NEW JERSEY COURT OF ERRORS AND APPEALS

STATE OF NEW JERSEY, GEORGE W. PHIFER, FISH AND GAME WARDEN, PROSECUTOR DEFENDANT IN ERROR v. ANDREW SNYDER, PLAINTIFF IN ERROR	In Error Brief Plaintiff In Error

The writ brings up for review before the Supreme Court a summary conviction before George W. Payne, Esquire, a justice of the peace of the County of Cumberland, wherein one Andrew Snyder, the plaintiff in certiorari was convicted of violating section sixteen of an Act of the Legislature of this State entitled "An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture, and provide open and close seasons for such capture and possession. (Revision 1903)," approved April fourteenth nineteen hundred and three, and the several amendments thereof.

At the hearing it was moved, on the part of the defendant below that the defendant be dismissed, (1) because the defendant was not lawfully in court; (2) that the complaint of the game warden does not show a cause of action against the defendant; and (3) that the above mentioned Act does not inhibit the commission of the Act set forth in the complaint of the game warden. All of which motions were overruled by the justice.

There are numerous reasons why the conviction should be set aside but the plaintiff in certiorari will rely chiefly on the following:

POINTS.

I.

THE DEFENDANT WAS NOT LAWFULLY IN CUSTODY.

II.

THE COMPLAINANT OF THE GAME WARDEN DOES NOT SHOW A CAUSE OF ACTION AGAINST THE DEFENDANT BELOW.

I.

THE DEFENDANT WAS NOT LAWFULLY IN CUSTODY.

The warrant was directed, among others to the game wardens of this State. The prosecutor in this suit is George W. Phifer, a fish and game warden, and the return endorsed on the warrant shows that it was executed by the same person. The penalty in prosecutions under this Act, if recovered from the defendant, is to be "paid in each case to the person making the complaint, who shall pay one-third thereof to the fish and game protector for the use of the fish and game commissioners, and one-third thereof in equal proportions to the person furnishing the evidence to secure a conviction;" (P. L. 1897, Chapter 41, Section 8). This leaves the remaining one third of the penalty to the fish and game warden who prosecuted the suit; thus making him a party in interest to the suit.

It is an unquestioned principle of law that a man cannot be judge in his own cause. On the same theory a man should not be allowed to execute the original process in a cause to which he is a party in interest. In the former instance, where the party is the judge, his province is to adjudge what amount he is to recover, if anything, in the latter case the officer is a part of the court in which he

seeks redress and it is he who is instrumental in bringing parties into court against whom there is a prospect of recovery. The judge determines what can be recovered; the officer selects from whom it is to be recovered.

The proper construction of the Act will not allow the game warden who makes the complaint to serve the process. The case *Schroder v. Ehlers, 2 Vr. 44,* is analogous. In that case a justice of the peace on view arrested a trespasser for trespassing on his (the justice's) own property. He justified himself under the Act entitled "An Act for the preservation of deer and other game, and to prevent trespassing with guns, (*Nix. Dig.* (*R. S. 12*), *334*)." That Act provided that an offender be taken before "any justice of the peace," (Section 1, page). It directs "any justice of the peace" to hear cases of the alleged violation of the Act but it does not allow a justice to have cognizance of the matter when he is the owner of the property trespassed upon and he is to receive the penalty sued for.

Mr. Chief Justice Beasley, in delivering the opinion of the court in *Schroder v. Ehlers,* stated that the particular rule of construction for such statutes was, "that where some collateral matter, which is absurd and manifestly repugnant to common reason, arises out of the general words of a statute, the judges are to conclude that this consequence was not forseen, and as to it, to disregard the Act."

Schroder v. Ehlers, 2 Vr. bottom page 50.

The Act entitled "An Act to provide a uniform procedure for the enforcement of all laws relating to fish, game and birds, and for the recovery of penalties for violations

thereof." (P. L. 1897, page 109) under which this proceeding is brought provides that the justice upon receiving a complaint is directed to issue a warrant "to any constable, police officer, fish and game warden," &c.

P. L. 1897, Section 3, page 109.

The same rule, ("that where some collateral matter which is absurd and manifestly repugnant to common reason, arises out of the general words of a statute, the judges are to conclude that this consequence was not foreseen, and as to it, to disregard the Act"). for the construction of statutes is to be applied to the last mentioned Act. It is unjust for a suitor to seek redress in the tribunal of which he is an officer. Such a method would lead to oppression, in that the warden, may, in many ways pecular to the circumstances, ill treat and abuse his prisoner with a view of coercing him into paying the penalty of the Act rather than endure the treatment of the warden.

A constable who is a plaintiff cannot serve a summons in his suit (*Hevener v. Kerr, 1 South. 65*) and it would be much more absurd to allow a party in interest to have the custody of the person from whom the interest is to be levied.

Evidently the Legislature did not intend such a state of affairs to exist, for, it provides that other officers may serve the warrant in such cases. The justice may issue his warrant to constables and police officers.

P. L. 1897, Sec. 3, page 109.

A constable who is plaintiff cannot serve the process out of the court for the trial of small causes.

Havener v. Kerr, 1 South. 65.

Neither can he serve a venire where he is an interested party.

Cranmer v. Crawley, Coxe, page 53.

The same view is taken by the courts of other States.

"It is a general rule of almost universal application that no one who is a party to the litigation can make a valid service therein."

19 Enc. Pl. & Pr. page 580.

"In Arkansas a service of a summons by plaintiff's attorney is bad.

Rutherford v. Moody, 50 Ark. 328.

19 Enc. Pl. & Pr. note, page 581.

"A writ in favor of a corporation, served by a constable who is a member of the corporation, was for this cause abated.

Dunwell Mfg. Co. v. Rockwell, note page 581 of 19 Enc. Pl. & Pr.

"The sheriff as the ministerial officer of the court is ordinarily the proper officer to execute all processes issued from the court, provided he is not an interested party or otherwise disqualified.

Ibid, page 581.

"Where the sheriff is a party to the suit or is interested therein, both he and his deputies are disqualified from serving the process; nor can the sheriff in such case serve process on his deputy where the other is a party.

Ibid, 583.

"The right of a sheriff to execute process in cases where he is a party, or interested, is so manifestly inconsistent with public policy and with the impartial admini-

stration of justice, that the exercise of any such right has always been prohibited, in Kentucky, at least, by express statute."

Ibid, note page 583.

"Where the sheriff was also Coroner, and the writ in an action in which the sheriff's deputy was a party, was directed to a Coroner it was held that service by a sheriff in this capacity was illegal.

Ibid, note page 583.

Service cannot be made by a party to the suit.

Am. & Eng. Enc. L, (1 Ed.) page 110, note 3 and cases there cited.

The fact that a sheriff is an inhabitant of the town makes him incompetent to serve a writ.

Evarts v. Georgia, 18 Vt. 15.

Lyman v. Burlington, 22 Vt. 131.

A sheriff after being appointed guardian of the plaintiff cannot complete service commenced before his appointment.

Clark v. Patterson 58 Vt. 676.

II.

THE COMPLAINT OF THE GAME WARDEN DOES NOT SHOW A CAUSE OF ACTION AGAINST THE DEFENDANT BELOW.

Whether the complaint of the game warden shows a cause of action against the defendant below depends on the construction of the sixteenth section of the Act which is claimed to have been violated, to wit, Chapter 246, P. L. 1906, Section 16.

Section sixteen of the statute above mentioned as originally enacted reads as follows:

"16. *It shall be unlawful for two years after the passage of this Act* for any person to gun for or take, or attempt to take, kill, injure or destroy or have in possession any wild deer * * * and thereafter it shall be unlawful to take, kill, injure or destroy any wild deer &c. excepting only on every Wednesday in the month of November &c."

P. L. 1903, Section 16, page 699.

This section was amended by Chapter 233 P. L. 1904, page 406, so as to read as follows:

"16. *It shall be unlawful for two years after the passage of this Act* for any person to gun for or take, or attempt to take, kill, injure or destroy, any wild deer &c. * * * excepting only on every Wednesday in the month of November &c."

P. L. 1904, page 406.

The same section of this Act was again amended by Chapter 317, P. L. 1906, page 699 &c. so as to read as follows:

"16. *It shall be unlawful for three years after the passage of this Act* for any person to gun for or to take, kill, injure or destroy, * * * any wild deer &c. * * * and thereafter it shall be unlawful to take, kill, injure or destroy, * * * any wild deer &c. * * * excepting on every Wednesday in the month of November &c."

P. L. 1906, page 699.

Until the constitutional amendment of September twenty-eighth, eighteen hundred and seventy five, a statute was usually amended by striking out certain words and inserting others.

For the purpose of illustration we will take Chapter

CI, P. L, 1874, Section 2, page 295. While the subject matter of the last above cited Act has no bearing on this case it is as useful for the purpose of illustration as any other. The amendment reads as follows:

"2. And be it enacted, that the words fourth day of July, eighteen hundred and seventy three," at the beginning of the twenty-fourth section of said Act be altered and amended so as to read as follows: "fourth day of July, eighteen hundred and seventy five."

P. L. 1874, page 295.

"This mode of amendment did not repeal or disturb the existance of the parts of the original section not stricken out but the objection thereto was that it tended to confuse the law and make it uncertain, because of the difficulty of clearly reading the original section with the amendments, a difficulty which largely increased with subsequent amendment."

26 Am. & Eng. Enc. L. (2 Ed.) page 706.

The old method of striking out and inserting words and provisions was liable to abuse, and calculated to mislead the careless, even affording an opportunity for intentional deception.

To obviate this difficulty the following constitutional amendment was made in 1875:

"No law shall be revived or amended by reference to its title only, but the Act revived, or section or sections amended, shall be inserted at length."

Const. N. J. Art. IV, Sec. VII, Par. 4.

The effect of amendment in this form is to put the language of the new statute (or section) in the place of that of the old.

The portions unchanged are considered to have been the law all along (either as not having been repealed or as having been repealed and re-enacted at the same instant of time), and the new or changed portions as taking effect from the time of the amendatory enactment.

The amendment for purposes of construction takes its place as part of the original Act.

26 Am. & Eng. Enc. L (2 Ed.) pages 706-707, and the cases there cited.

The author of Lewis' Sutherland Statutory Construction upholds the above doctrine in an exhaustive paragraph on this subject. He treats of this style of amendments in the following language, comprehending the whole subject:

"237 (133) EFFECT OF AMENDMENT. *So as to read as follows:* The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the mere nominal re-enactment should have the effect of disturbing the whole body of statutes in pari materia which had been passed since the first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be recognized. By observing the constitutional form of amending a section of a statute says the court in one case the Legislature does not express an intention then to enact a whole section as amended, but only an intention then to

enact the change which is indicated. Any other rule of construction would surely introduce unexpected results and work great inconvenience."

"The amendment operates to repeal all of the section amended not embraced in the amended form. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule. But all the provisions of the prior law amended which continue in force after the passage of the amendatory Act derive their force thereafter not from the original but the amendatory Act, and as to the future the old Act or section is repealed in toto. A repeal of that Act would not revive the provisions as originally enacted. On the contrary, a repeal of the amendatory Act would be a repeal of provisions therein continued in force from the original Act.

"The word 'hereafter' used in the statute as amended must be construed distributively. As to cases within the statute as originally enacted, it means subsequent to the passage of the original Act; as to cases brought within the statute by the amendment, it means subsequent to the time of the amendment. It is a general rule, however, that an amended statute is construed, as regards any action had after the amendment was made, as if the statute had been originally enacted in the amended form. The effect of an amendment of a section of the law is not to sever it from

its relation to other sections, of the law, but to give it operation in its new form as if it had been so drawn originally, treating the whole Act as a harmonious entirety, with its several sections and parts mutually acting upon each other. Where a proviso is added to a section by amendment it will be strictly construed and will be applied only to that section, unless a contrary intent is clear."

Lewis' Statutory Construction (2 Ed.) par. 237.

This construction is emphatically recognized and commended by the courts of this State. Dixon, J. in *McLaughlin v. Newark* in which this point was raised, says: "By observing the constitutional form of amending a section of a statute the Legislature does not express an intention then to enact the whole section as amended but only an intention then to enact the change which is indicated. *Any other rule of construction would surely introduce unexpected results and work great inconvenience."*

McLaughlin v. Newark, 28 Vr. on page 301, Affirmed 29 Vr. page 202. See opinion Simmons v. Millville, filed June term, 1907, by Swayze, J.

The original Act (1903) makes it unlawful to hunt deer for two years after the passage of that Act which would allow hunting on the proper days in nineteen hundred and five. The amendment of nineteen hundred and four two years after the passage of the (original) Act, to wit, in nineteen hundred and five, The amendment of nineteen hundred and six allows hunting three years after the passage of the (original) Act, to wit, the proper days in nineteen hundred and six.

To sustain this construction:—

Evidently the purpose of neither amendments to the Act of nineteen hundred and three was not to lengthen the close season for hunting deer. Other reasons are obvious. The proviso of the original Act permitted "the owners of deer preserves at present established hunting or killing their deer whenever they see fit; or disposing of them as they see fit."

The amendment of nineteen hundred and four seems to have been enacted to regulate the importing of deer into the State. It contains the same provisions as in the original Act, but continues: "or interfering with deer that have been legally killed or taken in other States and brought into this State properly tagged to show where they were killed or taken."

P. L. 1904 page 406.

The Legislature of nineteen hundred and six, observed the impropriety of allowing the owners of private preserves to hunt wild deer—the property of the State soverignty—on their property at all times of the year, while other land owners were forbidden that privilege, and the injustice of the law permitting persons to indiscriminately import them into the State according to their own pleasure, eradicated the proviso of the original statute and the amendment of nineteen hundred and four which allowed hunting on private preserves, and the importation of deer.

And further as a protection, then, to wild deer, the Legislatute provided for an open season in nineteen hundred and six, by inserting a provision not contained in the previous enactments mentioned. They provide that "on person shall kill, injure, destroy or have in possession more

than one wild deer, * * * in any one year, * * *"

P. L. 1906, page 700.

All of which indicates that the Legislature intended the statute to permit hunting deer in nineteen hundred and six.

Upon the proper construction of the statute, the complaint shows that the alleged violation of the Act took place on the third Wednesday in the month of November, (the twenty-first), nineteen hundred and six. The statute did not forbid the hunting of deer on Wednesdays in the month of November, nineteen hundred and six, (P. L. N. J. page 699) no offence is charged in the complaint, and the proceeding should have been dismissed by the justice.

Respectfully submitted,

JOSEPH F. SMITH,

Of Counsel with Plaintiff in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS

STATE OF NEW JERSEY,
GEORGE W. PHIFER,
FISH AND GAME WARDEN, PROSECUTOR
DEFENDANT IN ERROR
v.
ANDREW R. SNYDER,
PLAINTIFF IN ERROR
} In Error

WRIT OF ERROR.

New Jersey, ss. The State of New Jersey to our Justices of our Supreme Court, Greeting:

(Seal)

Because in the record and proceedings, and also in the giving of the judgment in a plaint, which was in our said supreme court before you, between George W. Phifer, fish and game warden, defendant in certiorari, and Andrew R. Snyder, plaintiff in certiorari, on a certiorari issued out of our said supreme court, to George W. Payne, Esquire, one of the justices of the peace in and for the county of Cumberland, as is said manifest error hath intervened to the great damage of the said Andrew R. Snyder, plaintiff in certiorari, as aforesaid, as by his complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid, in this behalf do command you that if judgment be thereupon given, then you send distinctly and openly, under your seal, the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our court of errors and appeals before the judges thereof, on the twenty-second day of December, Nineteen Hundred and seven, and this writ,

that the records and proceedings aforesaid being inspected, we may cause to be further done thereupon what of right and according to law ought to be done.

Witness our chancellor and president judge of our said court of errors and appeals at Trenton, aforesaid, this second day of December, nineteen hundred and seven.

S. D. DICKINSON, Clerk.

JOSEPH F. SMITH, Attorney.

WRIT OF CERTIORARI

New Jersey, ss. The State of New Jersey to George W. Payne, Esquire, one of the Justices of the Peace in and for the County of

(Seal) Cumberland, Greeting:

We being willing for certain reasons, to be certified of the record, conviction, judgment and proceedings in a certain proceeding lately pending before you the said justice, wherein the State of New Jersey was plaintiff, George W. Phifer, Fish ahd Game Warden, prosecutor, and Andrew Snyder was defendant, in which said proceedings Andrew Snyder was charged with violating section sixteen of an Act of the Legislature of the State of New Jersey, entitled "An Act for the protection of certain kinds of birds, game and fish, and to regulate their method of capture, and provide open and close seasons for their capture and possession (Revision 1903)," approved April fourteenth. nineteen hundred and three, and the amendments thereof, DO HEREBY COMMAND YOU that you send under your hand and seal to our justices of our Supreme Court,

at Trenton, on the twenty-ninth day of December, nineteen hundred and six, the record, conviction, judgment and all your proceedings in the matter aforesaid, with all things touching and concerning the same as fully and entirely as the same remains of record before you by whatsoever names the parties may be called therein, together with this writ, that we may cause to be done thereupon what of right we shall see fit to be done.

WITNESS, William S. Gummere, Esquire, Chief Justice of our said Supreme Court, at Trenton aforesaid, this day of December, in the year of our Lord one thousand, nine hundred and six.

WM. RICKER, JR., Clerk.

SMITH & VANNAMAN, Attorneys.

RETURN TO WRIT.

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW JERSEY:

I, George W. Payne, one of the Justices of the Peace, in and for the County of Cumberland, hereby send to the Supreme Court of the State of New Jersey, the judgment, conviction, record and all proceedings lately depending before me wherein the State of New Jersey, was plaintiff, George W. Phifer, prosecutor, and Andrew Snyder was defendant, together with all things touching and concerning the same as fully and entirely as the same remains of record before me as within I am commanded. And I hereby certify that the same are true and correct in every particular.

Witness my hand and seal this twenty-second day of December, nineteen hundred and six.

(Seal) GEORGE W. PAYNE,
Justice of thc Peace.

ENDORSEMENT ON WRIT.

NEW JERSEY SUPREME COURT.

State of New Jersey,

GEORGE W. PHIFER, Fish and

Game Warden, Prosecutor,

Defendant in Certiorari,

V

ANDREW SNYDER,

Plaintiff in Certiorari.

ON CERTIORARI.

WRIT.

SMITH & VANNAMAN,

Attorneys plaintiff certiorari.

P. O. Address, Millville, N. J.

I allow this writ. Let it be sealed.

THOMAS W. TRENCHARD,

Justice Supreme Court.

COMPLAINT FOR ATTEMPT TO TAKE, KILL, INJURE AND DESTROY WILD DEER UNLAWFULLY.

State of New Jersey, }
County of Cumberland, } ss.

Personally appeared before me, the subscriber, a Justice of the Peace of said county, George W. Phifer, one of the Fish and Game Wardens of this State, who, being duly sworn according to law, on his oath deposes and says, that on the twenty-first day of November, A. D., nineteen hundred and six, one Andrew Snyder, of the city of Millville, in the County of Cumberland and State of New Jersey, did, on the road leading from Hunter's Mill to Estelleville, in the Township of Weymouth, in the County of Atlantic and State of New Jersey, unlawfully attempt to take, kill, injure and destroy one wild deer, contrary to the provisions of the sixteenth section of an act entitled "An act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and provide open and close seasons for such capture and possession, (Revision 1903)," approved April fourteenth, nineteen hundred and three, as said section was amended by an act entitled "an Act to amend an Act entitled 'An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and to provide open and close seasons for such capture and possession (Revision 1903)'," approved April fourteenth, nineteen hundred and three, approved April fifth, nineteen hundred and four, and as such section was amended by an Act entitled "An Act to amend an Act entitled 'an Act to amend an Act entitled

'An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture, and provide open and close seasons for such capture and possession (Revision 1903)',' approved April fourteenth, nineteen hundred and three, approved April fifth, nineteen hundred and four, approved June nineteenth, nineteen hundred and six.

Whereby the said Andrew Snyder did incur a penalty of one hundred dollars, and he prays that the said Andrew Snyder may be apprehended and dealt with according to law.

GEORGE W. PHIFER.

Sworn to and subscribed before me this twenty-seventh day of November A. D., nineteen hundred and six.

GEORGE W. PAYNE,
Justice of the Peace.

WARRANT.

State of New Jersey, }
County of Cumberland, } ss.

The State of New Jersey to any constable or police officer of said county, or to any fish and game warden of the State of New Jersey:

Whereas, proof has been made before me under oath that Andrew Snyder, of the city of Millville, County of Cumberland, and State of New Jersey, did on the twenty-first day of November A. D., nineteen hundred and six, on the road leading from Hunter's Mill to Estelleville, in the township of Weymouth, in the County of Atlantic and State of New Jersey, unlawfully attempt to take, kill,

injure and destroy one wild deer, contrary to the provisions of the sixteenth section of an Act entitled "An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and provide open and close seasons for such capture and possession (Revision 1903)," approved April fourteenth, nineteen hundred and three, as said section was amended by an act entitled "An Act to amend an act entitled 'An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture, and provide open and close seasons for such capture and possession (Revision 1903)'," approved April fourteenth, nineteen hundred and three, approved April fifth, nineteen hundred and four, and as such section was amended by an act entitled "An Act to amend an act entitled 'An Act to amend an act entitled 'An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture, and provide open and close seasons for such capture and possession (Revision 1903)' " approved April fourteenth, one thousand nine hundred and three, approved April fifth, nineteen hundred and four," approved June nineteenth, nineteen hundred and six.

You are hereby commanded to take the body of said Andrew Snyder, so that you have him forthwith before the subscriber at my office in the city hall, second ward, city of Millville, New Jersey, in the county aforesaid, to answer the said charge and be dealt with according to law.

Given under my hand and seal this twenty-seventh day of November, A. D. nineteen hundred and six.

GEORGE W. PAYNE,

Justice of the Peace. (SEAL)

(RETURN OF WARRANT.)

I arrest the within named Andrew Snyder at the city of Millville, on the twenty-seventh day of November, nineteen hundred and six, and have him now before the said justice as within I am commanded.

Dated this twenty-seventh day of November, A. D. nineteen hundred and six.

GEORGE W. PHIFER,
Fish and Game Warden.

RECOGNIZANCE.

New Jersey, Cumberland County ss.

Be it remembered that on this twenty-seventh day of November, in the year one thousand nine hundred and six, personally appeared before me George W. Payne, Mayor of the city of Millville, County and State aforesaid, Andrew Snyder and Parker Hayes, and by this recognizance signed by them on the day and year aforesaid acknowledged themselves to be indebted unto the State of New Jersey in the sum of one hundred and fifty dollars to be made and levied of their respective goods and chattels, lands and tenements, if failure is made in the following conditions:

The conditions of the above recognizance is such, that if the above bounden Andrew Snyder shall personally be and appear at my office in the city hall, second ward, city of Millville, on the fourth day of December, nineteen hundred and six, at ten thirty o'clock in the forenoon, then and there to answer such charges as shall be preferred against him and not depart the said court without leave then the above recognizance to be void, or else to be and

remain in full force and virtue

ANDREW R. SNYDER,

PARKER HAYES.

Taken and acknowledged the day and year above written, before me

GEORGE W. PAYNE,

Justice of the Peace.

CONVICTION

State of New Jersey, }
County of Cumberland, } ss.

Be it remembered that on this fourth day of December, A. D. nineteen hundred and six, at Millville, N. J., in said County, Andrew Snyder defendant was, by George W. Payne, one of the Justices of the Peace in and for said County, convicted of violating the sixteenth section of an act of the Legislature of said State entitled "An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and provide open and close seasons for such capture and possession (Revision 1903)'," approved April fourteenth, nineteen hundred and three as said section was amended by an act entitled "An Act to amend an act entitled 'An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture, and provide open and close seasons for such capture and possession (Revision 1903)'," approved April fourteenth, nineteen hundred and three, approved April fifth nineteen hundred and four, and as such section was amended by an Act entitled "An Act to amend an Act entitled 'An Act to amend an Act entitled 'An Act for the

protection of certain kinds of birds, game and fish, to regulate their method of capture, and provide open and close seasons for such capture and possession (Revision 1903)',' approved April fourteenth, nineteen hundred and three, approved April fifth, nineteen hundred and four, approved June nineteenth, nineteen hundred and six, in a summary proceedings at the suit of George W. Phifer, one of the Fish and Game Wardens of this state.

Whereupon I, the said Justice of the Peace, doth hereby give judgment that the plaintiff, George W. Phifer, Fish and Game Warden of the State of New Jersey, recover of the defendant one hundred dollars penalty and three dollars and sixty-five cents cost of proceeding.

GEORGE W. PAYNE,
Justice of the Peace.

REGOGNIZANCE.

State of New Jersey, }
County of Cumberland, } ss.

Be it remembered that on this fourth day of December, in the year one thousand nine hundred and six, personally appeared before me, George W. Payne, Mayor of the city of Millville, County and State aforesaid, Mark Smith and Andrew Snyder and by this recognizance signed by them on the day and year aforesaid acknowledged themselves to be indebted unto the State of New Jersey in the sum of two hundred dollars to be made and levied of their respective goods and chattels, lands and tenements, if failure be made in the following conditions:

The condition of the above recognizance is such that if

the above bounden Andrew Snyder shall personally be and appear before me at my office in the City Hall, second ward city of Millville, New Jersey, county aforesaid, on Thursday the third day January, nineteen hundred and seven at ten thirty o'clock in the forenoon, then and there to answer such charges as shall be preferred against him and not depart the said court without leave, then the above recognizance to be void, or else to be and remain in full force and virtue.

MARK SMITH,
A. R. SNYDER,
ANDREW R. SNYDER.

Taken and acknowledged the day and year first above written, before me

GEORGE W. PAYNE,
Mayor.

Cumberland County, ss.

Mark Smith, being sworn upon his oath saith, that he is one of the signers of the within recognizance, and that he is a freeholder in the County of Cumberland, and that he is worth in his own right two hundred dollars over and above all incumbrances whatsoever, and that his property is situate Number 427-429 Pine street and 116 High street, Millville, N. J.

MARK SMITH.

DOCKET.

Cumberland County, ss.

11—27—1906. Personally appeared before me, the subscriber, a Justice of the Peace of said county, George

W. Phifer, one of the Fish and Game Wardens of this state who, being duly sworn according to law, on his oath deposes and says that on the twenty-first day of November A. D., nineteen hundred and six, one Andrew Snyder, of the city of Millville, in the county of Cumberland and state of New Jersey, did, on the road leading from Hunter's Mill to Estelleville, in the township of Weymouth, in the county of Atlantic in the state of New Jersey, unlawfully attempt to take, kill, injure or destroy one wild deer, contrary to the provisions of the sixteenth section of an Act entitled "An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and to provide open and close seasons for such capture and possession (Revision 1903)," approved April fourteenth, nineteen hundred and three, as said section was amended by an Act entitled "an Act to amend an Act entitled 'an Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and to provide open and close seasons for such capture and possession (Revision 1903)'," approved April fourteenth, nineteen hundred and three, approved April fifth, nineteen hundred and four, and as such section was amended by an Act entitled "an Act to amend an Act entitled 'an Act to amend an Act entitled 'an Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture, and to provide open and close seasons for such capture and possession, (Revision 1903)'," approved April fourteenth, nineteen hundred and three, approved April fifth, nineteen hundred and four, approved April nineteenth nineteen hundred and six.

Whereby the said Andrew Snyder did incur a penalty of one hundred dollars and he prays and he prays, etc.

11—27—1906. Issued a warrant returnable before me forthwith.

11—27—1906. Warrant returned with the body of the defendant in custody. The defendant not being ready to go to trial at this time he entered bonds to the amount of one hundred and fifty dollars for his appearance at my office in the City Hall, second ward, city of Millville, New Jersey, at ten thirty o'clock in the forenoon on Tuesday, December fourth, nineteen hundred and six. Parker Hayes freeholder, signing said bond in Snyder's behalf.

12—4—1906. Case called at the appointed time, viz. ten thirty in the forenoon. At this time appeared the defendant Andrew Snyder and Nelson B. Gaskill, assistant Attorney General on behalf of the state and Smith & Vannaman for defendant Andrew Snyder.

On behalf of the defendant it was moved that the case be dismissed.

1. On the ground of the insufficiency of the warrant it appeared that the warrant had been executed by a party to the suit and was therefore irregular and should be set aside. Motion overruled:

2. That the defendant be dismissed because the complaint did not show a cause of action against the defendant.

3. Because section sixteen of an act entitled "an Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and to provide open and close seasons for such capture and possession, (Re-

vision 1903)'' approved April fourteenth, nineteen hundred and three, and the amendments thereof, under which this proceeding is brought authorizes the commission of the acts set forth in the complaint. These motions overruled.

The complaint being read to the defendant Andrew Snyder pleaded non vult. This plea was accepted by the court with the acquiesense of the prosecutor.

I therefore adjudged that the said Andrew Snyder had incurred the penalty provided for by the sixteenth section of an Act entitled ''An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture, and provide open and close seasons for such capture and possession (Revision 1903)'' approved April fourteenth, nineteen hundred and three, as the same was amended by an Act entitled ''an Act to amend an Act entitled 'an Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and provide open and close seasons for such capture and possession (Revision 1903)','' approved April fourteenth, nineteen hundred and three, approved April fifth, nineteen hundred and four, as said section was further amended by an Act entitled ''an Act to amend an Act entitled an Act to amend an Act entitled 'an Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture, and provide open and close seasons for such capture and possession (Revision 1903)','' approved April fourteenth, nineteen hundred and three, approved April fifth, nineteen hundred and four, approved June nineteenth, nineteen hundred and six, for attempt to take, kill, injure and destroy one wild deer, on the twenty-first day of No-

vember, A. D. nineteen hundred and six. I therefore give judgment for the prosecutor and against the defendant and imposed a penalty of one hundred dollars as provided by law together with three dollars and sixty-five cents of these proceedings.

I hereby certify that the foregoing is a copy of the proceedings. In witness whereof I hereto set my hand and seal this eighteenth day of December, nineteen hundred and six.

GEORGE W. PAYNE,
Justice of the Peace.

REASONS FOR REVERSAL.

1. The court was without jurisdiction because the defendant was unlawfully brought into court, in that the return endorsed on the warrant shows that the same was executed by a party in interest to the suit.

2. Because the complaint of the game warden does not show a cause of action against the defendant, the defendant should have been dismissed by the justice.

3. Because section sixteen of the act of the legislature entitled "An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and provide open and close seasons for such capture and possession, (Revision 1903)," approved April fourteenth, nineteen hundred and three, and the amendments thereof authorizes the commission of the acts set forth in the complaint of the game warden.

4. Because the conviction filed by the justice is in divers respects erroneous, unlawful and contrary to law,

and should be set aside, to wit.

a. It does not show the complaint against the defendant, or its substance.

b. It does not show the issue or return of process.

c. It does not show the appearance of the defendant.

d. It does not show the defendant's plea, confession, or testimony upon which the conviction is founded.

e. It does not show the defence, if any, made by the defendant.

f. The judgment of the justice does not conform to the particular section of the act under which the proceedings were instituted.

5. Because the said proceedings, conviction and judgment are in divers other respects unlawful, erroneous and contrary to law.

SMITH & VANNAMAN,
Attorneys Plaintiff Certiorari.

NEW JERSEY SUPREME COURT.

June Term 1907.

Branch Court No. 111.

STATE

v.

ANDREW W. SNYDER

Submitted June Term, 1907.

Decided November 11, 1907.

1. The legislature by the act to establish a uniform procedure for the enforcement of laws relating to fish, game and birds (P. L. 1897, 109) has authorized the fish and game wardens to prosecute for penalties and to arrest persons against whom a warrant has been issued; held that a warden may make the arrest even in a case in which he himself is the prosecutor, and although he is entitled to receive one-third of the penalty.

2. The amendment of 1906 of the game law of 1903, (P. L. 1906, 699) is to be read as an independent enactment and extends the close season for deer for three years from 1906.

CERTIORARI.

Before Justices Garrison and Swayze.

Joseph F. Smith for prosecutor.

Nelson B. Gaskill, Assistant Attorney General, for the State

The opinion of the Court was delivered by Swayze, J.

This is a prosecution for a penalty under the game laws for unlawfully attempting to take, kill, injure and destroy a wild deer. The prosecutor is one of the fish and game wardens of the state.

The first objection is that the prosecutor was himself the officer who served the warrant and arrested the defendant, and it is urged that this was improper because he was interested to the extent of one-third of the penalty.

It is not necessarily fatal to a proceeding that the officer who serves the writ is himself a party.

Bennett v. Fuller, 4 Johns, 486.

Tuttle v. Hunt, 2 Cowen, 436.

Putnam v. Man, 3 Wendall, 202.

It is an irregularity only,

Parmalee v. Loomis, 24 Michigan, 242,

or the subject of a plea in abatement.

Shaw v. Baldwin, 33 Vermont, 447.

In Massachusetts it has been held that the process was not rendered void in such a case but if it is questioned upon motion or a plea in abatement, the proceedings will be set aside or the defendant may be discharged, but if the defendant appears and answers, it is not error in the proceedings that process has been served by an officer related to one of the parties.

Gage v. Graffam, 11 Mass. 181.

There is, we think, no reason why the legislature may not authorize service of process by one who is himself entitled to a share of the penalty, and the statute indicates that such was the legistative intent. The warrant may be issued to one of the wardens (P. L. 1897, 109, sec. 3) and he is one of the class of persons who alone are authorized to institute the proceedings (P. L. 1897, 113, sec. 16). If this were not so, the defendant could not now raise the objection for he has pleaded to the merits nolo contendere

which is equivalent to a plea of guilty.

The real question in the case is the proper construction of the act of June 19, 1906 (P. L. 1906, 699). That act purports to be an amendment of section 1 of the act of April 5, 1904 (P. L. 1904, 406) which itself is an amendment of the revised game law of 1903 (P. L. 1903, 526). Section 16 of the act of 1903 established a close season for deer for two years after the passage of the act. The only object of the amendment of this section in the act of 1904 seems to have been to exempt from its operation deer legally killed in other states. The amendment of 1906 on its face purports to amend section one of the act of 1904 but in reciting it, omits to indicate that it was section 16 of the act of 1903, the mistake is obvious and we think may fairly be disregarded. The language of the amended section follows that of the act of 1903, but substitutes the word three for two so that it reads "it shall be unlawful for three years after the passage of this act for any person, etc.," The other changes it is not now important to consider.

The act of 1903 was approved April 14, 1903. The act of 1906 was approved June 19, 1906.

The argument of the defendant is that the amendment of 1906 must be read as a part of the original act and that the three years provided by the amendment therefore expired April 14, 1906. We do not question the general rule of construction of amendatory acts for which the defendant contends, but it is a rule of construction only. The fact that in the present case it leads to an absurd result is sufficient to show that it is not applicable. The legislature

could never have intended in 1906 to provide for a change in the close season for deer which would be wholly without effect; yet that would be the result if in June 1906 the close season was made to extend only to the preceeding April.

It is quite evident that the legislature meant the close season to extend three years from the date of the act of 1906 and in this respect the act of 1906 is to be read as an independent enactment.

The conviction must be affirmed with costs.

ASSIGNMENT OF ERROR.

7. The supreme court adjudged that the conviction be affirmed; whereas by the law of the land it should have decided that said conviction be reversed, set aside and for nothing holden.

JOINDER IN ERROR.

The defendant in error joins in error on the seventh assignment, the other assignment having been stricken out by order of the court.

Dated April 20, 1908.

NELSON B. GASKILL,

Counsel defendant in error.

MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

THE STATE, GEORGE W. PHIFER,
FISH AND GAME WARDEN,
Prosecutor,
Defendant in Error,
v.
ANDREW R. SNYDER,
Plaintiff in Error.

On Error to New Jersey Supreme Court.

Brief for Defendant in Error.

The cause now presented to the court arises out of a conviction had on the prosecution in a summary action under section sixteen of an act entitled "An act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and provide open and close seasons for such capture and possession" (Revision of 1903); Pamphlet Laws 1903, p. 530; as the same was amended in 1904; Pamphlet Laws of 1904, p. 406, and as further amended in 1906; Pamphlet Laws of 1906, p. 700.

I.

The only assignment of error remaining before the court is the common assignment that the Supreme Court

adjudged that the "conviction be affirmed, whereas by the law of the land it should have been decided that said conviction should be reversed, set aside and for nothing holden." There were a number of assignments of error, but all others were stricken out on motion, and joinder was had upon this sole assignment, which, therefore, raises only those errors which are apparent upon the face of the record.

The first of the reasons presented to the Supreme Court for reversal of the conviction was that the defendant was not lawfully in custody, the argument being that the prosecutor, George W. Phifer, as Fish and Game Warden, executed the warrant and received one-third of the penalty, becoming thereby a party in interest to the suit, which it was argued disqualified him from executing the warrant, and made the original process void. This argument was disposed of by the opinion of Mr. Justice Swayze, found on next to the last page of the printed book, by statements and citation of authorities, to which no supplement is needed.

The real question in the case was raised under the second point presented to the Supreme Court, that the complaint did not show a cause of action against the defendant, and in support of this argument counsel contended that the proper construction of the act of June 19, 1906, by Section 16, as amended, did not prohibit the commission of the alleged violation of the statute, holding that the amendment of 1906, providing for a close season, should be read as a part of the original act, and that the three years provided by this last amendment as a close season should date from the approval of the original act, and had, therefore, expired prior to the commission of the alleged offence. These various amendments to the original act are sufficiently indicated as follows:

Section sixteen of the act of 1903 provided in part:

> "It shall be unlawful for two years after the passage of this act for any person to gun for or to take or attempt to take, kill, injure or destroy,

> or to have in possession any wild deer, be the same buck, doe or fawn, under a penalty of one hundred dollars for each offense, and thereafter it shall be unlawful to take, kill, injure or destroy any wild deer, be the same buck, doe or fawn, excepting only on every Wednesday in the month of November, etc."

This law went into effect April 14th, 1903, and the two-year period of close season provided thereby accordingly expired April 14th, 1905. At the session of the Legislature in 1904 section sixteen, just referred to, was amended *(P. L. 1904, p. 406)*, as follows:

> "It shall be unlawful for two years after the passage of this act for any person to gun for, or to take or attempt to take, kill, injure or destroy, or to have in possession, any wild deer, be the same buck, doe or fawn, under a penalty of one hundred dollars for each offense, and thereafter it shall be unlawful to take, kill, injure or destroy, or to hunt with intent to take, kill, injure or destroy, any wild deer, be the same buck, doe or fawn, excepting only on every Wednesday in the month of November, under a penalty of one hundred dollars for each and every wild deer so taken, killed, injured or had in possession, etc."

In its material and essential provisions this amendment differed but slightly from the original act. It went into effect April 5th, 1904. Under the contention of counsel for the plaintiff in error, this close season, dating from the time of the original act, would have expired in two years from April 14th, 1903, or April 14th, 1905.

This section sixteen was further amended in 1906 *(P. L. 1906, p. 700)*, and this last amendment differs materially from the original act, and from the amendment which immediately preceded it.

> "It shall be unlawful for three years after the passage of this act for any person to gun for or to take or attempt to take, kill, injure or destroy,

> or to have in possession, any wild deer, be the same buck, doe or fawn, under a penalty of one hundred dollars for each offense, and thereafter it shall be unlawful to take, kill, injure or destroy, or hunt with intent to take, kill, injure or destroy any wild deer, be the same buck, doe or fawn, excepting only on every Wednesday in the month of November, under a penalty of one hundred dollars for each and every wild deer so taken, killed, injured or had in possession, etc."

Applying the contention of counsel for the plaintiff in error the prohibitory effect of this act would have expired within three years from the fourteenth day of April, 1903; that is to say, April 14th, 1906. In fact this last amendment of 1906 did not take effect until June 19, 1906, *which means that under the contention of counsel for the plaintiff in error, the period provided for the close season had already expired before the act establishing it went into effect.*

II.

The fundamental principle of statutory interpretation is that the intent of the Legislature is first to be sought, and if the words are free from ambiguity and doubt, and express clearly the sense of the framers of the instrument, there is no occasion to resort to any other means of interpretation, and when the legislative intent is plainly expressed so that the act read by itself, or in connection with other statutes pertaining to the same subject, is certain, clear and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. As the Court said in *Orvil* v. *Woodcliff, 64 N. J. L. 288:*

> "The fundamental principle is that the object of all judicial interpretation of a statute is to determine what intention is conveyed by the language used therein so far as it is necessary for determining whether the particular case or state

of facts presented fall within it. When the intention is expressed, the question is one of verbal construction only; but if the language be not expressed, and some intention must necessarily be imputed, then it must be determined by inference, grounded on legal principles, one of which is that the Legislature must have entertained some intention and the interpreter must determine what it was, unless it be that the statute lacks the formal requisite needed in order to give it the effect of a law. It is the true sense of the form of words which are used which is to be discovered by the interpretation or construction of the statute, taking all its parts into consideration, and if fairly possible, giving them all effect."

Looking then to the law of 1903, is there a clear intent expressed in section sixteen, or is there such ambiguous expression or form of words used that construction becomes necessary? The contrary is quite the case. In language that admits of no doubt the Legislature provided a close season for two years after the passage of the act, during which it was made unlawful to hunt or attempt to hunt any wild deer. After the expiration of that time hunting could only be carried on on every Wednesday in the month of November, with a proviso that this section should not interfere with the owners of deer preserves killing deer thereon or disposing of them as they saw fit. This was clearly an exercise of the police power, designed to increase the number of deer within the State by protecting them from harm during a specified period. An examination of the amendment of 1904 shows the continuance of the same legislative intent expressed in language designated and designed particularly to express that intent and carry it into effect. For a period of two years after the passage of this amendment a close season was provided, and thereafter hunting was to be permitted on Wednesdays in the month of November. The proviso with reference to the owners of deer preserves was continued and

slightly enlarged. There is no ambiguity about the act; the legislative intent is clear; there is no necessity for interpretation or construction; and so with the amendment of 1906. It provided a close season for three years after the passage of the act; permitted hunting on Wednesdays in November thereafter, and did away with the proviso in favor of deer preserves. The same exercise of police power for the same purpose runs throughout the original act, and the amendments, designed to create a close season for deer for the purpose of protecting them from injury during a period thought necessary for their proper increase. As to this there can be neither cavil or dispute. The purpose is evident. The effect of the contention of counsel for plaintiff in error is to make this act of 1906 both an absurdity and a nullity, because if that contention be correct, the Legislature, with due formality, and with particular intent to do the contrary, passed an act which has no force and effect, and could never have any force and effect by reason of the fact that its essential provisions were inoperative before it became a law.

> "It must be presumed that the Legislature intended to pass a valid law, and an admissible construction which supports the law must be adopted."

Such was the language of the Court of Errors and Appeals, speaking through Mr. Justice Van Syckel, in the case of *Road Commission* v. *Harrington Township*, *55 N. J. L. 327*.

Starting then with the presumption that the Legislature intended to pass a valid law, is it possible to find from the reading of the law such interpretation as will sustain its validity? Certainly counsel advance a contention which will destroy it. It is evident that the purpose of the Legislature in passing the first law of 1903 was to create a prohibitive period for the increase of deer subject to no harm. This certainly appears to be a valid interpretation of all the subsequent legislation upon the subject. The two-year period provided for in

the law of 1903 expired April 14th, 1905. Prior to that time, at the session before the close season would have expired, a re-enactment by amendment continued a further period of two years close season. This is a possible interpretation which would give force and effect to the amendment of 1904. This period of close season would have expired April 5th, 1906, and in the session of 1906, the last session before this prohibitive season would have expired, a further close season for three years was enacted. The change in the time of duration of the prohibitive season in the last amendment is significant, going to show that it was not merely a formal re-enactment of what was considered by the Legislature an unessential part of the section, and that necessary changes were to be made in other parts thereof, but the fact that for the first time a three-year period was provided clearly indicates that the intention of the Legislature and the minds of the legislators were directed at an increase of the prohibitive period, and that one of their purposes at least in the amendment of 1906, was to provide for a close season which would run for three years from the passage of that act Taking all circumstances into consideration the language "from the passage of this act" has a special significance. It clearly indicated the idea of the Legislature, that the effects of the section under consideration should be prospective; that it should run from the time when the act, which they had then under consideration, should take effect, and that the three-year period was in addition to the period which had been previously enacted, and which was then on the point of expiration. Certainly at any rate this is no forced interpretation, but on the other hand it is the idea which would instantly occur to the normal person in reading the statute. If there is any forced argument it is rather in the contention of counsel who seek by interpretation of law, to nullify an act of the Legislature. Between these two interpretations it is the duty of the court to

sustain that interpretation which will sustain law and give it force rather than to destroy it.

The decision referred to above was approved and followed in *Wyse* v. *Jersey City, 68 N. J. L. 127.* It seems clear, therefore, in view of this decision, read with the statement of the court in *Smith* v. *Tucker, 2 Harr. 84,* that "every statute should be so constructed as to suppress the mischief and advance the remedy," that the interpretation of this statute advanced by counsel for the prosecutor cannot stand, and that the law does not authorize the commission of the acts set forth in the complaint, but, on the other hand, strictly forbids them.

In addition the tendency of the cases is against giving to a statute a retrospective effect by implication. So said Beasley, C. J., in *Belvidere* v. *Warren R. R. Co., 34 N. J. L. 200.* Citing a maxim that a legislative enactment ought to be prospective, and not retrospective, in its operation, he says:

> "On the presumption that this maxim prevails with the law-making power, it has ever been requisite, when the endeavor has been to apply a statute to old affairs, to show either express words indicative of such a purpose, or circumstances giving rise to a necessary intendment.
>
> "The effort of the court is always to give a statute a prospective effect only. A statute will be construed to be prospective only, unless in cases where there is something on the fact of the enactment putting it beyond doubt that the Legislature meant it to apply retrospectively."

City of Elizabeth v. *Hill, 39 N. J. L. 555.*

So also in *Berdan* v. *Van Riper, 16 N. J. L. 15; Williamson* v. *N. J. Southern R. R. Co., 29 N. J. Eq. 311.*

There does not appear in the present case any necessity for giving this statute a retrospective effect. There is no reason why it should date back to the time of the

original statute. To do so is to make it of no effect; to conceive that the Legislature went through an empty formality; that with the idea of deliberately doing what was of no effect they passed an absurd act with all the form of law. The other contention supported by this defendant in error gives life to the statute and to the legislative intent. It advances the remedy by suppressing the mischief. It is both reasonable and rational, and requires no forced interpretation, no violent construction. Upon the face of the statute there appears to be no reason why this particular amendment should be read into the act of 1903 purely for the purpose of taking away any force or effect it might have.

Counsel for plaintiff in error avers that the conviction filed by the justice is, in divers respects, erroneous. The form of conviction in prosecutions conducted in accordance with the requirements of "An act to provide a uniform procedure for the enforcement of all laws relating to fish, game and birds, and for the recovery of penalties for violations thereof" (*P. L. 1897, p. 109*), under which this prosecution was conducted, was supplemented by an act of the Legislature of 1905 (*P. L. 1905, p. 184*), in which supplement the form of conviction is set out that has been followed in this instance.

The writ should be dismissed with costs.

NELSON B. GASKILL,
Assistant Attorney-General.
Of Counsel for Defendant in ~~Certiorari~~ error.