

Sup. C.]

CHRYSLER V. MCKAY ET AL.

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Then the 45th section 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 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. III., ch. 7, and $\frac{1}{2}$ d. per acre under 59 Geo. III., ch. 8, were charged upon the land, and in arrear and unpaid in the years 1846 to 1850 inclusive, and he produced a book which I understand 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 9th concession, in columns headed respectively with years 1846, '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. In a column headed with the year 1850 were two entries, thus :—

£1 0 3

£1 0 3

40 7

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 & 14 Vict. ch. 67, as due upon the N. and S. 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 assessed for the N. $\frac{1}{2}$ only. In the years from 1852 to '60, both inclusive, the S. $\frac{1}{2}$ was returned as "non-resident." In the columns headed 1852 and '53 were entered the taxes rated and imposed for those years only. Now upon the 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 & 14 Vict. ch. 67 the arrears had been placed for the purpose of being so collected. The treasurer, as I understand the evidence, had in his office the roll as returned by the collector, which should have shown whether he had or had 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 in 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 court 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 forbids 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 collector's 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 rolls; and I gather from Mr. Justice Patterson's judgment that this was his opinion also, for he rests his judgment in favour of the plaintiff, upon the effect of the statute 16 Vict. c. 182, the 51 and 53 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 collectors' rolls returned to him any tax unpaid, and the amounts so due, and he was required, upon the 1st 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 thereon the total amount, if any, charged on the land at that date, and to add 10 per cent. thereto each year.

The main object, no doubt, which the Legislature had in view, in requiring the 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 evidence of the charges against the lands. Such entries so made by a public officer in discharge of a duty imposed upon him by