RICHARD CHURCH ..... APPELLANT; 1880

AND *March 23.
*June 21.

WILLIAM JOHN FENTON ..... RESPONDENT.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of lands for taxes—Indian lands—Liability to taxation—Lists of lands attached to warrant—32 Vic., ch. 36, sec. 128, O., and sec. 156, ch. 180 R. S. O.

In September, 1857, a lot in the Township of *Keppel*, in the County of *Grey*, forming part of a tract of land surrendered to the Crown by the Indians, was sold, and in 1869, the Dominion Government, who retained the management of the Indian lands, issued a patent therefor to the plaintiff. In 1870, the lot in question, less two acres, was sold for taxes assessed and accrued due for the years 1864 to '69 to one *D. K.*, who sold to defendant; and as to the said two acres, the defendant became purchaser thereof at a sale for taxes in 1873. The warrants for the sale of the lands were signed by the warden, had the seal of the county, and authorized the treasurer "to levy upon the various parcels of land *hereinafter mentioned* for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands claimed by plaintiff. The lists and the warrant were attached together by being pasted the whole length of the top, but the lists were not authenticated by the signature of the warden and the seal of the county.

By sec. 128 of the Assessment Act, 32 *Vic.*, ch. 36, *O.*, the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c.

Held, affirming the judgment of the Court below (1), that upon the lands in question being surrendered to the Crown, they became

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

(1) 4 Ont. App. Rep. 159.

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ordinary unpatented lands, and upon being granted became liable to assessment.

2. That the list and warrant may be regarded as one entire instrument, and as the substantial requirements of the statute had been complied with, any irregularities had been cured by the 156th sec., ch. 180 Rev. Stats. *Ont.* (*Fournier* and *Henry*, J. J., dissenting.)

THIS was an appeal from the judgment of the Court of Appeal for *Ontario*, affirming the judgment of the Court of Common Pleas (1), discharging a rule *nisi* to set aside a verdict for the defendant, and to enter a verdict for the plaintiff.

The facts appear in the judgments.

Mr. *Boyd*, Q. C., for appellant:—

The sales were not legal, there having been no proper authority to the treasurer to sell. Both sales were had under the Assessment Act of 1868-9. Sec. 128 of the Act requires the warden to authenticate the lists of lands in arrears with his signature and the seal of the corporation, &c. Here there was no authenticated list, and all the warrant directs is the sale of "the land hereinafter mentioned," and there is no lands in it; the warrant is a complete instrument in itself, it makes no reference to any list attached, and the list that is attached, which is without seal or signature, makes no reference to any warrant. You cannot prove by parol evidence that the statutory provisions have been complied with. Where the statute requires a particular thing to be done, you cannot deprive a man of his property until it is done. *Hall* v. *Hill* (2); *in re Monsell* (3); *in re McDowell* v. *Wheatly* (4).

The warrant was the foundation of the sale, and we contend that the authentication of the list as required by the statute is a condition precedent to and the

(1) 28 U. C. C. P. 384.
(2) 2 Grant's E. & A. R. 569.
(3) 5 Ir. Ch. Rep. 529.
(4) 7 Ir. C. L. R. N. S. 569.

foundation for the warrant. *Kenney* v. *May* (1); *Greenstreet* v. *Paris* (2).

The English authorities with regard to the poor rates are also very applicable. *Re Justices of North Staffordshire* (3).

The 156th section of the Assessment Act is relied on as to the first deed. This section does not make valid all deeds. See *Harrison's* Manual 4 ed., p. 748, and authorities there collected.

Then the lands in question were Indian lands, or lands held in trust for the Indians by the Crown, and were not liable to sale for taxes.

In *Street* v. *The County of Kent* (4) it was held that there was no law rendering liable to assessment Crown lands in *Upper Canada*, except such provisions as were contained in the Acts relative to the assessment of property. 16 *Vic.*, ch. 159, sec. 24, Con. Stat. Can., ch. 22, sec. 27, and 23 *Vic.* ch. 2, sec. 27 only applied to *Lower Canada*, and crown, clergy and school lands, although sold or agreed to be sold, were not liable to taxation unless a lease or license of occupation had been issued to the purchaser, and the section of the Public Lands Act, authorizing the issue of leases and licenses of occupation, was mandatory and imperative; also see *Austin* v. *Co. Simcoe* (5).

The Act 27 *Vic.*, ch. 19. upon which respondent relies, was passed to meet the case of *Street* v. *Co. Kent.*

It is admitted by the Courts below that, prior to this Act, Indian lands, whether sold or unsold, were not liable to taxation; but the learned judges were of opinion that the language of sec. 9 of this Act was broad and general enough to cover them. The appel-

(1) 1 Moo. & R. 56.
(2) 21 Grant 226.
(3) 23 L. J. Mag. C. 17.
(4) 11 U. C. C. P. 255.
(5) 22 U. C. Q. B. 73.

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lant, however, contends that sec. 9 of the Act in question was only intended for public lands, and must be read in connection with the exemption clause of the Assessment Act, to which it is an exception, and this view is supported by sec. 11 of the same Act which amended sec. 108 of the Assessment Act (ch. 55 Con. Stat., U. C.) so as to include the lands made liable by the 9th sec.; and the 108th sec. of the Assessment Act refers only to the Commissioner of Crown Lands and not to the Chief Superintendent of Indian Affairs.

The object was to make these lands free from taxation in order to get a larger amount when sold.

I also contend that the land, by the Confederation Act, was in the Crown as represented by the Dominion Government, and was granted by the Crown after the alleged taxes accrued; the Crown therefore could disregard the taxes, and the patent from the Crown must, in a court of law, prevail against the tax title until the patent has been cancelled or vacated in a proceeding to which the Crown is made a party.

Then my last point is that, as to the two acres, appellant has a statutory right to have a finding in his favor. Until the sheriff executes the conveyance and gives deed, the title remains in the patentee of the Crown.

Evidence that he was purchaser at the tax sale is no title; he was bound to produce the certificate of sale. As a matter of law, our case was complete when we put in our patent from the Crown, and it is for him to prove title.

Mr. *Reeves* for respondent:—

As to this last point, if the objection had been made at the trial, then the defendant would have been entitled to an equitable plea. Here we have a valid deed, and it must be presumed there was a certificate of sale. The deed can only be issued after the certificate has been issued.

The principal point on which my learned friend relies is, that because the list of lands was not authenticated by the signature of the warden and the seal of the corporation, the sale is invalid, and they say sections 156 and 131, ch. 180 Rev. Stats, *Ont.*, cannot cure an invalid warrant. The cases of *Morgan* v. *Perry* (1) and *Fenton* v. *McWain* (2) show such a defect or irregularity would be cured by sec. 156 ; but the manner in which the warrant and list of lands were incorporated made them one instrument, and the list was, under the circumstances, authenticated by the affixing of the seal to the warrant, and there has been a substantial compliance with the statute. The object of the legislature in requiring the seal of the corporation to be affixed to the list, was to identify the list as being the list of lands liable to be sold, and if it is established, either from the construction of the warrant or from other evidence, that the list in question was the list of lands liable to be sold which had been forwarded by the treasurer to the warden, and by him returned to the treasurer with the warrant, this will be sufficient.

The learned counsel also referred to *Cooley* Const. Limit. (3), and to *Torrey* v. *Milbury* (4).

Now, as to the question raised, whether these lands, having been held in trust by the Crown, as Indian lands, should not be liable to taxation, it has been sought to limit the words *public* lands in the Act 27 *Vic.*, ch. 19 ; but why not give a full meaning to these words? This Act was expressly passed for the purpose of doing away with all such distinctions. These Indian lands were present to the mind of the legislature when this Act was passed, and surely some limitation would have been made as to this interest, if they had intended it to be exempted.

(1) 17 C. B. 334.
(2) 41 U. C. Q. B. 239.
(3) 4th ed. p. 648.
(4) 21 Pick. 67.

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The argument based on the fact that the patent was issued by the Dominion Government after the accrual of the taxes, and, therefore, in a court of law, must prevail against the tax title until the patent has been cancelled in a proceeding to which the Crown is made a party, can have no weight, for the patent was issued more than a year before the sale. At the time the taxes were properly assessed, and there was no reason to suppose the land would be sold for the payment of taxes.

Mr. *Boyd*, Q. C., in reply.

RITCHIE, C. J.:—

This was an action of ejectment brought to recover possession of lot No. 22, in the 13th concession of the Township of *Keppel* in the County of *Grey*.

The writ issued on the 28th September, 1877, and was served 13th same month. Plaintiff claims title under letters patent issued by Dominion Government, dated 4th June, 1869.

The defendant appeared, 28th September, 1877, defended for the whole of the land, denied plaintiff's title, asserted title in himself, except as to two acres by virtue of a deed dated 26th September, 1873, from *David Keltie*, who claimed under a tax deed from Warden and Treasurer of the County of *Grey*, dated 10th February, 1872; and as to the two acres, as purchaser thereof at a sale for taxes by the treasurer of the County of *Grey*, on the 18th November, 1873.

The cause was tried on the 11th October, 1877, when verdict was rendered for the defendant. In Michaelmas Term, November 21, 1877, plaintiff obtained a rule *nisi* to set aside the verdict as being contrary to law and evidence, and to enter a verdict for plaintiff. In Hilary Term, February 4, 1878, the rule *nisi* was discharged.

The plaintiff appealed from the judgment of the Court of Common Pleas to the Court of Appeal for *Ontario*,

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and on 22nd March, 1879, that court dismissed the appeal with costs. Against this judgment plaintiff now appeals.

As to the first sale, if it had been irregular for the cause assigned, I think the 155th section, 32 *Vic.*, c. 36, Ont., applies and cures the irregularity. As to the second deed: as to the want of the corporate seal and signature of the warden, while it is much to be regretted that officers who have plain and explicit directions given them do not follow the terms of the statute and literally fulfil its injunctions, still I think, in the case where the statute has been unquestionably substantially complied with, I am not prepared to differ from the Court of Common Pleas and the Court of Appeal and to say that the warrant and list are not to be regarded as one entire instrument, and that the words "hereinafter mentioned" is not such a reference to the list as to incorporate it in the warrant, and so make it form part of the warrant, and so be under the corporate seal and signature of the warden. For the reasons given by the Court below, I am of opinion that, although the lands in question had been Indian lands, they were in the hands of grantees liable to be sold for taxes.

The appeal should be dismissed with costs.

FOURNIER, J.:

Les faits de cette cause donnent lieu aux deux questions suivantes: 1o Le lot de terre en question en cette cause, faisant partie des terres reservées et détenues par la couronne en fidéicommis pour le bénéfice des sauvages, était-il sujet à être vendu pour taxes?

2o La vente qui en a été faite en cette cause était-elle légale et conforme aux dispositions du statut à cet égard?

Quant à la première question je n'hésite pas à déclarer que je concours pleinement dans les raisons données

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par l'honnorable juge en chef *Moss* pour en arriver à la conclusion que le terrain en question était cotisable et partant sujet à être vendu pour arrérages de taxes. Sur la seconde question concernant la légalité des procédés adoptés pour effectuer cette vente, j'ai le malheur de ne pas être du même avis.

En cas de vente pour arrérages de taxes, les procédés à suivre sont indiqués par la sec. 128, 32 Vict., ch. 36 (1). Le trésorier doit d'abord d'après cette section faire une liste en double de toutes les propriétés qui doivent être vendues pour taxes, avec le montant dû par chaque lot mis en regard de tel lot.

Chaque double de cette liste doit être authentiquée par la signature du préfet et le sceau de la corporation, l'un doit être déposé au bureau du greffier du comté et l'autre renvoyé au trésorier avec un warrant y annexé ; ce warrant doit aussi être sous la signature du préfet et le sceau du comté. Ainsi, deux conditions sont impérativement exigées avant de pouvoir procéder à une vente pour taxe—la 1ère, la préparation de la liste qui doit être authentiquée par la signature du préfet et le sceau de la corporation—la 2me, la préparation d'un warrant authentiqué de la même manière par la signature du préfet et le sceau de la corporation. Ce sont deux documents distincts et séparés qui après leur complète confection doivent être annexés l'un à l'autre pour être remis au trésorier. Mais chacun d'eux doit être complet suivant la disposition du statut. Ces formalités sont essentielles pour la validité de chaque document, et elles ne sont pas moins importantes pour l'un que pour l'autre. Un warrant qui ne serait pas

(1) And the warden *shall authenticate each of such lists by affixing thereto the seal of the Corporation and his signature*, and one of such lists shall be deposited with the Clerk of the County, and the other shall be returned to the treasurer, with a warrant thereto annexed, *under the hand of the Warden and the seal of the County*, commanding him to levy upon the land for the arrears due thereon, with costs.

revêtu de la signature du préfet et du sceau du comté serait sans doute considéré comme absolument nul. Pourquoi n'en serait-il pas de même pour la liste qui doit être faite absolument de la même manière et dont la confection doit précéder la préparation du warrant ? Il y a de fort bonnes raisons pour qu'il en soit ainsi. C'est afin sans doute qu'il ne puisse être fait aucune addition quelconque à cette liste et pour protéger les contribuables contre la fraude que la loi exige cette formalité importante de l'apposition de la signature du préfet et du sceau du comté. La loi ayant imposé la même formalité à ces deux documents, dans des termes précis qui n'admettent point de doute, je n'ai pas le droit de faire une distinction et de dire, que nécessaire pour le warrant elle ne l'est pas pour la liste.

Dans le cas actuel la liste des propriétés qui devaient être vendues n'a pas été faite conformément aux dispositions de la sec. 128 ; elle n'est ni signée par le préfet ni revêtue du sceau du comté. Ces formalités n'ont été accomplies que pour le warrant, la liste des propriétés n'est ni signée ni scellée comme le veut le statut,—mais comme elle est annexée au warrant on veut considérer les deux comme ne faisant qu'un seul document. Cette annexion étant aussi une formalité requise par le statut—il m'est impossible de comprendre comment son accomplissement peut dispenser de remplir une autre formalité plus importante exigée par le langage impératif de la loi. Lorsqu'il s'agit de procéder à l'expropriation des individus toutes les formalités nécessaires pour constituer l'autorisation de vendre doivent être remplies. On ne peut y substituer des équivalents. En vain argumenterait-on qu'il arrive souvent que les tribunaux admettent comme valables des écrits privés dont les signatures ont été irrégulièrement apposées,—que même des documents solennels,

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comme les commissions des plus hauts fonctionnaires publics, sont attestés par la signature de Sa Majesté ou du Gouverneur-Général, mise le plus souvent au commencement de ces documents ; la loi n'ayant pas dans ces cas prescrit un mode particulier, il n'y a pas de raison pour déclarer illégale ces sortes d'attestations. Mais la pratique suivie dans ces cas ne saurait justifier une violation aussi manifeste de la loi que celle qui a été commise dans la confection de la liste des propriétés qui devaient être vendues par la municipalité du comté de *Grey*.

Cette liste est la preuve exigée par la loi de l'existence d'une taxe pour laquelle la propriété peut être vendue ; elle tient lieu d'un jugement, et avant de lui en donner l'effet, la loi a voulu qu'elle fût non seulement préparée par le trésorier, mais qu'elle ne pût être mise à exécution par warrant qu'après avoir reçu l'attestation du plus haut officier municipal, afin, sans doute, de mettre les intérêts des contribuables sous la protection de cet officier. Ce n'est pas le trésorier qui est responsable de l'exactitude de cette liste—ce n'est pas à lui que le contribuable lésé, parce que sa propriété y aurait été mal à propos insérée, pourrait s'adresser pour une réparation, mais bien au préfet auquel la loi a imposé ce devoir. C'est lui qui serait tenu responsable des conséquences de toute faute ou négligence à cet égard. La liste en question, est suivant moi, la base de l'autorité pour vendre, c'est le jugement, et le warrant tient lieu du *fi. fa.* dans les cas ordinaires. Le warrant, bien que régulier dans sa forme, ne peut pas plus dispenser d'une liste authentiquée comme le veut la loi, qu'un bref de *fi. fa.* parfait dans sa forme ne pourrait dispenser d'un jugement avant de pouvoir exécuter les biens d'un défendeur.

En l'absence de la liste exigée, il n'y a pas de preuve légale de l'existence d'une taxe, et par conséquent point

d'autorité pour vendre. Cette cause de nullité se rencontre dans les deux ventes qui ont été faites du lot No. 22. Dans la cause de *McKay vs. Chrysler* (1) cette cour a décidé qu'une vente pour taxe était nulle, parce qu'il n'y avait pas de preuve que la propriété vendue avait été cotisée. Le principe de cette décision est applicable à cette cause. Il n'y a pas ici, non plus, de preuve de l'existence d'une dette pour taxe, parce que la seule preuve faite n'est pas celle que la loi requiert pour autoriser une vente. Quant à la nécessité de faire cette preuve, je me borne à référer aux autorités citées dans la cause mentionnée plus haut de *McKay vs. Chrysler* comme parfaitement applicables à celle-ci. Je me fonde aussi sur les autorités citées dans la même cause pour établir que la sec. 156 du ch. 180, R. S. O. ne peut être invoquée pour couvrir la nullité résultant du défaut d'autorisation de procéder à la vente, autorisation qui ne peut résulter que de la préparation d'une liste en la forme imposée par la loi.

Pour ces raisons, je serais d'opinion d'admettre l'appel, mais la majorité de cette cour est d'un avis contraire.

HENRY, J. :—

In consequence of the conclusion which I have arrived at in regard to the warrants under which the lands of the appellant were sold, it is unnecessary for me to discuss the question whether, under the circumstances, they, having been at one time Indian lands, were, when in his possession before his patent, liable to be taxed. I have, however, considered the subject, and have discovered strong reasons why they were not so liable, but as to that part of the case I need give no opinion.

Without the operation of the validating acts the common law throws upon the claimant under a tax deed

(1) 3 Can. Sup. C. R. 436.

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the onus of proving every link in the chain of legal provisions to divest the title of the owner. It is, however, necessary for me to refer but to some of them. The warrants for the sale of the lands were signed and sealed by the warden as prescribed; but they, to my mind, are void for a patent ambiguity on the face of them. They are both in the same form, and each is written on a page of foolscap paper, and bears at the foot the signature of the warden and the seal of the corporation of the County, and

> Authorize, require, empower and command you (the Treasurer) to levy upon the various parcels of land *hereinafter* mentioned for the arrears of taxes due thereon and set opposite to each parcel of land with your costs.

These documents in no other way point to the lands to be levied on, and are, therefore, imperfect. There is no reference in them to any other paper or writing by which the lands could be identified, and the warrants are therefore defective. No lawyer would claim that a warrant for the arrest of a criminal, so referring to the charge made against him, would be good merely by annexing the information to it. No oral testimony can be admitted to supply such a patent defect. The same rule is applicable to the warrants in this case, and the wardens could no more be permitted to say they meant, in them, to refer to the lands mentioned in the lists, than a justice to say he referred in his warrant to the charge made in the information annexed to the warrant. But even if such evidence were admissible, it was not given in this case. Neither of the wardens was examined, and there is no evidence that at the time the warrants were signed or issued the lists were annexed to them. The only persons who could satisfactorily state whether or not, are the wardens themselves—all else is mere hearsay. The treasurers who were the only witnesses examined as to this point

were incompetent to speak to it. There is, too, another fatal objection. No lists as required by the statute were authenticated, and therefore there was no authority at all to issue a warrant.

Section 128 of the Assessment Act of *Ontario*, 32 *Vic.*, ch. 36, required that the treasurer of the county should

> Submit to the warden of such county a list in duplicate of all the lands liable under the provisions of this Act to be sold for taxes with the amount of arrears against each lot set opposite to the same, and the warden *shall* authenticate each of such lists by affixing thereto the seal of the corporation and his signature, and one of such lists shall be deposited with the town clerk, and the other shall be returned to the treasurer with a warrant thereto annexed under the hand of the warden and the seal of the county, commanding him to levy upon the land for the arrears due thereon with his costs.

Before then, the warden had authority to issue a warrant, his duty was first to authenticate the lists. To give himself jurisdiction the statute provided that he should so authenticate them. He had no right to question the wisdom or necessity of the peremptory legislative direction, nor have we. Many good and sufficient reasons might be shown for the provision, but that is unnecessary, for we have no right to speculate as to the sufficiency of them. That was for the legislature to decide, and having done so, it is not permissible for any one to question the decision. To give life or vitality to the lists as records on which to found subsequent proceedings the legislature has provided for doing so in a particular manner, otherwise the lists are in themselves no better than waste paper. They may be correct, or grossly the opposite; and may be the production of an unauthorized person. They are not vouched by any responsible officer, and the legislature has wisely provided that before lands shall be sold the lists must be authenticated in a particular way and the highest official in the county held responsible for its correctness. This is necessary, and was intended for

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the due protection of property from the errors, negligence or frauds of municipal officers. The act of previous authentication of the lists by the warden is as necessary to give him jurisdiction to issue a warrant as if the statute had required that authentication by the act of another—just as necessary as if the provision had been for it to have been by the treasurer, in which case without it the issue of a warrant by the warden would be wholly unauthorized and unjustifiable. Before authentication in the solemn manner prescribed, a duty was thrown upon the warden by a proper inquiry to ascertain the correctness of the list; but that legislative check was wholly withheld in regard to the warrants in this case. Did the legislature intend to leave it as a duty to be performed or not? If it was intended to leave it optional, why require it at all? Independently of the accepted construction of "shall," when employed in a statute by which it is held to be imperative, we are in this case bound by the statutable provision. In sub-sec. 2 of sec. 8 of ch. 1 of the Revised Statutes of *Ontario*, the legislature plainly guides us. It provides that:

> The word "shall" shall be construed as imperative, and the word "may" as permissive.

To make a good and valid list it therefore became necessary to be authenticated as the imperative provision requires, and if not so authenticated a warrant might as legally be issued without any list at all. An execution extended on land without being founded on any judgment would be quite as effectual to sell and convey a man's property as the warrants in this case without the lists being authenticated. I feel bound to say that the warrants in this case gave no authority to sell. It is, however, urged that by sec. 155 of ch. 36 of 32 *Vic.* a title passes by the deed alone, or, at least, that the validity of the deed cannot be questioned after two years from the sale. That section provides that:

Whenever lands are sold for arrears of taxes and the treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding, except as against the Crown, if the same has not been questioned before some court of competent jurisdiction by some person interested in the land so sold within two years from the time of sale.

It has been judicially settled in *Ontario* and by this Court in *McKay* v. *Chrysler* (1), that arrears of taxes must be shown before the sale, and that the provision does not include a case wherein it is not shown such arrears existed. I refer particularly to the judgment of my learned brother *Gwynne* in that case, where in addition to his own views forcibly expressed he cites judgments from the appeal and other courts in *Ontario*. He cites approvingly at page 473 this language used by *Draper*, C. J., in a judgment delivered by him in reference to this statute.

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 be in a distant part of the world and unconscious of the proceeding.

To support a sale under such circumstances *it must be shown that those facts existed which are alleged to have created a forfeiture, and which are necessary to warrant the sale.*

I hold that the perfecting the lists by the authentication prescribed and a valid warrant are necessary. *Blackwell*, in his treatise on tax sales on the subject of similar validating statues, and after discussing the constitutionality of such statutes, says (2):—

Whatever may be the decision upon the question of power, when it properly arises the moral injustice of such legislation cannot be denied, and it will be seen upon an examination of the authorities that when such arbitrary power has been exercised by the legislature, the courts have given a *strict construction* to the law and not extended its unjust operation beyond the very words of the statute (3).

(1) 3 Can. Sup. C. R. 436. (2) P. 103 Ed. 1855.
(3) *Moulton* v. *Blaisdell*, 24 Maine R. 283.

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See also *Hughes* v. *Chester & Holyhead Railway* (1); and the remarks of *Turner*, L. J., in the same direction:

> 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 on the subject. They might be cited almost without end.

I shall hereafter apply this doctrine, and particularly when I come to refer to section 155, and the absence of evidence of a sale within the purview of that section.

By an Act of the *Illinois* Legislature it was declared that the deed should vest a *perfect title* in the purchaser, *unless* the land shall be redeemed according to law, or the former owner shall show that the taxes were paid, or that the land was not subject to taxation; but the Supreme Court of that state, in giving a construction to that statute, state the rule of the common law as to the burthen of proof and the strictness required in this class of cases, and that under that statute several preliminary facts to a legal sale are to be inferred by the deed, and the responsibility of proof shifted from the purchaser to the original owner, but the court deny that that statute will by any fair construction warrant the opinion that the auditor (here the Treasurer) selling land *without authority*, could by his conveyance transfer the title of the rightful owner.

In that case it was not shown that the land had been advertised as prescribed by the statute. The court held that "the publication of notice of sale as required by law was not one of those facts inferred from the deed, nor is the proof thereof thrown upon the former owner. Without proof of this fact, the auditor's deed was not evidence of the regularity and legality of the sale, and consequently conveyed no title to the purchaser." The

(1) 7 L. T. N. S. 203.

case before us is a much stronger one, for, if my contention as to the warrant is right, there is not merely the absence of proof of some necessary fact, but a deed from a party without legal authority to convey. To conclude that a deed of land in the words of the section "sold for arrears of taxes" is not to be questioned at all after two years is, to my mind, a monstrous proposition. I can imagine dozens of cases where the most unjust and improper results would necessarily flow from such a conclusion. It will be only necessary to state one case. It is largely the interests of non-resident owners that have been, or will be, affected. Without any knowledge of arrears existing a sale for (alleged) arrears of taxes takes place by no one authorized to make it, and the treasurer subsequently gives a deed. It would certainly be monstrous to hold that such a conveyance would pass the title, and still the clause in the statute, if literally construed, would make the conveyance available for that purpose. The clause must mean a sale as provided for, and it therefore becomes necessary to show by extrinsic evidence that a sale took place. To invoke the aid of the statute, such is necessary, but here we have no evidence at all that any sale took place. The only witness who refers to the sales says he was not treasurer in 1870, when the first is alleged to have taken place; does not say he was present; no date given or purchaser named, or who the land was sold by. There is no evidence to show the sale took place at the time and place named in the advertisements, and it is equally defective as to the second alleged sale. The newspapers to show the advertisements required by the statute were not put in evidence, except four numbers of the "Gazette" in 1873. No paper or advertisement for the sale in 1870 was produced. No assessment rolls were put in to show the land was taxed, and, in fact, little but hearsay and improperly received evi-

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dence of any taxing at all. In my opinion, it would be a mockery of justice to deprive a man of his real estate by such evidence.

In addition to the objections I have suggested, I think it is necessary to show a legal sale by extrinsic evidence, that is, that it was made by the proper officer at the time and place mentioned in the advertisements, and that the grantee or his assignee became the purchaser. The statute provides that the deed shall be made to the purchaser at the sale or his assigns. The conveyance of the 98 acres is to *David Keltie*, who is represented in the deed as the assignee of *Fenton*, who in it is alleged to have been the purchaser. To this there are two objections. If *Fenton* was the purchaser, that fact should have been proved, otherwise than by the mere statement of it in the deed, and secondly no assignment from him to *Keltie* was shown in compliance with the statute.

If, however, the appellant is considered as not entitled to recover for the 98 acres, I can see no reason why he should not recover for the remaining two acres. At the commencement of the suit he was entitled to recover for those two acres. Until the subsequent deed to the respondent, he had no defence for them. By the common law, as well as by the statute of *Ontario*, he was entitled to a judgment for his costs; and how he can be deprived of them I must say I have failed to discover.

By section 31, c. 51, of the Revised Statues of *Ontario*, it is provided that:

> In case the title of the plaintiff, as alleged in the writ, existed at the time of service thereof, but had expired before the trial, the plaintiff shall notwithstanding be entitled to a verdict according to the fact, that he was entitled at the time of serving the writ and to judgment for his costs of suit.

This was adopted from C. S. U. C. c. 27, sec. 22. Clause

155 does not in any way affect his right to recover *pro tanto*, and as, I think, the necessary proof of the legality of the sale or of the rating was not given, and the warrant and list were defective, he is, under any circumstances, entitled to recover for the two acres.

The views I entertain and have expressed as to the operation of section 155 are in accordance with principles laid down by *Blackwell* on Tax Titles before alluded to in the third chapter, founded on and derived from judgments and decisions of the Supreme Courts in the States of *New York*, *Illinois*, *Michigan*, *Tennessee* and *Ohio*. Those judgments are cited as unanimous in every instance, and are recommended by the able manner in which the cases were considered and disposed of, and in the absence of authorities to the contrary I feel quite safe in following the decisions.

After full and mature consideration I think the appellant is entitled to recover for his whole claim; that the appeal should be allowed and judgment given in his favor with costs.

TASCHEREAU, J., concurred in dismissing the appeal.

GWYNNE, J.:—

I concur that the appeal should be dismissed, but I desire to add, that I am unable to perceive any bearing that my judgment in *McKay* v. *Chrysler* can have upon the present case. I should be very much surprised if anything could be found in that judgment in support of the position that it is competent for this court to suggest, and to act upon the suggestion, that the case of either a plaintiff or defendant was defective for insufficiency of evidence upon a point, not only not made a ground of appeal, but not suggested even in argument as an existing fact in any of the courts through which the case was passed, nor at the trial; if there had been

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any foundation for the suggestion, no doubt, counsel would have made the point. As to the quotation which has been made from my judgment in *McKay* v. *Chrysler*, those observations were applied by me to a point which did arise in that case, and obviously they can have no bearing upon this case, wherein no such point has been made.

Appeal dismissed with costs.

Solicitors for appellant: *Jackes & Galbraith.*

Solicitors for respondent: *James Reeves.*