ONTARIO REPORTS.

CHANCERY.

The Bank of Toronto v. Fanning.

Tax Titles.

The Statute 27 Vic. chap. 19 sec. 4, cures all errors as regards the purchaser at a tax sale, if any taxes in respect of the land sold had been in arrear for five years; this rule applies where an occupied lot has been assessed as unoccupied.

In a suit to impeach a sale of land for taxes, it appeared that about 20 or 30 acres of the lot were cleared and fenced, and a barn was erected thereon, into which hay made on these twenty acres was stored in winter, by the person occupying the adjoining lot under the authority of the proprietor; no one resided on the 20 acres; the owner was resident out of the country and had not given notice to the assessor of the township to have his name inserted on the roll of the township:

Semble, that the lot should have been assessed as occupied.

[In Appeal*—18 Grant, 391.]

An appeal by the plaintiffs from the decree reported 17 Grant, 514.

J. Hillyard Cameron, Q. C., and *Snelling*, for the appeal.

Moss, and *Morrison*, (of Owen Sound), contra.

Wilson, J.—The land was sold for taxes alleged to have been due and in arrear for the years 1857, 1860, 1861, 1863, and 1864.

The sale was on the 1st of November, 1865, under a warrant, the precise date of which is not given, but which it must be presumed was issued more than three months before the sale, according to the Consolidated Statute of Upper Canada, chap 55 sec. 130, under which statute the sale was made; the warrant would therefore bear date sometime before the 1st of August, 1865.

Leaving the year 1857 out of consideration for the present, there would not have been a portion of taxes due for five years† (s. 123) at the time when the warrant was delivered to the sheriff.

The 29 & 30 Vic. chap. 53 sec 156, or the 32 Vic. chap. 36 sec. 155, does not apply, as the bill was filed on the 22nd of September, 1868, before the period of limitation therein mentioned had expired.

The sale then, in my opinion, cannot be supported, unless the taxes for the year 1857 can be considered as taxes due and in arrear at the time of the sale.

The taxes for that year were not paid, and they were rated in fact upon the land, but upon the land as vacant or non-resident, instead of as occupied and resident land, as it is contended should have been done.

The 27 Vic. chap. 19 sec. 4, provides that if any taxes in respect of any lands sold by the sheriff after the passing of that Act shall have been in arrear for five years preceding the first day of January in the year in which the sheriff shall sell the said land, and the same shall not be redeemed in one year after the said sale, such sale and the sheriff's deed to the purchaser of any such lands, (provided the sales shall be openly and fairly conducted), shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through or under them. The object of the statute was to make the sale valid, although the assessment may not have been quite regularly made, or although there were some other informality or irregularity in the way of the sale being such as would otherwise be a perfectly legal sale, so long as any taxes were in arrear for five years, and the land had not been redeemed. The re-enactment of this clause by the 29 & 30 Vic. chap. 53 sec. 131, and by the 32 Vic. chap. 36 sec 130, with the addition to it, "it being intended by this Act that all owners of land shall be required to pay the arrears of taxes due thereon within the period of five years," "(three years 'by the last Act),' or redeem the same within one year after the treasurer's sale thereof," is very conclusive on this point.

In my opinion the irregular or wrongful assessment of this lot in 1857 as an unoccupied or non-resident lot, instead of its having been rated as an occupied or resident lot, cannot now be impeached.

There was in fact a portion of taxes due upon the lot for five years, and as the sale was made after the passing of the 27 Vic. chap. 19, that statute has given validity to the title, which in my opinion, might otherwise have been invalid. It is not necessary to say what would, or will, or may constitute an occupant or an occupation, as I am assuming for the purposes of my opinion that the land was occupied in 1857, and was improperly assessed as an unoccupied lot.

If I had been obliged to do so, it is probable my opinion would have been upon this evidence that the land was not vacant or unoccupied property.

Mowat, V. C.—During the years that the lot in question was returned as unoccupied, twenty or thirty acres of it were cleared land, and this clearing was fenced; there was on the place a barn, which, though out of repair, was capable of being used as a barn, and was from year to year used for storing the hay cut on this lot and on the adjoining lot, by the person who was owner or tenant of the latter, and who cut the hay and used the barn on the lot in question under the authority of its proprietor. I feel great difficulty in saying that this use of the lot did not constitute a sufficient occupation of the lot to make it improper and illegal for the assessor to return the lot as unoccupied; even though when the assessor visited the lot in February or March, there may have been no hay in the barn. There are thousands of parcels throughout the country which belong to persons actually residing on adjoining parcels, and which it would surely be against the intention of the law for the assessor indolently to return as unoccupied, though the visible occupation of them in February or March is not greater than that of this parcel was. The analogous cases which were cited to us from the American and English reports, as well as the reason of the thing, seem to me to support the contention of the appellants on this point. Land which is in use during the season seems to me to be occupied within the meaning of the Act, though in winter there is no produce in the barn, and no person to be seen in the fields. The 19th section of the Assessment Act* required the assessors to make "diligent inquiry;" and an inquiry which does not extend to the occupiers of the adjoining lots is certainly the reverse of diligent.

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* *Present*—Draper, C. J.; Richards, C. J.; Hagarty, C. J.; Wilson, J.; Mowat, V. C.; Gwynne, J.; Galt, J., and Strong, V. C.

† *Ford* v. *Proudfoot*, 9 Grant 478; *Kelly* v. *Macklem*, 14 Grant 29; *Bell* v. *McLean*, 18 U. C. C. P. 416; 27 Vic. chap. 19, secs. 1, 4.

* Con. Stat. U. C. chap. 55.