined that the signature of the clerk without any formal certificate was sufficient, is not in any way inconsistent with this view, but on the contrary that case also implies that the court considered such a signature to be necessary. I am compelled with much respect to dissent from the view of Mr. Justice Burton that the omission of the statute to make some provision for the case of the incapacity or death of the clerk, which latter event was in the present case the reason why the omission could not be remedied, is a reason why we should not hold signing to be imperative. I think we must rather regard that as *casus omissus*, and that it is an insufficient reason for holding that the payment of taxes may be enforced under a roll which upon the *primâ facie* meaning of the words of the statute is a nullity.

The appeal must be dismissed with costs.

FOURNIER J. concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. The reasoning of Hagarty C.J. and

(1) 9 U. C. L. J. 301. (2) 4 O. R. 217.

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Maclennan J. in the Court of Appeal is unanswerable. Dyer never was vested with the right to collect the taxes, for the reason that the clerk never delivered to him the roll certified under his hand as required by the statute. He was in the position of a police officer, bearer of a warrant which is not signed by the magistrate, or not evidenced by seal where that is required. *Archibald* v. *Hubley* (1); *Cotter* v. *Sutherland* (2); *Morgan* v. *Quesnel* (3); *Reg.* v. *Chapman* (4). I do not attach much importance to the word "shall" in sec. 120, c. 193 R. S. O. The definition of the words "shall" and "may" in the Interpretation Act is taken from the school books.

It is hard case law that though the statute decrees that a certain thing "shall" be done, it "may" not be done, or need not be done, and I, for one, will always restrict the application of that law within the narrowest possible limits.

I do not exactly see, however, that there is here room for the controversy raised by the parties as to the construction to be given to that word "shall" in this part of the statute. The words "and the clerk shall deliver the roll certified under his hand" are clearly imperative. As to the delivery of the roll that is not questioned, The only question that remains, then, is: What roll is it that he has to deliver? And to this question the enactment, to my mind, leaves room but for one answer, that is "the roll certified under his hand," under the hand of the clerk. Or, in other words, I read the clauses 120 and 122 simply as if they said: "The collector, upon receiving the collector's roll certified by the clerk, shall proceed to collect the taxes." So long as he has not received the roll so certified he is without authority to act. This roll, whilst in the clerk's hands, before being so certified and delivered, is not yet a "roll" as to the collector, a

(1) 18 Can. S. C. R. 116.
(2) 18 U. C. C. P. 357.
(3) 26 U. C. Q. B. 539.
(4) 12 Cox 4.

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completed roll. It is only by the certificate and delivery, that it becomes efficacious for the purpose of collecting the rates, that it gets vitality. Before that it is an inchoate document which confers no power whatever on the collector. And the genuineness of a document of this nature must be self apparent. It must bear some mark of attestation. Upon general principles a public officer who, in the name of the law, claims the right to intrude upon the private rights of his fellow citizens, and the power to force them to obey his commands, must be prepared, when required, to satisfy them of his authority. And, to my mind, an unattested document like the one delivered to Dyer in this case is not intrinsically a voucher of authenticity sufficient for that purpose in the collector's hands. It lacks what is called, in the civil law, the *solemnia probantia*, necessary to make it what it should be, *probationem probatam*.

Great stress was put by Mr. Marsh at the argument on the point, not raised in the court below I understand, that upon the true construction of section 120 this enactment as to the roll being certified applies only to cases in which taxes are being collected for provincial purposes, and not to cases, as the present one, provided for in the preceding section, where taxes are to be collected for municipal purposes only, and the appellant's factum, in a full historical review of the legislation on this particular part of the Municipal Act, has apparently established his proposition, that from the introduction of municipal institutions into the province, down to 1853, the roll was a sufficient authority for the collector, though not signed or certified by the clerk. He has failed, however, to convince me that in the statute, as it stands in the Revised Statutes of 1887, which rules this case, the provision of section 120, that the roll must be certified under the hand of the collector, does not apply to the roll mentioned in section 119, that is to say, to the roll for municipal taxes. There is

only one roll provided for, not two rolls, one for municipal taxes and another for provincial taxes, as the appellant's contention would import.

It has also been urged for the appellant, though, it seemed to me, not much relied upon, that as the provision in that same sentence of the statute as to the time within which the clerk was to deliver the roll to the collector had been held to be directory (1), therefore the provision as to the signature of the clerk should also be treated merely as a directory one. But I do not see anything in this argument. There is no objection whatever that I can see in the enacting of two provisions in the same sentence of a statute, one imperative, and the other directory, though it may lead to controversy. Here the date is immaterial. What difference does it make to the rate-payer that the roll be handed over to the collector on the second of October, instead of on the first ?

And the delivery is not a preparatory matter. It is something that happens after it is completed and signed. Whilst the attestation is, to my mind, an essential requisite of that document to confer any power on the collector (2) ; it is a condition precedent to an effectual delivery.

The holdings in the cases of *Whitby* v. *Harrison* (3), and *Whitby* v. *Flint* (4), assuming them to be law, do not support the appellant's case. I would be inclined to think that, if they bear at all on the case, it is more in the respondent's favour than in the appellant's.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitor for appellant: *H. W. Delaney.*

Solicitors for respondent Dyer: *Ostrom & Abbott.*

Solicitor for other respondents: *T. A. O'Rourke.*

(1) *Lewis* v. *Brady* 17 O. R. 377.
(2) *Vienna* v. *Marr* 9 U. C. L. J. (O. S.) 301.
(3) 18 U. C. Q. B. 603.
(4) 9 U. C. C. P. 453.