

The persons named it was said owned a great deal of property in the town, and were on the assessment roll assessed for the ordinary town taxes in other respects, but that the town clerk, Thomas H. Brush, in making up the roll for the collector, had omitted to carry out opposite to their names any rate whatever in respect of the sum so directed by the by-law, upon the ground that those persons were to be considered as exempted from the rate by reason of their being supporters of the separate school.

It was sworn that in the early part of the year, and before the roll was made up, it was intended to exempt these persons from payment of the rate, and Brush, as the town clerk, was notified that it would be illegal to exempt these persons, for they were not Roman Catholics. The roll however, was delivered to the collector having no rate in respect of common schools to be paid by these persons set opposite their names or property. On the 3rd of February, 1862, a written notice was served upon Brush, requesting him to set opposite to the names of the persons mentioned in the roll the amount for which each person was chargeable for school rate for the year 1861, or to certify the same to the clerk of the municipality, or to certify the same to the county treasurer.

During last term *Prince* shewed cause, and filed affidavits in reply. In none of the affidavits was it denied that any of the persons mentioned were not Roman Catholics. Two of these persons said they had been supporters of the separate school before the year 1861, and had sent children to the separate school. The clerk stated that he had sent his children to the separate school before 1861, but he had never claimed exemption till 1861.

The collector's roll was delivered to the collector on the 21st of November, 1861, and he refused to allow any alterations while in his hands.

Consol. Stats. U. C., ch. 55, secs. 89, 101; ch. 61, sec. 27, sub-sec. 12; ch. 63, sec. 18 *et sequ.*, secs. 29, 31 were referred to in the argument.

BURNS, J., delivered the judgment of the court.

This case is a most curious one in many respects, and exhibits the ingenuity of the human mind to devise ways and means for evading payment of what the legislature thought was perfectly plainly expressed. We mean in cases where people think their pockets are touched upon by those having such power as school trustees and others in a similar position,

We take it to be perfectly plain, from reading the Common School Act, chapter 64 of the Consol. Stats. of U. C., chapter 65, providing for separate schools, and chapter 55, the Assessment Act, that the legislature intended the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favour.

The persons mentioned as having signed the notice before stated have not in that notice, which Mr. Brush seems to have very strangely acted upon, told us that they were or are Roman Catholics. All they have said is that they claim to be exempted from all rates relating to common schools, because they are subscribers to the Roman Catholic school. That is not the class of persons the legislature was providing for. The provision was and is for those who not only supported the separate school, but for such persons as were in a position to claim the exemption from paying to the common schools by reason of their being Roman Catholics. The two things must combine, and in the present case it would be impossible to bring into operation the provisions of the 31st section of the act, chapter 65, with regard to the penalty for making a false statement in the notice, for though it may be quite true the persons are supporters of the separate school, a thing perfectly legal if they choose to do so, yet they have not said they are supporters because they are Roman Catholics.

The 29th section of the Act has not been complied with by those who were claiming the exemption from paying the school rate.

But suppose the notice given might be considered as sufficient to exempt the persons signing it from payment, we must see how

Mr. Brush has acted upon it. He seems to have thought that he, as the clerk of municipality, had a right to omit on the collector's roll carrying out the rate to his own name and the others who signed that notice. This is a clear violation of his duty as prescribed by the 89th and 90th sections of the Assessment Act, chapter 55 of the Consol. Stats. U. C. When the town council passed the by-law authorising the levying of such sum as the school trustees required, it was the duty of the clerk to calculate the rate that each person should pay according to the assessed value of his property, and set the sum down in the collector's roll. Whether the individuals named in the collector's roll would be exempt from payment of any sum or rate mentioned in the roll depended upon something else, which the clerk in the discharge of his duty, as far as making out the roll according to law, had nothing to do with.

The 23th section of chapter 61 does not exempt those who are Roman Catholics supporting a separate school from having taxes imposed upon them; it only exempts them from the payment of all rates imposed for the year for the support of the common schools, provided they give the notice mentioned in the section. To enable those who are thus by law exempt from payment of the rate imposed the 30th section provides for the clerk of the municipality giving a certificate to the person giving such notice of the effect of it, and the date of such notice, so that when the collector called for the rate the person holding the certificate could shew that he was not liable to pay, but was exempt from paying the rate. When the legislature intended the names of any persons supporting separate schools should be omitted from the collector's roll, they have said so, as in the provisions for separate schools for protestants and coloured persons.—See sections 11, 13, and 14 of chapter 65.

It appears that the roll was delivered to the collector on the 21st of November, 1861, and the collector states that he collected a great portion of the rates before the 14th of December, and that the council extended the time for making his return to the 14th of March, 1862, and by that time he had collected all the rate except from some indigent persons. Whether the roll yet remains in the collectors hands does not appear. Mr. Brush's duty as clerk of the municipality ended when he completed the roll and placed it in the hands of the collector for the collection of the rates. We can no where find that it is laid down, either in the Assessment Act, or the Municipal Act, that it is the duty of the clerk to certify either to the collector or to the treasurer any errors which may have been made. There are provisions with respect to errors and mistakes made, and that the lands stated shall not be exempt from the taxes by reason of the error and mistake, but we can no where find it stated to be a duty upon the clerk of any municipality to certify to any other person or authority when such error or mistakes exists or has been made.

We can see very plainly that in this case Mr. Brush has not discharged his duty as he should have done, but then we cannot see our way clearly to rectify that now, under the circumstances of this case, by the writ of mandamus as sought for. The effect of granting the writ would be to invest the collector, if he still remain in office, with an additional duty and liability, in the event of the roll being now made right, as it should have been when first delivered to him, and in case of the collector being out of office, or the roll returned, to create some confusion in the treasurer's accounts or mode of dealing with the matters provided for in the statute.

The 171st and 173rd sections of the Assessment Act provide for punishing the clerk of a municipality who refuses to do his duty, or who commits malversation in the discharge of it, by indictment. The in-sinuation thrown out in this case against Mr. Brush are of the latter description. So far as the complaint affects him personally the remedy provided for by statute should be pursued. Adopting such a course or omitting to do so would not in either case prevent the remedy by mandamus in order to correct the error in the discharge of the duty of the clerk, if the duty be plain and clear. There is no difficulty in pronouncing that the clerk in this instance did not discharge his duty according to law, but the difficulty consists in saying that we can by mandamus at this stage of the proceedings order him to do any thing which will have the effect of remedying the defective execution of his duty.