INDEX

New Jersey Supreme Court

J. CHAUNCEY VAN HORN, trading as the Jersey Investment Company,

Plaintiff,

vs.

J. WILLIAM HUEGEL and ALFRED S. CLARK, trading as Huegel & Clark, and Ray Meltz,

Defendants.

Judgment Record

Action at Law.

JUDGMENT FOR DEFENDANTS ON STRIKING OUT COMPLAINT.

(Filed November 1, 1926)

Hugo Woerner, Attorney for Defendant, Ray Meltz.

Lowy & Lowy, Attorneys for Defendants, J. William Huegel and Alfred S. Clark, trading as Huegel & Clark.

J. William Huegel and Alfred S. Clark, trading as Huegel & Clark, and Ray Meltz, the defendants in this cause, were summoned to answer unto J. Chauncey Van Horn, trading as the Jersey Investment Company, the plaintiff therein, in an action at law upon the following complaint:—

(Summons issued September 15, 1923).

Plaintiff, residing in the City of Trenton, in the County of Mercer, and State of New Jersey, says that:

FIRST COUNT.

1. On October 20, 1922, the Collector of Taxes of the City of East Orange, in the County of Essex, and State of New Jersey, sold at public vendue to the plaintiff certain lands and premises situate in the said City of East Orange, and known and designated as lots numbered 141, 143, 145 and 147 in block numbered 532 on the tax duplicate of said City of East Orange, and also known as the lands and premises numbered 165 Park Avenue in said City of East Orange; that said lands and premises were sold to the said plaintiff in fee simple, subject to be redeemed according to law.

2. On the 27th day of October, 1922, the aforesaid Collector of Taxes of the City of East Orange did, by his certain certificate bearing the date last aforesaid, a true copy of which is hereunto annexed and made a part hereof, grant and convey the aforesaid lands and premises to the plaintiff in fee simple, subject to be redeemed according to law.

3. The plaintiff caused the aforesaid certificate of sale, executed and delivered to him by the said Collector, to be duly recorded as a mortgage of lands in the Office of the Register of the County of Essex on the 2d day of November, 1922, in Book V46 of Mortgage for said County, on pages 477, etc.

4. The aforesaid lands and premises were not redeemed from the aforesaid sale until the 9th day of May, 1923.

5. Prior to and until the said 20th day of October, 1922, the said defendant, Ray Meltz, was the owner of the aforesaid lands and premises.

6. The said plaintiff, under the statute in such case made and provided, and from and after the date of recording of the said certificate of sale as aforesaid, became and was entitled to the immediate possession and to all the rents and profits of the aforesaid lands and premises until redemption.

7. The said defendants, J. William Huegel and Alfred S. Clark, trading as Huegel & Clark, and the said defendant, Ray Meltz, did collect and receive the rents and profits of the said lands and premises for the period, and for each and every part thereof, from November 2, 1922, to and until May 9, 1923, which said rents and profits amounted in the whole to $14,025.00, and have failed, refused and neglected to pay the same or any part thereof to the plaintiff.

SECOND COUNT.

1. On October 20, 1922, the Collector of Taxes of the City of East Orange, in the County of Essex, and State of New Jersey, sold at public vendue to the plaintiff certain lands and premises situate in the said City of East Orange, and known and designated as lots numbered 141, 143, 145 and 147 in block numbered 532 on the tax duplicate of said City of East Orange, and also known as the lands and premises numbered 165 Park Avenue in said City of East Orange; that said lands and premises were sold to the said plaintiff in fee simple, subject to be redeemed according to law.

2. On the 27th day of October, 1922, the aforesaid Collector of Taxes of the City of East Orange, did, by his certain certificate bearing the date last aforesaid, a true copy of which is hereunto annexed and made a part hereof, grant and convey the aforesaid lands and premises to the plaintiff in fee simple, subject to be redeemed according to law.

3. The plaintiff caused the aforesaid certificate of sale, executed and delivered to him by the said Collector, to be duly recorded as a mortgage of lands in the Office of the Register of the County of Essex on the 2d day of November, 1922, in Book V46 of Mortgages for said County, on pages 477, etc.

4. The aforesaid lands and premises were not redeemed from the aforesaid sale until the 9th day of May, 1923.

5. Prior to and until the said 20th day of October, 1922, the said defendant, Ray Meltz, was the owner of the aforesaid lands and premises.

6. The said plaintiff under the statute in such case made and provided, and from and after the date of recording of the said certificate of sale as aforesaid, became and was entitled to the immediate possession and to all of the rents and profits, rental value or value of the use and occupation of the aforesaid lands and premises until redemption.

7. That on and prior to the said 2d day of November, 1922, and from thence until the said date of redemption, the said defendant, Ray Meltz, was, by her tenants, in possession and occupation of the aforesaid lands and premises, the rents and profits, rental value or value of the use and occupation of which said lands and premises amounted to the sum of $14,025.00 for the said period from the date of recording of the said certificate of sale to the aforesaid date of redemption.

8. Plaintiff says that the said defendant, Ray Meltz, is liable to him for the rents and profits, rental value or value of the use and occupation of the said lands and premises for the period from the date of recording of the said certificate of sale to the aforesaid date of redemption, and has failed, refused and neglected to pay the same or any part thereof to the plaintiff.

Plaintiff demands against the defendants, as damages, on the first count, the sum of $14,025.00; or in the alternative, against the defendant, Ray Meltz, as damages, on the second count, the sum of $14,025.00.

AMOS M. WALN,
Attorney of Plaintiff.

(COPY OF CERTIFICATE)

$3,774.70 No. 579.

The City of East Orange, County of Essex, State of New Jersey.

Tax Sale Certificate (Chapter 237, P. L. 1918 and the Several Amendments Thereto).

I, W. A. Clapp, Collector of Taxes of the City of East Orange, hereby certify that on the 20th day of October, 1922, I sold to Jersey Investment Company, of the City of Trenton in the County of Mercer and State of New Jersey for Three Thousand Seven Hundred Seventy-four and 70-100 Dollars, the lands in said Municipality described as No. 165 Park Avenue, Block 532, Lot 141-147 101 ft. on the tax duplicate of said municipality, and assessed thereon, in the year 1921 to Atlas Realty Company as owner. The amount of sale was made up of the following items.

Taxes, 1921.....$3,774.70

Total.....$3,774.70

Said sale is subject to redemption on repayment of the amount of the sale, together with interest thereon at the rate of 5½ per centum per annum from the date of sale, and the costs incurred by the purchaser. Said sale is subject only to municipal liens accruing after July 1, 1921. The right to redeem will expire in six months after the service of notice to redeem, except that the right to redeem shall in all cases extend for two years from the date of sale.

Witness my hand and seal this 27th day of October, 1922.

W. A. CLAPP

[SEAL]

STATE OF NEW JERSEY, }
COUNTY OF ESSEX } *ss.*

On this 27th day of October, A. D. 1922, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared W. A. Clapp, Collector of Taxes of the City of East Orange, who is, I am satisfied, the individual described in and who executed the within Tax Sale Certificate, and I, having first made to him the contents thereof, he thereupon acknowledged to me that he signed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

THEO. MCC. MARSH,
Master in Chancery of New Jersey.

(Endorsed)

SUPREME COURT OF NEW JERSEY
ESSEX COUNTY

J. Chauncey Van Horn, trading as the Jersey Investment Company,

Plaintiff,

vs.

J. William Huegel and Alfred S. Clark, trading as Huegel & Clark, and Ray Meltz,

Defendants.

ACTION AT LAW.

AMENDED COMPLAINT.

Consent to the filing of the within Amended Complaint is hereby given, and service of the same is hereby acknowledged, this 17th day of October, 1923.

Lowy & Lowy, Attorney of Defendants, Huegel & Clark.

Hugo Woerner, Attorney of Defendant, Ray Meltz.

Amos M. Waln, Counsellor at Law, 5 E. State Street, Trenton, N. J.

Filed October 20, 1923.
Edward J. Kelleher, *Clerk.*

NEW JERSEY SUPREME COURT

ESSEX COUNTY

J. CHAUNCEY VAN HORN, trading as the Jersey Investment Company,
Plaintiff,
vs.
J. WILLIAM HUEGEL and ALFRED S. CLARK, trading as Huegel & Clark, and Ray Meltz,
Defendants.
} Action at Law.

NOTICE TO STRIKE OUT.

To Amos Waln, Esq., Attorney for Plaintiff.

Please take notice that on Saturday, November 17, 1923, at the Court House, Newark, New Jersey, at ten o'clock in the forenoon or as soon thereafter as counsel may conveniently be heard, before the Honorable William

S. Gummere, Chief Justice of the above Court, we shall move to strike out the complaint filed by you against the defendants, J. William Huegel and Alfred S. Clark, trading as Huegel & Clark, upon the ground that no cause of action exists for the following reasons:

1. No allegation that plaintiff took immediate or any possession whatsoever under his mortgage in order to have the right which the statute gives him.

2. No notice given to agents of plaintiff's certificate or mortgage.

3. No allegation that the agents did not turn over to their principal the rents collected.

4. That the certificate of sale is defective in that it bears no seal, does not show the office held by the signer, and fails to separate the items of interest and costs separately.

Yours respectfully,
LOWY & LOWY,
Attorneys for Defendants, J. William Huegel and Alfred S. Clark, trading as Huegel & Clark.

(Endorsed).

NEW JERSEY SUPREME COURT
ESSEX COUNTY

J. Chauncey Van Horn, trading as the Jersey Investment Company,

Plaintiff,

vs.

J. William Huegel and Alfred S. Clark, trading as Huegel & Clark, and Ray Meltz,

Defendants.

ACTION AT LAW.

NOTICE TO STRIKE OUT.

Lowy & Lowy, Attorneys for Defendants, J. William Huegel and Alfred S. Clark, 19 Clinton Street, Newark, N. J.

Service of a true copy of the within notice acknowledged this 10th day of November, 1923, continued to December 22, 1923.

AMOS M. WALN,
Attorney of Plaintiff.

Filed December 24, 1923.
Edward J. Kelleher, *Clerk.*

NEW JERSEY SUPREME COURT
ESSEX COUNTY

J. CHAUNCEY VAN HORN, trading as the Jersey Investment Company,
Plaintiff,
vs.
J. WILLIAM HUEGEL and ALFRED S. CLARK, trading as Huegel & Clark, and Ray Meltz,
Defendants.
} Action at Law.

NOTICE.

Take notice, that on Saturday, the seventeenth day of November, next, at ten o'clock in the forenoon, at the Court House, in the City of Newark, New Jersey, before the Honorable William S. Gummere, Chief Justiec of the above court, I shall move to strike out the complaint filed in this cause upon the ground that it states no cause of action, for the following reasons, viz.:

1. That said complaint does not allege that the plaintiff took possession of the premises described therein, and therefore, he is not entitled to the rents and profits of said premises nor to the rental value or value of the use and occupation thereof.

2. The certificate of the Collector of Taxes of the City of East Orange, set out in paragraph 2 of the complaint, is void and invalid, for the following reasons:

a. It is made to the Jersey Investment Com-

pany. There is no such company. It is merely a trade name used by the plaintiff.

b. It is not signed by the Collector as such. The only signature is "W. A. Clapp."

c. It does not set forth the name of the owner, as required by law. It gives the name of the owner to whom it was assessed in "1921."

d. It does not set forth the items of interest and costs separately as required by law.

3. The said certificate was not properly recorded as a mortgage of lands for the reasons set out in reason Two (2) above.

4. An action for money had and received will not lie against the defendant, under the facts stated in the complaint.

5. The first count of the complaint does not allege any legal grounds why Ray Meltz should be obliged to pay over to complainant the rents and profits, which it is alleged she collected.

6. The second count of the complaint does not allege any legal grounds showing that the defendant is liable to plaintiff for rents and profits, rental value or value of the use and occupation of said lands and premises from the date of the recording of the said certificate of sale to the said date of redemption.

7. The complaint does not allege that the plaintiff filed a certificate in this county authorizing him to do business under the trade name of Jersey Investment Company.

To Amos M. Waln, Esq., Attorney of Plaintiff.

Hugo Woerner, Attorney of Defendant, Ray Meltz.

(Endorsed).

NEW JERSEY SUPREME COURT

ESSEX COUNTY

J. Chauncey Van Horn, trading as the Jersey Investment Company,

Plaintiff,

vs.

J. William Huegel and Alfred S. Clark, trading as Huegel & Clark, and Ray Meltz,

Defendants.

ACTION AT LAW.

NOTICE.

Hugo Woerner, Attorney of Defendant, Ray Meltz, 790 Broad Street, Newark, N. J.

Service of the within Notice to strike out is hereby acknowledged this October 29th, 1923.

AMOS M. WALN,

Attorney of Plaintiff.

Filed December 24, 1923.
Edward J. Kelleher, *Clerk.*

SUPREME COURT OF NEW JERSEY
ESSEX COUNTY

J. CHAUNCEY VAN HORN, trading as the Jersey Investment Company,
Plaintiff,
vs.
J. WILLIAM HUEGEL and ALFRED S. CLARK, trading as Huegel & Clark, and Ray Meltz,
Defendants.
} Action at Law.

STIPULATION.

It is hereby stipulated and agreed by and between the attorneys of the parties hereto that the argument of the Notice to Strike out the Complaint be continued from the 17th day of November, 1923, to December 22d, 1923, at the same time and place.

HUGO WOERNER,
Attorney of Defendant, Ray Meltz.
AMOS M. WALN,
Attorney of Plaintiff.

(Endorsed).

SUPREME COURT OF NEW JERSEY
ESSEX COUNTY

J. Chauncey Van Horn, trading as the Jersey Investment Company,

Plaintiff,

vs.

J. William Huegel and Alfred S. Clark, trading as Huegel & Clark, and Ray Meltz,

Defendants.

ACTION AT LAW.

STIPULATION.

Hugo Woerner, Attorney of Defendant, Ray Meltz, 790 Broad Street, Newark, N. J.

Filed December 24, 1923.
Edward J. Kelleher, *Clerk.*

JUDGMENT.

Afterwards, upon proceedings duly had according to the statute, the Court ordered the said complaint to be struck out on the ground that it discloses no cause of action.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed.

Judgment entered December 1, 1925.

WM. S. GUMMERE, *C. J.*

I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true Copy of the notice of appeal and also a copy of the judgment entered in the above-stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-ninth day of October, A. D. nineteen hundred and twenty-six.

[L. S.]

EDWARD J. KELLEHER,
Clerk.

SUPREME COURT OF NEW JERSEY

ESSEX COUNTY

J. CHAUNCEY VAN HORN, trading as the Jersey Investment Company,
Plaintiff,

vs.

J. WILLIAM HUEGEL and ALFRED S. CLARK, trading as Huegel & Clark, and Ray Meltz,
Defendants.

} Action at Law.

NOTICE OF APPEAL.

(Filed October 28, 1926)

To J. William Huegel and Alfred S. Clark, trading as Huegel & Clark, defendants, or Lowy & Lowy, their attorneys, and to Ray Meltz, defendant, or Hugo Woerner, her attorney.

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in the said cause.

Dated: December 28, 1925.

AMOS M. WALN,
Attorney of and Counsel with Plaintiff.

NEW JERSEY COURT OF ERRORS AND APPEALS

J. CHAUNCEY VAN HORN, trading as the Jersey Investment Company,
Plaintiff-Appellant,
vs.
J. WILLIAM HUEGEL and ALFRED S. CLARK, trading as Huegel & Clark, and Ray Meltz,
Defendants-Respondents.

GROUNDS OF APPEAL.

(Filed November 10, 1926)

The above-named plaintiff-appellant assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court, in this cause:

Because the Supreme Court gave judgment for the defendants-respondents, when it should have given judgment for the plaintiff-appellant.

AMOS M. WALN,
Attorney of and Counsel with Plaintiff-Appellant.

Dated: October 28, 1926.

New Jersey Court of Errors and Appeals

J. CHAUNCEY VAN HORN, trading as the Jersey Investment Company,
Plaintiff-Appellant,

vs.

J. WILLIAM HUEGEL and ALFRED S. CLARK, trading as Huegel and Clark, and RAY MELTZ,
Defendants-Respondents.

Action at Law

On Motion to Dismiss Appeal

BRIEF OF PLAINTIFF-APPELLANT.

The Defendant-Respondent, Ray Meltz, moves to dismiss this appeal upon three grounds; (1) that there are no proper grounds of appeal served or filed in the case, (2) that the appeal should have been taken from the order striking out the complaint and not from the judgment ordering that the complaint be struck out, (3) and that the said appeal was not taken within the time allowed by law.

The Defendants-Respondents moved to strike out the complaint, and, upon the argument of those motions, the Chief Justice made an order that the complaint be stricken out "on the ground that it discloses no cause of action" (Brief of Defendants-Respondents on this motion, page 8, line 1.) This order was entered on December 24, 1923. This order was not printed in the

State of the Case in this matter because it does not properly constitute a part of the record on appeal. The Defendants-Respondents did not cause any judgment to be entered upon the said order until December 1, 1925. The notice of appeal was filed on October 28, 1926, and the grounds of appeal were filed on November 10, 1926, both being filed within one year from the entry of judgment.

1. *There are proper grounds of appeal served and filed in this case.*

It is difficult to perceive what grounds of appeal could have been properly served and filed in the situation existing in this case other than the ground which was served and filed. The record, so far as the grounds of appeal are concerned, consists merely of the complaint, the notices of motion, and the judgment of the court below. There was no opinion filed, but even if an opinion had been filed grounds of appeal could not properly have been assigned to the matters contained in it. *McCarty* vs. *West Hoboken*, and *Cahill* vs. *West Hoboken* (June 20, 1919) (Ct. of Err. & App. of N. J.) 107 Atl. 265, 93 N. J. L. 247. To assign as grounds of appeal the reasons contained in the notices of motion would amount to nothing more than assigning to the Defendants-Respondents, the same reasons which they had given to the Plaintiff-Appellant and with which they were already thoroughly familiar. To assign such reasons as grounds of appeal would consist of merely questioning the soundness of the reasons which prompted the judicial action of the Court below without directly bringing in issue such judicial action, the propriety of which action is the question to be determined upon review in an appellate court.

This court has held, in situations similar to that in the case at bar, where the appeals were from the Supreme

Court as the court of first instance, that grounds of appeal almost identical in form with the ground of appeal in the present case, and certainly identical in substance, were proper.

Assignments of error—grounds of appeal under our present practice—are in the nature of a declaration, to which the Respondent, at common law, might plead or demur.

Repetitious and superfluous grounds of appeal (assignments of error in criminal cases) are subject to a motion to strike out.

Grounds of appeal (or assignments of error), which are unscientific and repetitional in character, should not be filed.

Trenton Banking Co. vs. *Rittenhouse* (No. 15) (Ct. of Err. & App. of N. J.) (Nov. 14, 1921) 115 A. 443, 96 N. J. L. 450.

Opinion by Walker Ch.

In this case, which was an action in the Supreme Court as the court of first instance, Walker Ch. said, "In this case it is conceived that two grounds of appeal might properly have been filed in this Court, alleging errors in the Supreme Court—the court of first instance, as the appeal was taken directly from that court to this court. Those grounds would be (1) that the Supreme Court erred in finding that the statute of limitations did not bar the account sued on, and (2) *that the Supreme Court erred in giving judgment in favor of the Plaintiff and against the Defendant, whereas it should have given judgment in favor of the Defendant and against the Plaintiff.*"

In *McCarty* vs. *West Hoboken*, and *Cahill* vs. *West Hoboken* (Nos. 44, 45) (Court of Errors & Appeals of N. J.) (June 20, 1919)

107 Atl. 265, 93 N. J. L. 247, this court said in a per curiam opinion;

"These two cases are identical. *On motion to strike out the answers and for summary hearing before Mr. Justice Parker the hearing resulted in the granting of the motions and the entering of appropriate judgments which have been removed into this court on appeal.*

Two grounds of reversal have been assigned; *one that the Supreme Court found in favor of the Plaintiff instead of Defendant. This is a good assignment;* the other that the Supreme Court decided as follows, etc. Here follows excerpts from the Court's opinion, upon which error cannot be assigned.

In State, *Ruckman* vs. *Demarest*, 32 N. J. L. 528, it was held that *to assign errors in matters not on the record, but in the written opinion of the court, alleging imperfections and defects in the reasoning by which the Court reached its conclusion, is wholly unwarranted, and the Court of its own motion will order such assignments stricken out.*

The question to be determined upon review in an appellate court is always as to the propriety of the judicial action of the court below, and not the soundness of the reason which prompted it. *Gillespie* vs. *Ferguson Co.*, 78 N. J. L. 470, 74 Atl. 460; *Sadler* vs. *Young*, 78 N. J. L. 594, 75 Atl. 890; *Brientnall* vs. *Sadler*, 82 N. J. L. 405, 81 Atl. 819; *Pierson* vs. *N. Y. V. S. W. R. Co.*, 83 N. J. L. 661, 85 Atl. 233; *McAndrews & Forbes Co.* vs. *Camden*, 78 N. J. Eq. 244, 78 Atl. 232.

It must be perfectly obvious that, if the court below reached a right conclusion, even if upon a wrong reason, the judgment should not be dis-

turbed; and, therefore, it is that *errors may be assigned upon matters in the record only*, and not upon the reasoning which induced the rendering of the judgment under review.

The assignments resting upon the alleged erroneous reasons in the Supreme Court's opinion will be stricken out."

2. *The appeal was properly taken from the judgment ordering that the complaint be stricken out, and should not have been taken from the order striking out the complaint.*

The judgment being the final judicial action of the court below, it would seem quite clear that such action is properly the matter in question upon review in an appellate court. If an appeal had been taken from the order, and if judgment had later been entered upon the order, the Plaintiff-Appellant would have been placed in the position of being required to take two appeals in the same matter in order to question the propriety of the judicial action of the court below.

Also, the order from which the Defendants-Respondents contend the appeal should have been taken is not even properly a part of the record before this Court on appeal. The judgment is the only definite adjudication against the Plaintiff-Appellant disclosed by the record.

The appeal is certainly properly taken from the judgment of the Court below, and until that judgment was entered no appeal would properly lie.

Order recording verdict is not appealable before judgment has been entered thereon.

Soplso vs. *Norris, et al.* (Nos. 66, 77) (N. J. Sup.) *Brower* vs. *Same*, (June 3, 1926), 133 A. 481 (Per Curiam).

In this case, the Supreme Court said, in its opinion;

"No judgment, so far as the record discloses, has been entered on either of the verdicts. Until judgment is entered no appeal lies."

The right of appeal begins when the final judgment is entered.

Morley vs. *McDonald* (No. 68) (Ct. of Err. & App. of N. J.) (Oct. 6, 1922) (Judgment of Supreme Court affirmed per curiam upon the per curiam opinion of the Supreme Court), 118 A. 582, 98 N. J. L. 275.

An appeal under section 25 of the supplement of 1912 to the Practice Act (Act March 28, 1912, P. L., p. 382), cannot be effective until final judgment.

Van Hoogenstyn vs. *Delaware, L. V. W. R. Co.* (No. 84) (Ct. of Err. & App. of N. J.) (March 5, 1917), 100 A. 232, 90 N. J. L. 189.

In this case this Court said in its opinion by Swayze, J. "It is equally unnecessary to cite authorities for the proposition that an appeal cannot be effective until final judgment. The appeal in this case is taken under the supplement of 1912 to the Practice Act (P. L. 1912, p. 377) Section 25 permits an appeal where the Appellant would formerly have been entitled to a writ of error. That there could be no relief by writ of error until after final judgment is elementary learning. Courts of law do not permit the intolerable delay and expense that would arise if interlocutory appeals were permitted from every order that might be incidental to the progress of the cause; by its very terms the writ

of error required a return only if judgment be given."

An order striking out a complaint in an action at law against one of two defendants is not reviewable on appeal until after final judgment in the cause.

Wheat vs. *Public Service Gas Co.*, et al. (No. 87) (Ct. of Err. & App. of N. J.) (June 19, 1922) (Per Curiam opinion) (Citing *Young, etc.*, vs. *Board of Education*, 84 N. J. L. 770, 87 A. 347) 97 N. J. L. 584, 117 A. 594.

An order striking out the complaint as against one of several defendants is not appealable until after final judgment disposing of the case, either at common law or under our Practice Act (P. L. 1912, pp. 382, 398) secs. 25, 79, abolishing writs of error and allowing appeals in lieu thereof, and providing for notice of appeal.

Young vs. *Board of Education* (1913) (Ct. of Err. & App. of N. J.) 84 N. J. L. 770, 87 A. 347.

When a verdict of not guilty is directed, it is the better practice to enter a judgment of acquittal in proper form.

State vs. *Hart*, 88 N. J. L. 48, 95 Atl. 756.

In this case Swayze, J. said, in the opinion of the court, "The trial judge directed a verdict for the defendant and the record shows that the jury in accordance with that direction found the defendant not guilty. No judgment was entered upon the verdict and in strictness this writ of error might be dismissed for that reason. But in view of the laxity in the practice spoken of by

Chief Justice Green in *West* vs. *State*, 22 N. J. Law, 231, and of the fact that the question was not raised at the argument, we pass it with the mere remark that it would be better to enter the judgment in proper form."

In *Tomlinson* vs. *Armour* & *Co.*, 75 N. J. L. 748, 70 Atl. 314, (Court of Errors and Appeals of New Jersey, June 15, 1908) Pitney Ch., in delivering the opinion of the Court, said, "This writ of error is brought to review a decision of the Supreme Court sustaining Defendant's demurrer to Plaintiff's declaration. The record returned by that court to the writ of error, besides reciting the declaration and the demurrer thereto, sets forth simply that the court, having heard the argument of counsel upon the demurrer, and having duly considered the same, did order that the demurrer be sustained, with costs. There is no more formal entry of judgment, nor any award of a specific sum for costs. Upon this record the plaintiff in error assigns error, in that the Supreme Court ordered that the demurrer be sustained, with costs, and decided that judgment should be given for the defendant, whereas judgment should have been given for the plaintiff. The defendant in error filed the common joinder in error, averring "that there is no error, either in the record and proceedings aforesaid or in giving the judgment afoesaid"; and praying "that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed," etc. The case has been submitted upon arguments addressed to the merits, without suggestion of a motion to quash, or other objection, based upon the want of a proper judgment returned. The question suggests itself, however, whether the record mani-

fests a definitive adjudication against the plaintiff in error, which ought to be reviewed here.

The general rule is laid down in 2 Tidd's Prac. (3d Am. from 9th London Ed.) 1141, as follows: "No writ of error can be brought but on a judgment, or an award in the nature of a judgment; for the words of the writ are 'si judicium redditum sit,' etc. And hence it was formerly holden that a writ of error could not be brought before judgment given; and, if tested before, it was no supersedeas. But it seems to be now agreed that a writ of error, bearing teste before judgment, is good, so as the judgment be given before the return of it; and this is the usual course for preventing execution, and the allowance of it may be served before the return of the writ of inquiry and final judgment. Still, however, if the writ of error be returnable before judgment, it may be quashed." And at page 1162 it is said: "If the writ of error be returnable before judgment is given, it may be quashed on motion. But where the writ of error, on a judgment in the common pleas, was returnable in Easter Term, and the costs were not taxed and final judgment signed until Trinity Term, after which the defendants, in Michaelmas Term, served the plaintiff with a rule to assign errors, and, the plaintiff having assigned them, the defendants, in the same term, joined in error, and, the case being afterwards argued, the judgment of the Court of Common Pleas was reversed. The Court of King's Bench, under these circumstances, refused to quash the writ of error, on the ground that it was returnable before costs were taxed in the court below, and consequently before any judgment was given in that court; as the defendants ought to have applied

to quash it, in an earlier stage of the proceedings." —Citing *Den* vs. *Roake*, 5 Barn. & Cres. 735, note.

In *Thompson* vs. *Bowne*, 39 N. J. Law, 2, our Supreme Court, upon an examination of the record returned with a writ of error, concluded that no judgment had, as yet, been actually entered, and therefore dismissed the writ, as having been improvidently issued and returned; and this, although manifest error appeared in the proceedings. So harsh a practice ought not to be followed (especially after joinder in error and consideration of the merits), unless the state of the return clearly requires it; else a mere mistake in form, for which the plaintiff in error is not responsible, may delay the reversal of an erroneous judgment, or the affirmance of one that is free from error. And why should an erroneous judgment stand any the longer, because it adds informality to error? To so hold is simply to encourage loose practice in the entry of judgments.

In *Cooper* vs. *Vanderveer*, 47 N. J. Law, 178, it clearly appeared that the action in which the alleged error had been committed had not proceeded to its termination, and the Supreme Court properly dismissed the writ of error. Chief Justice Beasley, however, in delivering the opinion employed the phrase: "A writ of error will not run until the conclusion of the course of law in the court of first instance."

But in *Stein* vs. *Goodenough*, 69 N. J. Law, 635, 56 Atl. 701, it was pointed out by this court that by the later English practice the writ of error was permitted to be tested before judgment entered, in order that it might operate as a supersedeas in cases where execution was forth-

with sued out; that even under this practice the writ was good only provided judgment was given before its return, and if it was returnable before judgment was entered, it was quashed upon motion; and that this practice is prevalent in this state, and is recognized by that section of our practice act (P. L. 1903, p. 582, sec. 170), which provides that whenever any writ or other proceeding shall require the removal of the record of any judgment to any other court, the clerk shall record the judgment and the proceeding in the action in full. In *Stein* vs. *Goodenough*, we retained the cause, in order that the actual entry of judgment final might be procured, and the record then brought up by certiorari. But in that case the return showed that, although rules entitling the defendant in error to judgment had been entered in the minutes, no judgment had been actually entered.

The present case differs, for here the return discloses, not a mere minute or memorandum of the judgment that is to be entered, but the very entry of the judgment itself. The order sustaining the defendant's demurrer is certified to us, by the Supreme Court, as the record of the judgment called for by our writ of error. It may be presumed to have been entered in that form in the judgment book. Of course, such an entry is informal. The technical and proper form of a judgment, sustaining defendant's demurrer to plaintiff's declaration, after reciting that it appears to the court that the declaration and the matters and things therein contained are not sufficient in law for the plaintiff to have and maintain his action thereof against the defendant, proceeds in substance as follows: "Therefore it is considered that the plaintiff take nothing by his said writ,

and that the defendant go thereof without day," etc. And there follows a judgment for costs in the following form: "And it is further considered that the defendant do recover against the plaintiff (mentioning the sum), for his costs and charges by him about his defense, in this behalf laid out and expended, by the court here adjudged to the defendant with his assent, according to the form of the statute in such case made and provided; and that the defendant have execution, thereof," etc. Archbold's Append. 299.

But the technical phrase, "ideo consideratum est" is not necessary to constitute such a judgment as will support a writ of error. Doe ex dem. *Rutherford* vs. *Fen*, 21 N. J. Law, 700, 702. Such a defect, being one of form merely, may be amended (if necessary) in this court. *Apgar's Adm'rs* vs. *Hiler*, 24 N. J. Law, 808; *Del., Lack & Western R. R. Co.* vs. *Toffey*, 38 N. J. Law, 525, 526, citing *Hooper* vs. *Lane*, 6 H. of L. Cas. 443, 476, 489, 501, 555.

The common joinder in error—"in nullo est erratum"—amounts to an admission, by defendant in error, that what is returned as the record of the judgment under review is, in truth, the record thereof; so that after joinder in error neither party can of right allege diminution or have a certiorari. 2 Tidd, Prac. 1174; *Gilliland* vs. *Rappleyea*, 15 N. J. Law, 138, 145. Indeed the common joinder ordinarily concludes with a prayer "that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed." And such is the prayer of the defendant in this case. It involves a clear inconsistency to admit the defendant in error after-

wards to move to quash the writ of error, on the ground that no judgment has been returned.

It is true that, notwithstanding the parties may thus be bound by their admissions, the court of review is not restrained from looking into the record, and may of its own motion award a certiorari to supply any defects in the body of the record or in its outbranches. Such was the course pursued by us in the case of *Stein* vs. *Goodenough*, above cited. But in the present case the judgment record, in the form of which it has been made up in the Supreme Court, and by that court returned to us, sufficiently imports a determination of the merits raised by the demurrer, and lacks only a precise ascertainment of the amount of costs. Of this imperfection defendant in error makes no complaint. If the judgment is to be affirmed, only defendant in error will be harmed by the omission of costs. If the judgment is to be reversed, because erroneous on the merits, the judgment for costs will, of course, fall with it. A judgment in favor of either party upon demurrer to a declaration is a final judgment, reviewable on error. *Hale* vs. *Lawrence*, 22 N. J. Law, 72, 80. Upon the whole, therefore, we see nothing in the exigencies of the present case to require that decision be delayed in order to enable the Supreme Court to perfect its judgment record, and return the perfected record to us pursuant to a certiorari. For the purposes of review we consider the judgment, as returned, sufficient in substance, and will treat it as if amended in this court with respect to the mere matter of form."

3. The appeal was taken within the time allowed by law.

The judgment of the court below was entered on December 1, 1925. (State of Case, Page 14, line 32). The notice of appeal was filed on October 28, 1926 (State of Case, Page 16, line 20), and the grounds of appeal were filed on November 10, 1926 (State of Case, Page 17, line 20), both the notice and grounds of appeal being filed within one year after the entry of the judgment. This appeal, was, therefore, taken within the time allowed by law. *Prantl* vs. *Junk*, 93 N. J .L. 389, 101 Atl. 56. (Ct. of Err. & App. of N. J., May 8, 1917).

The plaintiff-appellant respectfully submits that the motion to dismiss the appeal should be denied.

AMOS M. WALN,
Attorney for and Counsel with Plaintiff-Appellant.

COURT OF ERRORS AND APPEALS

OF NEW JERSEY

J. CHAUNCEY VANHORN, trading as the JERSEY INVESTMENT COMPANY,
Plaintiff-Appellant,

vs.

J. WILLIAM HUEGEL and ALFRED S. CLARK, trading as HUEGEL AND CLARK, and RAY MELTZ,
Defendants-Respondents.

Action at Law. On Appeal from the Supreme Court.

BRIEF OF THE PLAINTIFF-APPELLANT.

No opinion of Gummere, C. J., in this action appears to have been filed in the office of the Clerk of the Supreme Court, but the following opinion is reported in Volume 2, New Jersey Miscellaneous Reports, on page 16, as the opinion of Gummere, C. J., in this action:

> "This suit is brought by a man named Van-Horn to collect from the defendants rents which the latter have received from the tenants in occupation of certain premises in East Orange, as I understand it, and the basis of the plaintiff's claim is that some year or more ago this property was sold by the taxing authorities of East Orange for non-payment of taxes; that the plaintiff attended the tax sale, and that the property was struck off and sold to him by the collector, and a certificate

of sale, showing his purchase and his rights as a purchaser, delivered to him, and that this certificate, as I judge, was duly recorded, in compliance with the statute. (I have not looked through the complaint.) The plaintiff claims that, although he was never in possession personally, and although the rents were never demanded by him from the tenants, yet, because of his right to possession as the purchaser at the tax sale, he was entitled to these rents, which were collected by the agents of the owners, subject to his rights as the purchaser at the tax sale; in other words that, as such purchaser, he was entitled to those rents and may recover them from the record owners or their successors in title.

In view of the conflict of authority alleged to be exhibited by the decisions of the Supreme Court, to which counsel have referred this morning, I should hesitate to decide, without an examination of those decisions, either for or against the proposition that, in order to entitle the purchaser at the tax sale to the rents of the property which had been sold, he was required to take possession himself, and then rent the property, or at least to have the tenants in occupation attorn to him as the landlord. Of course, he has a right to the rents, under the statute, if he takes possession in the way I have mentioned.

"But it is not necessary to decide that legal question, as I think, for this reason. The plaintiff is only entitled to these rents (assuming his construction of the statute, to which I have referred, to be sound), when it appears that he was the purchaser at the tax sale—that is, that the collector had sold the property to him, and delivered to him, as the purchaser, a certificate exhibiting that fact. The certificate, which he has produced and annexed to his complaint as evidence of his

right to these rents, conclusively shows that he is not entitled to them; for this certificate, made by the collector, was not to the present plaintiff, Mr. J. Chauncey VanHorn, as purchaser, but to either a corporation or a non-existing entity, known as the New Jersey Investment Company. Whether that is a corporation, and whether the property was sold to that corporation or not, does not appear, except that the plaintiff says 'there is not any such person, but I was carrying on business under that trade name, and the certificate was really meant for me.' That may or may not be so; but whether it is so or not is quite immaterial, in view of the statutory requirement that the certificate must be made out to the purchaser himself—that is, to the person or corporate entity to whom it has been struck off—and not to a non-existing company or a mere trade name.

"Because of the fact that the certificate exhibits no right of any kind in this plaintiff under that tax sale, I think this complaint should be stricken out."

The plaintiff-appellant respectfully submits that the judgment of the Supreme Court in this action should be reversed, for the following reasons:

1. *The plaintiff is not required to take possession, nor to demand the rents and profits, as a condition precedent to his right to such rents and profits.*

The plaintiff is under no legal obligation to take possession of the property sold to him by the municipal officer, nor to demand the rents and profits thereof as a prerequisite to his right to recover such rents and profits from one who has received the same, or the value of the use and occupation from one who has held possession of said property.

The Tax Act of 1903 (P. L. 430, sec. 56), provided, among other things:

> "* * * ; the purchaser at his option may record the certificate of sale for taxes in the office of the clerk or register of the county where the land lies as a mortgage of land, and thereupon shall be entitled to the immedate possession of the property sold and described in the certificate and to all the rents and profits thereof from and after the date of the certificate, for the term of the sale or until redemption; * * *."

Under this section of this Act, the Supreme Court held, in *Anson* vs. *Elwood*, 76 N. J. L. 56, 68 Atl. 784:

> A purchaser at a tax sale, who records his certificate as a mortgage pursuant to section 56 of the Tax Act (P. L. 1903, p. 430), is entitled to the rents and profits of the land, and need not account to the owner therefor upon the redemption of the property.

In this case (*Anson* vs. *Elwood*) the Supreme Court, in its opinion by Swayze, J., said:

> "But section 56 gives the purchaser at the tax sale the option of two courses; he may have the certificate of sale noted on the records for unpaid taxes, or he may have it recorded as a mortgage. It is only in the latter case that he is entitled to the immediate possession and to the rents and profits. We think this was meant to secure him something more than he would have if the certificate were merely noted on the record of unpaid taxes."

Also, under section 56 of the Tax Act of 1903, the Supreme Court held in *Baldauf* vs. *Mann*, 86 N. J. L. 46, 92 Atl. 276:

> Under Tax Act, sec. 56, providing that the purchaser of land at a tax sale shall be entitled to the rents from the date of the sale until the land is redeemed, together with interest at 12 per cent. on the unpaid taxes, as well as the principal thereof, the redemption of land so sold does not cancel the sale ab initio, nor deprive the purchaser of the right to the rents between the date of sale and redemption.

This action (*Baldauf* vs. *Mann*) was brought after redemption by the purchaser, who had never been in possession, to recover the rents for the period from the sale to the redemption. The Supreme Court, in *Baldauf* vs. *Mann*, supra, in its opinion by Parker, J., said:

> "The case at bar is the converse of *Anson* vs. *Elwood*, 76 N. J. L. 56, 68 Atl. 784, where the rent had been paid to the tax purchaser and after redemption the owner sued to recover it back. We held there that the owner was not entitled to the rent that had accrued between the sale and the redemption. So far as applicable the decision is, of course, controlling.—*The act itself, under section 56, says that under circumstances similar to the present the purchaser is entitled to the rents for the term of the sale or until redemption. Plainly it was intended that a tax delinquent in such case should lose both his rents and the 12 per cent. interest on the unpaid taxes as well as pay the principal thereof.*"

The case of *Baldauf* vs. *Nathan Russell* (Court of Errors and Appeals of New Jersey), 96 Atl. 96, was an action by a tax sale purchaser against the occupant of

the property purchased, and also the agent of the owner for the rents of the property from the date of the certificate of sale to the date of redemption. The complaint in that action is used as a form in Sheen's New Jersey Practice Act, page 329, form 89, from which the complaint in the present action is adopted, and the complaint in that action (*Baldauf* vs. *Nathan Russell*) contains no allegation that the plaintiff therein either obtained or demanded possession of the property at any time. In that case, a judgment for the plaintiff was affirmed by this Court, but that action was not before this Court upon the questions involved in this suit.

Thereafter, the Legislature passed the Act known as "The Tax Sale Revision" (Chapter 237 of the Laws of 1918). This Act (P. L. 1918, p. 888, sec. 24), provides:

> "* * * *Such sale shall be made in fee to such person as will purchase the same, subject to redemption* at the lowest rate of interest, but in no case in excess of eight per centum per annum, etc."

The Tax Sale Revision (P. L. 1918, p. 892, sec. 34), provides:

> "The purchaser may record the certicate of sale in the office of the clerk or register of the county where the land lies as a mortgage of land, and thereupon shall be entitled to the immediate possession of the property sold and described in the certificate, and to all the rents and profits thereof from and after the date of record until redemption, etc."

Although the Legislature, at the time of enacting the Tax Sale Revision of 1918, is presumed to have known the construction placed upon section 56 of the Tax Act of

1903 by the Supreme Court in the cases of *Anson* vs. *Elwood*, and *Baldauf* vs. *Mann*, supra, section 34 of the Tax Sale Revision of 1918 is practically a reiteration of section 56 of the Tax Act of 1903, in so far as the rights of the tax sale purchaser in respect to the possession and the rents and profits are concerned, except that by the Tax Sale Revision of 1918 it is provided that these rights run from the date of recording, rather than from the date of the certificate, as provided in the Tax Act of 1903.

It is true that, under the later Act, the Supreme Court did, at November Term, 1921, hold, in an unreported decision, in the cases of *Cohn* vs. *Simon et al.*, and *Cohn* vs. *Schrader et al.*, before Swayze, Black and Katzenbach, J. J., opinion by Swayze, J., that it was necessary that the purchaser should have taken possession in order to be entitled to the rents and profits, and said:

> "Thereupon Cohn, the purchaser of the tax title, brought these suits to recover the rents and profits, and the question is whether the statute enables him to recover them. We think it does not. Its language is that the purchaser may record the certificate as a mortgage of land and thereupon shall be entitled to the immediate possession of the property sold and to all the rents and profits thereof from the date of record to the date of redemption. The right the purchaser has under the tax title is to immediate possession and evidently it is required that he should take this possession in order to have the right which the statute thereupon would give him."

It is difficult to perceive upon what construction the Supreme Court, in the decision last aforesaid, arrived at the conclusion that the right to the rents and profits was contingent upon the plaintiff taking possession of the property. The briefs of the defendants in the cases of *Cohn* vs. *Simon et al.*, and *Cohn* vs. *Schrader et al.*,

supra, contain not a single citation of a case in support of any of the defendants' contentions. The statute plainly gives the purchaser both the right to possession and the right to the rents and profits, and contains nothing whatever to indicate that either of these rights is contingent upon the exercise of the other. The language of the statute, P. L. 1918, p. 892, sec. 34, is that "The purchaser may record the certificate of sale * * * ,and thereupon shall be entitled to the immediate possession of the property sold and described in the certificate, and to all the rents and profits thereof from and after the date of record until redemption, etc." The statute provides that the purchaser shall "thereupon" be entitled to the rents and profits as well as entitled to the possession. "Thereupon" obviously refers to the time of the recording of the certificate, at which time, rather than at such time when he might take possession, he becomes entitled to the rents and profits. The statute also provides that the purchaser shall be entitled to the rents and profits "from and after the date of record until redemption," rather than that he shall be entitled to the rents and profits from and after the date of taking possession, nor from and after the date of demanding possession. Also, suppose that the purchaser's demand for possession was not complied with, or that he was prevented from taking possession. In such a situation, what is to become of the purchaser's right to the rents and profits. Those in possession could put the purchaser to the necessity of bringing ejectment, and, immediately upon such action being brought, redeem and thus defeat the purchaser's right to any rents and profits.

It is to be observed also that, by the Tax Sale Revision of 1918, the purchaser at a tax sale acquires an estate in fee subject to be defeated by the contingency of redemption. But, until the redemption is made, the purchaser is the owner in fee. It would, therefore, appear that, aside from an express provision of the statute to that effect, he would be entitled to recover the rents and profits for the period during which he had an estate in fee in the

property from those who received them. Apparently, the Legislature intended to invest the purchaser with absolute ownership, except that it gave the delinquent owner an opportunity to recover his property by redeeming.

> The estate which the owner has passes at the tax sale. *Dows* vs. *Drew*, 27 N. J. Eq. 442; *Morrow* vs. *Dows*, 28 N. J. Eq. 459; *Hopper* vs. *Malleson*, 16 N. J. Eq. 382; *State, Canal* vs. *Haight*, 35 N. J. L. 178.

The Supreme Court, in *Baldauf* vs. *Mann*, supra, held that not even a notice to the owner was required in order for the purchaser to become entitled to the rents, and said, in its opinion by Parker, J.:

> "But it is argued that the act in its spirit contemplates some sort of notice to the owner when the certificate is recorded as a mortgage, and that this must be governed by the rules of the common law requiring personal service. *We think that no formal notice to the owner is required, except in cases where it is intended to cut off the right to redeem. The owner would seem to be charged with notice that he owes his taxes, and with notice of sale if they are unpaid, and by virtue of the recording acts he would seem to be also charged with notice of the record of the certificate of sale as a mortgage and the resulting right of the purchaser thereunder to the rents.*"

Also, in the unreported cases of *Cohn* vs. *Simon et al.*, and *Cohn* vs. *Schrader et al.*, supra, Swayze, J., in his opinion, said that he thought the intent of the statute was to enable the purchaser to acquire the right of a mortgagee in possession, while in the reported case of *Anson* vs. *Elwood*, supra, the same Justice, in his opinion, said, "The question to be decided, then, is whether the pur-

chaser of land at a tax sale is chargeable with the rents and profits as if he were a mortgagee in possession," and thereafter proceeds at considerable length in his opinion to show that the purchaser does not occupy a position similar to that of a mortgagee in possession.

At the June Term, 1922, the Supreme Court rendered a decision in the case of *VanHorn* vs. *Colilio et al.* This was an action brought by a tax sale purchaser against the owner for the rents of the property for the period from the date of recording of the certificate to the date of redemption. It appeared that the owner had collected the rents covering that period in advance of the date of recording the certificate. It was stipulated that the plaintiff was not given possession during the period nor any part thereof, nor did he receive any part of the rents and profits of said property for said period, nor was any demand made by the plaintiff of the defendant either for possession of said property or for the rents of the same. The District Court gave judgment for the defendants, and the plaintiff appealed. The appeal was heard before Parker, Bergen and Minturn, J.J. The Supreme Court reversed the judgment of the District Court, and, in its opinion by Parker, J., said, in part:

> "The state of the case shows that the proper municipal officer sold the defendant's land for taxes to the plaintiff, and on the 22d day of August, 1921, issued to the plaintiff his certificate of the sale and purchase which was recorded on the 24th day of August, 1921, and the premises redeemed on the 30th of August, 1921; that the defendant had collected the rents from the tenants for the month of August in advance, on the first day of the month, and the question is whether the rents having been paid in advance of the sale, the purchaser is deprived of the rents *during the period he was entitled to same under the statute.* The District Court gave judgment for defendant

and plaintiff appeals. *We think that the plaintiff was entitled at least to compensation for use and occupation during the period of defendant's occupation, and that the judgment in favor of the defandant was erroneous.*"

The opinion in this case was filed November 8, 1922, which was about a year later than the decision in *Cohn* vs. *Simon et al.*, and *Cohn* vs. *Schrader et al.*, supra, and although the state of the case set forth that the plaintiff neither took nor demanded possession, the court, in the later case, apparently followed the former reported decisions in *Anson* vs. *Elwood* and *Bauldauf* vs. *Mann*, supra, in holding that the plaintiff was entitled to compensation for use and occupation.

So far as an attornment of the tenants is concerned, this appears to have been abolished by P. L. 1877, p 575, Comp. Stat. of N. J., Vol. 3, p. 3076, sec. 26. But such attornment is immaterial as this action involves no claim against the tenants.

2. *If the certificate was in fact made to the plaintiff, by whatever name he is therein designated, he is entitled to recover.*

The statute (P. L. 1918, p. 889, sec. 28) contains no requirement that the certificate of tax sale shall be made out to the purchaser in the name which was given him at his birth. The statute (P. L. 1918, p. 889, sec. 28) provides:

"Said officer shall deliver to the purchaser a certificate of sale under his hand and seal, duly acknowledged by him as a conveyance of land, *which shall set forth that the property therein described was sold by said officer to the purchaser*, setting up the date of sale, the amount paid by the purchaser, the description of the land, the

name of the owner and the items of the several municipal liens or charges, interest and costs, *all as contained in said list*, the rate of redemption for which sold, the date to which liens are included, and the time when the right to redeem will expire. *No other statements need be included in said certificate.*"

Even if the statute (P. L. 1918, p. 889, sec. 28) had provided that the certificate should be made to the purchaser himself, or in the name of the purchaser, such certificate could certainly be made to the purchaser in any name by which such purchaser could lawfully be designated. While identity of name has been held to be prima facie evidence of identity of person, the court below fell into the error of assuming that lack of identity of name was conclusive as to lack of identity of person. There is no legal objection to the plaintiff transacting business under an assumed or trade name, and purchasing the property in question and receiving the certificate of sale therefor under such designation.

The Court said *In Re Witsenhausen*, 42 N. J. L. 183:

"There is nothing in the common law prohibiting a man from taking another name if he so desires, nor is there any penalty or punishment for so doing, except that if a man assumes another name with the purpose of thereby defrauding another, he might, perhaps, be enjoined from the use of such name. The statute in question (Vol. 3, Compiled Statutes, p 3685) does not repeal the common law by implication or otherwise, but merely gives an additional method of effecting a change of name, whereby a record may be kept of such change of name and whereby judicial sanction to such change of name may be secured."

A man has a right to adopt any name he sees fit. *Delaney* vs. *Gaylord*, 131 N. Y. Supp. 890.

A person may adopt any name in which to prosecute business. *Emery* vs. *Klipp*, 154 Cal. 83, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 97 Pac. 17, 16 Ann. Cas. 792; *Sheridan* vs. *Nation*, 159 Mo. 27, 59 S. W. 972.

In *Emery* vs. *Klipp* (supra) the Court said:

"If a man chooses to take the title to real estate in a name other than his true name, so far as that property is concerned, he has assumed the name in which he takes title as his true name, and in suits affecting the property he may be sued by such designation."

In *White* vs. *Hartman*,—Colo. App.,—145 Pac. 716, the Court said:

"A person may adopt or assume any name in which he prefers to do business, or may consummate any individual transaction in any name he may adopt, and will thereafter be responsible in the assumed name."

In *Tuggle* vs. *Bank of Cave Spring*, 8 Ga. App. 291, 68 S. E. 1070, the Court said:

"It is a general principle of law that one in the transaction of business may use a purely artificial name, or assume the proper name of some other natural person, and the person who thus adopts a fictitious name, or who uses the name of the other person, will be held liable on the contracts, where the evidence clearly shows that the name is artificial, or that the name of the other person was used without his authority, and that only the

party using it is interested in the transaction of the business and in the contract so made.

In *McMiekin* vs. *Ferry*, 39 Can. (S. C.) 378, the Court said:

"Assuming a firm name, though in fact it represents only one man, is much too common a device in use for business purposes to say that a man cannot be bound by any such name he chooses to adopt. Usually the man doing so carries on for a longer or shorter period, as the case may be, his business in that way. But is length of time in the use thereof the measure of its efficacy in binding him who uses such a business name?"

C. M. Leonard may do business and make valid contracts under the name of "Leonard Construction Co., not Inc.," if the name is assumed in good faith.

Leonard vs. *Howard*, 67 Or. 203, 135 Pac. 549.

A patent issued to a person under an assumed name is not void, and a conveyance by such person under his assumed name will transfer title."

Devlin on Deeds, Vol. 1 para. 191.

Julia Graham may lawfully do business under the name of Freeman Graham, Agent.

Graham vs. *Eiszner*, 28 Ill. App. 269.

An individual may do business under a corporate name.

Bryant vs. *Eastman*, 7 Cush. 111; *Fuller* vs. *Hooper*, 3 Gray. 334.

A business name may consist of a combination of initials with the surname.

Oakley vs. *Peyler*, 30 Neb. 628.

Where a person does business alone under the name of a bank, and a chattel mortgage is made to him under that name, the legal title vests in him.

Carlisle vs. *People's Bank*, 122 Ala. 446, 26 So. 115.

In business matters a contract or obligation may be entered into by a person by any name he may choose to assume.

Bell vs. *Sun Print. Pub. Co.*, 10 Jones & S. 576; *Re Snook*, 2 Hilt. 568.

One may carry on business in the name of his agent.

Chandler vs. *Coe*, 54 N. H. 561.

A person, being the sole owner and manager of a business, has, in the absence of a statute to the contrary, the right to assume any name under which he chooses to conduct his business, so long as such business is conducted under such name in good faith, and may maintain an action for breach of contracts made under such business name.

Robinovitz vs. *Hamill* (1914) (Okla.), 144 Pac. 1024, L. R. A. 1915 D 981.

Without abandoning his real name, a person may adopt any name, style, or signature, wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue and be sued.

Pease vs. *Pease*, 35 Conn. 131, 95 Am. Dec. 225;

In Re Pelican Ins. Co., 47 La. Ann. 935, 17 So. 427;

Spark vs. *Despatch Transfer Co.*, 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714;

England vs. *N. Y. Pub. Co.*, 8 Daly 375;

Rich vs. *Mayer*, 7 N. Y. Supp. 69, 26 N. Y. S. R. 107;

Cairns vs. *Hay*, 21 N. J. L. 174;

Inhabitants vs. *String*, 10 N. J. L. 323.

It is not a question of the certificate of sale being made to a non-existing entity or a fictitious person, but to an existing person in an assumed or trade name. The question, then, whether the plaintiff acquired any rights under the certificate of tax sale, resolves itself to the question of identity, which is a question of fact.

Patent to land issued to a person under an assumed name is not void, but vests the title in him, and his title will pass by a transfer of the land under his assumed name.

Thomas vs. *Wyatt*, 31 Mo. 188, 77 Am. Dec. 640.

The Court in this case (*Thomas* vs. *Wyatt*, supra), apparently fell into the same error when the case was first heard as the Court below did in the present case, as the Court said in its opinion in that case:

"The ground on which the defendant repelled the plaintiff's right to a recovery was that Johnson was a fictitious person; that there was no such man in being, and therefore the patent was void, and the plaintiff could not derive any title from it or the patentee. There is no doubt that a patent issued to a person not in existence is void. This was the view taken of this case when it was formerly here. But now we have more light upon

it, and although we adhere to the opinion then expressed, we doubt whether it is applicable to the case as it is now presented.

The only theory that will solve the question involved in this litigation—and we think there is sufficient evidence to put it to a jury—is that Samuel Johnson is an assumed name of James Coleman, and not a fictitious person. If we regard Coleman as usurping the name of Johnson when it suited his purposes, we have a clew by which we may be guided to the justice of this case. * * * If James Coleman used the name of Samuel Johnson to designate himself when he thought proper, and made the entry in the name of Samuel Johnson for himself, merely using that name as he would the one by which he was usually known, and endorsed it in the name of Samuel Johnson with the same view, then the transaction is to be regarded as though James Coleman had used, instead of the name 'Samuel Johnson,' the name 'James Coleman.' So the patent to Samuel Johnson is to be regarded as to James Coleman, and not to a fictitious person. I knew an individual once who was sued in an action in which heavy damages were claimed, and during its pendency he entered a great quantity of land in his name reversed or spelled backwards. Now, no one supposed that if a judgment had gone against him that the title had not passed from the United States so that the land would have been subject to the claim of the creditor. So we suppose it is competent to the party here to prove that James Coleman was Samuel Johnson or James Coleman, just as it suited his purpose; that he was a man who used two names; that to effect his ends he endeavored to make it appear that he was two different persons. It matters not whether it was generally known that he went by two names. The

law is the same, though he was known by one name only, as though he was known by both. If a man signs a bond by a name by which he was never called or known, or which he had never used before, he would be bound by it. *Williams* vs. *Carpenter*, 28 Mo. 460. * * *

This case, then depends on facts to be determined by a jury. These facts are whether James Coleman and Samuel Johnson were not the same identical person, and the name Samuel Johnson was assumed by Coleman to carry out his fraudulent designs. If these facts are found, the plaintiff will be entitled to recover. If, on the other hand, the jury believe from the evidence that the government, in issuing the patent, intended it for another person distinct and separate from James Coleman, and that there was no such person ever in existence, then, in the nature of things, no title could pass by the patent."

Where there is evidence in proceedings involving the validity of a tax sale of real estate that the owner was as well known by the name of Maria Lancy as Maria S. Lancy, the tax proceedings will not be set aside because the owner is described therein by the former name.

Lang vs. *Snow*, 180 Mass. 411, 62 N. E. 735.

In principle, there is no difference between assuming a purely artificial name, by which to transact business, and assuming the proper name of some other natural person; only this, that in the latter case the proof ought to be very clear to show that the contract was not designed to be the personal contract of such natural person.

Pease vs. *Pease*, 35 Conn. 131, 95 Am. Dec. 225.

A contract or obligation may be entered into by a person by any name he may choose to assume. *The law only looks to the identity of the individual*, and when that is established, the act will be binding upon him and upon others.

Petition of Snook, 2 Hilt. (N. Y.) 566, citing *Waterbury* vs. *Mather*, 16 Wend. 611; *Griswold* vs. *Sedgewick*, 6 Cow. 456; *Jones' Estate*, 27 Penn. 336; *Prettyman* vs. *Wales*, 4 *Harring* 299; *Toole* vs. *Peterson*, 9 Ired. 180; *Selman* vs. *Shackleford*, 17 Geo. 615; *Williams* vs. *Bryant*, 5 Mees. & Wels. 447; *Finch* vs. *Cocken*, 5 Tyrw. 774; *Attorney-General* vs. *Hawkes*, 1 Cro. & Jer. 120; *The Queen* vs. *Avery*, 18 A. & Ellis (N. S.) 576; *Comeyn's Digest*, Fait. E. 3.

In *Carlisle* vs. *People's Bank*, 122 Ala. 446, 26 So. 115, the Court said:

"The $750 note and mortgage were made to 'The People's Bank.' The bill of exceptions states that 'it was proven that W. B. Folmar (plaintiff) was doing business under the name of the People's Bank, and also was doing a business under the name of W. B. Folmar.' It does not clearly appear from this that 'The People's Bank' and W. B. Folmar were one and the same, and that he alone constituted the People's Bank. If, however, such was the fact, the legal title under the mortgage, though made to the People's Bank, eo nomine, vested in W. B. Folmar; but, otherwise, if the two were not one and the same."

In *Medway Cotton Mfg. Co.* vs. *Adams*, 10 Mass. 360, a declaration upon a promissory note to the Medway Cotton Manufacturing Company by the name of Richardson, Metcalf & Co. was held good on demurrer. In this case the Court said:

"The inquiry however is, in this case, as it was in the cases of misnomer which have been cited, of the description of the promisees or parties in the note or contract declared on. Does the name in the note sufficiently indicate the plaintiffs? Were they known by it as the promisees? Now this depends, in part at least, upon an inquiry of facts which may or may not be proved, and which may be provable by evidence extraneous to the note, or, for ought that appears, the note itself may maintain the plaintiff's averment, that it was made to them by the name therein expressed."

A deed made to O. P. & Co., by the firm name, instead of the individual members of the firm, is not for that reason void. It is a latent ambiguity, which may be explained by parol.

Murray, Ferris & Co. vs. *Blackledge*, 71 N. C. 492.

A deed will not be void for uncertainty, as to the grantee, if the grantee be so described that he may be made certain or discovered by proof aliunde.

Wood vs. *Boyd*, 28 Ark. 75.

If the grantee is a person in existence and identified, and delivery is made, it makes no difference by what name he is called.

Wilson vs. *White*, 84 Cal. 239.

A deed made to Lewis Staak as grantee passes title to Arnold Staak where he furnished the purchase money and was the intended grantee, whether the name used was by mistake or by design, the disagreement or mistake in name being

a latent ambiguity which is susceptible of explanation by parol.

Staak vs. *Sigelkow*, 12 Wis. 234.

A person, not engaged in a fraudulent or criminal purpose, may enter into a contract under any name he may choose to assume. All that the law looks to is the identity of the individual, and when that is established the act will be binding upon him and upon others.

Scanlan vs. *Grimmer*, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146.

In *Scanlan* vs. *Grimmer*, supra, the Court said:

"The court below failed to apply the true and well settled rule to the facts. It overlooked the distinction between the assumed name of a person actually identified and a wholly fictitious name without an identified person behind it."

A contract or obligation may be entered into by a person by any name he may choose to assume. The law only looks to the identity of the individual, and when that is clearly established, the act, when free from fraud, will be binding.

Roberts vs. *Mosier*, 35 Okla. 691, 132 Pac. 678, Ann. Cas. 1914 D. 423.

In *Blinn* vs. *Cheesman*, 49 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666, the Court said:

"The name is not the person, but only a means of designating the person intended; and where one assumes and comes to be known by another name than that which he properly bears, that

name may be effectually employed for the purpose of designating him. In this case it is probably true that the defendant did not intend to change his name, nor to adopt for general purposes the name of Cheesman, but he did—if he knew of the misnomer, as we must assume he did—most effectually assume that name for the purpose of taking and holding the title to this land."

Names are merely used as one method of indicating the identity of persons.

Meyer vs. *Indiana Nat. Bank*, 27 Ind. App. 354.

In a suit on a contract, the question of the person with whom the contract was made, should be distinctly left to the jury, when the question appears by the evidence to be disputed.

Diament vs. *Collity*, 66 N. J. L. 295, 49 Atl. 445.

Where a note was made payable to a name which plaintiff adopted in carrying on business at one of its branches, plaintiff can maintain an action on it.

Bath Motor Mart vs. *Miller* (1922) (Me.), 118 Atl. 715; *Jones* vs. *Home Furnishing Co.*, 9 App. Div. 103, 41 N. Y. Supp. 71; 7 Cyc. 567; 14 C. J. 324.

In *State* vs. *Tinnin* (1925), 64 Utah 587, 232 Pac. 543, 43 A. L. R. 46, the Court said:

"There is no question in law, either, as to a contract entered into by a person under an assumed or fictitious name being valid. The law looks to the identity of the individual, and when this is established the act is binding upon him and others, irrespective of the name he has assumed."

3. The court below, on a motion to strike in the nature of a demurrer, should not have decided that there was a lack of identity.

The manner in which the plaintiff is styled in the writ and also the complaint in this action, "J. Chauncey Van Horn, trading as the Jersey Investment Company," indicates to the defendants and to the Court that the name "Jersey Investment Company" is a name assumed by the plaintiff in business, and that it is really another name for the plaintiff. As was said in *Lewis* vs. *Scoville* (1919), (Supreme Court of Errors of Connecticut), 108 Atl. 501, at page 504:

> "In this case the plaintiff by his writ told the whole story—that he did business under the business name of the Army and Navy Magazine."

This action was properly brought in the name of the plaintiff, "trading as the Jersey Investment Company."

> Suit for buyer's breach of contract to purchase books sold under the name of "Army and Navy Magazine" as seller was properly brought in the name of the plantiff, "doing business under the name of "Army and Navy Magazine."
> *Lewis* vs. *Scoville* (1919), (Supreme Court of Errors of Connecticut), 108 Atl. 501.

It has been held that a person may sue by his right name on a contract made by himself under another name.

Steinfeld vs. *Taylor*, 51 Ill. App. 399.

It has also been held that a person may sue in a professional or stage name.

Parmelee vs. *Raymond*, 43 Ill. App. 609; *Baumeister* vs. *Markham*, 101 Ky. 122, 72 Am. St. Rep. 397, 39 S. W. 844, 41 S. W. 816.

The allegations of the amended complaint were that the said property was "sold at public vendue to the plaintiff" (State of Case, page 2, line 3, and page 3, line 14), that "said lands and premises were sold to the said plaintiff in fee simple" (State of Case, page 2, line 10, and page 3, line 21), that "the aforesaid Collector of Taxes of the City of East Orange did, by his certain certificate bearing the date last aforesaid, a true copy of which is hereto annexed and made a part hereof, grant and convey the aforesaid lands and premises to the plaintiff" (State of Case, page 2, line 14, and page 3, line 24), and that "The plaintiff caused the aforesaid certificate of sale, executed and delivered to him by the said Collector, to be duly recorded" (State of Case, page 2, line 21, and page 3, line 31). It appears from these allegations that the property was sold to and purchased by the plaintiff, that the property was conveyed to him by the certificate which was executed and delivered to him, and that he caused this certificate to be recorded.

On motion to strike the complaint as insufficient, the Court must assume that its averments are true.

Malone vs. *Brotherhood of Locomotive Firemen et al.* (N. J. Sup.), 110 Atl. 696.

A pleading should not be struck out as insufficient in law, upon motion tantamount to a general demurrer unless the insufficiency be apparent on its face.

Goss vs. *New York Cent. R. Co.* (N. J. Errors and Appeals), 125 Atl. 110.

The plaintiff proposed to produce evidence at the trial of this cause to show that he was the purchaser of the property in question at the sale held by the Collector of Taxes; that the Collector of Taxes sold the said property to him; that the said Collector of Taxes, executed and delivered the certificate of tax sale to the plaintiff; that the plaintiff caused the certificate of tax sale to be duly recorded; that the Collector of Taxes, by the said certificate of tax sale, granted and conveyed the said property to the plaintiff; that said certificate was made, executed and delivered to the plaintiff in the name of Jersey Investment Company; that the plaintiff is designated in said certificate by the name Jersey Investment Company; that the name, Jersey Investment Company, is a name by which the plaintiff is known and designated in business; and by which he was known and designated in this particular transaction and which name is a name adopted and assumed by the plaintiff in business and in this particular transaction; and that the plaintiff caused a certificate of the adoption and assumption by him of the name, Jersey Investment Company, as a trade or business name to be filed in the Office of the Clerk of Mercer County, New Jersey, in which county the plaintiff's principal office or place of business is located, on April 7, 1920, which date last aforesaid was approximately two and one-half years prior to the purchase of the property in question, and a true copy of a certified copy of which certificate is as follows:

(*Copy of Certified Copy of Certificate of Trade or Business Name.*)

To whom it may concern:

I hereby make statement and certify that the Jersey Investment Company, of Number Two East State Street, Trenton, in the County of Mercer, and State of New

Jersey, is to engage in and carry on a general real estate business, including the purchase, sale and exchange of real estate at the place aforesaid, and that the true and real full names, residences and post-office addresses of all persons who are members of such company are: J. Chauncey Van Horn, Residence 516 Riverside Ave., Trenton, N. J., Post-Office address Number Two East State St., Trenton, N. J.

STATE OF NEW JERSEY, }
} ss.
COUNTY OF MERCER, }

J. Cauncey Van Horn, of full age, being duly sworn according to law, upon his oath deposes and says, that the foregoing statement of the nature of the business, and of the true and real full names, residences and post-office addresses of all persons who are members of the Jersey Investment Company, is true.

J. CHAUNCEY VAN HORN.

Sworn and subscribed to before me this thirty-first day of March, A. D. 1920.

AMOS M. WALN,
Master in Chancery of New Jersey.

Endorsed: "Filed April 7-1920
John H. Fetter, County Clerk"

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss.*

I, Harry C. Hartpence, County Clerk of the County of Mercer, do hereby certify that the foregoing is a true and correct copy of a certain certificate of Trade Name as the same remains of file in my office, being filed April 7th, 1920, and entered in register of business names.

In Testimony Whereof, I have hereunto set my hand and seal of office, this 26th day of July, 1924.

CLERK'S SEAL OF THE COUNTY OF MERCER, N. J.

HARRY C. HARTPENCE,
Clerk.

AMOS M. WALN,
Attorney and Counsel for Plaintiff-Appellant.

MARTIN P. DEVLIN,
Counsel for Plaintiff-Appellant.

Court of Errors and Appeals

of New Jersey

J. Chauncey Van Horn, trading as the Jersey Investment Company,

Plaintiff-Appellant,

vs.

J. William Huegel and Alfred S. Clark, trading as Huegel and Clark, and Ray Meltz.

Defendants-Respondents.

ACTION AT LAW ON APPEAL FROM THE SUPREME COURT.

BRIEF FOR DEFENDANT-RESPONDENT, RAY MELTZ.

The plaintiff claimed he was the purchaser of property of the defendant, Ray Meltz, at a tax sale held by the tax collector of the City of East Oranage on October 20, 1922. The property was struck off ond sold to Jersey Investment Company. A certificate of sale was executed by the collector to the Jersey Investment Company on October 27, 1922, and it was recorded as a mortgage under the Tax Revision Act on Nov. 2, 1922. The plaintiff, J. Chauncey Van Horn, claims he is doing business under the trade name of Jersey Investment Company, and asserts that he filed a certificate of trade in the Office of the County Clerk of Mercer County on April 7, 1920.

The plaintiff sued for $14,025, for rent and use and occupation of the premises from the date of recording the certificate of sale to the date of redemption.

This defendant moved to strike out the complaint and it was struck out. The plaintiff appeals from the judgment striking out the complaint.

POINT I.

The certificate of tax sale must be made to the purchaser at the sale, who must be a natural or an artificial person.

Section 28 of the Tax Sales Revision Act (P. L. 1918, p. 889) provides:

> "Said officer shall deliver to the purchaser a certificate of sale under his hand and seal, duly acknowledged by him as a conveyance of lands, which shall set forth that the property therein described was sold by said officer to the purchaser," etc.

The purchaser at the tax sale according to the certificate of the collector of taxes was the "Jersey Investment Company" (Case, page 5). The plaintiff is J. Chauncey Van Horn, trading as the Jersey Investment Company (Case, page 1). The sale was not to J. Chauncey Van Horn, trading as the Jersey Investment Company. If it had been, the words "trading as Jersey Investment Company" would be held mere words of description. *Den* v. *Hay,* 21 N. J. L. 174; *Schenck* v. *Spring Lake Co.,* 47 N. J. Eq. 44.

So that we can fairly say that the sale and the certificate were to the Jersey Investment Co., and the suit by J. Chauncey Van Horn. Surely J. Chauncey Van Horn cannot maintain suit on a certificate to Jersey Investment Company.

Chief Justice Gummere, in delivering his opinion striking out this complaint, says:

> "The plaintiff is only entitled to these rents when it appears that he was the purchaser at the tax sale,—that is, the collector had sold the property to him, and delivered to him, as purchaser, a certificate exhibiting that fact. The certificate which he produced and annexed to his complaint as evidence of his right to these rents, conclusively shows that he is not entitled to them; for this certificate, made by the collector, was not to the present plaintiff, Mr. J. Chauncey Van Horn, as purchaser, but to either a corporation, or a non-existing entity, known as the New Jersey Investment Company. Whether that is a corporation, and whether the property was sold to that person or not does not appear, except that the plaintiff says 'there is not any such person, but I was carrying on business under that trade name, and the certificate was really meant for me.' That may or may not be so: but whether it is so or not is quite immaterial, in view of the statutory requirement, that the certificate must be made out to the purchaser himself, that is, to the person or corporate entity to whom it has been struck off and not to a non-existing company or a mere trade name.
>
> Because of the fact that the certificate exhibits no right of any kind in this plaintiff under that tax sale, I think this complaint should be stricken out."

Simonton Tax Sales in N. J., second edition, page 65.

Taxation in New Jersey, by Charles C. Black, 3rd edition, sec. 335b.

In *Palmaffy* v. *Cort,* 135 A. 463 (not yet officially reported), the court held that a tax deed to one other than the purchaser and holder of certificate of sale, or his heirs or assigns, is a nullity. That is a decision under the Martin Act, but the provisions are practically the same as those of the Tax Sale Revision Act. Under that decision a deed to J. Chauncey Van Horn would have been void. It follows that if he is not entitled to a deed, he is not entitled to maintain any action on the certificate of sale.

The plaintiff, in his brief under point 2, claims that "if the certificate was in fact made to the plaintiff by whatever name he is therein designated, he is entitled to recover." If this were so, Charles Bierman, in the case of *Palmaffy* v. *Cort, supra,* could have claimed that he was doing business under the corporate name of Cedar Realty Company.

Under this point in his brief, plaintiff claims that he can purchase property under any name that he wishes to assume and that such a transaction is legal and valid. This assertion is not the law.

It is a rule asserted from early times that no grant can exist without a grantee. That is, of course, axiomatic, for the title cannot pass from the grantor unless it passes to some one; and it is also axiomatic that a deed must have both a grantor and grantee.

8 R. C. L., p. 951, section 25.
18 C. J. 158.

The grantee, if not a natural, must be an artificial person. Hence, subject to a well recognized exception of dedications to public, pious,

and religious uses, grants to unincorporated bodies or to a class of persons, are considered void, because the grantees are incapable of taking, which, of course, includes deed to partnerships in the firm name; the effect of such conveyance being, at most, to vest title in one or more of the individual partners.

8 R. C. L. 953, section 28.

A deed to a fictitious person is admittedly void.

18 C. J. 158.

Whatever the law may be elsewhere, in this state it is well settled that the rule against the admission of parol evidence to vary or contradict a written instrument is held to preclude the admission of evidence to show the real parties to the instrument are other than those whose names appear in or are signed to it.

Kuperschmidt v. *Agricultural Ins. Co.,* 80 N. J. L. 441, 78 A. 225, 34 L. R. A. N. S. 503;
Le Grant Co. v. *Richman,* 82 N. J. Eq. 481, 91 A. 723.

The rule laid down in *Higgins* v. *Senior,* 8 Mees and W. 834, that a person not a party to a written contract may be shown to be a party by parol evidence, has never been adopted by the courts of New Jersey.

Schenck v. *Spring Lake Co.,* 47 N. J. Eq. 44, 19 A. 881.

In *Den* v. *Hay,* 21 N. J. L. 174, it was held that a lease to "S. C., J. C., and J. M., Trustees of the associated Presbyterian Congregation of Newark," vested title to the premises in the trus-

tees as individuals and not in the corporation, "The Associated Presbyterian Congregation of Newark." The court says, at page 178, that "although it is pretty clear from the inspection of the deed itself, and particularly from the use therein of the words, successors in connection with the names of the grantees, that the object was to convey the premises to the corporation, and not to the trustees; yet we cannot give effect to that intention without striking out the names of the grantees, which we have no right to do."

That the rule in New Jersey is different than that of some other jurisdictions is pointed out in 22 C. J. 1233, sec. 1647.

The certificate of sale in this case is made to the Jersey Investment Company and parol evidence is not admissible to show that J. Chauncey Van Horn was the purchaser, at least not in a court of law.

It is essential that the purchaser at a tax sale should be a natural person or corporation in order that the owner may be able to exercise his right to redeem. If persons were permitted to purchase and take certificates under fictitious or assumed names they could not be located for the purpose of tendering them the money to redeem the land from the tax sale. While the certificate in our case gives the address of the Jersey Investment Company, the statute does not require it. Even so, if one were attempting to locate the Jersey Investment Co. one would naturally assume it was a corporation. But if the address were not given it would be a difficult task to locate a person using a trade name. It would mean searching the records of every county in this State. If a fictitious name were used it would be impossible to discover the person using it. In the case of *Baldauf* v. *Russel*,

88 N. J. L. 303, 96 A. 96, in this court, the charge was made that the purchaser at the tax sale was a fictitious person.

Persons who make a business of purchasing at tax sales are despised by the people of the community and many purchasers would seize the opportunity to hide their identity under assumed or fictitious names, if it were permitted. A few would even do so for dishonest purposes. They could serve their notices to redeem, and then not being located within the time limited, they could file the certificate as a deed and so fraudulently secure title to the property.

POINT II.

The third point briefed by the plaintiff is that the court below, on a motion to strike in the nature of a demurrer, should not have decided that there was a lack of identity. The error in this proposition is that even in those states where parol evidence is admissible to show that the real parties to the instrument are other than those named in it, the test is not the identity of the party, but it is one of the intent of the parties to the writing.

In *Sisson* v. *Donnelly,* 36 N. J. L. 432, this court, at page 440, adopted the rule of construing conveyances, laid down by Sir T. Plumer, Master of Rolls in *Cholmondeley* v. *Clinton,* 2 Jac. and W. 1,

> "That the primary object of inquiry is the *intention of the parties* and that where that is on the face of the instrument, clearly and satisfactorily shown, and found not contrary to any rule of law, the court is

> bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference."

In that case the court read party of the second party to be party of the third part.

In *Huylers* v. *Atwood,* 26 N. J. Eq. 504, affirmed 28 N. J. Eq. 275, the court, following *Sisson* v. *Donnelly, supra,* saying:

> "The deed is to be read according to the manifest intention of the parties."

Party of the first part was held to mean party of the second part.

The author in writing the subject "deeds" in 8 R. C. L., page 957, section 32, is very careful to point out that where it is the "intention of both parties" that the grantor should be some person in existence and capable of taking, that intent may be effectuated by ascertaining the intent under proper rules of evidence, though such person be designated by an assumed or fictitious name.

While this rule may apply to deeds between natural persons or corporations, it cannot apply to a deed by a tax collector. This court in the case of *Woodbridge* v. *Allen,* 43 N. J. L. 262, held that the officer entrusted with the power to sell land exercises a naked statutory and special authority or power. He could not bind the owner of the land to an intent to convey to the plaintiff by an assumed or fictitious name. He is a mere instrument of the state to effect the sale and execute the certificate of sale. He does not represent, in any way, the owner of the property.

POINT III.

The holder of a tax sale certificate must take possession of the premises in order to be entitled to the rents and profits.

The Tax Sale Revision Act (P. L. 1918, p. 892, sec. 34) provides:

> "The purchaser may record the certificate of sale in the office of the clerk or register of the county where the land lies as a mortgage of land, and thereupon shall be entitled to the immediate possession of the property sold and described in the certificate, and to all rents and profits thereof, from and after the date of record until redemption, etc."

The Supreme Court construed this section of the statute in the unreported cases of *Cohn* v. *Simon, et als.*, and *Cohn* v. *Schrader, et al.*, at the November term, 1921. The decision was rendered by Justices Swayze, Black and Katzenbach, in a *per curiam* opinion, as follows:

> "This case involves the construction of the Tax Act of 1918, Chapter 237, section 34. Cohn had bought two tracts of land at a sale for taxes and had recorded his certificates as the statute provides, but did not take possession. After a few months the owner redeemed the land, having in the meantime spent for interest on mortgage, taxes, insurance, water rents, repairs, etc., more than would equal the rents and profits from the date of record of the certificate of sale to the date of redemption. Thereupon Cohn, the purchaser of the tax title, brought these suits to recover the rents and profits and the question is whether the statute enables him to recover them. We think it

> does not. Its language is that the purchaser may record the certificate as a mortgage of land and thereupon shall be entitled to the immediate possession of the property sold and to all the rents and profits thereof from the date of record to the date of redemption. The right the purchaser has under the tax title is to immediate possession, and evidently it is required that he should take this possession in order to have the right which the statute thereupon would give him.
>
> "The later sections of the statute draw the distinction clearly between the situation that arises upon the mere recording of the certificate of sale and the situation which arises after notice has been given to the owner to redeem, which we may call a foreclosure. In other words we think the intent of the statute was to enable the purchaser of the tax title upon recording his certificate to acquire the right of a mortgagee in possession, but in this respect the statute was not self executory and the purchaser of the tax title might, if he chose, avoid the responsibility of a mortgagee in possession. He does this by refraining from taking actual possession and being content with the fact that he is entitled to possession at any time. The judgment must therefore be affirmed."

The unreported case of *Van Horn* v. *Colillio,* decided at the June term, 1922, seems to be opposed to the decisions of *Cohn* v. *Simon* and *Cohn* v. *Schrader, supra,* but the point under consideration does not appear to have been raised. The court says

> "the question is whether the rents having been paid in advance of the sale, the purchaser is deprived of the rents during the period he was entitled to them under the statute."

The rent was paid on the first of the month in advance. The tax sale and recording of the certificate took place during the month. The court considered and decided that the purchaser was entitled at least to compensation for use and occupation for the part of the month remaining after his certificate was recorded until redemption. The court did not pass on the question whether the purchaser was required to take possession of the lands before he was entitled to the rents and profits of the premises.

These are the only cases construing section 34 of the Tax Sales Revision Act. There are three cases passing upon section 56 of the Tax Act of 1903 (P. L., p. 430) which is practically the same as section 34 of the Tax Sales Revision Act. The case of *Baldauf* v. *Russel, supra,* is the only case decided in this court, and that case did not construe the statute. That was a case where the defendant claimed the plaintiff was a fictitious person. The other cases are *Anson* v. *Elwood,* 76 N. J. L., 56, 68 A. 784; and *Baldauf* v. *Mann,* 86 N. J. L. 460, 92 A. 276. They are Supreme Court cases.

The plaintiff in the case of *Anson* v. *Elwood* brought suit for money had and received to his use. He owned real estate which had been sold for taxes to the defendant. A certificate of sale was issued and recorded as a mortgage of land. Thereafter defendant collected rents to the amount of $50. The court held the plaintiff could not recover; that the purchaser at a tax sale, who records his certificate as a mortgage, is entitled to the rents and profits of the land, and need not account to the owner therefore upon redemption of the property. This decision is sound. I have no doubt that where a holder of a tax sale certificate takes possession and has the tenant attorn

to him and collects rent, he is entitled to keep it for his own use. In that case the purchaser did just what I claim the plaintiff in this suit is compelled to do, that is, take possession of the property before he is entitled to the rents and profits of it.

The case of *Baldauf* v. *Mann, supra,* is also not dispositive of the proposition now being argued. The court says

> "it is unnecessary to decide whether the owner is not entitled to notice, because the owner before he collected the rent had received actual notice of the sale from the plaintiff by a letter demanding the rents. Necessarily he had all the notice of the tax sale that anyone could reasonably require, apart from the terms of some statute."

In that case the purchaser had made a demand for the rents which is tantamount to a demand for possession and, of course, was entitled to recover from the owner the rents which he had collected. The court also said,

> "Perhaps it would be better if the statute required prompt service of a notice to redeem. But this is a matter for the Legislature."

I submit, therefore, that the opinions in the cases of *Cohn* v. *Simon* and *Cohn* v. *Schrader,* are not contrary to the decision in the cases cited by counsel for the plaintiff.

The certificate *per se* does not pass title, nor does it give any right of entry to the described premises, and, in itself, confers no further right than to entitle the holder to receive payment of the redemption money, but proceedings are necessary on his part to obtain the land either temporarily, as regards its immediate possession, and the

rights to its avails, or permanently, by cutting off the right of those interested, and acquiring title.

Simonton Tax Sales in New Jersey, second edition, page 77.

It seems to me that the Legislature intended to give, and did give, to the purchaser at a tax sale the right to immediate possession, similar to the actual estate with a right to immediate possession, which vested in a mortgagee at common law under a mortgage as pointed out by this court in *Stewart* v. *Fairchild-Baldwin Co.*, 91 N. J. E. 86, 108 A. 301. The right of immediate possession carried with it, of course, the rents and profits. If the mortgagee did not exercise his right to take possession of the property, he would not be entitled to the rents and profits. It was a right which he had, and which he could exercise or not as he pleased. So with a purchaser at a tax sale, he has a right to take possession and collect the rents if he chooses to do so, but if he does not exercise his right, he waives it.

The injustice of allowing the holder of a tax sale certificate to secure the rents and profits of the premises without taking possession is apparent from the facts in this case. The plaintiff bought in the property of this defendant at a tax sale on October 20, 1922, for $3,774.70. This amount was repaid to him on May 9, 1923, with eight per cent. interest. He now is attempting to get from the defendants the rents collected from November 2, 1922, the date he recorded his certificate, until the date of redemption, amounting to $14,025. If the theory of the plaintiff is correct, and the property had not been redeemed for years and he had served no notices or taken possession,

he could acquire a fortune at the expense of the defendant. The law will not countenance such an injustice.

The contention of counsel in his brief "that by the Tax Sales Revision Act of 1918, the purchaser at a tax sale acquires an estate in fee subject to be defeated by the contingency of redemption," is not sound. The cases cited by him do not support any such principle.

The holder of a certificate of sale for unpaid taxes before service of notice to redeem or foreclosure of right to redeem has only a lien.

Simonton, Tax Sales in New Jersey, 2nd ed., pp. 77;
Abell v. *Friedman,* 90 N. J. Eq. 339, 107 A. 590;
Woodbridge v. *Allen, supra.*

POINT IV.

Redemption destroys a certificate of tax sale.

The primary effect of redemption is to destroy the potential title of the tax purchaser, and to restore the *status quo* as though no sale had taken place.

Simonton, Tax Sales in New Jersey, 2nd edition, page 139, citing *Elrod* v. *Owensboro Wagon Co.,* 128 Ga. 361.

Section 37 of the Tax Sale Revisions Act provides that the owner, among others, may redeem within a stated time, by paying to the collector, for the use of the purchaser, the amount required for redemption.

Section 38 of said act provides that such collecting officer on receiving payment in full shall execute and deliver to the purchaser redeeming a certificate of redemption which may be recorded, and that the register shall on request note on the record of the original certificate of sale a reference to the record of the certificate of redemption; or at the option of the person redeeming, the collecting officer shall procure and deliver to the owner the certificate of sale receipted for cancellation by endorsement required by law to satisfy or cancel a mortgage, whereupon the certificate of sale shall be cancelled in like manner as in the case of mortgages.

Section 40 of said act provides that the collecting officer shall pay all redemption money to such purchaser "on surrender of the certificate of sale and compliance with the provisions of the preceding two sections of this act."

The plaintiff therefore has no certificate of sale on which he can bring suit. He is in the position of one who has been paid and delivered up a note for cancellation. He has nothing to sue on. There is no certificate of sale existing. It has been cancelled.

POINT V.

The defendant also urged as a reason for striking out the complaint, the fact that the tax sale certificate sued on did not set forth the items of interest and costs separately.

Section 28 of the Tax Sale Revision Act requires that the certificate shall set forth among other things, "the items of the several municipal liens or charges, interest and costs."

Section 29 of the act gives the form to be used for the certificate, which requires among other things, "The amount of the sale made up of the following items (followed by items, including interest and costs)."

In the certificate of tax sale sued on by the plaintiff (Case, page 5) we have the bald statement, "The amount of sale was made up of the following items":

Taxes 1921	$3,774.70
Total	$3,774.70

We are dealing in this case with a certificate or instrument, not *inter partes,* founded upon a consideration passing from one party in the suit to his opponent, but we are dealing with a certificate whose only right to exist can be found in a statute, which prescribes exactly how that certificate, to have validity against the defendants, shall be executed and perfected, the certificate of a stranger claiming to exercise a confiscatory right, and before the complainant can have any remedy in this court, it must show that its statutory right exists, by producing a certificate executed according to the statute.

Harrington v. *Hoerster,* 89 N. J. Eq. 270, 108 A. 150.

The certificate of sale is also void for the reasons advanced under this point.

POINT VI.

Plaintiff cannot sue under trade name, not having filed his certificate in Essex County, where the business is transacted.

The act to regulate the use of business names (P. L. 1906, p. 513) makes it unlawful to transact under a fictitious name without filing in the office of the clerk of the county where the business is transacted, a certificate as required by the act.

The sale took place at the City of East Orange, in the County of Essex, and the suit was instituted in the Supreme Court, Essex Circuit. The business was, therefore, transacted in Essex County, while the certificate of trade name was filed in Mercer County.

A plaintiff transacting business under a name which was not his real name cannot recover under an executory contract.

Rutkowsky v. *Bozza,* 77 N. J. L. 724, 73 A. 724.

I submit, therefore, that for the reason herein stated the judgment of the court below should be affirmed, with costs.

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