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NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

JOHN G. HORNER, Receiver of the WEST JERSEY MORTGAGE COMPANY, *Plaintiff in Certiorari,* vs. BOARD OF COMMISSIONERS OF MARGATE CITY, HENRY F. GERTZEN, JOSIAH NORCROSS and CHARLES HART, Commissioners of Margate City, and A. GERTZEN, JR., Collector of Taxes of Margate City, *Defendants in Certiorari.*	ON CERTIORARI. NOTICE OF APPEAL. CERTIORARI No. 7451.

To Joseph Thompson, Esq., Attorney of Defendants in Certiorari:

Take notice that the plaintiff in certiorari appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following ground:

That the Court erred in holding that the lien created under the provisions of the act of the Legislature entitled "An Act for the assessment and collection of taxes," approved April 8, 1903, under the authority of which act the sale of the premises

in the above case was advertised, could be enforced against the owner of the premises after the expiration of two years from the twentieth day of December of the year for which the taxes were assessed.

Dated August 22, 1917.

HARVEY F. CARR,
Attorney for Plaintiff in Certiorari.

[ENDORSED]

Service of the within notice of appeal is hereby acknowledged this 18th day of August, 1917.

Joseph Thompson,
Attorney for Defendant in Certiorari.

WRIT.

(Filed April 5, 1917)

NEW JERSEY, *ss.:*

The State of New Jersey to the Board of Commissioners of Margate City, (SEAL) Henry F. Gertzen, Josiah Norcross and Charles Hart, Commissioners of Margate City, and A. Gertzen, Jr., Collector of Taxes of Margate City,

GREETING:

We being willing for certain reasons appearing by the affidavit of John G. Horner filed in this cause

to be certified of a certain order or resolution of the board of commissioners of Margate City, authorizing and directing the sale of lot No. 14 in block 82B, situate on the westerly side of Fredericksburg Avenue three hundred feet south of the southerly line of Atlantic Avenue, west sixty-two and five-tenths feet by south seventeen hundred feet, to be sold at public sale at the City Hall, in Margate City, New Jersey, on Tuesday, April 10th, A. D. 1917, at 12 o'clock noon, we command you that the said order or resolution so made by said board of commissioners of Margate City together with all matters touching and concerning the same, as fully and entirely as before you they remain to our Justices of our Supreme Court of Judicature at Trenton on the twenty-fifth day of April instant, you certify and send together with this writ that therein may be done what of right and according to the laws of this state should be done.

Witness, William S. Gummere, Chief Justice of said Supreme Court, at Trenton, this fifth day of April, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.
HARVEY F. CARR,
Attorney.

[ENDORSED]

New Jersey Supreme Court.

John G. Horner, Receiver of West Jersey Mortgage Company,
Plaintiff in Certiorari,
vs.
Board of Commissioners of Margate City, et als.,
Defendants in Certiorari.

Writ of Certiorari.

Returnable April 25, 1917.
Harvey F. Carr, Attorney.
Camden, New Jersey.

I allow this writ. Let it be sealed.
Dated April 5, 1917.

Chas. C. Black,
Justice of Supreme Court.

RETURN.

To the Honorable Justices of the Supreme Court of Judicature of New Jersey:

I, William A. McArdle, city clerk of Margate City, in obedience to the command of the writ hereto annexed, directed to the board of commissioners of Margate City, do hereby certify and send to you, the said Justices, the order or resolution made by the board of commissioners of Margate City, bearing date October 9th, 1916, together with all matters touching and concerning the same, as fully and entirely as the same remains in my hands and possession as by said writ I am commanded, as appears by the schedule hereunder written.

In witness whereof I have hereunto set my hand and seal this 20th day of April, A. D. 1917.

WILLIAM A. MCARDLE,
(SEAL) *City Clerk of Margate City.*

SCHEDULE.

Resolution passed by Margate City commissioners on October 9th, 1916.

Mr. Norcross offered the following resolution:

"Be it Resolved by the Board of Commissioners of the City of Margate City, that the tax collector be and hereby is authorized to sell land for unpaid taxes for the years 1911, 1912, 1913, 1914 and 1915, and to take all necessary steps to that end."

On motion of Mr. Norcross, seconded by Mr. Hart, the resolution just read was adopted as read.

AFFIDAVIT IN SUPPORT OF APPLICATION.

(Filed Apr. 4, 1917)

NEW JERSEY SUPREME COURT.

JOHN G. HORNER, Receiver of the WEST JERSEY MORTGAGE COMPANY, *Plaintiff in Certiorai,* vs. BOARD OF COMMISSIONERS OF MARGATE CITY, HENRY F. GERTZEN, JOSIAH NORCROSS and CHARLES HART, Commissioners of Margate City, and A. GERTZEN, JR., Collector of Taxes of Margate City, *Defendants in Certiorari.*	ON APPLICATION FOR WRIT OF CERTIORARI. AFFIDAVIT IN SUPPORT OF APPLICATION. CERTIORARI No. 7451.

STATE OF NEW JERSEY, COUNTY OF CAMDEN, } *ss:*

JOHN G. HORNER, being duly sworn on his oath, says that he is the receiver of the West Jersey Mortgage Company, duly appointed by an order of the Court of Chancery of New Jersey, entered on the first day of October, nineteen hundred and fifteen, in a certain cause therein depending, wherein George Conover is complainant and the West Jersey Mortgage Company is defendant; that on the twenty-first

day of February, nineteen hundred and twelve, Ventnor Syndicate made, executed and delivered to the West Jersey Mortgage Company its certain indenture of mortgage in the sum of five thousand dollars, and covering premises in the city of Margate City, New Jersey, and known as lot No. 14 in block 82B, and that deponent as receiver of said West Jersey Mortgage Company is now the owner of said mortgage; that there is due upon the said mortgage the full principal thereof with interest thereon from the twenty-first day of February, nineteen hundred and twelve.

Deponent further says that one Anthony Gertzen, Jr., tax collector of the city of Margate City, has advertised for sale the lands described in said mortgage, on Tuesday, the tenth day of April, A. D. nineteen hundred and seventeen, at twelve o'clock noon, at the City Hall in Margate City aforesaid, for the taxes for the year nineteen hundred and twelve; that said sale is advertised to be made under the provisions of an act of the legislature entitled, "An act for the assessment and collection of taxes," approved April 8, 1903, and the acts amendatory thereof and supplemental thereto.

Deponent further says that he is advised and believes the lien of the municipality for the said taxes has expired, and that no authority exists for the sale of the said lands under the said proposed tax sale.

JOHN G. HORNER.

Sworn to and subscribed before me this fourth day of April, A. D. 1917.

SAMUEL J. EDWARDS,
Commissioner of Deeds for New Jersey.

REASONS IN CERTIORARI.

(Filed Apr. 11, 1917)

NEW JERSEY SUPREME COURT.

JOHN G. HORNER, Receiver of the WEST JERSEY MORTGAGE COMPANY, *Plaintiff in Certiorari,*	
VS.	
BOARD OF COMMISSIONERS OF MARGATE CITY, HENRY F. GERTZEN, JOSIAH NORCROSS and CHARLES HART, Commissioners of Margate City, and A. GERTZEN, JR., Collector of Taxes of Margate City, *Defendants in Certiorari.*	ON APPLICATION FOR WRIT OF CERTIORARI. REASONS IN CERTIORARI. CERTIORARI No. 7451.

John G. Horner, receiver of the West Jersey Mortgage Company, the prosecutor in the above-entitled proceedings, relies upon the following reason in his application to have set aside and for nothing holden the proceedings for the sale of lands described in the affidavit filed by the prosecutor herein, to wit:

The lien created under the provisions of an act of the legislature entitled, "An act for the assessment and collection of taxes," approved April 8, 1903,

and under the authority of which act the said sale is advertised, has expired, and the defendants, in consequence, have no right or power to sell the said lands, and can convey no valid title thereto.

Dated, April 11, 1917.

HARVEY F. CARR,
Attorney for Prosecutor.

STIPULATION.

NEW JERSEY SUPREME COURT.

JOHN G. HORNER, Receiver of the WEST JERSEY MORTGAGE COMPANY,
Plaintiff in Certiorari,
vs.
BOARD OF COMMISSIONERS OF MARGATE CITY, HENRY F. GERTZEN, JOSIAH NORCROSS and CHARLES HART, Commissioners of Margate City, and A. GERTZEN, JR., Collector of Taxes of Margate City,
Defendants in Certiorari.

ON APPLICATION FOR WRIT OF CERTIORARI.
STIPULATION.
(CERTIORARI SUIT No. 7451.)

It is Hereby Stipulated and Agreed, by and between the parties in the above matter that the action taken by the Supreme Court upon the above-named suit shall be dispositive of certiorari suits Nos. 7452

to 7462, inclusive, by and between the same parties, and of all and singular the rights of the parties therein.

It Is Further Agreed that the plaintiff in certiorari, on condition that he duly prosecute the above-named suit (certiorari No. 7451) be excused from prosecuting suits Nos. 7452 to 7462, inclusive, aforesaid.

It Is Further Agreed that this stipulation shall in no wise refer to or affect in any way certiorari suit No. 7450 by and between the parties hereto, wherein the present plaintiff in certiorari is relator by reason of being the owner of a bond issue of $150,000 by the Margate Company to the Guarantee Trust Company, trustee, and secured by the mortgage of the lands advertised for sale.

JOSEPH THOMPSON,
Attorney for Commissioners of Margate City and Collector of Taxes of Margate City.

HARVEY F. CARR,
Attorney for John G. Horner, Receiver.

STIPULATION.

NEW JERSEY SUPREME COURT.

JOHN G. HORNER, Receiver of the WEST JERSEY MORTGAGE COMPANY, *Plaintiff in Certiorari,* vs. BOARD OF COMMISSIONERS OF MARGATE CITY, *et als., Defendants in Certiorari.*

ON CERTIORARI. No. 7451.

STIPULATION.

It Is hereby Stipulated and Agreed by and between the parties hereto:

1. That John G. Horner is the receiver of the West Jersey Mortgage Company, duly appointed by an order of the Court of Chancery of New Jersey, entered on the first day of October, nineteen hundred and fifteen, in a certain cause therein depending wherein George Conover is complainant and the West Jersey Mortgage Company is defendant, and that on the twenty-first day of February, nineteen hundred and twelve, the Ventnor Syndicate made, executed and delivered to the West Jersey Mortgage Company its certain indenture of mortgage in the sum of five thousand dollars, covering premises in the city of Margate City, county

of Atlantic and state of New Jersey, and known as Lot No. 14, in block 82B, and that the said John G. Horner, as receiver of the said West Jersey Mortgage Company, is now the owner of the said mortgage, and that there is due upon the said mortgage the full principal sum thereof, together with interest thereon from the twenty-first day of February, A. D. nineteen hundred and twelve.

2. That Anthony Gertzen, Jr., tax collector of the city of Margate City, did advertise to be sold on the tenth day of April, A. D. nineteen hundred and seventeen, at twelve o'clock noon, at the City Hall, in Margate City aforesaid, the lands described in the said mortgage, for taxes of the year nineteen hundred and twelve, and that such sale was advertised to be made under the provisions of an act of the legislature entitled, "An act for the assessment and collection of taxes," approved April 8, 1903, and the acts amendatory thereof and supplemental thereto.

HARVEY F. CARR,
Attorney for John G. Horner, Receiver.

JOSEPH THOMPSON,
Attorney for Commissioners of Margate City, et als.

RULE DISMISSING WRIT.

NEW JERSEY SUPREME COURT.

JOHN G. HORNER, Receiver of WEST JERSEY MORTGAGE COMPANY, *Prosecutor*,
vs.
BOARD OF COMMISSIONERS OF MARGATE CITY, *et al.*, *Defendants.*

ON CERTIORARI.
RULE DISMISSING WRIT.

This writ being regularly on the list of the Supreme Court and having been duly heard and considered by the Judges of the Supreme Court, who are of the opinion that said writ should be dismissed;

It is on this twenty-third day of July, A. D. 1917, Ordered; that said writ of certiorari be dismissed with costs.

Entered July 23, 1917.

On motion of
JOSEPH THOMPSON,
Attorney for Respondents.

A true copy.
WM. C. GEBHARDT,
Clerk.

OPINION.

NEW JERSEY SUPREME COURT.

JOHN G. HORNER, Receiver of WEST JERSEY MORTGAGE COMPANY, *Prosecutor*, vs. BOARD OF COMMISSIONERS OF MARGATE CITY, *et als.*, *Defendants.*

ON CERTIORARI. OPINION.

Under the act entitled "An act for the assessment and collection of taxes" P. L. 1903, p. 394, there is no limitation as to the lien of a tax assessed on lands against the owner, at least so long as he continues to be the owner, and a taxing district has, in such case, the right to enforce the payment of taxes assessed against the owner although the sale is not made, or attempted to be made, within two years of the twentieth day of December of the year for which the taxes are assessed.

Argued June Term, 1917, before Justices Swayze, Bergen and Black.

Harvey F. Carr, for Prosecutors. Joseph Thompson, for defendants.

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

In this cause a writ of certiorari was allowed to review a resolution of the defendant corporation di-

recting its tax collector to sell lands for taxes in arrears.

The record is so meager that it is doubtful whether the precise question is presented in it, but we think it sufficiently supplemented by admissions on the argument and the briefs of counsel to justify the consideration of the real question in dispute, which it, does the lien against the land for unpaid taxes expire, in favor of the owner, at the end of two years from the date when they are payable, where the owner, against whom the assessment was levied, still holds the title? The facts as we find them from the record and admissions of counsel are substantially as follows: In 1912 the Ventnor Syndicate was the owner of a tract of land in Margate City of which it is still the owner; in that year a tax was assessed against the land in the name of the owner which became payable December twentieth of that year and is not yet paid; that October 9, 1916, the city passed a resolution directing the sale of the land to make the taxes in arrears, which is the resolution under review; that the collector advertised the land for sale on April 10, 1917; that February 21, 1912, the Ventnor Syndicate mortgaged the land of the West Jersey Mortgage Company for $5000, and the latter company being decreed to be insolvent the prosecutor was appointed its receiver October 1, 1915.

While we have concluded to consider the merits of the question presented, we do not thereby wish to be understood as conceding the right of a mortgagee to challenge the legality of a tax assessed in the name of the owner against the mortgaged premises, under such conditions as are present in this case, for it may well be that even if the lien has expired as to the mortgagee, it might remain a lien

against the interest of the owner sufficient in value in excess of the mortgage to raise the sum due for unpaid taxes, and that if the lien had lapsed as to the mortgagee a sale of the owner's interest would not affect the mortgagee's lien. This question we do not pass on for it is not raised, and defendant makes no objection to the prosecutor's standing.

The only reason filed by the prosecutor is that "The lien created" by the act of 1903, P. L. 394, C. S. 5075 "has expired, and the defendants, in consequence, have no right or power to sell the said lands and can convey no valid title thereto." This raises but one question, and the only one argued, viz.: is there any limitation to the lien for taxes on the land against which they are assessed and levied where there has been no subsequent conveyance by the owner? We are of opinion that under the act of 1903 *supra*, there is no limitation for the lien for taxes, so far as the owner is concerned against whom the tax was levied, at least so long as he retains the title. Prior to 1854 we had no statute making taxes and lien on land or limiting the lien for taxes. In that year P. L. 429 an act was passed which provided, sec. 2, that an assessment for taxes against any person residing out of the state, or of corporations residing out of the county where the lands were located should be a lien on the lands for the "Space of two years" from the time when they were made payable, and in 1863 P. L. 497 this was extended to all persons and corporations whether resident or not. This limitation was maintained in all subsequent statutes relating to the subject until the general revision of the tax act in 1903, so that under the statutes prior to 1903 taxes were made a lien on the land against which they were assessed for the space of two years after they were payable, except since 1888 P. L. 372, when all taxes were made a

first and paramount lien for the space of two years from and after December 20, in each year, to which all conveyances, mortgages and other liens were subservient, and our Courts in construing this legislation have uniformly held that the lien imposed expired at the end of two years from the due day, Johnson vs. VanHorne, 45 N. J. L. 136, Poillon vs. Rutherford, 58 N. J. L. 113, Hohenstatt vs. Bridgeton, 62 N. J. L. 169. With this statutory limitation regarding taxes continued in our law for a period of 40 years, together with its judicial construction before it, the legislature by the act of 1903, *supra,* deliberately eliminated the limitation of the lien of taxes, and expressly repealed by P. L. 1903, p. 436, all the legislation relating thereto, and by section 49 of the revised statutes of 1903 declared that all unpaid taxes should be, after the twentieth day of December next after the assessment "A first lien on the land on which they are assessed, and paramount to all prior or subsequent alienations and the descents of the said land or encumbrances thereon, except subsequent taxes." Section 50 of the act requires the collector of each taxing district to file, on or before the first Tuesday of February in each year with the county clerk, except in cities having charter provisions for a public record of tax liens on land, a list of all unpaid taxes assessed the preceding year on real estate in his taxing district, setting forth against whom assessed, the description of the property and the amount of taxes assessed thereon, arranged alphabetically in the names of the owners, and then declares that "The said list when filed and the record thereof shall be constructive notice of the existence of the tax lien for two years from said first Tuesday of February but not thereafter against any parcel unless within said

term of two years the sale of said parcel shall be noted in the record."

The same section further provides that a purchaser or mortgagee in good faith after the said first Tuesday of February, whose deed or mortgage is recorded before the collector has filed his list, shall hold his title free from the tax lien. The radical change made by this statute is that the lien of taxes is no longer subject to any limitation, they are made a lien paramount to all conveyances or mortgages except such as are taken after the first Tuesday in any February and recorded before the collector has filed his list. This was manifestly adopted to protect innocent purchasers and mortgagees in good faith against the default of the collector in not filing his list on the day required by law, but they are not protected if recorded after the list has been filed, so that if such purchaser or mortgagee finds no list on file showing taxes in arrears against the land when he records his conveyance or mortgage he may safely accept either. That part of sec. 50 relating to the limitation of constructive notice to two years does not destroy the tax lien in favor of an owner for he has actual notice that he has not paid his taxes, and the legislature could not have intended to do away with the actual notice which he had, and put in its place a constructive notice, which is one which the law implies and charges him with in absence of actual notice.

This limitation of constructive notice only applies to persons who deal with the land without notice of any tax lien.

As to such persons the list filed is a notice which the law implies they have, but this implication fails, by force of the statute, after the lapse of two years from the beginning of the lien, after which

the list is not constructive notice to a purchaser or mortgagee of the tax lien, and if he finds no list on file, or a sale noted, within two years he may assume that there are no taxes in arrears which are a lien upon the property. It may well be doubted whether this statute applies in any case where the conveyance or mortgage is recorded prior to the assessment, for as was said by Mr. Justice Dixon in Robinson vs. Hulick, 67 N. J. L. 496, "All persons interested, or about to become interested in lands in New Jersey are charged with notice of these laws and of their normal operation. Every purchaser or mortgagee of such lands must therefore be deemed to have notice of the taxes which become a lien upon that land on every twentieth day of December after he acquires his interest."

We are inclined to think that the statute with reference to the constructive notice to be derived from the filed list was intended for the protection of persons intending to become interested in the land and that as to them the list is not constructive notice for more than two years after it is filed, so that if in searching the record he finds no list containing an assessment unpaid against the land he is not chargeable with notice of any assessment, although filed, which is not within the limited period, but if this be not sound we are of opinion that the limitation of the effect of the constructive notice provided by the statute does not apply where the owner had actual notice of a tax levied during his ownership, and that so far as he is concerned the tax remains a lien upon his land without limitation by any statute.

The result which we reach is that the prosecutor can take nothing by his writ and that it should be dismissed with costs.

Filed June 19, 1917.

WM. C. GEBHARDT,
Clerk.

New Jersey Court of Errors and Appeals

JOHN G. HORNER, Receiver of West Jersey Mortgage Company,
Plaintiff-Appellant,
vs.
BOARD OF COMMISSIONERS OF MARGATE CITY, et al.,
Defendants-Respondents.

ACTION AT LAW.
ON APPEAL.

BRIEF OF DEFENDANTS-RESPONDENTS.

This appeal brings before the Court for review, the action of the Board of Commissioners of Margate City, for sale of lands for unpaid taxes for the years 1911, 1912, 1913, 1914 and 1915.

The Appellant assigns as grounds for setting aside the resolution passed by the Board of Commissioners authorizing the Collector of Taxes to sell, the following reason:

> "The lien created under the provisions of an Act of the Legislature, entitled 'An Act for the Assessment and Collection of Taxes,' approved April 8th, 1903, and under the authority of which act the said sale is advertised, has expired, and the defendants, in consequence, have no right or power to sell the said lands, and can convey no valid title thereto."

The appellant contends that the right to sell should have been exercised within two years, and that after that time the lien is lost.

The Supreme Court decided this contention untenable and in that, this Court should fully concur for the reasons assigned by the Supreme Court and for the further reason that the appellant, a mortgagee, has no standing in this Court to question the legality of a tax assessed against the owner, under circumstances surrounding this case.

The City's right to sell as against the owner of the premises could not defeat or impair the lien of the mortgagee. Hence the appellant-mortgagee has no right to complain nor has he any standing in this Court.

Respondent respectfully submits that the lien is not lost, but still alive as against the owner:

> Section 50 of the foregoing Act in part reads as follows:
>
> "The said list when filed and the record thereof shall be *constructive notice* of the existence of the tax lien for two years from said first Tuesday of February, but not thereafter against any parcel unless within said term of two years the sale of said parcel shall be noted in the record as hereinafter provided. A *purchaser or mortgagee in good faith,* after said first Tuesday of February, whose deed or mortgage is recorded before the Collector has filed his list, showing an assessment and tax on the land conveyed or mortgaged, shall hold his title free from the tax lien." Volume 4, Compiled Statutes, page 5131.

It evidently was the intention of the Legislature that notice should be given of unpaid taxes in order that a purchaser or mortgagee in good faith might, by an examination of the record, know the true condition with respect to tax liens, in order that they might be protected in purchasing or loaning money on the land.

They would have the right under Section 50 to assume the land had been released from tax lien if it had not been sold within two years.

It was not, however, the intention that failure to sell within two years should operate as a release of the lien from taxes, provided the title, after two years, still remained in the person or corporation owning the same, at the time the lien attached.

The above provision could only have been intended to protect parties in good faith as purchasers or mortgagees *and not the owner.*

The Act says that filing the return should be "constructive notice of the existence of the tax lien," and could not apply to *the owner who must always have notice* if the taxes are unpaid.

At the time the mortgagee's lien attached (February 21st, 1912) the return had been made to the Clerk for the year 1911, and the mortgagee had notice of the lien. The sale for taxes under the resolution included the year 1911, and also the years 1912, 1913, 1914 and 1915.

An examination of the statutes prior to 1903 relating to the period in which land should be sold for taxes after the return made on the first Tuesday of February, each year, clearly limited the time in making the sale to two years.

The first Act I find making a tax on real estate and authorizing sales for the payment of the same, was passed in 1854, Pamphlet Laws, page 429, Section 2.

That Act created a lien "for the space of two years from the time when the taxes so as aforesaid assessed, was payable." *Clearly* under the provisions of that Act, there was a *limitation* to the life of the lien.

In 1863, a supplement was passed to the Act of 1854, Pamphlet Laws, 1863, page 498, Section 1. The lien under that Section was "for the space of two years from the time when the taxes so as aforesaid assessed were payable."

This Act left the lien the same as in the original Act.

In 1879 a further Act was passed making taxes a first lien on real estate. Pamphlet Laws 1879, page 341, Section 1, created a lien "for the space of two years from the time when such taxes, so assessed were payable."

In 1898, an amendment was made to the Act of 1879, Pamphlet Laws 1899, page 455, Section 1.

> "The levy and assessment shall be made and while unpaid shall remain such lien for the space of two years."

All of the foregoing acts clearly limited the life of the lien to the space of two years.

In 1903 the present Tax Act was passed and as before stated Section 50 of that Act created the present lien.

Prior to 1903, there was no reference made to a purchaser or mortgagee in good faith. There must have been

some reason why the Legislature changed the language respecting the lien, which had been enacted originally fifty years before, and in each subsequent reference to the life of the lien employed practically the same language.

There was no suggestion in the former Acts that the lien should be *constructive notice* to purchasers or mortgagees in good faith. To my mind it was clearly the intention to limit the lien only to a purchaser or mortgagee after two years if the property *had not been sold, but if the title still remained in the owner,* the lien attaches until paid, and it may be sold at any time either before or after two years.

Respectfully submitted,

JOSEPH THOMPSON,
Attorney for Defendants-Respondents.

NEW JERSEY COURT OF ERRORS AND APPEALS

JOHN G. HORNER, Receiver of WEST JERSEY MORTGAGE COMPANY,
Plaintiff-Appellant,

vs.

BOARD OF COMMISSIONERS of MARGATE CITY, et als.,
Defendants-Respondents.

ON APPEAL.

BRIEF OF PLAINTIFF-APPELLANT.

By this appeal there is brought before this Court for review the action of the Supreme Court in dismissing the plaintiff's writ of certiorari. This writ was prosecuted for the purpose of setting aside the proceedings of the city of Margate City in advertising for sale lands on which taxes for 1912 remained unpaid.

In all, twelve certiorari suits were prosecuted by the plaintiff-appellant (being numbered respectively Nos. 7451-7463), the parties agreeing, however, by their stipulation (*S. of C., pp.* 9-10) that the determination of Certiorari No. 7451 should be dispositive of the others, the same facts and the same question of law being involved in all the suits.

The plaintiff in certiorari prosecuted these suits as owner of mortgages covering lots advertised by the city for sale. (*S. of C., p.* 11.) In one case (Certiorari #7459), he held a mortgage to secure a bond issue of the Ventnor Syndicate in the amount of $150,000, the total bond issue being in his possession. The plaintiff, therefore, is vitally affected by these proposed sales, and the estate which he represents would be a heavy loser, were the sales permitted.

The unpaid taxes for which the sales were advertised were assessed for the year 1912. On October 9, 1916, when the resolution authorizing the sale was passed by the municipality (*S. of C., p.* 5), the taxes were four years overdue. The plaintiff insisted that the Tax Act limited the lien for unpaid taxes to a period of two years' duration, that at the determination of this period, the lien expiring, no right of sale remained and the proceedings of the city were therefore wholly invalid.

The Supreme Court declined, however, to grant the relief prayed, holding that Section 50 of the Tax Act (wherein the two years' limitation appears), applied only where the lands encumbered by the tax lien had been subsequently conveyed by the owner. The Court held that under the present legislation there was no limit to the life of the lien, so long as the owner remained in possession of the property. *Opinion of Bergen, J.* (*S. of C., pp.* 14, *et seq.*).

This construction of the Act we controvert. The following ground for reversal has been assigned:

> "That the Court erred in holding that the lien created under the provisions of the act of the Legislature entitled 'An Act for the assessment and collection of taxes,' approved April 8, 1903, under the authority of which act the

sale of the premises in the above case was advertised, could be enforced against the owner of the premises after the expiration of two years from the twentieth day of December of the year for which the taxes were assessed."

We contend that this construction of Sections 49 and 50 of the Act was erroneous, and that no intention is evident in this legislation to impose a stricter liability upon the owner of the properties than is imposed upon the land itself. In other words, the two years' limitation of the lien was intended to cover all cases.

The Rule of Strict Conformity.

The rule of law is a familiar one that sales of land by municipalities for delinquent taxes must be in strict conformity to the statutory provisions.

"So far as regards provisions of the law designed for the protection and security of the citizen, it is essential to the validity of a tax sale of lands that there shall be a strict compliance with all the directions of the statute, both in relation to the observance of any conditions or prerequisites to the exercise of the power of sale, and to the conduct of the sale itself, as well as to the performance of conditions subsequent to the sale."

37 *Cyc.* 1281.

"The power to sell lands for taxes is a naked power and the validity of the title derived from such a sale depends upon a strict compliance with the directions of the statute. The pur-

chaser must show affirmatively that everything has been done which the statute makes essential to the due execution of the power."

Mitsch vs. Riverside, 86 N. J. L. 603 (E. & A. 1914);

Allen vs. Woodbridge, 43 N. J. L. 263 (E. & A. 1881);

Hopper vs. Malleson, 16 N. J. Eq. 382 (Ch. 1863).

It is evident, therefore, that unless the defendants can produce statutory authority upholding their right to make the sale advertised, their proceedings to that end should be set aside and for nothing holden. Our contention is simply that the power to sell is co-extensive with the life of the municipal lien, and that when the latter expires the municipality no longer possesses the power of sale.

The question of law involved arises out of the following statutory provisions:

Section 49 of the Tax Act of 1903, 4 *Comp. St.* 5129, creates the lien for unpaid taxes:

"All unpaid taxes on real property, with interest, penalties and costs of collection, shall be, on and after the twentieth day of December next after the assessment, a first lien on the land on which they are assessed, and paramount to all prior and subsequent alienations and descents of said lands, or encumbrances thereon except subsequent taxes. * * * Where a sale is made in the enforcement of a tax lien, pending the existence of the lien, the lien shall pass with the title to the purchaser, and where such sale shall be set aside for defect in the proceedings to sell, the lien shall be thereby continued for one year after final action in the proceeding by which the sale was annulled."

Section 50 defines the period during which the lien subsists.

> "On or before the first Tuesday of February in each year the collector in each taxing district * * * shall file with the clerk of this county a list of all unpaid taxes, assessed the preceding year, on real estate in his taxing district, setting forth against whom assessed, the description of the property, and the amount of taxes assessed thereon * * * *; *the said list when filed and the record thereof shall be constructive notice of the existence of the tax lien for two years from said first Tuesday of February, but not thereafter, against any parcel, unless within said term of two years a sale of said parcel shall be noted in the record as hereinafter provided.* * * *"
>
> 4 *Comp. St.* 5131.

By Section 50, therefore, there having been no sale noted on the record, the lien for unpaid taxes on these Margate City lands ceased and determined two years after the first Tuesday in February, 1913.

Sections 51 and 52 of the Act (4 *Comp. St.* 5132-5133), provide for the sale of lands for unpaid taxes.

> "When taxes on real property remain in arrears on the first day of July, in the year following the levying thereof, the collector or other officer charged by law in the taxing district with that duty, shall enforce the tax lien by selling the land or any part thereof sufficient for the purpose, etc."

View Taken by the Supreme Court.

Undue emphasis is placed by the Supreme Court on the circumstance that in place of the specific limitation of the tax lien found in the earlier acts, the revision of 1903 simply declares that the unpaid taxes shall be "a first lien on the land on which they are assessed." This enactment standing alone is indefinite. If the legislature intended that the lien should continue indefinitely (and this seems to us an extraordinary assumption) they would have used the words "until paid," or some equivalent expression. This they did not do, but on the contrary we find in the succeeding section of the revision the declaration that the collector shall file his list of unpaid taxes, and that the said list when filed, "shall be constructive notice of the existence of the tax lien for 2 years, etc." In this section the legislature inserted the limitation that in the previous acts had been coupled with the words creating the lien.

The mere fact that the two-year limitation in question had been "continued in our law for a period of forty years" (*S. of C., p.* 14, *line* 11) indeed raises a presumption that the legislature would not have annulled the limitation and the legislative policy it embodied, and substituted therefor a conflicting policy, without a specific repealer.

> "The legislature may express its will in any form—affirmative or negative— that it pleases, so long as it does not transgress constitutional prohibitions. It is under no obligation to use words of express repeal. But the repeal of statutes by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To

justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed."

36 *Cyc.* 1071.

"The repeal of statutes without express words is not favored, and such repeal will not be recognized unless the inconsistency between the prior and the subsequent statutes is clear."

State vs. Brooks, 63 N. J. L. 359 (S. C. 1899).

The Act of 1903 merely repealed "all acts inconsistent with the provisions of this act." *P. L.* 1903, *p.* 436. Its provisions were not inconsistent with the provisions of the earlier statutes, because as we have shown the earlier policy was incorporated in the 50th section of the Act of 1903.

The Supreme Court says that the limitation set forth in Section 50 relates only to constructive notice and not to the lien itself. If this were true, the purchaser from a delinquent taxpayer with *actual* notice, would be bound by the tax lien years after the tax had been levied. We do not believe that the words of these two sections will support the construction put upon them by the Supreme Court, particularly in view of the fact that such construction would involve a policy not only radical in itself, but a radical departure from the former policy adopted in this state, and that without express words but by mere implication.

Power to Sell Limited by Life of Lien.

No direct limitation of time during which a sale can be had is made by this act, and it has, therefore, become necessary for the Courts to pass on the question of the time within which a sale may be had. This is the point raised by the prosecution of this writ of certiorari. The question, however, is no longer open to discussion, for repeated decisions by the Courts of this state have held that a sale of lands for unpaid taxes must be had within the period during which the lien runs.

Thus, it was held in *Johnson vs. Van Horn*, 45 N. J. L. 136 (1893), that:

> "The sale of land for taxes, under the provisions of the Act of 1879, must be made before the expiration of the two years during which, by the provisions of said act, the lien for taxes is to be continued."

The Act of 1879 was similar in its provisions to the Act of 1903.

Following and approving *Johnson vs. Van Horn* are the following:

In re Commissioners of Elizabeth, 49 N. J. L. 488;
Poillon vs. Rutherford, 58 N. J. L. 113;
Hohenstatt vs. Bridgeton, 62 N. J. L. 169;
Field vs. West Orange, 37 N. J. Eq. 434, 39 Ibid. 61;
Kirkpatrick vs. New Brunswick, 40 N. J. Eq. 46;
Doremus vs. Cameron, 49 N. J. Eq. l. 7;
Durgee vs. Credit System Co., 55 N. J. Eq., 311;

Harned vs. Camden, 66 N. J. L. 520;
Campion vs. Raritan (S. C. 1903), 56 Atl. 704;
Hunt vs. Lambertville, 6 N. J. L. J. 343;
Field vs. West Orange, 7 N. J. L. J. 348.

It was held in *Harned vs. City of Camden, supra,* that:

> "Unless otherwise provided, the power to sell land for taxes must be exercised within the period during which such taxes remain a lien upon the land to be sold."

In *Poillon vs. Rutherford, Field vs. West Orange, Kirkpatrick vs. New Brunswick, Doremus vs. Cameron,* and *Harned vs. Cameron, supra,* the prosecutor (or complainant), was the owner of the premises at the time of the original levy.

Black, in his text book on the New Jersey law of taxation, has the following to say about the tax lien and the sale of lands to enforce it:

> "The period of two years, during which the lien exists, commences to run at the time fixed by the statute on the twentieth day of December next after the assessment. If the legislature, in creating the lien, has given it a limited existence, it will not continue beyond the period fixed; if the lien has expired by limitation the municipal authorities cannot revive it. Nor can the lien be revived without consent, except by legislative enactment. Nor can the municipal authorities extend the lien, merely for their delay in enforcing it. A sale of land for non-payment of taxes, after the expiration of the lien of the taxes upon such land, is *ultra vires* and void."
>
> *p.* 407.

We therefore ask that the judgment of the Supreme Court be reversed and the cause remanded.

Respectfully submitted,

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