QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court*)

Corbett v. Taylor.

Taxes—When in arrear—C. S. U. C. ch. 55, sec. 16.

Defendant conveyed land on the 13th of April, 1863, covenanting against arrears of taxes. The property was assessed in February, and the by-law fixing the rate passed in July. *Held* (reversing the judgment of the county court), that the taxes for the year could not be considered as in arrear at the date of the deed, for the amount had not then been ascertained, no rate having been fixed, and they therefore could not be paid.

"Arrears" means something behind in payment; it implies a duty and a default.

Sec. 16 of the assessment act is intended only to fix the fiscal year as regards taxes, and to provide that no matter when the by-law imposing the rate is passed, they shall be considered as imposed for the year; it gives no retrospective existence to the tax.

(Q. B., E. T., 27 Vic.)

Appeal from the county court of Frontenac, Lennox and Addington.

The declaration stated that by deed, dated 13th April, 1863, defendant conveyed in fee to the plaintiff lot number 412 in the city of Kingston, and covenanted for quiet enjoyment, freely and clearly acquitted of and from all arrears of taxes and assessments whatever due and payable upon and in respect of the said lands, &c., &c. *Breach*, that the lands while owned by the defendant were lawfully assessed: that at the time of the making of the said deed there was a legal assessment made and imposed on the said premises, and in consequence thereof the plaintiff was compelled and obliged to and did pay $133, being the taxes assessed, rated and imposed by the corporation of the city of Kingston on the said land for the year 1863; and that after the making of the deed, the said taxes being unpaid, and being a charge and incumbrance on the premises, defendant refused to pay them, and plaintiff then being the owner and in possession was compelled to pay.

Plea.—That the premises were not while owned by defendant lawfully assessed, charged and incumbered with the sum of $133, being the taxes, &c., for 1863.

The plaintiff proved the deed above stated. The city clerk produced the assessment book for Frontenac ward for 1863, containing entries shewing the plaintiff assessed as owner of this lot, and said that by a date in the book the assessment appeared to have been made on the 25th of February, 1863; and one of the assessors swore that the property was assessed on that day. The by-law fixing the rate was passed on the 21st of July, 1863. On the 31st of October, 1863, the plaintiff paid to the collector $133, the taxes due on this property. On the same day the collector drew a draft on defendant for $100, which was not paid, and the plaintiff had to pay it over and above the $133. The collector produced a letter, dated 28th October, 1863, to himself from the defendant, respecting the payment of $100 to himself on account of these taxes, but it was not among the papers sent up to this court.

At the trial, *Kirkpatrick*, for defendant, objected that there were no taxes in arrear at the date of the deed, and no legal evidence of an assessment having been made, that the roll should be returned, &c.

The objections were overruled. The plaintiff had a verdict, and a rule *nisi* obtained for a new trial was afterwards discharged. Against this decision the defendant appealed.

A. Kirkpatrick for the appellant.

Sir H. Smith, Q. C., contra, cited *Lewis* v. *Hillard*, Sid. 374; Petersdorff's Abr. "Covenant," vol. vii., p. 188. Rawle on Covenants for title, 113; Consol. Stats. U. C., ch. 55, secs. 16, 24, 107.

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

We do not think that the evidence established, either as a matter of fact or of law, that at the date of the deed containing the covenant on which this action was brought there was any arrear of taxes and assessments on the land in question.

We take arrears to mean something which is behind in payment, or which remains unpaid, as, for instance, arrears of rent, meaning rent not paid at the time agreed upon by the tenant. It implies a duty and a default.

In that sense, how can it be said that on the 13th of April, 1863, there were arrears of taxes and assessments on these lands. The 16th section of the assessment act, Consol. Stat. U. C. ch. 55, is relied upon as answering this question. It enacts that the taxes or rates levied or imposed for any year shall be considered *to have been imposed for the then current year*, commencing with the first day of January and ending with the thirty-first day of December, unless otherwise expressly provided for, &c.

The interpretation of this section argued for in the present case is, that the taxes imposed for 1863 by a by-law passed in July shall be considered to have been imposed as if the by-law had been passed on the first of January of that year. By thus giving an *ex post facto* existence to the tax it became due in the beginning of the year, and not having been paid was in arrear in April.

We do not so interpret this section of the statute, but read it as intended to fix the fiscal year for all the municipalities, for the purpose of rates and taxes, and as providing that no matter in what part of the year a by-law imposing rates and taxes may be passed, the taxes shall be considered as imposed for the whole current year.

The argument for the plaintiff, if pushed home, amounts to this—that on such a covenant, if entered into on the 2nd of January, the taxes for the current year would be in arrear on that day, if a tax or rate was imposed within the year; and in effect the covenant would thus be broken as soon as it was made, although when entered into no tax or rate had been imposed.

We are, moreover, in this case to construe the covenant, not the statute; and it appears to us to be contrary to the plain meaning of the words used to hold that taxes not imposed, the amount of which is not as yet ascertained, and which therefore cannot be paid, can be in arrear—in other words, that a tax the amount of which is fixed and which is imposed in July can be in arrear in April; nor does the 16th section of the statute in our judgment affect the construction of the covenant.

The fact that the premises were *assessed* in February can make no difference. The assessment, as respects real property, is the mode provided for ascertaining the actual or yearly value or rental thereof; unless it is followed by the imposition of a rate it creates no liability in respect of which there can be arrears. None of the methods pointed out by the statute for collecting and enforcing the payment of a rate can apply until it has been actually imposed.

Appeal allowed.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court*)

In re Tremayne, an Attorney.

Attorney—Roll of court—Striking off.

A certificate of the clerk of the court in which an attorney has been struck off the rolls, and on which the application under the rule of court is made to another court to have the attorney struck off the rolls of that court, should shew the grounds on which he was struck off the rolls of the court from which the certificate was granted. The application should also be for a rule to shew cause and should not be moved for on the last day of term.

(C. P., E. T., 27 Vic.)

On the last day of the term, *McGregor* produced a certificate, signed by the clerk of the Crown and Pleas of the Court of Queen's Bench (and verified by the seal of the court), stating that an attorney, on the twenty-seventh day of May, 1863, had, by order of the Court of Queen's Bench, been struck off the roll of attornies of that court. On this he moved that the said attorney be struck off the rolls of this court.

The rule of Queen's Bench on the subject referred to in Draper's Rules, p. 8, provides, "that whenever an attorney shall be struck off the roll of attorneys by order of the court, the clerk shall forthwith certify such dismissal and the grounds thereof expressed in general terms under the seal of the court, and the court on any similar certificate from the Court of Chancery or the Court of Common Pleas, of any attorney or solicitor of either of the said courts respectively, having been struck off the roll of such court, shall thereupon take proceedings for striking such person, being an attorney of this court, from the roll of attorneys, according to the course and practice and in like manner, and under like cir-