

C. S. Patterson for the plaintiffs.

Richards, Q. C., contra, cited, Kepp v Wiggett, 10 C. B. 35; Webb v James, 7 M. & W. 279.

The facts of the case, and the questions to be decided, are sufficiently stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The *nisi Prius* record shews that the plaintiffs took issue on all the defendants' pleas. Upon the 1st, 2nd and 3rd pleas the plaintiffs were entitled to a verdict, for they only denied the making of the deed sued on, and the collection of any money, and set up payment of all that was collected, of which payment no proof was given.

There, as to the 4th, 5th and 6th pleas, on which issues in fact were joined.

The 4th Plea is that no collector's roll properly certified under the hand of the clerk of the council, was received by the collector before the time he collected the rates for 1857, or any of them, as in the declaration alleged, nor was any such roll ever delivered to him, but he collected the moneys wrongfully, without having received his collector's roll or any collector's roll for the township, or any part thereof, and without any authority for so doing.

The evidence, it seems, was that the collector did receive the roll signed by the clerk, but not certified otherwise than by such signature being placed at the foot of it. We think the substance of that issue was, that the collector received the taxes wrongfully and without authority, which it hardly lies in the surety's mouth to urge, if he did collect and receive them; but however that may be, we think the signature of the clerk sufficiently verified the roll to enable the collector to receive the money, for his signature at the end sufficiently authenticated the roll as that on which he was to make his collections.

The fifth plea is in substance that the collector had never taken the oath of office which he was required to take, and that the defendant had no notice of that omission until long after the money was collected.

It is not stated in the case whether the collector did take the oath or not. The affirmative of the issue was with the plaintiffs', but the burthen of proof, notwithstanding, we think, lay with the defendants, for it would be presumed that the collector did his duty in this respect till the contrary is shewn, * and there being no evidence on the subject, the verdict should be for the plaintiff.

The sixth plea is, that before the County Council had appointed any day later than the 14th of December, 1857, for the return of the collector's rolls, or for paying over the money collected, the collector had failed in collecting the taxes mentioned in the condition of the bond: that on the 19th of December, 1857, the township council authorized by resolution the collector to continue to levy unpaid taxes to the 15th of January, 1858, and that on the 29th of January, and before any other resolution on this subject had been passed, the County Council of Ontario by by-law extended the time for the return of the collector's roll to the 1st of March, 1858, and thereby extended the time for the collectors of municipalities paying over the rates to that day; that the said by-law was passed without the knowledge of the defendant, and that he never consented to the extension of the time given by such by-law.

This plea and the fifth are pleaded as equitable defences.

According to the statements of the evidence contained in this case, the sixth plea was proved, and without regard to its sufficiency the defendant was therefore entitled to a verdict upon the issue on that plea.

An objection was taken, that though the bond was taken to "the municipality of the township of Whitby," it cannot be now enforced in the name of the Corporation of the Township of Whitby, on account of the change made by statute 20 Vic., ch. 113, which divided the Township of Whitby into East Whitby and Whitby, after the making of this bond. That act was to take effect upon the 1st of January, 1858, so that the change was after this bond was executed, namely, on the 16th of November, 1857.

We see no other way that the bond could have been sued upon than as it has been.

The plaintiffs in our opinion are entitled to have a verdict entered for them on all the issues, except that on the sixth plea, and the defendant should have a verdict on the sixth plea.

THE SAME CASE.

The fact that a collector of taxes received the money without any roll having been delivered to him, and without having taken the oath of office, forms no defence for his surety to an action for not paying over such money. An extension of time for making the collection without the surety's consent does not discharge him, being expressly allowed, and his liability retained, by the 18 Vic., ch. 21.

The plaintiffs, besides taking issue, demurred to the fourth, fifth, and sixth pleas.

C. Patterson for the demurrer. *Richards, Q. C., contra.*

ROBINSON, C. J., delivered the judgment of the court.

As to the fourth plea, we can only understand it to mean that the collector collected or received the money without having any roll furnished to him.

The demurrer, we think, must be taken to admit that, for we cannot infer from the plea what the evidence on the trial proved: that a collector's roll signed by the clerk, though not otherwise certified, was delivered to him.

As the plaintiffs have taken issue upon the plea as well as demurred to it, and as we think the plaintiff's were entitled to a verdict in their favour upon that issue, the costs only of this demurrer are in question. The defendant's counsel relied much on the authority of *Webb v. James*, (7 M. & W. 279,) for supporting this plea, but the condition of that bond made it, when coupled with the recitals, much more restricted in its nature than the bond into which this defendant entered. We think this bond makes the surety liable for all rates and assessments for 1857, which should come into the collector's hands, and which he should not pay over.*

The declaration avers that the collector collected moneys of the rates and assessments for 1857, which he did not pay over, but neglects and refuses to pay over. It is no sufficient answer to the declaration to say that no certified collector's roll came to the collector for the rates of 1857, before he received the said moneys, or at any time; for if any person assessed, knowing what he stood rated at on the roll as formerly revised, should voluntarily pay it to him before the clerk had sent him the roll, he would be bound to pay it over; and besides, under 12 Vic., ch. 81, sec. 179, there might be rates which the collector would be bound to collect for 1857, and which would not appear on the certified roll, but would be leviable by the collector under a precept from the sheriff.

The fifth plea assumes it to be a good equitable defence, when insisted on by the surety, that the collector had not taken the oath of office at any time after he was appointed.

The 12 Vic., ch. 81, sec. 127, requires that every collector shall, before entering on the duties of his office, take an oath that he will truly, faithfully, and impartially, to the best of his knowledge and ability, execute the office of collector, and, that he has not received, and will not receive any reward for the exercise of any partiality or malversation, or other undue execution of the said office.

No doubt it would be a breach of this oath, which the collector ought to have taken, if he received rates which he did not duly pay over; and it is possible, though not certain, that the defendant when he became surety for the collector, looked upon this oath, which he might have supposed the collector must have taken, or must take, as affording some security for his integrity. We must not suppose that a sworn officer would have more scruples about acting unfaithfully than one who was not sworn, otherwise it would be altogether idle in the legislature to exact such oaths. But we can find no authority that would warrant our holding that the omission to take the oath on the part of the collector furnished a legal excuse to the collector for not paying over money that he had collected, or that it could be set up by his surety as a claim to

* The bond in this case contained no recital, and was conditioned as follows: "The condition of this bond is such that if the above bounden Thomas Hodgson shall collect all rates and assessments of the said municipality for the year 1857, for which he has been appointed collector, and shall pay all such rates and assessments (or so much thereof as can be collected) over to the treasurer of the said municipality of the township of Whitby, on or before the fifteenth day of December, one thousand eight hundred and fifty seven, then, and in such case, this bond shall be void, or otherwise to be and remain in full force and virtue."