1879

ALEXANDER McKAY.....APPELLANT;

*Jan. 28, 29.
*May 9.

AND

CHARLES SEYMOUR CRYSLER.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of land for taxes—32 Vic., c. 36, sec. 155 O.—Proof of taxes in arrear.

In a suit commenced by a bill in the Court of Chancery asking for an account of damages sustained by certain trespasses alleged to have been committed by the appellant (defendant) for an injunction and for possession, the principal question raised was whether a sale of the land for taxes, which took place on the 1st March, 1856, through and under which the respondent (plaintiff) claimed title, was valid. The evidence is fully set out below.

Held,—That there was no evidence to shew the land sold had been properly assessed, and, therefore, the sale of the land in question was invalid. [*Strong* and *Gwynne*, J. J., dissenting.]

*PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, J. J.

1879

MCKAY v. CRYSLER.

Per *Fournier*, *Henry* and *Gwynne*, J.J. :—Where it appears that *no* portion of the taxes have been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid, and the defect is not cured by section 155 of 32 Vic., ch. 36 O.

[*Strong*, J., *dissenting*, holding that sec. 155 applied to a case where *any* taxes were in arrear at the date of the sale.]

APPEAL from the judgment of the Court of Appeal for *Ontario* (1), dismissing an appeal from a decree of the Court of Chancery.

This suit was commenced by a Bill in the Court of Chancery, to restrain the defendants from trespassing upon the south half of Lot No. 15, in the 9th concession of *Winchester*, and to obtain possession of the lands, and asking for an account of the damages arising by the trespasses of defendants.

The defendants, other than *McKay*, the appellant, did not contest the respondent's claim. The appellant denied the respondent's title to the land, setting up that the tax sale of March, 1856, was invalid, owing to five years arrears of taxes not being due when the sale took place, and claimed title thereto in himself by length of possession.

The following extract of p. 132, of Book "B" belonging to the office of the Treasurer of the united counties of *Stormont*, *Dundas* and *Glengarry*, was fyled in the case:

WINCHESTER.

Lots.	Con.	Grantees.	Acres	1841	1842	1843	1844	1845	1846	1847	1848	1849	1850	1851	1852	1853
15	9	Chloe Froom. D.	200	Psh.	Psh.	Psh.	Psh.	Psh.					1-0-3 1-0-3 40-7		S ½ 5-6	S 7-3

1854	1855	1856	1857	1858	1859	1860
Dec. 1853 and Addition.	May 1854 and Taxes of 54	Dec. 1854 and Addition.	May 1855 and Taxes of 55.	Dec. 55 and Addition Tax of 55.	May 56 and Tax of 56.	
N ½ 1-0-3 2- 63-5 S ½ 1-13- 3-3	N ½ 1-2-3 S ½ 1-16-3 6-5	N ½ 1-1-3 2-1 2-2-3 4-3	N ½ Sh 1-3-4 S ½ Sh 2-16-11 11-10	S ½ 11-10 1-4	S ½ 13-2 12-0	

29

(1) 2 Ont. App. Rep. 569.

1879

McKAY v. CRYSLER.

The Treasurer in his evidence stated that these blanks indicated that no taxes were paid to him for these years, and that the south half of Lot 15, being charged for taxes for the years '46, '47, '48, '49 and '50, and for the years '52, '53, '54, the total sum amounting to £2 6s. 11d., he returned it to the Sheriff to be sold, and sent his warrant, on 1st August, 1855, to the Sheriff, to realize taxes for these years.

The evidence referring to the manner in which the Treasurer's books were kept, and in explanation of the entries made in the book, is reviewed at length in the judgments hereinafter given.

The case was heard before *Proudfoot*, V. C., at the Chancery Sittings at *Kingston*, in May, 1876, who pronounced a decree in favor of the defendant, and directed the plaintiff's bill to be dismissed.

This decree was re-heard at the instance of the plaintiff before the full Court, who reversed the decree of *Proudfoot*, V.C., *Blake*, V.C., delivering the judgment of the Court. The defendant thereupon appealed from the order and decree on re-hearing to the Court of Appeal in *Ontario*, when judgment was given affirming the decree of the Court of Chancery on re-hearing, and dismissing the appeal therefrom.

The principal question in dispute in the Courts below, as well as on this appeal, was the validity of the sale of the land in question for taxes, which took place on the 1st of March, 1856, through and under which the plaintiff claims title.

Mr. *Leggo* and Mr. *Gormully* for appellant:

The appellant contends that the sale of land for taxes which took place on the 1st March, 1856, through and under which respondent claims, is invalid. The first act of assessment was 59 Geo. 3. c. 7, and under that act wild unoccupied land, having no owner resident

1879

McKAY v. CRYSLER.

in the township, could not be assessed or sold. The Quarter Sessions evidently took no action to tax non-resident lands, for the simple reason that under Ss. 2, 3 and 7 they were compelled to raise all the money required from the property and persons mentioned in those sections; and therefore resort to the non-resident lands would be, not only useless, but wrong. This view of the statute is well and fully explained by *Wilson*, J., in *Cotter* v. *Sutherland* (1).

There can be no doubt that the treasurer taxed this land, without the slightest authority, the maximum of the taxation under the statute, which was one penny in the £. This tax is called the "Land Tax."

The only statute under which this property could be taxed until 1850 was 59 Geo. III. c. 8 sec. 3, and that gave only a discretionary power to put a tax on wild lands, provided it did not exceed a certain sum. It is not pretended in this case that the Quarter Sessions ever moved in the matter. There is no evidence that they ever struck a rate in virtue of this statute, and if the rolls of the quarter sessions were never produced, it was no doubt because they did not move.

The only tax for which this property was liable was the "road tax," of one-eighth of a penny on every acre of wild land. This tax became a charge on the land by force of the statute and did not need the intervention of the Quarter Sessions or assessors.

There were, therefore, two taxes which the treasurer collected—the "land tax," which the appellant submits was an illegal one, and the "road tax," which he concedes was properly leviable.

The £1 0 3 appearing on the extract from the treasurer's book, as forming part of the sum of £2 6 11, for which the property was sold, is made up of this illegal

(1) 18 U. C. C. P. 401.

1879

McKAY v. CRYSLER.

"land tax" of one penny in the £, and of the legal and valid "road tax" of one-eighth of a penny per acre. The entry in 1850 column is as follows: £1 0 3 } £0 4 0 7. But there is no evidence what the taxes were for that year, nor explanation given. Then, what right had the assessor to divide the lot and put against one-half the taxes which should have been put against the whole lot? It might perhaps be explained by the fact that in that year the whole system of taxation was revolutionized by the passing of the statute 13 and 14 Vic., c. 67, known as the "Act of 1850." By this act the power of assessing was transferred to the municipal councils.

The first step under the new system was to ascertain the amount of arrearages due on each lot of land up to 1st January, 1851. Sec. 46 required the county treasurer to perform this duty,—to certify the list and arrears to the municipal council:—these were to be certified to the township clerk, who was directed to add the amount to the sums raised by By-Law under the new system and payable in 1851, *which aggregate was to be collected with the taxes for that year.* In column 1851 there is a blank.

It must be assumed that these officers performed their duties, and it follows that, if the taxes for the year 1851, imposed by the new authority of the county council, were actually collected, the sum of £1 0s. 3d. was also collected. Now, how were these taxes to be collected, and to whom were they to be paid? Sec. 40 provides for this;—it declares that "it shall be the duty of the *collector* (not the treasurer of the county) to receive taxes upon the lands of non-residents, if tendered to him within the time of his collection." Sec. 41 provides that, on or before the 14th December of each year, each collector shall return his collector's roll to the treasurer of the *township* (not the *county* treasurer) and pay over the amount collected to him. Sec. 42 provides that if the

collector cannot collect the taxes (in this case the taxes imposed by the county council for 1851, together with the £1 0s. 3d.) he shall make a return to the *township* treasurer, and also to the *county* treasurer, shewing the reason why he cannot collect, by inserting in each case the words "non-resident," or "no property," or "no property to distrain," or as the case may be, and having done this under oath, he shall be credited with the amount, and "*the account shall be sufficient authority to the county treasurer*" to sell the lands. Sec. 32 points out the mode of preparing the collector's rolls, and sec. 33 permits the county treasurer to receive, if so desired, the non-resident land tax; but it does not interfere with the *duty* of the collector to secure its payment under sec. 40. This clause is highly important.

Under this system the county treasurer must enter in his book the amounts reported to him by the collector as unpaid. If the collector had returned the taxes for the year as unpaid, we should have found an entry in that column, either of a sum composed of the £1 0s. 3d. and the taxes imposed by the county council, or of the amount of taxes imposed by the council, without the addition of £1 0s. 3d.; but in the absence of such an entry we are compelled to believe that the 1851 taxes were paid to the collector; and as we must assume that officer to have obeyed the positive injunctions of sec. 40, we must also assume that with this he collected the £1 0s. 3d., and this is the necessary legal inference unless displaced by positive evidence to the contrary.

The result is, that on the 31st December, 1854, up to which date the taxes are computed for which the warrant for sale was issued, there were not five years' taxes in arrear. In fact, there were not five years in arrear, even adding 1851, and the default necessary to warrant a sale can not be made out without using

1879

McKAY v. CHRYSLER.

part, at least, of the £1 0s. 3d. for the purpose, and this, as has been seen, was doubtless paid along with the taxes of 1851.

The appellant further submits that the Assessment Act of 1859, 16 *Vic.*, c, 182, is the only curative one on which the respondent can depend, all prior ones having been passed subsequent to this sale, and not being retrospective; and he submits that no sale is valid unless there be full five years' arrearages of taxes due before the issue of the Treasurer's warrant.

Now, so far as the 155 sect. of the Assessment Act of 1869 affects this case, we must look upon that statute as an *ex post facto* legislation, and the Court should put the strictest possible construction on it, if we have proved that the land was not sold for the proper arrears of taxes. We contend this Act cannot make a sale valid which is invalid: see *Hamilton* v. *Eggleton* (1). It does not validate anything but defects in conveyance, and no matters subsequent to the sale.

The learned counsel referred also to *Proudfoot* v. *Austin* (2); *Austin* v. *Armstrong* (3); *Kempt* v. *Parkyn* (4); the cases collected in Mr. *Harrison's* Municipal Manual, Ed. of 1878, pages 682 *et seq.* and pages 716 and 717; and the remarks of *Draper*, C. J., in *Payne* v. *Goodyear* (5), on *Cotter* v. *Sutherland* (6).

Mr. *Maclennan*, Q. C., and Mr. G. M. *Macdonnell*, for respondent:

There is nothing in the statute of 59 Geo. III, c. 7 to warrant appellant's contention that wild lands could not be assessed. A value is put on wild land for the purpose of taxation (sec. 2,) and by sec. 7 the quarter sessions to whom the assessment roll was sent determined the rate to be fixed, and the fact of their striking the

(1) 22 U. C. C. P. 536.
(2) 21 Grant 566.
(3) 28 U. C. C. P. 47.
(4) 28 U. C. C. P. 123.
(5) 26 U. C. Q. B. 448.
(6) 18 U. C. C. P. 401.

rate affected the wild lands, as well as the lands of owners resident in the township; see also secs. 13, 14 and 15. Then, under the Act 59 Geo. III, c. 8 sec. 3, a positive definite tax was imposed upon all wild land for road purposes. We do not prove, it is true, any action of the quarter sessions, but the treasurer's evidence and book clearly shew that taxes had been imposed, and were in arrear for more than five years. The entries made in the book in 1850 and 1853, we contend, are evidence of the correctness of the arrears. It must be assumed the quarter sessions imposed the full rate and the treasurer, ascertaining the fact, made up the amount in accordance (1). Then also, we have the fact that, in 1850, the statute required the treasurer to obtain from the best information he could get what the arrears were. He tells us what he did, made his enquires carefully and the £1 0s. 3d. entered in the column of 1850 of his book is the result of his enquires.

The respondent contends further that, in order to support this decree, he is not compelled to prove that every part of this tax is due. If it is conceded the road tax was due, although the sum was small, the sale is valid, and it was for the appellant to show that it had been paid, which he has not done. But it is contended that this road tax also was paid, because the treasurer could not have left a blank in the column of 1851, if he had received the amount. Now, we have the evidence of *Macdonnell*, who says that the taxes due prior to 1850 should have been paid to him and that they were not paid.

The taxes of 1850 were no doubt paid for the whole lot by the resident on the north half of lot who was *Alex. McDonald*, and the arrears were not collected. But, as he was not a resident on the half lot in question, after that

(1) Best on Presumptions, p. 68; Best on Evidence, p. 426; Taylor on Evidence, p. 1015.

1879
McKAY
v.
GRYSLER.

it was assessed as a non-resident. Then the sale of this land took place under 16 *Vic.*, c. 182, sec. 55, which enacts that whenever a portion of tax is in arrear for five years a sale may be had; and sec. 62, whether the arrears are under this or prior Acts.

The respondent further relies on the fact, as stated by the Vice-Chancellor on the re-hearing, that sec 155 of 32 *Vic.*, c. 36 seems plainly to apply, and thus the sale is validated. It is a limitation Act and its object is to quiet titles.

We say if any tax is due at all, the owner having three years to attack the sale, the title of the stranger who has paid the tax should be quieted after three years. The case of *Jones* v. *Cowden* (1) seems to have determined this point.

The respondent relied also upon the following authorities:—*Proudfoot* v. *Bush* (2); *Bank of Toronto* v. *Fanning* (3); and *Hall* v. *Hill* (4).

Mr. *Leggo* in reply:

There is no section of 59 Geo. III, c. 7, which necessarily imposes a tax on non-resident wild lands. It was only in 1850 that these wild lands were taxed. There is no evidence that in 1850 the tax on the south half was paid. The collector must have found that there were arrears and he had no authority to receive the taxes for 1850 and leave the arrears unpaid. All he could do was to receive the amount charged on the assessment roll.

THE CHIEF JUSTICE:—

In this case there is, in my opinion, no sufficient evidence to shew the land sold was properly assessed, or, if assessed, that when sold there were any taxes in arrear;

(1) 34 U. C. Q. B. 345; 36 U. C. Q. B. 495.
(2) 12 U. C. C. P. 52.
(3) 18 Grant 391.
(4) 22 U. C. Q. B. 519.

so that it is, in the view I take of the case, unnecessary to discuss what amount of arrearages should be shown, or what defects, substantial or formal, are covered by the 155th sec. of the 32 *Vic.*, ch. 36.

The question of assessment and arrearages rests on the testimony of *R. Macdonald*, treasurer of the united counties of *Stormont*, *Dundas* and *Glengarry*, since the month of October 1846. It is as follows on these points:—

Q.—How long have you been so [Treasurer]? A.—Since the month of October, '46.

Q.—You have there with you the treasurer's book in which the arrears of taxes are entered? A.—Yes, in which arrears of taxes for a certain period.

Q.—From what dates? Turn to this particular lot, the south half of 15, in the 9th concession of *Winchester*. A.—The lot in question is charged with taxes for the years' 46, '47, '48, '49 and '50, and for the years '52, '53 and 54. The total sum of the taxes then amounted to two pounds six shillings and eleven pence (£2 6s. 11d), for which I returned it to the Sheriff to be sold.

Q.—Have you your warrant? A.—Yes. It is for arrears of taxes up to the 31st December, 1854. It gives the south half of 15, in the 9th concession of *Winchester*.

Q.—Have you the Sheriff's return? A.—Yes. It says that the south half of 15, in the 9th concession of *Winchester*, was sold to Charles Rattery on the 1st March, 1856, (100 acres), for three pounds seven shillings and eight pence, including costs.

Q.—Was the land redeemed? A.—No.

[Mr. *Macdonnell* here placed treasurer's book before witness, referring to page where lot in question appears.]

Q.—What does that "O" and to "D" mean? A.—By this letter "O" it made the land subject to be sold for taxes; "P. S. H." shows that it was in the Sheriff's hands up to 1845, to be sold for taxes up to 1845.

Q.—So that the taxes for which it was sold were the taxes up to 1845? A.—No, up to 1855.

Q.—The taxes for which it was sold commenced in 1846? A.—Decidedly.

Q.—Then it was the taxes of 1854, going backwards. And what is this blank in 1851? A.—That signifies that it was not returned; at

1879

McKAY v. CRYSLER.

all events it was not taxable by a certain return received from the township.

Q.—In other words, the taxes were paid? A.—I do not know.

Q.—Would there be a blank there if the taxes were not paid? A.—I think so.

Q.—Then the presumption is that they were paid to the township in 1851? A.—Yes, for there is no charge for 1851.

Q.—There is none for 1845 or———? A.—That is the way we used to do the business; that is the system they followed, and I followed it up to 1850, when we got a new set of books.

Q.—You cannot swear that the taxes for '47, '48, and '49 were unpaid, at least from any information you get from these books? A.—The time is so far back that I cannot swear from perfect memory. I say that the system that would be followed when the assessment roll would be sent to us, and we had to examine it, and any lots that we would find upon the assessment roll they were supposed to be put upon the collector's roll, and collected in that roll. A lot that we would find upon the assessment roll we would charge the taxes against it by leaving it blank.

Q.—Can you say, from the mode that you adopted, that the taxes for '46, '47, '48, and '49 were not paid from the entries in the book? A.—Yes.

Q.—You say from looking at the book. Now the book shews blanks in these years. Will you be kind enough to tell me how it is from these blanks that the taxes were not paid? A.—Now, here is a lot (referring to another) that was found on the assessment roll when it came to our office, and the letter "A" was put after the year, signifying that it was assessed and put upon the collector's roll and assessed for the township, but when we found it was not on the assessment roll we left it a blank until the taxes were paid.

By Mr. MAGUIRE:—

Q.—So far as you know, in those years the lot was not assessed? A.—I think not—that is, so far as I know.

By HIS LORDSHIP:—

Q.—Do you say it was assessed or was not assessed? A.—I think it was not assessed. If it was assessed and could be found on the assessment roll the lot would be credited with the taxes in that way.

Q.—Then if it was never assessed for these years there could be no arrears? A.—Well, I think the statute provided—it was assessed according to a certain scale.

Q.—You told Mr. *Maguire* just now that it was not assessed for these years. Can you tell from your books whether the property was assessed? A.—I cannot tell, but I see here, from the system carried

out then, I think they did not assess it for these years, because it was one of those lots that were considered to be wild lots, unoccupied, and nothing upon them.

Q.—Wild lands were assessed in a certain way. A.—An act that was passed in '19 or '20 directed the way in which taxes could be raised on wild lands, and it was according to that scale that the system was carried out that I understood.

By Mr. MACDONNELL:—

Q.—Supposing it was assessed, you do not know of your own knowledge that it was not assessed? A.—That blank is to be taken as they were not paid. There was a new system adopted in '49 or thereabouts. When I was treasurer I got very little assistance from my predecessor by way of opinion, but to inform myself went to Brockville and saw Mr. Buell, who was then treasurer, and he gave me that schednle to point out the system they followed in their county.

Q.—Then it could not be sold for less than eight years? A.—No.

Q. How did you return this to the sheriff as being for sale unless you were certain of these taxes being in arrears? You required all the years from '46 to be in arrears in order to justify the sale? A.—We were instructed to make out schedule of all lots in arrears up to, that would be up to the year '50, including '50, as far as I can remember, and to send the schedule to municipalities so that the officers there would examine it and compare it with their own documents; and any lot that they would say was wrongly charged or ought not to be charged on they erased the return, sending the lots they themselves considered should have been in arrears, and upon that schedule we acted, and this lot here I am convinced they returned as in arrears on that schedule.

Q.—It is very likely that schedule is in your office? A.—It is very likely it is.

Q.—Was the land in question assessed during the years '46 to '50? Can you say from your books that the land was assessed? A.—From the books I can say that the lands were in some arrears for these years. I say so from my books; I may be in error in that; I cannot say positively, but my impression is, whichever way I may be understood—my impression is that that lot has been in arrears for these years, and to strengthen me in that opinion this was examined by my auditors and marked as approved of.

By HIS LORDSHIP:—

Q.—You returned this lot to the sheriff as in arrears for these years? A.—Yes, returned it to the sheriff, and sent my warrant to the sheriff to realize taxes for these years.

1879

McKAY v. CRYSLER.

Q.—You must then have been under the impression that the taxes were in arrears? A.—Certainly I was.

Cross-examined by Mr. MAGUIRE:—

Q.—You said something about that Schedule that had been returned to you, and based your impression that the taxes had not been paid, and I think had been in arrears, upon that Schedule received from the township? A.—There was more reason than that. We were directed to return and make out a Schedule of all land in arrears in our office in each township, and I made out a scale of them, as appeared on the books of my office, and sent them to the township municipalities, so that officers there, who were supposed to have more local knowledge about matters in their own municipalities than we—so that they would examine the Schedule, and if they would find that any lot was wrongly charged or in arrears, to correct the error; and if they found any lot against which charges had been made, if they found that they ought not to be charged with the taxes, they left it out altogether, and they corrected my own lots.

Q.—And this Schedule came back to you and and remained a record in your office? A.—Yes.

Q.—I suppose that the Schedule that contained particulars in regard to these lands is there now? A.—It ought to be.

By Mr. MACDONNELL:—

Q.—In regard to those years in which the entries appear blank, supposing the taxes for these years had been paid, what would the entry in your book be for the years '46, '47, '48 and '49? Supposing they had been paid in any way, what entry would appear in your books? A.—Well, the book in which I enter items received for the lots is in my office; any taxes that have been paid to me as treasurer by any one, I have put down in the book in my office.

Q.—Would you have made any entries in this book of the payments? A.—No.

Q.—Now if payments had been made you, the entries would have been in another book in your office? A.—Yes.

Q.—Have you examined that book? A.—No.

Q.—You have not ascertained in that book whether any payments have been made? A.—No, but I feel pretty sure that no payments have been made to me, otherwise the land would not have been returned to the Sheriff. Before I would make out the warrant I would be satisfied.

I think this evidence quite too loose and unsatisfactory to justify the conclusion that five years taxes were duly assessed against this land, and that five years' or

any number of years' taxes were in arrear at the time the sale took place. With respect to the particulars not helped by the act, they should, in my opinion, be made out beyond all reasonable doubt to the satisfaction of the court, before any man's property should be taken from him by a forced sale such as this; and with respect to all such particulars, the party seeking to dispossess an owner by proceedings to which he is no party should, in the absence of any statutory enactment relieving him from the burthen, be prepared to show very clearly and conclusively, that all the requirements of the statute under which the land has been sold have been strictly complied with, and nothing left to mere theory or conjecture; and as in a case of this kind the records of the county or assessed district, or the officers or books of the officers of the county, or district, ought to furnish conclusive testimony as to all these particulars, I do not think these means of information should be ignored, as it appears to me they have been in this case, and the court be called upon to take this defendant's property from him on evidence so vague and unsatisfactory and inconclusive as has been offered to establish the assessment and arrears in this case. We must, I think, have better evidence, than the mere suppositions, understandings or impressions of the treasurer, or his merely "feeling pretty sure" that no payments had been made to him, (for this is the exact character of his language and of his evidence on most material particulars), without the production of the schedule, which this witness says came back to him and remained a record in his office, and which contained the particulars in regard to these lands, and which the witness says ought now to be in his office, and in the absence of evidence to the contrary must be presumed to be there, but which he says he was not even subpœnaed to produce, and without production, or even examination, of the books in his

1879
McKAY
v.
CRYSLER.

office, in which entries, he says, would have been made if payments had been made.

And as to the entries in the book produced, which, with reference to this ½ lot are as follows:—

WINCHESTER.

LOTS.	CON.	GRANTEES.	ACRES	1841	1842	1843	1844	1845	1846	1847	1848	1849	1850	1851	1852	1853
15	9	Chloe Froom. D.	200	Psh.	Psh.	Psh.	Psh.	Psh.					1-0-3 1-0-3 40-7		S ½ 5-6	S 7-3

1854	1855	1856	1857	1858	1859	1860
Dec. 1853 and Addition.	May 1854 and Taxes of 54	Dec. 1854 and Addition.	May 1855 and Taxes of 55.	Dec. 55 and Addition Tax of 55.	May 56 and Tax of 56.	
N ½ 1-0-3 2- 63-5 S ½ 1-13- 3-3	N ½ 1-2-3 S ½ 1-16-3 6-5	N ½ 1-1-3 2-1 2-2-8 4-3	N ½ Sh 1-3-4 S ½ Sh 2-16-11 11-10	S ½ 11-10 1-4	S ½ 13-2 12-0	

I have been, and am, wholly unable to understand them, or to draw from them any intelligent conclusion as to whether taxes were in arrear or not, nor have I been in the least aided by the evidence of the treasurer; for in answer to a most pertinent question, viz.:—"You cannot swear that the taxes for '47, '48, '49 were unpaid, at least from any information you get from these books?"—to this very plain and intelligent question we have this very unsatisfactory answer: "The time is so far back that I cannot swear from perfect memory"—with this, if not incoherent, certainly to me unintelligible addition: "I say that the system that would be followed when the assessment roll would be sent to us, and we had to examine it, and any lots that we would find upon the assessment roll they were supposed to be put upon the collector's roll, and collected in that roll. A lot that *we would* find upon the assessment roll we would charge the taxes against by leaving it blank."

As I must assume the assessment and arrearages

could have been made clear by reference to the official documents and records, I cannot feel myself justified in taking away this man's land on such unsatisfactory and inconclusive testimony.

I think the appeal should be allowed and the judgment of the Court below reversed, with costs in this Court and in the Court of Appeal, and on re-hearing, and the judgment of *Proudfoot*, V. C., dismissing plaintiff's bill, confirmed.

STRONG, J.:—

Was of opinion that sec. 155 of the Assessment Act of 32 *Vic.*, ch. 36, applied to a case where any taxes were in arrear at the date of the sale. In other respects he concurred in the judgment of *Gwynne*, J.

FOURNIER J. :—

Dans cette cause il s'agit de la légalité de la vente de la moitié sud du lot No. 15, 9me concession du township de Winchester, faite par le shérif des comtés-unis de *Stormont*, *Dundas* et *Glengarry* le 1er Mars 1856, pour arrérages de taxes dues sur ce lot, depuis au-delà de cinq ans, avant le 1er Décembre 1854.

Pour qu'une telle vente puisse être valablement faite, d'après les décisions des cours d'*Ontario*, qui ont fixé la jurisprudence à cet égard, il est nécessaire de prouver que, au moins une partie des arrérages réclamés est due depuis au-delà de cinq ans avant la vente. Le titre du shérif ne suffit pas pour prouver la vente ni l'existence de taxes dues, condition essentielle du droit de vendre (1).

La principale, ou pour mieux dire, la seule difficulté en cette cause, est de savoir si l'intimé (demandeur) a fait cette preuve, sans laquelle il est admis que le titre produit ne lui serait d'aucun service.

(1). Voir opinion de V. C. Blake: *Proudfoot* vs. *Austin*, 21 Grant 566.

1879

McKAY v. CRYSLER.

Le warrant adressé par le trésorier des susdits comtés-unis autorisant, entre autres, la vente du lot en question en cette cause, ainsi que le titre du shérif, déclare que cette vente devait se faire pour des arrérages de taxes dues depuis au-delà de cinq ans avant le 1er Décembre 1854.

La première chose à établir, est sans doute, l'existence d'une taxe légalement imposée, ou par la loi même, ou par une autre autorité à laquelle ce pouvoir a été délégué. Pour faire cette preuve il faut, ou citer le texte de loi imposant la taxe dont il s'agit, ou produire les procédés ou réglements de l'autorité municipale par laquelle cette taxe a été établie.

D'après la jurisprudence citée plus haut, c'est à l'intimé à faire cette preuve. Pour s'assurer s'il s'est conformé à cette condition, il faut d'abord référer à la loi en force à l'époque où la taxe en question est devenue due.

D'après l'état produit par le trésorier, M. McDonald, cette taxe paraît être due pour les années 1852-3 et 4. Pour l'année 1850, il y a l'entrée suivante: £1 0 3 } £0 4 0 7. Pour l'année 1851, il n'y a aucune entrée, ce qui signifie, d'après le témoignage du trésorier, qu'il n'est rien dû pour cette année-là. A moins de supposer qu'une moitié des 40/7 portés pour l'année 1850, ne doive être attribuée à la moitié sud du No. 15 pour les années 1846, 7, 8 et 9, il n'y aurait pas eu, lors de la vente, d'arrérages dus pendant le temps requis pour avoir droit de procéder à cette vente. Mais sur quoi s'est-on appuyé pour fixer le montant de 40/7; comment et pour quelle raison est-il ainsi chargé au compte du lot No. 15, c'est ce qu'il n'est pas facile de comprendre d'après la preuve. Il n'était cependant pas difficile de prouver ce fait par des documents écrits, soit par les listes de cotisations, les rapports des collecteurs, des trésoriers, ou par les livres que ces

derniers sont obligés de tenir d'après la loi, lesquels livres sont déclarés faire preuve *primâ facie*. Ayant négligé de faire cette preuve, et comprenant la faiblesse de sa cause, quant aux arrérages des années 1852, 3 et 4, l'intimé déclare qu'il n'insiste pas sur ce point et se retranche dans une autre position. Il n'est pas nécessaire, dit-il, qu'il y ait cinq années entières d'arrérages dus, il suffit qu'il y en ait une certaine partie due depuis au-delà de cinq ans pour que la vente soit légale. Laissant alors de côté les arrérages pour les années 1852, 3 et 4, l'intimé prétend que le lot en question était par la simple opération de la loi, sans procédé quelconque, sujet à une taxe de $\frac{1}{8}$ de *penny* par acre, imposée par sec. 3 de 59 Geo. 3 ch. 8. C'est en s'appuyant sur cette section que l'intimé essaie de prouver qu'une partie de la taxe était due depuis au-delà de cinq ans.

D'après le statut en question les taxes sont imposées comme suit : 1o. Toute personne dont le nom est inséré sur la liste de cotisation d'un township, sera, en proportion de la valeur de ses propriétés réelles ou personnelles, assujétie à travailler sur le chemin tous les ans. Le nombre de jours est ensuite déterminé dans une certaine proportion d'après la valeur de la propriété. La section 3 déclare que toute propriété cotisable qui, pour une raison ou pour une autre, ne se trouve pas comprise dans la liste de cotisation, sera néanmoins cotisée annuellement à raison de $\frac{1}{8}$ de *penny* par acre, pour être prélevé par le collecteur de la même manière que les autres taxes.

D'après cette disposition un lot inoccupé, mais cotisable, ne pouvait être sujet à cette taxe de $\frac{1}{8}$ de *penny*, (*road tax*), que dans le cas où il n'était pas compris dans la liste de cotisation, et que son propriétaire, s'il était un non-résidant, n'aurait pas demandé de l'y faire insérer. Dans le cas où il faisait une telle demande il devenait exempt de la taxe, et sujet alors à fournir un

1879

McKAY v. CRYSLER.

nombre de journées de travail ou leur équivalant d'après la valeur cotisée de sa propriété.

En référant à la sec. 2 du ch. 7, 59 Geo. 3, on voit que le lot dont il s'agit était cotisable; cette section déclare que les terres incultes, (*uncultivated lands*) seront cotisables, et pour les fins de l'imposition de la taxe, la valeur en est fixée uniformément à 4s. par acre. Toutes ces terres sont traitées de la même manière, soit qu'elles appartiennent à des résidants ou à des non-résidants.

La section 3 oblige les propriétaires à donner aux cotiseurs une liste de leurs propriétés cotisables; la 4ème déclare cotisables les propriétés tenues en *fee simple*, ou en vertu d'une promesse de *fee simple* obtenue en la manière y spécifiée. Le lot 15 dont il s'agit a été acquis de la Couronne par *Chloe Froom* et patenté le 6 Juillet 1807.

Lors de la confection du rôle de cotisation son propriétaire pouvait donc le porter dans la liste de ses propriétés qu'il devait donner aux cotiseurs pour être inséré dans le rôle de cotisation. Dans ce cas le propriétaire devenait sujet pour ce lot, comme pour ses autres propriétés, à fournir une certaine quantité de journées de travail pour les chemins, au lieu d'être soumis comme dans le cas où il était omis du rôle, à la taxe de $\frac{1}{8}$ de *penny* par acre. Ce n'est que dans ce dernier cas que cette taxe peut affecter le propriétaire. Elle ne peut exister de plein droit comme on l'a dit. La loi n'a d'effet et d'application, que si la propriété est omise du rôle, ce n'est qu'après la confection d'un rôle, constatant ce fait, que la taxe peut affecter la propriété omise. Puisque cette propriété pouvait y être légalement portée, on ne peut conclure à l'existence de la taxe de $\frac{1}{8}$ de *penny*, qu'en supposant qu'elle a été omise du rôle. Quelle raison nous oblige de recourir à une telle supposition. Serait-il juste d'adopter un semblable raisonnement lorsque la production du rôle, qu'il était si facile

de faire, eût établi d'une manière positive la véritable position ? Obligé de faire preuve de l'existence de cette taxe, l'intimé devait la faire légalement par la production du rôle d'évaluation, ou celle des livres officiels du trésorier, qui eussent fait preuve *primâ facie* de l'existence des taxes dues. Il me semble que dans le cas actuel, cette preuve devait être faite de la même manière que le trésorier du township ou du comté aurait été obligé de la faire devant une cour, dans une action pour faire condamner un propriétaire à payer ses arrérages de taxe. Aurait-il pu obtenir un jugement sans produire le rôle de cotisation ? Certainement non. Dans le cas actuel il aurait fallu également, pour prouver que le lot en question était, par son omission du rôle, soumis à la taxe de $\frac{1}{8}$ de *penny*, produire le rôle même. En l'absence de cette preuve, un propriétaire qui en était exempté par l'entrée de son lot sur le rôle de cotisation, aurait pu être condamné à payer double taxe. Il n'y en a pas deux qui soient exigibles pour les chemins, l'une payable en journées de travail, et l'autre en argent, $\frac{1}{8}$ de *penny* par acre. L'une des deux seulement est due sur le même lot et il fallait faire voir laquelle des deux est légalment due. Cela ne pouvait être fait que par la production du rôle d'évaluation et des livres du trésorier qu'il était si facile de faire.

Le trésorier *R. McDonald* n'a parlé dans son témoignage que du paiement, et non pas du rôle d'évaluation. Quant au paiement son témoignage est loin d'être suffisant. Il dit que le montant des arrérages de taxe a été établi par une cédule contenant toutes les terres de chaque township en arrérages dans son bureau, laquelle cédule fut envoyée pour correction dans les municipalités du township, et renvoyée à son bureau pour y demeurer de record. Il ne produit pas ce document, dont par conséquent il n'est pas possible de connaître la valeur légale.

1879

McKAY v. CRYSLER.

Au sujet du rôle d'évaluation il n'est fait aucune question. Interrogé pour savoir quelle serait l'entrée dans son livre pour les années 46, 7, 8 et 9, en supposant que la taxe de ces années eut été payée, il répond que le livre dans lequel il fait ces entrées est dans son bureau.

Ce n'était pas son impression qu'il devait donner en témoignage mais les documents dont il fait mention. L'intimé doit s'imputer la négligence de ne pas en avoir exigé la production, et si sa preuve est trouvée insuffisante, c'est à lui-même qu'il doit s'en prendre.

Le défaut de production de la cédule en question, des livres du trésorier, et plus que tout cela, le défaut de production du rôle d'évaluation, rend insuffiante la preuve faite de l'existence d'une quotité quelconque de taxes dues avant la vente.

Cette vente est encore nulle pour la raison que le statut oblige le secrétaire-trésorier à faire dans son warrant adressé au shérif, la distinction entre les les terres tenues en vertu d'une patente de la Couronne de celles qui ne sont qu'à titre de bail ou permis d'occupation, et dont la propriété (*fee*) demeure à la Couronne. Le shérif est également obligé de faire cette distinction dans les annonces de vente. Ni l'un ni l'autre de ces deux officiers ne s'est, dans le cas actuel, conformé à cette disposition de la loi, qui, pour l'omission de cette formalité, impose la peine de nullité. Ce point a été décidé dans la cause de *Hamilton* vs. *Egleton* (1).

Pour faire à cette vente l'application de la section 155, il était nécessaire de prouver qu'il était dû des arrérages de taxe au moment de la vente. C'est la condition indispensable du droit de vendre, sans cela pas de vente légale. Enfin je concours dans l'opinion de l'Hon Juge *Gwynne* sur l'interprétation à donner à la 155me section.

(1). 23 U. C. C. P. 536.

Pour ces divers motifs, je suis d'avis que l'appel doit être reçu et le décret du Vice-Chancelier confirmé avec dépens dans toutes les cours.

HENRY, J.:

The respondent filed a bill in Equity in the Province of *Ontario* against the appellant and two others, alleging, amongst other things, that he was the owner in fee of a certain lot of land in the Township of *Winchester*, and County of *Dundas*, known as the Southern half part of Lot Fifteen, in the Ninth Concession of that Township; that the appellant, for several years previous and up to the time of the filing of the bill, continually trespassed on that lot, by cutting down and removing timber and trees from the same, which he alleges to have been of the value of $1,500, and praying for an injunction against the appellant to restrain him from committing further trespasses thereon—to be adjudged owner of the lot, and awarded damages for the alleged trespasses.

The appellant in his answer: 1st, denies that the respondent was seized in fee simple of the lands in question. 2nd, denies that the respondent had any title to the said lands. 3rd, alleges that he claims title by deed from one *Uriah Manhart*, in 1859, and that he and the said *Uriah Manhart*, and one *Alexander W. Connell*, through whom *Manhart* claimed, had been in the exclusive possession of said lot from the year 1841. That *Manhart* went into and held possession from 1843 till he conveyed to the appellant, and that the latter has held possession under his deed in 1859, from that time till the filing of the bill. 4th, He sets up the Statute of Limitations.

These are the main issues upon which the controversy rests.

The appellant under his deed from *Manhart* is enti-

1879

McKAY v. CRYSLER.

tled to set up a continued possession of twenty-three years, which I think is fully proved, and upon which he could successfully resist any claim made by the patentee, or those claiming through him—they having been so long out of possession.

The respondent, however, claims title by several transfers, commencing with a deed from *Charles Rattery*, who, he alleges, purchased the lot at public auction from the Sheriff of the County, who, on the 1st March, 1856, sold it under a warrant for taxes said to be in arrear for five years previous to December, 1854, and who subsequently, on the 3rd May, 1857, made a deed to him. The question for our decision, appears to me, to be only as to the effect of that sale and deed.

Leaving at present out of consideration the effect of section 155 of 32nd Victoria, in substance the same, as to this case, as sec. 156 of the Act of 1866, in relation to such sales and deeds, it becomes necessary to enquire what proof it would be incumbent on a party to adduce, to successfully maintain an action of ejectment. He should unequivocally in the first place show, by reasonably clear and legal evidence, that the taxes were imposed, either directly by force of some statute, or indirectly by the authorized acts of parties for that purpose duly appointed. In the next place the onus is upon him of showing some arrears for at least five years before the issuing of a warrant to sell land. The respondent contends that both municipal and statutory taxes for roads were in arrear for the required period. As to the first, I can see no satisfactory evidence that during the period in question any taxes upon the lot were assessed or imposed; and if not, could not be in arrear.

It is however claimed that, at all events, "under the Act 59 Geo. 3rd ch. 8 sec. 3, a positive definite tax was imposed upon all wild lands for road purposes."

That Act provided for the amending and keeping in order of Public Highways and Roads.

Section 2 enacted that * * * every person included or inserted upon the Assessment Roll of any Township, reputed Township, or place, should, in proportion to the estimate of his real and personal property stated on said Roll, be held liable to work on the highways and roads in each and every year. Then follows a scale apportioning the number of days work to be done, to the amount of each persons real and personal property.

Section 3 enacts that "every lot or parcel of land in this Province, subject to be rated and assessed, but which, by reason of its remaining unoccupied, or for other cause, *may not be included in the Assessment Roll* * * * shall nevertheless be rated and assessed at one eighth of a penny per acre annually * * * to be levied by distress and sale in case of non-payment, in the same manner *by collectors* in the different districts respectively, as the other rates and assessments shall and may be levied and collected by virtue of the laws then in force for that purpose."

Before this section is applicable, three conditions must, by proof, precede any claim for taxation: 1st. That the land must be subject to be rated and assessed; 2nd. That it has not been included in the assessment roll; and 3rd. That the owner, if non-resident, did not request that he should be rated.

Section 2 of the preceding chapter provides that uncultivated land shall be taxed, and that, for the purpose of taxation, it shall be rated at four shillings an acre as a valuation. It rates all lands alike, whether owned by residents or non-residents, excepting only from the operation of the Act crown property.

Section 3 provides that assessors shall obtain from every ratable *inhabitant* a list of all their ratable per-

1879

McKAY v. CRYSLER.

sonal property and lands, of which they were required to make a true return each and every year.

Section 4 provides "that all lands shall be considered as ratable property which are holden in fee simple, or promise of a fee simple, by Land Board certificate, Order of Council, or certificate of any Governor of *Canada*, or by lease."

Section 12 requires the Surveyor General annually to furnish the Treasurer of each District with lists of granted and other lands.

And section 13 provides, that *all* lands included in such lists of Schedules as granted or leased shall be subject to taxation.

Thus, then, the land in question was liable to be rated for municipal purposes, including the performance of statute labour, and if not included in the Assessment Roll of any year, but only in that event, became subject to the operation of sec. 3 of chapter 8, before recited.

It is argued that, because the land in question was what is called wild or uncultivated land, up to 1854, it could not be rated, but I have shewn that it was clearly ratable, if owned by a resident of the township. For all that appears from the evidence in this case it may have been rated in the assessment rolls for every one of the years in question, and if so, was unaffected by the provision in sec. 3 for the imposition of one eighth of a penny per acre. The respondent, I hold, was bound to show what would necessarily bring the land under the provisions of that section. The means, I presume, if it was not rated in the assessment rolls, were available by the production of the rolls, and no Court can be expected to presume it was not so rated when the law allowed it to be, if the owner were a resident one. Upon that point we have no evidence. *Chloe Froom* was the patentee, and the name is not mentioned or referred to in the evidence. Whether he,

at the time of the trial, was alive or dead; or, if the latter, when he died, with or without issue; whether he, or his legal representatives, resided or not in the township when the alleged arrears occurred, or important parts of them—the evidence does not state. I take it that the regular, and I think the only regular, mode of establishing the fact that the land in question was not rated in the assessment rolls, was by their production, if in existence, which we must presume in the absence of proof to the contrary. If lost or destroyed, secondary evidence of their contents might have been given, if available. Who can say from the evidence that those rolls would not show the land in question to have been rated; and if so, totally exempt from the imposition of the tax levied by sec. 3? The *remainder* from a particular quantity cannot be ascertained till the quantity to be *deducted* is given or ascertained.

So, in this case, no one could tell what lands were subject to the operation of sec. 3, till the contents of the rolls were known. In the absence then of the rolls, I think no evidence of a hearsay character can be allowed. In fact, as to the rolls in question, we have, in the evidence, not the slightest reference, and we are asked to decide as to their contents by intuition or by violent, rash and unreliable presumption, and, through them, turn a party out of property he has purchased and held so long. I cannot think that equity or justice would sustain our conclusion to do so. The respondent purchased, knowing, as he must have done, the possession and title of the appellant; and, as he himself says, as a speculation; the success in which must be by the deprivation of the long acquired rights and interests of the appellant. This he no doubt fully understood, and to secure that success we should not, under the circumstances unnecessarily contribute.

To sustain a rate under sec. 3, it was necessary to

1879

McKAY v. CRYSLER.

prove what the rolls contained, and that the land was not included therein. The evidence of the treasurer shows nothing on the point. It wholly refers to the question of payment, not to facts to show what is the important point, whether or not the rolls included the land in question. I have read over repeatedly and carefully the whole of the evidence, and can find no part of it relating to the contents of the rolls, in the absence of which it is a matter of impossibility for any one to say, whether or not the land in question was, during any one year, subject to the rate imposed by section 3. A party was not liable to perform statute labor under sec. 2 and to be taxed under section 3. The evidence does not enable us to decide under which section the land was liable, and we cannot resolve the doubt by a hap-hazard conclusion upon a point the respondent should have made clear, and in regard to which the evidence was at hand. In deciding such a point under the evidence, we would be as little certain of being right as would be a person called upon to say in which of two hands another had concealed a coin. In all cases the onus of making out a clear *prima facie* case is on the plaintiff, and in none is it more necessary than in ejectment,—which this case substantially is,—by which a party is turned out of his real estate. Every necessary link in the chain must be proved by the plaintiff, and if any one is left, by the plaintiff's own evidence, in a state of doubt and difficulty, law and justice in every way call upon us to adjudge against him.

Under the statute all *uncultivated lands* of residents should, and no doubt in all cases would, be rated in the rolls of assessment; and, by another provision, the *uncultivated lands of non-residents would* appear there also in the name of the owner, if he requested the assessor to rate them. In either case, the rolls would show the

exact facts, and who can say that we have any evidence that in neither of the cases was the land in question rated or assessed in the assessment rolls. It may be objected, that such would be negative evidence, the onus of which was not on the respondent; but that objection is answered by sec. 3 being only operative in case the land is absent from the rolls, and that they, if produced, would show the true position. The tax of one-eighth of a penny was wholly conditional, and dependent on the absence of the land from the rolls, as otherwise a party might be taxed under both sections two and three, which was clearly not intended by the statute. From all that appears, the patentee, his heirs or devisees, may have, during the years in question, been residents of the township, and not only included in the rolls for assessment, but have actually performed statute labor under section 2.

There is another position which is important for consideration. Sections 3, 4 and 8, show that it was the duty of the collectors to collect the taxes under section 3, and if paid to them, there could be no arrears. The taxes in question, as far as the evidence goes, may have been paid to the collectors. If they were alive and procurable they could, if so it was, negative the fact of payment, and, if dead, their returns under oath to the treasurer of the township would be evidence. Sec. 45 of 16 V. ch. 182 provides, that "the production of a copy of so much of the collectors roll as shall relate to the taxes so payable by such party, purporting to be certified by the clerk of the such city, town, township, or village shall be *prima fac e* evidence of the debt."

The treasurer did not know except as to payments to himself; and although he says that the returns of the collectors and schedules are in his office, he does not even speak of any special knowledge he derived from

1879

McKay v. Crysler.

them on that point, although, had he offered to do so, it would not be receivable evidence.

The Acts 59, Geo. 3rd, caps. 7 and 8 were repealed in 1850 by 13th and 14 Vic. chapter 66, which came into operation on the first day of January, 1851, and the provisions of section 3 of chap. 8, under which the tax of $\frac{1}{8}$ of a penny was imposed on all lands not included in the assessment rolls, have not since then been re-enacted. Sec. 3 cannot in any way affect the claim for arrears of taxes for 1851-52-53-54. We must see, therefore, even if there was shown to have been arrears for taxes for 5 years ending with and including 1850, under sec. 3 before mentioned, independently of the fatal objections I have already stated.

Sec. 46 of the Act 13th and 14th Vic. chap. 66 requires the county treasurers, before the 1st of January, 1851, to make out true lists of *all* arrears for taxes up to that date, including assessments for wild lands, with the names of the owners as far as known, and submit them to the county council, and the county clerk is required to certify to the clerk of the proper locality the said arrears, and provides they shall be added to the assessment roll for 1851, and collected in like manner. From the testimony of the county treasurer this was done, and the result would be the addition to the assessment in 1851 of all the arrears then certified to the township clerks, and the consequent power to collect all such arrears. When, then, the evidence shows no arrears for taxes in 1851, the reasonable presumption, in the absence of anything to the contrary, is that all arrears up to 1851 were collected by the collectors. Were it otherwise, the onus of shewing it was clearly on the respondent; and as the return of the collectors are pointed to in the act before mentioned as the satisfactory *prima facie* evidence on all such points, they should have been put in as the best, and indeed the only, reliable evidence.

By section 14, ch. 7, of 59 Geo. 3rd., in force up to January 1851, the treasurer of each district was required to keep an account with every parish, town, township or place within his district, * * * in which account he shall particularly enumerate every lot or parcel of land in the said parish, &c. * * * and shall charge the same with or credit it for the amount of the taxes and rates payable or paid in respect thereof for each and every year. We may fairly assume the treasurer in this case kept such a book, for, in reply to a question put by the counsel of the respondent as to the fact of payments to him of taxes for '46.'47.'48 and '49, he said: "Well, the book in which I enter sums received for the lots in my office; any taxes that have been paid to me as treasurer by any one I have put down in the book in my office" and he says he would not have made any entries in the book then before him–that if payments had been made him the entries would have been in another book in his office; and that he had not examined the latter book.

The attention of the witness was called to a book, which the learned Vice-Chancellor in his notes calls the treasurer's book, a copy of a page of which forms part of the respondent's case. Who the treasurer was, whose book it was said to be, was not stated, or by whom it was kept, or by whom the entries were made. Entries in it appear five years before the witness became treasurer. No evidence shows who made them. It exhibits cabalistic marks, unintelligible to any one unaided by explanations, and I must say such have not been satisfactorily given, in several respects which might be stated. By reference to it, with the explanation given, we learn that the 200 acres, of which the lot in question forms the southern half part, appears from 1841 to 1845 both inclusive to have been rated as a whole; then for four years up to and including 1849 there is *no entry*.

1879

McKAY v. CRYSLER.

In 1850 appears the figures £1 0s. 3d. / £1 0s. 3d. / £0 4 0s 7d. In 1851 there is another blank. Now what does the witness say in regard to them? He says that book is the one in which arrears of taxes were entered. He says further, that the lot in question (100 acres) is *charged* with taxes for the years '46.'47.'48.'49 and 50, and for '52.'53.'54. The book, however, for the first four years being a *blank*, shows no division of the lot and *charges* nothing. He is asked how the blanks show the taxes unpaid, but he evades the question and refers to a mark "A" in reference to another lot not touching the question put. He says further on, "that blank is to be taken as they were not paid" What "blank" he referred to is not shown, but we may, I think, reasonably assume the blank he referred to was for the four years in question. Then again, as to the blank as to 1851, he is asked what that blank means. He replies "that signifies that it was not returned, at all events it was not taxable by a certain return received from the township." How then could he construe the blanks for the four years to mean that there were arrears for those years and that the blank for 1851 meant the very opposite? He says "the presumption is that the taxes were paid to the township in '51, for there is no charge for '51." As far however as the book shews, there is no more charge for the four years than for 1851, and why the "blanks" should be differently understood he did not explain if he could, which, with the data before him, I very much doubt. How the *same mark* or the *same kind of blank* can mean one thing with respect to some years and the opposite for another year, I confess my inability to understand. He says in reply to a question as to the payments for '47.'48 and '49, and when asked to refer to the books he then had for information, "the time is so far back that I cannot swear from perfect memory." Again as to '46 to '50, he says: "From

my *books* I can say that the lands were in some arrears for these years. I say so from my books. I may be in error in that. I cannot say positively but my impression is—whichever way I may be understood—my impression is that the lot has been in arrears for these years." What "books" did he refer to? Certainly not to the one before him, for from that alone he could get no information. He did not examine the proper book to get it, and the contents of it could not be given without its production. He was not subpœnaed, or I presume asked, to produce it, and the only legitimate conclusion is that it would not have aided the respondent's case if produced. The non-descript book referred to in the evidence could not regularly be looked at, even to refresh the memory of the witness, until he first laid the grounds for the permission by shewing the entries were those of the witness himself and made very soon after the occurrences they referred to.

I might show further how incompetent the witness was to prove the essential facts the respondent was bound to establish, but I think I have shown quite enough. To turn a person out of property he bought, paid for, and occupied for so many years, upon such evidence, would be, to my mind, not only perpetrating great injustice, but destroying most salutary rules of evidence upon which the rights of property and even life and liberty depend. When "impressions" are the extent to which a witness can go, I cannot receive such as evidence of facts to make out even a *prima facie* case, where positive and reliable evidence is required, and I know of no rule under which they can be substituted for any purpose, much less for the evidence located in available public documents, which the statute makes evidence.

The statute applicable to this case, 59 Geo. 3, chap.

1879
McKAY
v.
CRYSLER.

7, sec. 7, requires the Courts of Quarter Sessions to apportion the amount to be assessed for the District upon each and every person named in the rolls, according to the provisions of sec. 2 of that act, but not in one year to exceed the rate of one penny in the pound. There is no evidence in the case of such rating and no sale for alleged arrears can therefore be upheld. It was hardly contended by the Respondent that the sale in question could be upheld for the ordinary municipal taxes, but his counsel contended that the sale for taxes under sec. 3 of chapter 8 was regular, and, therefore, the title passed by the Sheriff's deed. I felt great doubts on the argument of the correctness of that contention, and have since then satisfied myself that my doubts were well founded.

In *Blackwell* on Tax Titles (1), a work written apparently with great care and ability, he lays it down that "If land be sold for the non-payment of divers taxes, one of which is illegal and the residue legal, the sale is void; the land must be liable for all the taxes for which it was sold. In such cases all of the proceedings to collect are necessarily void, as it is impossible to separate and distinguish, so that the act should be in part a trespass, and in part innocent." In support of this doctrine he cites thirteen American cases. I will refer to some of them. In *Elwell* v. *Shaw* (2), it appeared that there were five distinct taxes assessed, for the non-payment of all which the land in controversy was sold. The only objection to the validity of the sale was, that in one of the assessments it exceeded by ten dollars and thirteen cents the amount authorized by the statute. The sale was held void. The Court said: "To suffer them" (the assessors) "to exceed this limit would be to subject the citizens to the payment of taxes, to the imposition of which they never as-

(1) P. 192. (2) 1 Greenleaf R. 335.

sented, and to create uncertainty in the amount in violation of the manifest provisions of the statute." The case now under consideration is much stronger where there is no evidence whatever of the imposition and apportionment by the Sessions as the acts require.

A still stronger case than the one just cited in support of the rule is *Huse* v. *Merriam* (1). There the assessment was, $226.62; the amount to be levied was $225 75; excess, $00.87. It was insisted that the proceeding was void, because the assessor had exceeded the levy *eighty-seven cents*. The answer was *de minimis &c.* Chief Justice *Mellen*, giving the judgment of the Court, says, that the maxim is not applicable to such a case, and that "the assessment was therefore unauthorized and void. If the line which the legislature has established be once passed we know of no boundary to the discretion of the assessors."

This doctrine would certainly apply to this case were it not for the legislation by the Validating Acts, 29 and 30 Vic. ch. 53 sec. 156, and 32 Vic. ch .36 sec. 155, *O.* The provisions of the two sections are indentical in language, except as to the time provided for questioning a deed made by a Sheriff or Treasurer.

Section 155 has been under consideration in many cases, and before, I think, all the Superior Courts of *Ontario*, and so far as I can ascertain has been always construed to have no affect unless where taxes were in arrear, some of the Judges holding it was necessary in the application of the section to show some taxes due for the period of five years before the issuing of the Treasurer's warrant; and so appears was the judgment of the Court of Appeal in this case delivered by Mr. Justice *Patterson*. He cited four cases, in which it was held that it was necessary to show some arrears, and two where those arrears should have been for five years,

(1) 2 Greenleaf R. 375.

1879

McKAY v. CRYSLER.

upon which he says he might, but for those decisions, have had some hesitation in arriving at that reading of the words "sold for taxes in arrears."

The case of *Jones* v. *Cowden* (1), was cited in the respondent's factum. I have read the case in both reports, and it differs from this case in one important feature. In that it distinctly appeared that there were arrears, and the judgment is founded on that assumption; the main questions in the case being as to the application of the Registry Acts, and the validity of the sale. Objection to the validity of the Sheriff's deed was taken because arrears were not shown in the absence of the proof that the taxes had been properly imposed by the quarter sessions, and therefore, that there were no arrears, but the Court held the particular objections cured by section 155. Vice-Chancellor *Blake*, in the first sentence of his judgment, says: "It is proved that at the time of the sale in question there were some taxes in arrear, and that a sale actually did take place;" and afterwards "the case is therefore brought within sec. 155 of 32 Vic. ch. 36, *O.*, and so the sale is validated, notwithstanding there may have been defects in the proceedings." Mr. Justice *Burton* said: "I think there is sufficient evidence of a sale, and a deed executed in pursuance of such sale, to bring the case within section 155 of the Assessment Act, and that it is consequently not open to the defendants to impeach the Sheriff's deed by reason of any alleged irregularities which were urged against it at the trial and renewed before us."

There is nothing therefore that I can see in the judgment in that case to weaken the decisions previously given with apparent unanimity, and all of which go to show the necessity of proving

(1) 34 U. C. Q. B. 345; and in 36 U. C. Q. B. 495, in the Court of Error and Appeal.

arrears at the time of the sale, and which necessity of proof I also feel bound to declare. To say that the section was intended to cover any thing more than mere irregularities would be giving to it too extensive an application; and to say that, as in one of the cases cited; where it was clearly shown there were no arrears, the rights of the owner, it might be, absent from the country at the time, should be transferred, through the mistakes or negligence of a public officer, to give credit for taxes paid, would, in my judgment, be going far beyond what I could conceive any civilized legislature could have intended.

I think before the aid of section 155 can be properly invoked, a sale should be proved independently of the recital or mention of that fact in the deed, and that arrears should be shown. In regard to the first, I may here say that, as the validity of the deed depends on the fact of a sale having taken place, a sale should be shown otherwise than by the deed, for the latter is only valid when a sale has been had. No proof having been given of any sale having taken place, and the sale being the point which is to give effect to the deed, I cannot hold it to come in this case within the purview of the section. It is no answer to this objection to urge that after many years the proof might be difficult. That may be one of the consequences of purchasing lands sold for taxes, but I don't think the amount of time elapsed in this case sufficient to call upon a court to presume that a sale did actually take place, unless indeed it was first shown that some diligence had unsuccessfully been used to get proof, either primary or secondary, of the fact. I am of opinion that the evidence does not shew any arrears at the time of the sale, that the want of proof of the sale invalidates the deed so as to take it out of the provisions of sec. 155, and that that section only applies to a sale and deed when taxes are in arrears when a

1879

McKAY
v.
CRYSLER.

warrant is issued. I therefore think the appeal should be allowed and the judgment below reversed.

GWYNNE, J.:—

One of the points pressed upon us by the learned counsel for the respondent was that, four years having elapsed without the Sheriff's deed, under which the plaintiff claims, and which was executed upon the 23 May, 1857, having been called in question, the 156th sec. of the assessment Act of 1866, made that deed now to be wholly unimpeachable, even though no portion of the taxes, for the alleged arrear of which the sale took place, had been due for 5 years, or even though there was no amount of tax whatever due, or in arrear, in respect of the land sold. It may be convenient, that I should address myself to this point, before adverting to the ground upon which the court below has based its judgment.

The fair and legitimate conclusion, resulting from the judgments of all the courts in *Ontario* upon the construction of the Assessment Acts, both before and since the first enactment of the section referred to, according to my understanding of the reported decisions, is, that the section can only be construed to remedy all irregularities and defects existing, when the event, the happening of which the statute has made an essential condition precedent to the creation of the power to sell, has occurred, namely, when some portion of the taxes imposed has been suffered to remain in arrear and unpaid for the prescribed period, which was formerly five years, but now three; and that it cannot be construed as supplying the want of that condition precedent. Sitting as we do here as a Court of Appeal from the courts in *Ontario*, speaking for myself, I must say, that if I should find a judgment of any of those courts affirming the position contended for, I should feel it to be my bounden duty to

raise my voice for reversal of such a judgment, as one which would be, in my opinion, subversive of all security for property, at variance with the plainest principles of justice, contrary to the whole scope, object and tenor of the Act in which the clause is found, and one which could only be arrived at by disregarding the elementary rule for the construction of all statutes, namely: that the construction is to be made of all parts together and not of one part only by itself.

In *Hall* vs. *Hill* in the Court of Error and Appeal, in 1865 (1), *Richards*, C. J., delivering the judgment of the court, says:

The courts in this country have always held that the imposition of taxes on wild lands, and the selling those lands for the arrears of such taxes, with the additions and accumulations to the amount of taxes which these acts require, in effect works a forfeiture of the property of the owner of the lands. In relation to statutes of this class, *Turner*, L. J., in *Hughes* v. *Chester and Holyhead Railway* (2), says: "This is an act which interferes with private rights and private interests and ought therefore, according to all decisions on the subject, to receive a strict construction, so far as those rights and interests are concerned. This is so clearly the doctrine of the court that it is unnecessary to refer to cases upon the subject. They might be cited almost without end."

In that case, in the Court of Queen's Bench (3), *Draper*, C. J., referring to the Assessment Act, in pronouncing the judgment of the court, says:

We must confess we more readily concur with what was said in *Doe* v. *Reaumore* (4): "The operation of this statute is to work a forfeiture, an accumulated penalty is imposed for an alleged default, and to satisfy the assessment charged together with this penalty the land of a proprietor may be sold, though he may be in a distant part of the world and unconscious of the proceeding. To support a sale made under such circumstances, *it must be shewn that those facts existed which are alleged to have created the forfeiture and which are necessary to warrant the sale.*"

In *Payne* v. *Goodyear* (5), *Draper*, C. J., says:

(1) 2 Er. and Ap. Rep. 574.
(2) 7 L. T. N. S. 203.
(3) 22 U. C. Q. B. 584.
(4) 3 U. C. Q. B. O. S. 247.
(5) 26 U. C. Q. B. 451.

1879

McKAY v. CRYSLER.

The primary, it may be said the *sole*, object of the Legislature in authorizing the sale of lands for arrears of taxes was *the collection of the tax*. The statutes were not passed to take away lands from their legal owners, but to compel those owners, who neglected to pay their taxes, and from whom payment could not be enforced by the other methods authorized, to pay, by the sale of a sufficient portion of their lands.

And again, at p. 452:

The power to sell land was created in order to *collect the tax*.

In *Connor* v. *Douglas*, in the Court of Appeal (1), *Richards*, then C. J. of the Court of Common Pleas, (the Court of Appeal then consisting of all the Judges of the Superior Courts,) referring to the above language of the court in *Doe* v. *Reaumore*, draws a distinction between matters of procedure and other matters. Thus he says:

The Judges could not intend their language to apply to a mere defective or informal advertising of the lands for sale.

The language referred to,

(quoting *Doe* v. *Reaumore*, as above, he goes on to say,)

may well apply to all those matters creating a charge on the property, fixing as it were the burden on it, and rendering it liable to be sold. When the charge has once been fixed on the land, *and* the period has elapsed after which it may sold, then the subsequent matters, as to how it may be sold, the manner of selling, advertising, &c., to a certain extent cease to be mandatory, and are, in fact, but the mode pointed out by the statute *how* the property is to be sold, *which by all the requirements of law before the officer was directed to sell it, had been made liable to sale.*

And referring to the judgment of the Court of Common Pleas in the then recent case of *Cotter* v. *Sutherland* (2), he says (3):

I think the language used by my brother *Adam Wilson*, in *Cotter* v. *Sutherland*, in the Common Pleas, is correct, and may be properly applied and laid down as *the rule in those cases*, viz: "We should require strict proof that the tax has been lawfully made, but, in promoting its collection, we should not surround the procedure with too unnecessary or unreasonable rigour."

(1) 15 Grant, at p. 463. (2) 18 U. C. C. P. 357.
(3) At p. 464.

And again, he says:

I would refer to the language used by the learned Judge from pages 405 to 408 inclusive. The conclusion arrived at is that: "Under these Acts there are certain things which must be strictly adopted, otherwise the whole proceedings following them must be void. There must have been an assessment in fact, and made by the properly authorized body. The writ must be directed to the Sheriff, and be returnable at the time named." * * * * * *

"These are essential elements in the constitution of any valid tax sale. There must be a charge rightly created on the land, there must be a power rightly conferred on the Sheriff to sell it. The sale must not be without some reasonable and sufficient notice, nor sooner than he is authorized to sell, nor otherwise than by public auction."

The learned C. J., then, while concurring in the above language, guards himself from being supposed to hold that there may not be in some instances, some other ingredients required than those stated, to make the sale valid.

Draper, C.J., with whom *Mowat*, V.C., concurred, repeated his opinion, that the tax sale acts are to be treated as penal in their character, leading to forfeiture, and that therefore they should be construed strictly. We have in this judgment an affirmation by the Court of Appeal of the views expressed by the Court of Common Pleas in *Cotter* v. *Sutherland*, with the single exception that, whereas the Court of Common Pleas did not incline to regard these Tax Sale Acts as of a penal character, the Court of Appeal seemed to regard them in that light. However Mr. Justice *Wilson*, delivering the judgment of the Court of Common Pleas in *Cotter* v. *Sutherland* (1), affirms the law imperatively to be, that the owner must be a defaulter for the prescribed period of years before his land can be sold. He regards the lawful imposition of the tax as creating a judgment debt, to satisfy which alone the law authorizes a sale. In either view of the statute, namely, whether it be regarded as penal, or as creating a debt in the nature of a judgment, the Acts

(1) 18 U. C. C. P. 389.

1879

McKAY v. CRYSLER.

sanction no sale, except to realize arrears of taxes actually imposed, and some portion of which has been suffered to remain in arrear for the prescribed period. We have here, then, the clearest judicial enunciation of the scope, object and intent of these acts.

In *Hamilton* v. *Eggleton* (1), the Court of Common Pleas, in perfect conformity with the principles above enunciated, held that sec. 155 of 32 Vic., ch. 36, which is identical with sec. 156 of the Assessment Act of 1866, does not make valid a deed executed upon a sale as for taxes in arrear, when, in fact, no taxes were in arrear at the time of the sale. In a matter which appears to me of such great importance, I may be excused for referring to a portion of the reasons given for that judgment, altho' it was pronounced in my own language, with the full concurrence, however, of my brother Judges. After pointing out the several clauses of the Assessment Acts, and shewing their scope to be, as laid down by other Judges in the cases which I have here quoted above, the judgment proceeds :

> The whole object of the Acts, and the whole machinery provided, being for the purpose of enforcing the payment of arrears of taxes, and the only authority to sell conferred by the act being in case of there being such arrears due out of the land and unpaid, there can, I think, be no doubt that the 155th sec. of 32 Vic., corresponding with the 156th sec. of the Act of 1866, relates only to deeds given in such cases as were in pursuance of a sale contemplated by the act—namely, a sale for the purpose of realizing payment of taxes in arrear and unpaid. The only deed authorised to be given being a deed in pursuance of a sale, which was authorized only in the event of there being taxes in arrear and unpaid, the natural construction is, that the 155th section, like all other parts of the act, relates to the like object —namely, that which the Act authorized, not to an event not at all authorized or contemplated by the act—namely, a sale of lands in respect of which there were no arrears of taxes due and unpaid, and the owner of which had never been in any default which called for or justified the intervention of the act.
>
> The object of the clause relied upon, in my opinion, was, as its

(1) 22 U. C. C. P. 536.

language appears to me plainly to express, and as is consistent with the whole tenor of the act, to provide that, when lands became liable to be sold for arrears of taxes, and were sold to recover such arrears, and a deed should be given in pursuance of such sale, that such deed should not be questioned for any irregularity or defect whatever, unless within a prescribed period, but it would be contrary to the whole scope and intent of the act, [which it is to be borne in mind was merely an act to amend and consolidate the several acts respecting the assessment of property], to hold that the object of the clause was to make good, after a period of two years, a deed given under circumstances in which the act had not authorized or contemplated any sale at all should take place—in which, in fact, the very purpose for which alone a sale was contemplated was wanting.

In that judgment attention was also drawn to the provisions and effect of an Act, 33 Vic, ch. 23, to which, however, I propose now to draw more particular attention. That act was passed for the express purpose of making valid sales known to be absolutely invalid, and it enacted that, in cases where lands, which were liable to be assessed, had been sold and conveyed under colour of the statutes, for taxes in arrear, and the tax purchaser at such sale had, prior to the first day of Novr., 1869, gone into and continued in occupation of the land sold, or of any part thereof, for at least four years, and had made improvements thereon to the value of $200, or, in lieu of such occupation, shall have paid at least 8 years taxes charged on the land since the sale, such sale should be deemed valid, notwithstanding any omission, insufficiency, defect, or irregularity whatsoever, as regards the assessment, or sale, or the preliminary, or subsequent steps required to make such sale effectual in law. Provided always, that the statute should not apply, among other cases, to the following, namely, in case the taxes, for non-payment of which the lands were sold, had been fully paid before sale. And it was further enacted, that nothing in the act contained should effect the right or title of the owner of any lands sold as for

1879

McKAY v. CRYSLER.

arrears of taxes, or of any person claiming through or under him, where such owner at the time of such sale was in occupation of the lands, and the same have since been in occupation of such owner, or of those claiming through or under him.

Now, is it conceivable, that the Legislature would have passed this act, so passed for the express purpose of making invalid sales valid, but which excluded from its operation the case of there being no taxes in arrear at the time of the sale, which was the case of *Hamilton* v. *Eggleton*, and the case of the true owner continuing in occupation from the time of the sale, and which, in cases in which it did operate, only made valid sales which had been followed by actual occupation by the tax purchaser for the full period of four years, accompanied by an outlay of $200 in improvements, or, in lieu of such occupation, the payment of taxes accrued due for eight years subsequent to the sale, if there was then a statute in existence having the effect, as is now contended—for this is the whole contention—that, even in a case where the owner of property may have continued in possession regularly, paying all taxes, both before and since the sale, and where, consequently, no taxes whatever were in arrear, nevertheless, if in such case a sale should take place, and a deed be given, as occurred in *Hamilton* v. *Eggleton*, the mere lapse of four years from such wrongful and inexcusable sale should divest the true owner of his property, although he had never been in default, and may have had no knowledge whatever of the sale, until after the lapse of the four years, the purchaser at such invalid sale, should proceed to evict him?

To my mind I must confess that the statute appears to convey a legislative recognition that the Assessment Act of 1866 is not open to the construction contended for.

What a state of society would ours be, what a reproach would it be, not upon our system of jurisprudence only, but upon our state of civilization, if we should be obliged judicially to declare, that such is the frail tenure upon which property and civil rights are held in the Province of *Ontario*.

Let us consider for a moment longer the proposition contended for, that we may be thoroughly familiar with the aspect of a proposition which is asserted in the name of an Act of the legislature. Lands are liable to assessment, whether they are resided upon or not. Those not resided upon, when the owner is not resident within the municipality, (or is unknown, if residing in the municipality,) are assessed upon a separate roll called the "Non-Resident Land Roll." Those upon which the owners reside are assessed against the resident owners personally. Now, as to this latter class first. He may pay his taxes regularly to the proper officer every year; may carefully preserve all his receipts; he may never have been in default at all, and yet, as in *Hamilton* v. *Eggleton*, his land may be sold behind his back without his knowing anything about it. He may continue in possession after the sale, paying his taxes regularly as before, until, after a number of years, he finds he is no longer the owner of his own lands, the fee simple estate therein having, as is contended, passed to a stranger by the mere lapse of two years now, formerly it was four, from the committal by a municipal officer of an unwarrantable act which is called "A Sale under a Power." This may be done without any notice whatever to the owner; for, as advertisement of the sale is part of the procedure only, and as the clause, (according to the contention, and as is conceded,) cures all defects in procedure, the sale may have taken place without having ever been advertised, and without the owner, who was in no default, having ever had any notice whatever that his land was about to be, or had been, offered for sale.

1879

McKAY v. CRYSLER.

Then, the owner of lands assessed upon the non-resident land roll knows that the law permits him to suffer the taxes upon his land to fall in arrear,now for 3 years, formerly it was for 5 years, subject merely to the payment by him for that accommodation of compound interest, at the rate of 10 per cent per annum. Knowing this to be the law, and in perfect confidence in its integrity, he makes his arrangements accordingly. His business takes him abroad for three years. He returns before the expiration of the third year,in time to pay up all arrears, with the accumulated interest, within the period prescribed by the law, and he finds that, immediately after he left the Province, his whole property, consisting of a valuable estate, had been offered for sale without any authority of law by a municipal officer, as for one year's taxes due for the year before he left, when in fact none was due, and that a Deed has been executed by the municipal officer to a stranger, and that more than two years have elapsed since the sale, and he is told by the Courts of Law, where he seeks for redress, that his case is helpless—that, notwithstanding he was never in default, and that the act of the municipal officer was inexcusable and unwarranted, still the lapse of two years from the committal of that unwarranted act has had the effect of divesting him of his estate and and of vesting it in the person to whom the municipal officer so wrongfully, without any legal authority, had executed a Deed purporting to convey it. Surely, if ever there was a case in which, if necessary, judicial astuteness should be called into action to avoid such a construction it is this. But in my opinion no astuteness is necessary, for the proposition seems to my mind to be so shocking that I never could feel myself to be justified in imputing to the Legislature an intent so arbitrary, so subversive of civil liberty, and of the right of the subject to the full enjoyment of his property, as

such a construction would imply, unless I should find the intent expressed in language which admits of no other possible construction, and from which there is no possibility of escape.

But it is said, that unless this construction be given to the act the maxim of law *omnia presumuntur rite esse acta* would be disregarded. The clause relied upon, and other similar clauses in other assessment acts, form the best commentary upon the inapplicability of such a maxim, for it was the repeated illegal acts committed by the public officers in the conduct of these sales which formed the sole excuse for the enactment of these clauses. However, the rights of property are too sacred to be left to the mercy of this maxim: moreover, it never claimed to apply to the giving jurisdiction to deprive a man of his estate. Even in the case of a sale under an execution issued out of the Superior Courts, it is necessary that there should be a judgment obtained against the owner of land, in order to support a transfer of his estate under the execution. Here the contention is that neither a judgment, nor anything analgous to it, is necessary. The maxim, too, only purports to operate *donec probetur in contrarium*, whereas the construction sought to be put upon the act in which the clause in question is found asserts the right to pass an estate by the mere lapse of two years from the committal of an act *proved, or admitted* to have been, at the time it was committed, illegal and wholly unwarranted. If this construction should be established, the first fruits of that decision would be to divest the true original owner of the land, which was the subject of litigation in *Hamilton* v. *Eggleton*, of his estate, which the judgment in that case, so long as the construction it put upon the act is maintained, secured to him; for the action there having been ejectment is not final, and the party who there claimed under the wrongful deed may bring

1879

McKAY v. CRYSLER.

a new action and recover the estate from the rightful owner, if a new construction should be put upon the act by this court.

Again, it it is said that in these cases the innocent purchaser should be protected, but I cannot see that he, however innocent, has any greater claims upon our sympathy than the innocent owner of the property, who would be cruely wronged if the purchaser in the given case should succeed. In a matter so affecting the rights of property, there is something more to be considered than: which party is most entitled to our sympathies? That is a question with which we, as expounders merely of the law, have nothing to do. What the owner of the property submits to our adjudication is, whether or not the language used by the legislature warrants the construction, that the mere lapse of two or four years from the committal by a municipal officer of an utterly illegal and unwarranted act, (whether such act was fraudulent, or only done in ignorance, or by mistake, is alike to the owner) can have the effect of divesting the true owner, who was in no default whatever to the muicipality, and who had been guilty of no breach of any law, of his estate in real property.

In *Proudfoot* v. *Austin* (1), the plaintiff, who was a purchaser at a tax sale, rested his case upon the sheriff's deed alone. *Blake*, V. C., held this insufficient, and that the 155th sec. of 32 Vic. ch. 36 only applies where there was an arrear of taxes due at the time of the sale, and where there has been an actual sale. He adds:

> I think, therefore, that here the plaintiff should have shewn that at the time of the sale there were some taxes due, *and* that an actual sale did take place.

And he remitted the case for further evidence.

This sentence, extracted from the learned Judge's judgment, by no means implies that he was of opinion

(1) 21 Grant 566.

that it was not necessary that some part of the arrears should be due for the period prescribed by the statute; he was simply adjudicating that a sheriff's deed alone was not sufficient, but that proof of arrears of taxes, and of an actual sale for such arrears *under the provisions of the statute, was necessary to be given.*

This judgment is no more authority for the contention that an arrear for any shorter period than the statute has prescribed would be sufficient, than is the expression in the judgment of the court in *Hamilton* v. *Eggleton* (1), that the sec. refers "only to cases of deeds given in pursuance of sales where *some* tax upon the land sold was in arrear."

When the evidence should be offered would arise the question whether what was offered was sufficient. Upon this point I have referred to the records of the court in *Proudfoot* v. *Austin*, and I find that upon the 11th and 25th June, 1875, the Vice-Chancellor took the further evidence which his judgment at the hearing had directed to be given, and that then the treasurer of the county produced the several collectors rolls for the years '52, '53, '54, '55, '56, and '57, shewing arrears of taxes charged upon the lands for each of those years, to the respective amounts following in the order of the years, and which still remained due when the sale took place in 1858, viz.:—£1 9s. 5½d., £3 6s. 7½d., £4 7s. 4½d., £19 5s. 7½d., £18 18s. 5½d., and £19 7s. 2d; and it was upon this evidence and evidence of the sale that a decree was made in favor of the plaintiff upon the 28th June, 1875.

In *Kempt* v. *Parkyn* (2), the Court of Common Pleas held that the section under consideration did not cure the defect that no part of the tax was in arrear for the period prescribed by law, viz.: 5 years in that case, be-

(1) At p. 541.

(2) 28 U. C. C. P. 123.

1879

McKAY
v.
CRYSLER.

fore the Treasurer's warrant under which the sale took place issued.

In the case now in review before us Mr. Justice *Patterson*, delivering the judgment of the Court of Appeal for *Ontario*, says that he does not wish to throw any doubt upon the construction thus put upon the clause in the Court of Common Pleas, although he might have had some hesitation in arriving independently at that reading of the words "sold for arrears of taxes." He adds, however, language amply approbatory of the decision as just and sound. He says, and this is the language of the Court:

> I see nothing objectionable in principle, nor anything unreasonably restrictive of the beneficial operation of the clause, in holding that while it cures defects in procedure, either in the formal assessment of the land, or in the steps leading to and including the sale, its operation is excluded when it appears that the substantial basis of liability, viz.: the fact that a portion of the tax on the land had been over-due for the period prescribed by the law under which the sale took place, is wanting.

This language involves a complete affirmation by the Court of Appeal of the judgments in *Hamilton* v. *Eggleton* and *Kempt* v. *Parkyn*, for if the construction which in these cases is put upon the section is "unobjectionble in principle," and is not "unreasonably restrictive of the beneficial operation of the clause," then the canons of construction imperatively direct that this construction, which is reasonable, wholesome and "unobjectionable in principle," must be preferred to a construction, such as that now contended for, which is unreasonable, unjust and mischievous in the extreme, inasmuch as it would, without any shadow of reason, deprive a man in no default whatever, and guilty of no breach of any law, of his legal rights in real property, without any value or consideration whatever.

In *Nicholls* vs. *Cummings*, reported in the 1st Vol. of the Reports of the decisions of this Court (1), I find langu-

(1) P. 395.

age relating to this same assessment Act confirmatory of that quoted from several of the cases which I have above referred to and conclusive, as it appears to me, upon the clause now under discussion. The question there arose under the 61st sec. of the Act 32 Vic. ch. 36, which enacts that the assessment roll as finally passed by the Court of Revision and certified by the Clerk as so passed

Shall be valid, and shall bind all parties concerned notwithstanding any defect or error committed in or with regard to such Roll.

Upon the Roll, so passed and certified, a party appeared to be assessed for $43,400.00 who had delivered to him an assessment slip stating his assessment to be only $20,900.00. It was contended that this 61st sec. made the Roll as passed binding and conclusive upon the party. I find however at p. 419 of the Report this language in the judgment of the Court:

I think it more consistent with justice that the fundamental rule which ought to prevail is, that the provisions that the Legislature has made to guard the subject from unjust or illegal imposition should be carried out and acted on.

And again at p. 422:

When a statute derogates from a common law right, and divests a party of his property, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed; therefore it has been often held that acts which impose a charge or a duty upon the subject must be construed strictly, and it is equally clear that no provisions for the benefit or protection of the subject, can be ignored or rejected.

And again at p. 427:

It needs no reference to specific authorities to authorise the proposition, that in all cases of interference with private rights of property, in order to subserve public interests, the authority conferred by the Sovereign—here the Legislature—must be pursued with the utmost exactitude, as regards the compliance with all pre-requisites introduced for the benefit of parties whose rights are to be affected.

And the Court held accordingly, that the 61st sec.

1879
McKAY
v.
CRYSLER.

applied only when pre-requisites ordained by previous clauses had been complied with. This case, as it appears to me, if it stood alone, ought to be conclusive authority in this Court, that the essential pre-requisite, which the statute ordains shall occur before the power to sell conferred by the statute comes into being, should occur to enable the clauses in question to apply; that the coming into existence of the power to sell under the conditions prescribed in the statute is an essential element in every deed authorised or confirmed by the statute.

But it is said, that the judgment of the Court of Appeal in *Jones* v. *Cowden* (1), is at variance with, and that therefore, being the judgment of a Court of Appeal, it in effect reversed, the judgment of the Court of Common Pleas in *Hamilton* v. *Eggleton*. If that were the effect of the judgment in *Jones* v. *Cowden*, it ought in my opinion to be reversed here, for the reasons which I have given. But in truth *Jones* v. *Cowden* has never been regarded as at variance with *Hamilton* v. *Eggleton*, or as an adjudication upon the point now under discussion. If it had been, *Kempt* v. *Parkyn* would not have been decided as it was, nor in the case now under review before us would the Court of Appeal itself have expressed itself in the terms it has of the judgments in *Hamilton* v. *Eggleton* and *Kempt* v. *Parkyn*. The court would, on the contrary, naturally have felt itself bound by *Jones* v. *Cowden*, and would have decided this case upon the short point as to the construction of the clause, and have so got rid of the difficulty, with which it seems to have been pressed, in arriving at the conclusion that there was direct evidence of there having been some portion of tax in arrear for five years sufficient to support the sale. A reference, however, to *Jones* v. *Cowden*, will shew that neither did the point which

(1) 36 U. C. Q. B. 495.

arose and was adjudicated in *Hamilton* v. *Eggleton*, nor that which arose and was adjudicated in *Kempt* v. *Parkyn*, arise in *Jones* v. *Cowden*. The tax sale took place in 1839, for eight years arrears of taxes to the 1st July, 1837, made up as follows:—

200 acres at ⅛*d.* per acre under 59 Geo. 3 ch. 8 sec. 3, road tax 2*s.* 1*d.* which for eight years amounted to..	£0	16*s.*	8*d.*
Add 50 per cent, under 9 Geo. 4 ch. 3 sec. 4.....		8*s.*	4*d.*
	£1	5*s.*	0*d.*
Then assessment of 1*d.* on the £ on 200 acres at 4*s.* per acre, under 59 Geo. 3, ch. 7, sec. 3, 3*s.* 4*d.* per acre for eight years.....	£1	6*s.*	8*d.*
Add 50 per cent.....		13*s.*	4*d.*
Total.....	£3	5*s.*	0*d.*

The evidence was that the clerk of the peace, on the 12th July, 1837, certified to the Quarter Sessions that there was this sum of £3 5*s.* due on the lot for eight years ending 1st July, 1837. The chairman made an order that a warrant for sale should issue, and the warrant was issued. *Wilson*, J., in his judgment in the Queen's Bench, says:—

> There is no reason to doubt that the land was actually though, perhaps not formally, taxed.

Now, as to the £1 5s. that was a tax clearly charged upon the land, being a tax directly imposed by statute, so that this amount was certainly due, and for the eight years, whether the 1d. in the £ was properly charged or not. There was no evidence, as in *Cotter* v. *Sutherland*, that it was not—the certificate of the Clerk of the Peace that it was charged upon the land, if not conclusive evidence upon that point would be sufficient *prima facie* evidence. When the learned Judge says that

1879

McKay v. Crysler.

perhaps it was not formally taxed, he was alluding, no doubt, rather to his knowledge of the practice which used to prevail than to anything in the evidence showing it not to have been formally taxed. It was, he says, *actually* done. There was however no question that the £1 5s. for road tax was due and in arrear for the proper time,and a sale did take place to realise £3 5s. arrears of taxes ; all of which was certified by the proper officers to have been imposed upon the land, £1 5s. of which was imperatively and completely imposed by statute directly. There was no suggestion that anything appearing in the evidence raised a presumption, as is contended the evidence in the case now before us does, that this charge had been paid before the sale. The case therefore had all those elements to support a sale which *Hamilton* v. *Eggleton* and *Kempt* v. *Parkyn* pronounce to be necessary ; and forthis reason *Hamilton* v. *Eggleton* appears to have been referred to for the purpose of distinguishing it. There were, however, in *Jones* v. *Cowden* objections taken to the sufficiency of the advertisement of the sale. In the Court of Appeal we have not, unfortunately, the judgment of Chief Justice *Draper*, which, although written, appears to have been mislaid. He certainly was not in the habit of going out of his way to over-rule, or to cast a doubt upon, a judgment of a Court upon a point not at all necessary for the decision of the case before him, and which, in fact, the evidence in the case before him did not raise. If V. C. *Blake* had changed the opinion he had then recently expressed in his judgment in *Proudfoot* v. *Austin*, he surely would have pointedly intimated that change, and he would not have thought it necessary shortly afterwards to take, as he did, the further evidence in *Proudfoot* v. *Austin*, and base his decree upon such further evidence ; but that he had not changed his mind appears from the fact that he based his judgment

expressly upon the ground that it was shown sufficiently in his opinion that at the time of the sale there were taxes in arrear; and, as I have already stated, whatever taxes were due upon the land were so due and in arrear for the period then required. The judgment of *Burton*, J., wherein he says that by reason of the 155th sec. of the Assessment Act it was not open to the defendants to impeach the sale by reason of the alleged irregularities which were urged against it, must be confined to the objections as to the irregularities in the advertisement of the sale, and cannot be extended to refer to a matter which did not exist, and which therefore did not require adjudication, as the case was argued upon the assumption that there did sufficiently appear to be taxes in arrear for the period necessary to warrant a sale.

The result is, that in all the reported cases since the first enactment of the clause under discussion, which have been decided in favor of the purchaser, it was proved that the event, upon the happening of which alone the power to sell comes into existence, had occurred, and that in the only cases in which that event did not appear to have occurred, the title of the original and true owner has been upheld.

Both authority and principle concur, then, in laying down the law to be, as this Court should take this the earliest opportunity of affirming it to be, namely, that the section under discussion does not remove an infirmity arising from there not appearing to have been at the time of the sale some portion of tax due which had been in arrear for the period prescribed by law before the sale. That the section covers all mere defects of form which may have occurred in the procedure to impose an assessment actually charged against the land, and all irregularities and defects in the execution of the power, but cannot,

1879
McKAY
v.
CRYSLER.

upon any principle of justice, be construed to supply or cure the want of that condition precedent, the existence of which is essential to the coming into existence of the power to sell, namely, that some portion of the tax imposed was in arrear for the period prescribed by law, and was still unpaid at the time of the sale.

Until I heard my Brother *Strong's* judgment I had never heard that the case of *The Bank of Toronto* vs. *Fanning* (1) was relied upon as an authority governing the point before us. If I had, I could, I think, have shown that it has no more application than has *Jones* vs. *Cowden*; indeed if it had, being a judgment of the Court of Appeal of *Ontario*, that Court, no doubt, when this case was in judgment before them, would have proceeded upon that judgment, and have followed it, instead of quoting the language which they have used, and which is as inconsistent with the case of *The Bank of Toronto* vs. *Fanning*, being a judgment upon the point, as it is with *Jones* vs. *Cowden* being so.

The Court below has held that the necessary condition precedent has been fulfilled in the case before us. It is necessary therefore to dispose of that point also.

The plaintiff claimed title under a deed bearing date the 23rd of May, 1857, executed by the Sheriff of the United Counties of *Stormont, Dundas & Glengarry*, in pursuance of a sale made by the Sheriff on the first of March, 1856, for arrears of taxes alleged to have been due in respect of the said piece of land up to the 21st of Dec'r, 1854. The years for which these arrears were charged to have become due were the years '46, '47, '48, '49, '50, '52, '53 and '54. The contention of the defendant was, that there was no evidence of any rate having been imposed upon the land in question (which was wild unoccupied land), for the years

(1) 18 Grant 391.

'46 to '50, inclusive, under 59 Geo. III, ch. 7. It was also contended by the defendant, that certain matters appearing in a book produced by the Treasurer of the counties raised a presumption that in the year 1851 all taxes charged for the preceding years were paid, and that no sufficient evidence rebutting this presumption was offered. The effect of this contention, if well founded, would be that the sale in 1856 was illegal, for the reason that no part of the taxes in respect of which the sale took place was due for 5 years.

The learned counsel for the appellant contended, that the judgment in *Cotter* v. *Sutherland*, upon the construction of the 59 Geo. III, ch. 7, and the wild land rate thereby authorized, was erroneous, and desired to bring that judgment in review before us in this case; but it is not necessary to express any opinion upon that point, for the reason that, as was conceded in argument, and as appears by the statute 59 Geo. III, ch. 8, the road tax therein mentioned was, by the statute itself, without more, rated and charged upon the land, and the question presented for our determination is, whether or not there was sufficient evidence of that tax or any part thereof remaining unpaid for 5 years when the sale took place; for sec. 55 of 16 Vic. ch. 182, and subsequent sections, authorized the sale of land for arrears of taxes, whenever a portion of the tax has been due for 5 years. Now, that the tax imposed by 59 Geo. III, ch. 8, s. 3, for road tax, became and was a statutory charge upon the lot in question for the years from '46 to '50 inclusive, I think there can be no doubt. But in order to understand the point raised by the defendant, namely: that the evidence offered by the plaintiff raised a presumption of payment in 1851 of all previous charges, it is necessary to refer to 13 and 14 Vic. ch. 67, which came into operation upon 1st of January, 1851.

The 46 sec. of that Act directed the Treasurers of the

1879

McKAY v. CRYSLER.

several counties to make out, and submit to the municipal council of their county, on or before the 1st of January, 1851, a true list of the lands in their respective counties on which any taxes shall then remain unpaid, and the amount of taxes due on each lot, or part of lot, both for taxes chargeable under the wild land assessment law, and for assessments imposed under By-laws of the municipal councils, and that the said arrears should be certified to the clerk of the proper locality by the County Clerk, and should be added to the assessment roll for the year 1851, and collected in like manner; and by the 33rd sec. it was enacted that it should be the duty of the Clerk making out any Collector's Roll to forward immediately to the County Treasurer a copy of so much of the said Roll as should relate to the taxes on the lands of non-residents. This same 33rd sec. enacted that every Collector, upon receiving his Collection Roll, should proceed to collect the taxes therein mentioned, and for that purpose should call at least once on the party taxed, or at the place of his usual residence, if within the Township, and should demand payment of the taxes charged on the property of such person. Provided always, that the taxes upon lands of non-residents in any township might be paid to the County Treasurer, who, on being thereunto required, should receive the same and give a receipt therefor; and that such County Treasurer should keep an exact account of all sums so received by him, and should pay over the same to the Treasurer of the township to which they should respectively belong. Then, the 34th section enacted that, in case any party should refuse or neglect to pay the taxes imposed upon him for the space of 14 days after demand, the Collector might levy the same by distress and sale of the goods and chattels of the party who ought to pay the same. Then, the 38th sec. enacted that the Collector should receive the tax on

any lot of land separately assessed, or upon any undivided part of any such lot, provided the person paying such tax should furnish in writing a statement of such undivided part, showing who is the owner thereof. Then, by the 42nd sec. it was enacted that, if any of the taxes mentioned in the Collector's Roll should remain unpaid, and the Collector should not be able to collect the same, he should deliver to the Township Treasurer and to the County Treasurer an account of all the taxes remaining due on the said Roll, showing opposite to each separate assessment the reason why he could not collect the same, by inserting the words "non-resident" or "no property to distrain," as the case might be. Then the 45th sec. enacted that the County Treasurer should prepare a list of such lands in each township, &c., &c., upon which any taxes should remain due at the time of the Collector making his return, distinguishing in separate columns, and opposite the respective lots, the amounts due for county rates, and the amounts due for township rates.

The Treasurer of the United Counties was called as as a witness upon behalf of the plaintiff and he testified that taxes, at the rate of 1d. in the £ for the wild land tax, under 59 Geo. 3, ch. 7, and ⅛d. per acre under 59 Geo. 3, ch. 8, were charged upon the land, and in arrear and unpaid in the years '46 to '50 inclusive; and he produced a book, which I understood to have been his Non-Resident Land Roll Book, but which did not appear to have the yearly entries made in it in the manner directed by the statute. In this book, opposite to the lot, viz: 15 in the 9th concession in columns headed respectively with the years '46, '47, '48 49, were blanks, instead of the rate for each year. The Treasurer stated that these blanks indicated, as he swore also the fact was, that no taxes were paid to him for those years.

1879

McKAY v. CRYSLER.

In a column headed with the year 1850 were two entries thus: £1 0s. 3d. / £1 0s. 3d. } 40s. 7d.

These entries were said to represent the amounts as returned to the municipal council in the Schedule furnished by the Treasurer in pursuance of the above quoted directions contained in 13 and 14 Vic. ch 67, as due upon the north and south halves of the lot respectively. In the column under 1851 there was no entry.

Evidence was given to the effect that in 1851 the whole lot was assessed to one *Alex. McDonald*, although in 1850 he had been asssesed for the north half only. In the years from '52 to '60, both inclusive, the south half was returned as non-resident. In the columns headed 1852 and 1853 were entered the taxes rated and imposed for those years only. Now, upon this evidence it was contended that it must be presumed that in 1851 all arrears had been collected by the Township Collector, upon whose roll, under 13 and 14 Vic. ch. 67, the arrears had been placed for the purpose of being so collected. The Treasurer had in his office, as I understand the evidence, the roll as returned by the Collector, which should have shown whether he had or not been paid those arrears, and he also swore that he had a book in his office in which payment of the arrears, if made in 1851, would appear, which book he had not brought to Court with him. The objection, as it appears to me, is not so much one of presumption of payment, arising from entries in the book produced, as an objection to the sufficiency of the evidence to show that at the time of the sale there remained unpaid an arrear of tax for the period necessary to warrant a sale, in the absence of the collector's roll for the year 1851, and of the book which the Treasurer said he had at his office; for if payment was made to the Collector in 1851 of the arrears as charged to the year 1850, and entered upon his roll, there were not arrears due for the

prescribed period to warrant the sale. It certainly seems to have been great negligence upon the part of the plaintiff, and of the Treasurer I think also, (whose duty it was to produce the best evidence the case admitted of, and which the Treasurer swears he had in his office,) that such evidence was not produced to establish the fact beyond all doubt. In a case where a plaintiff claims title under a Power of Sale, such as the power in these cases is, the courts should, I think, be very particular in requiring the clearest evidence that the right to exercise the power arose before they adjudge a man to be divested of his estate, unless the law provides any particular evidence as *prima facie* sufficient in the particular case; and if the case had stopped here I should be decidedly of opinion that the collectors returned roll should have been produced, and that the case should have been adjourned to another day, if that was necessary, as was done in *Proudfoot* v. *Austin*, to have enabled the treasurer to produce the roll, and I gather from Mr. Justice *Patterson's* judgment that this was his opinion also, for he rests his judgment in favor of the plaintiff, upon the effect of the statute 16 Vic. ch. 182, the 51st and 53rd sections of which imposed upon the treasurer the duty of keeping a book in which he should enter from the returns made to him by the clerk of the municipality, and from the collector's rolls returned to him any taxes unpaid, and the amounts so due, and he was required upon the 1st day of May in every year to complete and balance his books, by entering against each piece of land the arrears, if any, due at the last settlement, and the taxes of the preceding year which might remain unpaid, and to enter therein the total amount, if any, chargeable upon the land at that date, and to add 10 p. c. thereto each year.

The main object, no doubt, which the Legislature had

1879

McKAY v. CRYSLER.

in view in requiring this book to be kept by the treasurer, was as well to serve the convenience of the public, who had an interest in the matters so required to be entered, as for preserving in a convenient shape evidence of the charges against the lands; such entries, so made by a public officer, in discharge of a duty imposed upon him by statute, are always received as *prima facie* evidence of the matters so entered.

The treasurer testified to his having performed the duty thus imposed, and that in the book which he did produce he entered under the years 1853 and 1854, as directed, the result; and he moreover pledges his oath to his belief in the correctness of those entries, to make which he had necessarily occasion to refer to the rolls in his office including that of 1851. The entries so made shew the amounts entered on the collector's roll of that year as still unpaid in 1853 and 1854. This evidence, therefore, unless and until displaced, shews that there remained still, as a charge upon the land, so much of the amount at least as consisted of the road tax imposed by 59 Geo. 3 ch. 8, and the accumulations thereon for interest: so that a sale was warranted within the provisions of the statute, as some portion of tax charged upon the land was due, and in arrear for the required period. No attempt was made to displace this evidence, which no doubt would have been, if it could have been, done. For this reason I am of opinion that the appeal should be dismissed, with costs.

Appeal allowed with costs.

Solictors for appellant:—*Stewart, Chrysler* and *Gormully.*

Solicitors for respondent:—*Macdonnell* and *Mudie.*