THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) ..... } APPELLANT;

AND

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FREDERIC A. CASTON (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*April 21.
*June 12.

Assessment and taxes—Ontario Assessment Act—R. S O. (1887) c. 193—Construction of statute—Arrears of taxes—Distress.

The provisions of section 135 of the Ontario Assessment Act (R. S. O. (1887) ch. 193) in respect to taxes on the roll being uncollectable, providing for what the account of the collector in regard to the same shall shew on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative.

Taxes on the roll not collected cannot be recovered by distress in a subsequent year unless such arrears have accrued while the land in respect of which they were imposed was unoccupied.

Judgment of the Court of Appeal (26 Ont. App. R. 459) affirming the judgment of the Divisional Court (30 O. R. 16) affirmed.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of a Divisional Court (2) in favour of the plaintiff.

In 1891 the plaintiff was on the collector's roll for the taxes for that year in respect to lot 65 Huntley street, Toronto, and his sister for the adjoining lot 63. In January, 1892, plaintiff paid the collector $75, and at the trial there was a dispute about its appropriation, the collector swearing that he was instructed to pay off all the taxes on lot 63 and apply the balance towards payment of the sum due on the plaintiff's own lot. These instructions were denied by the plaintiff.

In 1895 a sum for arrears of taxes on lot 65 was placed on the collector's roll, though such arrears had never been demanded from the plaintiff. The roll for 1891 delivered to the treasurer in the following year did not show opposite the respective assessments remaining unpaid, the reason the same were not collected, nor was the city clerk furnished with a copy of the account as required by section 143 of the Assessment Act.

In 1896 the plaintiff's goods were distrained upon for the arrears and the action in this case was for damages caused by such alleged illegal distress. At the trial the action was dismissed, but the Divisional Court reversed the judgment of dismissal and gave judgment for the plaintiff with $100 damages, which the Court of Appeal affirmed. The city then appealed to this court.

Fullerton Q.C. and *Chisholm* for the appellant. The plaintiff had means of relief under the statute which should have been exhausted before he could bring an action. Cooley on Taxation, 2 ed. p. 283. Blackwell on Tax Titles, secs. 471 and 475. *Stewart* v. *Taggart* (3).

(1) 26 Ont. App. R. 459. (2) 30 O. R. 16.
(3) 22 U. C. C. P. 284.

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Failure of the collector to distrain in the first instance does not take away the remedy by distress in the future. *McDonell* v. *McDonald* (1); *Allan* v. *Fisher* (2).

J. W. McCullough for the respondent. The provisions of the Act as to the duties of officers of the municipality are imperative, and the city must show that they were strictly complied with. *O'Brien* v. *Cogswell* (3). And see *Whelan* v. *Ryan* (4); *Love* v. *Webster* (5).

The judgment of the court was delivered by:

GWYNNE J.—The respondent brought an action against the appellants alleging in his statement of claim that they had in 1896 caused a distress to be made upon his goods situate upon premises owned and occupied by him in the ward of St. Thomas, in the City of Toronto, for taxes assessed upon him in respect of the same premises in the year 1891, and which the respondent in his statement of claim alleged had been paid by him to the collector, having had the roll of that year for the collection of the taxes therein mentioned.

The premises in question consisted of a lot numbered 65 on the east side of Huntley street, in the City of Toronto, with a dwelling house thereon in which the respondent lived. He produced a receipt dated January 16th, 1892, signed by John Kidd, the collector of the taxes assessed in St. Thomas Ward, for the year 1891, as follows:

Received from F. A. Caston, on account of taxes on Huntley street, seventy-five dollars.

An extract from the collector's roll of the year 1891 was produced whereby it appeared that the respondent

(1) 24 U. C. Q. B. 74.
(2) 13 U. C. C. P. 63.
(3) 17 Can. S. C. R. 420.
(4) 20 Can. S. C. R. 65.
(5) 26 O. R. 453.

was assessed in that year as occupant and owner of said lot No. 65 in the sum of $48.24 taxes which the collector was authorised and directed to levy. And that immediately preceding this entry on the roll Mary L. Caston appeared to be assessed as occupant, and Richard T. Coady and Charlotte Coady as owners of lot 63 on the east side of said Huntley street, and adjoining said lot No. 65 in the sum of $46.31\frac{3}{4}$.

It appeared that the roll when returned by the collector to the treasurer did not comply with the provisions of section 135 R. S. O. 1887, but in lieu thereof there was an entry in pencil made in the column headed "date of demand of taxes" as follows: "Jan. 16, "'92, paid on account $75." This entry was placed opposite to both of lots Nos. 63 and 65, and no sum was appropriated to either lot. The respondent swore that the payment was made in respect of the taxes charged on the roll upon his lot No. 65, and not at all in respect of taxes charged on the lot No. 63. He also said that he never had any notice that the City of Toronto claimed that any arrears were due upon his said lot until the year 1895, when a sum of $69.27 arrears appeared in the collector's bill of taxes demanded of him in 1895, and served upon him. He said that upon receipt of this bill he made repeated efforts to have this corrected, but failed, and then he proved the distress complained of which was made in June, 1896, to collect said sum of $69.27 which with additional interest and charges then amounted to $73.43. On the defence the collector of the ward for the year 1891, who prior to that year and thenceforth until and in the year 1896 had been and still was collector of the ward, was called, and he testified that when the respondent paid the $75 mentioned in the receipt of 16th January, 1892 he gave express directions that the money should be applied first in

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payment of the taxes charged on lot 63, and the balance on his own lot 65. He said also that the respondent had paid the taxes on the lot 63 every year since 1885. In fine upon a lengthy examination and cross-examination of the collector, and upon a further examination and cross-examination of the respondent in reply, and upon an examination and cross-examination of Mr. Coady, who in 1891 was, and in 1897 still was treasurer of the city, was assessed as owner of lot 63, of which Mary L. Caston was assessed as occupant, in 1891. The learned trial judge came to the conclusion arrived at, as plainly appears by his judgment upon the estimate made by him of the weight and credibility of the evidence, that the respondent had instructed the collector to apply the $75 paid in January, 1892, in the manner the collector had stated, and he gave judgment dismissing the action with costs. From this judgment the respondent appealed to the Divisional Court of Queen's Bench. That court called for some further evidence to admit of proof of some by-laws and some other points, and while it declined to interfere in any respect with the judgment of the learned trial judge upon the question of fact so as aforesaid determined by him, namely that the taxes charged in respect of lot 65, in 1891, were not paid in full as was contended by the plaintiff in the action, still the court was of opinion that the distress made in 1896 for arrears of taxes in 1891 was unauthorised in law and could not be supported, and they therefore reversed the judgment of the learned trial judge and gave judgment for the plaintiff in the action with $100 damages.

Upon an appeal from that judgment by the above appellants to the Court of Appeal in Toronto, that court affirmed the judgment of the Divisional Court of Queen's Bench and dismissed the appeal. The appellants now appeal from that judgment to this court.

It has been held by both courts, and in this, I think, we must concur, whatever the result may be, that the duties prescribed in sec. 135 of ch. 193 R. S. O. 1887, are enacted as the basis and foundation of all subsequent proceedings which are authorised to be taken for the recovery of taxes not paid while the roll remains in the collector's hands unreturned; and that therefore the requirements prescribed in the section are imperative. That section enacts that:

If any of the taxes mentioned in the collector's roll remain unpaid and the collector is not able to collect the same, he shall deliver to the treasurer of his municipality an account of all the taxes remaining due on the roll, and in said account the collector shall *show opposite to each assessment* the reason why he could not collect the same by inserting *in each case* the words, *non resident or not sufficient property to distrain, or instructed by council not to collect* as the case may be, and such collector shall at the *same time furnish the clerk of the municipality with a duplicate* of such account, and the clerk shall upon receiving such account mail a notice to each person appearing on the roll with respect to whose land any taxes appear to be in arrear for that year.

It appeared in evidence that a return was made to the treasurer by the collector of his roll of 1891 professedly with intent to fulfil the obligations of sec. 135. Yet by an extract from the returned roll which, as affecting the lots 63 and 65 on Huntley street, was produced at the trial, it appeared that no entry was made showing what sum, if any, was paid in respect of the said lots respectively, nor of either of them, nor why the respective amounts directed by the roll to be levied in respect of the said lots were not levied, as, if not levied, was required by the section. All that was entered on the returned roll as appeared by the said extract as affecting these lots, was the entry already mentioned set opposite to both of them, "Jan 16, '92, paid on account $75." No duplicate return whatever as was required by the section was furnished by the collector to the clerk of the municipality. It appeared also in evidence that in levying

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the tax by distress the collector could not have had and had not any difficulty, for that the respondent resided upon the lot and had abundance of chattels on the lot for which he was assessed as occupant and owner by distress upon which the taxes due could have been collected.

The effect as it appears to me of this default of the collector in obedience to the requirements of the section was, not merely that notice was not, as indeed it could not have been given by the clerk to the respondent as required by the section (the importance of which notice being given to the respondent in the circumstances of the present case is referred to by Mr Justice Moss, in the Court of Appeal), but the main effect of the collector's default appears to me to be that the treasurer *could not from the collector's return on his roll* say how much of the $75 appearing on the roll to have been paid in respect of both lots, should be applied to each, and could not therefore *from the collector's return* say to which of the lots the sum which the $75 were insufficient to pay could be charged as arrears still due. The return therefore which the treasurer appears to have furnished to the clerk in 1894 containing a list of all the lands in his municipality in respect of which any taxes have been in arrears for three years wherein the sum of $69.27 as set down as due by the respondent for arrears of taxes assessed upon him in the year 1891, as occupant and owner of the said lot 65, could not have been made out *from entries* made on the collector's returned roll of 1891, as required by section 135, but apparently from oral information given by the collector to the treasurer.

In the Court of Appeal for Ontaro, Burton C.J. gives a reason for affirming the judgment of the Divisional Court not expressed in the judgment of that court which proceeds upon the ground that the default of

the collector of 1891 in fulfilling the requirements of section 135 *fatally effects all* future proceedings to enforce payment of arrears, if any there be, of 1891 from the respondent, and confines the remedy of the appellants to a claim against the collector for the injury suffered by his default. In the opinion of the learned Chief Justice of the Court of Appeal the law does not authorise any arrears of taxes of a previous year to be recovered by distress in a subsequent year except in the one case provided for in section 143 of the Act which, as the learned Chief Justice says in his judgment, is only where the "arrears" have accrued while the land in respect of which they have accrued was unoccupied.

If the learned Chief Justice's construction of section 143 is correct it is admitted as beyond dispute that the levy by distress upon respondent's property in 1896 was illegal and cannot be justified.

Now apart from all consideration of any question whether the return of the respondent's name on the list furnished by the treasurer to the clerk in 1894 can be used *for any* purpose affecting the respondent in view of the default as already referred to, of the collector to fulfil the requirements of section 135, let us for the present purpose look upon that return as quite valid. Section 141 requires the clerk to keep the list so furnished to him by the treasurer, and to give a copy of it to the assessor of the next year who is required to ascertain if the lots in such lists are occupied or incorrectly described, and if occupied to notify the occupants and also the owners, if known, whether resident in the municipality or not "that the lands are liable to be sold for arrears of taxes." Then the assessor is required to return the list to the clerk together with his assessment roll of the year and also a memorandum *of any error discovered in the list.* All

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this enactment points to the taking of a step preliminary to a sale of the land for the arrears of taxes.

Now the clerk of the municipality who has charge of all the assessment rolls as returned in each year upon which are entered the names of all occupants of the lands therein assessed and who from these rolls makes out the collector's rolls in each year upon which are entered the names of all occupants as assessed in each year and who by section 135 is furnished with a duplicate of the collector's returned rolls every year would require to do no more than refer to these rolls upon receipt from the treasurer of a list of the lots upon which there is said to be an arrear of taxes for three years for the purpose of seeing whether the lands enumerated on that list are occupied or not, but he would require information otherwise to ascertain whether any of the lands on the list and which upon the rolls in his possession appear to have been assessed as unoccupied have since *become* occupied, and that this is the object for which the clerk is required to place in the hands of the assessors the list of lots in arrear furnished by the treasurer sufficiently appears, as was held by Burton C.J., from section 143 of the Act which enacts that the clerk shall examine the assessment roll when returned by the assessor to ascertain whether the lands on the list furnished by the treasurer are returned on the assessment roll as then occupied, and that he shall forthwith furnish the treasurer with a list of the several parcels which appear on *the resident* roll as *having become* occupied, and the treasurer thereupon, s. s. 2, shall render to the clerk an account of all arrears of taxes due *on such occupied* lands, and by s. s. 3, the clerk of the municipality is directed on making out the collector's roll of the current year to add *such* arrears of taxes to the taxes assessed against *such occupied* lands that is plainly as it appears to me *such*

lands as since the last assessment roll *have become* occupied, in order that the taxes in arrear upon lands assessed as *unoccupied* may be collected by distress if necessary against *the person who has become*, and in the current year is *assessed as the occupant*. The construction put upon this section by Burton C.J. appears to me to be the true one.

The appeal therefore must, I think, be dismissed with costs, and as to the notice given to the appellants by the respondent that upon the argument of the appeal he would ask that the judgment in his favour should be varied by increasing the amount adjudged to him for damages, that application is refused. In view of the grounds upon which the learned trial judge determined the question of the fact as to payment of the tax of 1891, in full, as was insisted by the respondent, we are of opinion that the damages awarded by the Divisional Court judgment gave ample compensation to the respondent.

As the claim of the respondent for an increase of the amount adjudged does not appear to have increased the cost of the appeal it is unnecessary to say anything as to costs upon our refusal of the respondent's application.

Appeal dismissed with costs.

Solicitor for the appellant: *Thomas Caswell.*

Solicitors for the respondent: *Caston & Co.*