

VOL 200 - 1894

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

THE COMMON COUNCIL OF THE

CITY OF BEVERLY,  
PLAINTIFF IN ERROR,

vs.

ROBERT W. WALN,  
DEFENDANT IN ERROR.

ON ERROR.

BOOK.

GILBERT & ATKINSON,  
*For Plaintiff in Error.*

HOWARD FLANDERS and  
SAMUEL W. BELDON,  
*For Defendant in Error.*

THE UNIVERSITY OF CHICAGO PRESS

New Jersey, to wit., the State of New Jersey to our Justices of our Supreme Court, greeting :

Because in the record and proceedings, and also in  
 [L. s.] the giving of the judgment in a plaint, which was  
 in our said Supreme Court, before you, between  
 the State of New Jersey, Robert W. Waln, prosecutor, and 10  
 the Common Council of the city of Beverly, defendants,  
 on a certiorari issued out of our said Supreme Court to the  
 said Common Council of the city of Beverly directed, as  
 in said manifest error hath intervened to the great damage  
 of the said defendant as aforesaid, as by its 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 20  
 and proceedings and plaint aforesaid, with all things touch-  
 ing and concerning the same to our Court of Errors and  
 Appeals, before the Judges thereof, on the first day of  
 August next, and this writ, and that the records and pro-  
 ceedings 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, the  
 fourteenth day of August, in the year of our Lord one 30  
 thousand eight hundred and ninety-three.

HENRY C. KELSEY,  
 Clerk.

GILBERT & ATKINSON,  
 Attorneys.

## ASSIGNMENT OF ERROR.

• And now at this day the plaintiff in error assigns the following causes of error :

1st. Because the Supreme Court decided that the act in question, as follows: "Be it enacted, &c., That the costs heretofore or hereafter incurred by any city of the third class of this State for improving sidewalks shall be a lien upon the abutting lands in front of which such work  
10 is done, and the same may be collected in the same manner and by the same officers as taxes are or may be collected in such cities," P. L., 1891, 480, is retroactive in effect, stating that when the assessment was before the Supreme Court upon a previous occasion doubt was suggested as to the constitutionality of this statute, assuming that properly interpreted it was retroactive in effect.—*Waln vs. City of Beverly*, 24 Vr., 560.

2d. Because the said Court decided that what there is about cities of the third class that so distinguishes them  
20 from all other cities of the State that this peculiar right of lien and consequent sale is appropriate to them alone has not been even suggested in argument or brief.

3d. Because the said Court decided that the only characteristics of cities of the third class is that their population is not in excess of twelve thousand, and that they are not on the seashore.

4th. Because the said Court decided that the exclusive right to subject private property to sale for improvements done by the municipality irrespective of the benefit it may  
30 be to the land owner must rest upon some more salient feature than inland situation or number of inhabitants.

5th. Because the said Court decided that there is no possible relation between the classification and the proposed burden to property.

6th. Because the said Court decided that the said act is clearly within the constitutional prohibition.

7th. Because the said Court decided that the warrant of sale should be set aside with costs, when judgment should have been ordered dismissing the writ of certiorari.

GILBERT & ATKINSON,  
Attorneys for and of Counsel with  
Plaintiff in Error.

And hereupon, afterwards, to wit: On the twenty-<sup>10</sup> eighth day of September, A. D. 1893, the said Robert W. Waln, by Howard Flanders, his attorney, comes into Court and says that there is no error either in the record and proceeding aforesaid, or in giving judgment aforesaid, and he prays here that the Court here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

HOWARD FLANDERS, 20  
Attorney for Defendant in Error.

#### OPINION.

1. The act of April 16, 1891 (P. L., p. 480), which provides that the cost heretofore or hereafter incurred by any city of the third class for improving sidewalks shall be a lien upon the abutting lands, and may be collected in the same manner as taxes are in said cities, is unconstitutional.

#### CERTIORARI.

Argued at February term, 1893, before Justices VAN SYCKEL and GARRISON. 30

HOWARD FLANDERS and S. W. BELDEN, for the Prosecutor.

GILBERT and ATKINSON, for the Defendant.

The opinion of the Court was delivered by Garrison, J. This writ of certiorari brings up the proceedings of the city of Beverly by which it proposes to sell the lands of the prosecutor for unpaid assessments for curbing. The assessment was made December 3rd, 1884; the warrant to sell bears date March 3rd, 1892, and in the interim the Legislature passed the act by virtue of which these proceedings are said to be justified. P. L., 1891, 480. When this assessment was before this Court upon a previous occasion, doubt was suggested as to the constitutionality of this statute, assuming that, properly interpreted, it was retroactive in effect. *Waln vs. City of Beverly*, 24 Vr., 560.

The act in question is as follows: "Be it enacted, &c, that the cost heretofore or hereafter incurred by any city of the third class of this state for improving sidewalks shall be a lien upon the abutting lands in front of which such work is done, and the same may be collected in the same manner and by the same officers as taxes are or may be collected in such cities."

20 What there is about cities of the third class that so distinguishes them from all other cities of the state that this peculiar right of lien and consequent sale is appropriate to them alone has not been even suggested in argument or brief. The only characteristics of this class of cities is that their population is not in excess of twelve thousand and that they are not on the seashore.

The exclusive right to subject private property to sale for improvements done by the municipality irrespective of the benefit it may be to the land owner, must rest upon  
30 some more salient feature than inland situation or number of inhabitants. There is no possible relation between the classification and the proposed burden to property. The act is clearly within the constitutional prohibition. The warrant of sale is set aside with costs.

## RULE.

The Court having heard the argument of counsel and inspected the proceedings and tax sale removed by the writ of certiorari in the cause, and duly considered the reasons filed, it is ordered that said tax sale be set aside, made void and for nothing holden with costs to prosecutor.

Entered June 21, as of June 16, 1893, on motion of  
 HOWARD FLANDERS,  
 Attorney.

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## WRIT OF CERTIORARI.

[Returnable June 1, 1892.]

New Jersey, ss.—The State of New Jersey to the Common Council of the City of Beverly, greeting:

[L. S.] We being willing for certain reasons to be certified of a certain ordinance passed by the Mayor, Clerk and Common Council of the city of Beverly, entitled "An ordinance respecting the grading, curbing and paving of the sidewalks in the city of Beverly," approved August 20 6th, 1874, and of a certain resolution adopted by you at a meeting held on the 21st day of June, 1883, whereby it was resolved, "That Cooper street shall be curbed with stone not less than four inches thick, from the south side of Warren street to the north side of the Camden and Amboy railroad, and Warren street, from Broad street to the eastern city boundary line," and of a certain warrant of sale dated March 3rd, 1892, issued by the said Common Council of the city of Beverly, directed to B. Franklin Soby, City Collector, authorizing and directing the said 30 City Collector to sell certain lands for unpaid assessments for curbing and paving, &c.

We command you that the said ordinance, the said resolution, the said warrant, and all proceedings on said ordinance, resolution and warrant, with all things touching

the same, you certify and send to our Justices of our Supreme Court of Judicature, on the 1st day of June next, at Trenton, together with this writ, that we may further cause to be done therein what of right and according to law should be done.

Witness Mercer Beasley, Esquire, Chief Justice of our Supreme Court aforesaid, at Trenton, this 17th day of May, A. D. 1892.

BENJ. F. LEE,  
Clerk.

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HOWARD FLANDERS,  
Attorney.

I allow this writ; let it be sealed.

C. G. GARRISON, J. S. C.

#### RETURN TO WRIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Judicature of the State of New Jersey:

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In obedience to the command of the annexed writ of certiorari directed to the Common Council of the city of Beverly, I do hereby certify and send to the honorable the Justices of the Supreme Court therein mentioned, the ordinance and the resolution and warrant, and the proceedings thereon, with all things touching the same, whereof mention is therein made, as fully as before me the same remain. In witness whereof, I have hereunto set my hand and seal this 31st day of May, 1892.

30

[L. S.]

CLARENCE L. HAZZARD,  
City Clerk.

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An ordinance respecting the grading, curbing and paving the sidewalks in the city of Beverly.

Be it ordained and enacted by the Mayor, Clerk and Common Council of the city of Beverly in Common Council assembled, and it is hereby enacted by the authority of the same :

SEC. 1. That it shall be lawful for the Common Council of the city of Beverly to require all or any portion of the streets, lanes, alleys and sidewalks to be filled, graded, graveled, curbed, paved or flagged in such manner and agreeably to such regulations as are now or may hereafter be established.

10

SEC. 2. That whenever it is deemed necessary to have any portion thereof so filled up, graded, graveled, curbed, paved or flagged, the said Common Council shall by resolution direct or determine the streets, lanes, alleys or sidewalks so intended to be filled up, graded, curbed, paved or flagged, the kind of material to be used and the nature and extent of the work to be done. The materials for the work so ordered to be done to be provided by and the work done under the supervision and control of the Street Committee, and the cost and expense thereof charged or as-  
20  
sessed by the Street Committee upon the owners of the lots fronting or bordering on such streets, according to its valuable proportion of the same, of which charges or assessment notice in print or in writing shall be given to the owners thereof, if resident in the city, by the Street Committee; and in case of the neglect or refusal of the said owner or owners to pay the same for the space of thirty days after notice thereof then it shall be lawful for the Treasurer of the city to sue for and recover the same, with  
30  
ten per cent. thereon, from the said owners aforesaid, in an action of debt, with costs of suit, before any justice of the peace or court having cognizance thereof; provided, that if the owner of any lot opposite the sidewalk ordered to be graded, curbed, paved or flagged shall by notice in writing to the Street Committee within ten days after the notice of

the passage of such resolution by the Common Council, signify his desire to furnish the material and do the said work himself, and shall proceed promptly to the execution thereof, then the same to be done by the owner thereof at his, her or their own expense, but under the immediate supervision and control of the Street Committee, who shall see that the materials used and the work done shall be in manner and form corresponding with other portions of the street so being graded, graveled, curbed, paved or flagged.

10 SEC. 3. The charges or assessments made for this purpose shall be a lien on the property, and if the owner thereof shall not reside in the city, then the said notice shall be sufficient if set up in some conspicuous place on the premises, fronting or adjoining the same, and if not paid within sixty (60) days thereafter, then the said Common Council shall have power to enforce the collection of such assessments made on the lots opposite to which the said improvements have been made, by exposing the same for sale, or as much thereof as may be sufficient to pay the  
20 said assessments, and for this purpose shall cause an advertisement to be set up in five of the most public places in said city for a period of three weeks, stating the amount of such assessment and requiring the owners of such lot to pay the same to the City Treasurer, appointing a day and place where such lot or lots will be sold at public sale, if default shall be made in such payment, to the person or persons who will take the least quantity of the said lot or lots so offered and pay the amount of the said delinquent assessments with the costs of advertising and expenses of  
30 the sale.

SEC. 4. That immediately after such sale the Common Council shall execute and deliver to the purchaser or purchasers of said lot a certificate of such sale, describing the lot, or portion of it, as may be sold, together with the amount paid for the same, entitling the holder thereof to a

deed of the premises so sold ; provided, that the owner or owners of the said lots do not within two (2) years from the date of said certificate appear before the said Common Council and deposit with it, for the purchase of the land, the amount so paid by him, together with ten per centum interest, in which case the said certificate shall be deemed to be cancelled, and the amount so received shall, on demand, be paid to the party holding and owning such certificate.

SEC. 5. That if, at the expiration of two years from time of said sale, the owner or owners of any land so sold does not appear to redeem said land as aforesaid, then the said Common Council shall execute to the holders or owners of said certificate a deed of the premises described therein, in their corporate name, the parties receiving the deed to bear the expenses thereof ; the sale shall be final, and the title of such land shall pass irrevocably to the holders thereof.

SEC. 6. That all ordinances hereto passed in conflict with the provisions of this ordinance be and the same are hereby repealed. 20

Passed August 6th, 1874.

\_\_\_\_\_, Mayor.

Attest—JOS. H. BRITTON,  
City Clerk.

I, Clarence L. Hazzard, Clerk of "The Mayor, Clerk and Common Council of the city of Beverly," do hereby certify that the foregoing is a true and correct copy of an ordinance passed by the Common Council of said city on August 6th, 1874, as the same now remains of record and in my custody. <sup>30</sup>

In witness whereof, I have hereunto set my hand and seal this 31st day of May, 1892.

[L. s.] CLARENCE L. HAZZARD,  
City Clerk.

An adjourned regular meeting of Common Council was held at City Hall on Thursday evening, June 21st, 1883.

The following resolution was read: Resolved by the Common Council of the city of Beverly, That Cooper street shall be curbed with stone not less than four inches thick, from the south side of Warren street to the north side of the Camden and Amboy railroad, and Warren street from Broad street to the eastern city boundary line. Carried.

10 A regular meeting of the Common Council was held at the City Hall on Thursday evening, July 5th, 1883.

The following resolution was read and adopted: It is moved and seconded that the clerk shall forthwith have notice served upon each of the resident owners of lots on Cooper and Warren streets of the resolution passed by Council requiring the sidewalks to be curbed with stone, and that he be directed to have the notices printed.

A regular meeting of Common Council was held at the  
20 City Hall on Thursday evening, August 2d, 1883.

Street Committee reported progress, work on streets, &c.

Mr. James D. Bennett also presented a report, which was, on motion of Mr. Osmond, received as a minority report.

On motion of Mr. Bennett:

Resolved by the Common Council of the city of Beverly, That the Street Committee be and is hereby authorized and directed to enter into a contract to purchase a sufficient number of feet of stone for curbing Cooper and Warren  
30 streets, in pursuance of a resolution for that purpose adopted, and the amount of the contract price is hereby appropriated. Carried.

A regular meeting of Common Council was held at City Hall, Thursday evening, December 6th, 1883.

A bill from Mr. E. M. Stevenson of \$753.97, for curbing, was laid over until next meeting.

A regular meeting of Common Council was held at City Hall on Thursday, January 3d, 1884.

On motion of Mr. Osmond:

Resolved, That an appropriation of \$1 be made to have curbing notices printed. Carried.

A regular meeting of Common Council was held at City Hall on Thursday evening, April 3d, 1884. 10

On motion of E. C. Reed:

Resolved, That an order be drawn in favor of E. M. Stevenson for \$438.72, on curbing account. Carried.

On motion of Mr. Bennett:

Resolved, That the City Treasurer be requested to furnish Council at next regular meeting a list of the names of all persons who have not paid for curbing in front of lots; also, all who have not paid for flagging. Carried.

A regular meeting of Common Council was held in the City Hall on Thursday evening, May 1st, 1884. 20

City Treasurer reported delinquents on flagging and curbing account.

On motion of Mr. Bennett:

Resolved, That the list be given to the City Solicitor for collection. Carried.

A regular meeting of Common Council was held in the City Hall on Thursday evening, December 4th, 1884.

On motion, the City Solicitor was instructed to commence proceedings for the collection of the curbing and flagging bills in his hands. 30

A regular adjourned meeting of Common Council was held in the City Hall Thursday evening, July 11th, 1889.

On motion of Mr. McElroy, the City Solicitor sue out, in the name of the City Treasurer, the delinquent curbing bills of 1883 and 1884, to make a test case.

The regular monthly meeting of Common Council was held in the City Hall on Thursday evening, August 1st, 1889.

Mr. McElroy offered the following resolution:

Whereas, Several charges of assessments due the city of  
 10 Beverly, the same being for curbing and flagging sidewalks during the years 1883 and 1884, still remain a lien upon the lots of land benefited by such improvements; therefore, be it resolved, that the President of Common Council proceed to advertise and sell, according to law, the said lots upon which the charges or assessments are a lien.

On motion of Mr. Peart, the resolution be adopted.

- Regular meeting of Common Council held in City Hall August 6th, 1891.

The following is an extract of the opinion delivered by  
 20 Justice Scudder, of the Supreme Court of New Jersey, in the suit of R. W. Waln et al. vs. The Common Council of Beverly, filed July 27th, 1891, and read this evening:

“The resolution of August 1st, 1889, that the President of Common Council proceed to advertise and sell according to law upon which the charges of assessments are claimed to be a lien, should be set aside, but without costs, and that the city of Beverly under their charter cannot make assessments for street improvements upon lands benefitted. The lien must be enforced according to the act of April  
 30 16th, 1891.”

An adjourned regular meeting of Common Council held Thursday evening, January 15th, 1892. The business in relation to delinquent curbing was laid over until next meeting.

Regular meeting of Common Council held Thursday evening, February 4th, 1892.

The report on delinquent curbing was, on motion of Mr. Morrell, laid over until next meeting.

Regular meeting of Common Council held Thursday evening, March 3d, 1892.

The report on delinquent curbing being called for, Mr. Gilbert, Solicitor, addressed Council as regards to progress made with same and the several laws bearing upon the <sup>10</sup> matter.

The Clerk then read the warrant to sell land for assessments.

On motion of Mr. Reed, the President of Common Council and the Clerk were ordered to sign the warrant under the seal of the city.

The following resolution read and adopted :

Resolved, That the warrant for the collection of unpaid assessments for curbing laid on Warren street in the year 1884 be recorded in the book known as "Record of Tax <sup>20</sup> Sales" by the City Clerk, and after he has recorded said warrant to deliver the same to the collector.

JOHN A. PAYNE.

I, Clarence L. Hazzard, Clerk of "The Mayor, Clerk and Common Council of the city of Beverly," do hereby certify that the foregoing is a true and correct copy of the minutes and record of the proceedings of the Common Council of the city of Beverly, as the same are now of record and in my custody.

In witness whereof, I have hereunto set my hand and seal <sup>30</sup>  
this 31st day of May, 1892.

[L. s.]

CLARENCE L. HAZZARD,

City Clerk.

To the Collector of the City of Beverly, in the County of Burlington :

County of Burlington, City of Beverly, ss.—Whereas, it appears to the Common Council of the said city of Beverly that the persons hereinafter named were each of them assessed the several sums hereinafter stated as to each respectively, for curbing laid on Warren street, in said city, in the year 1884, as follows :

Lot of land situate on the north side of Warren street, adjoining property of John C. Henry, \$25.03, assessed in the name of Mrs. Miercken.

Lot of land situate on the south side of Warren street, adjoining the property of St. Stephen's Protestant Episcopal Church, \$42.65, assessed in the name of Jacob Wilson.

Lot of land situate on the south side of Warren street, adjoining property of William C. DeArmond, \$69.03, assessed in the name of Mrs. R. N. Waln.

Lot of land situate on the south side of Warren street, adjoining property of William C. DeArmond, 44.23, assessed in the name of Mrs. T. Henderson.

And the said several assessments and the costs, fees, charges and expenses in relation to the assessment and collection of the same have become and remain unpaid more than six months from and after the time when payable.

You are, therefore, hereby commanded to make the said several assessments and the following fees, costs, charges and expenses for each name on this warrant, to wit: Fifteen cents for the fees of Common Council and Clerk, together with your lawful fees, for the execution hereof of the lands, tenements, hereditaments and real estate, on account of which the same were so assessed as aforesaid, by selling each of the said several parcels of land, or such parts thereof as will be sufficient for the purpose for the shortest term for which any person or persons will agree to take the same and pay such assessment and all costs, fees, charges

and expenses. Such term to be for a period not longer than thirty years.

And you are further commanded to pay the moneys raised by such sales to the Common Council of the city of Beverly, and to make return of this warrant and your proceedings thereunder to the said Common Council within four months from the date hereof.

Witness the seal of the said city and the hand of the President of the said Common Council and of the City Clerk, this 3d day of March, A. D. 1892.

10

ADDISON W. TAYLOR,  
President of Common Council.

Attest :

CLARENCE L. HAZZARD, [L. s.]  
City Clerk.

I, Clarence L. Hazzard, clerk of "The Mayor, Clerk and Common Council of the city of Beverly," do hereby certify that the foregoing is a true and correct copy of the warrant to sell lands for unpaid curbing bills as the same now remains of record in the book entitled "Record of Tax Sales" of the city of Beverly and in my custody. In witness whereof, I have hereunto set my hand and seal this 31st day of May, 1892.

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[L. s.] CLARENCE L. HAZZARD,  
City Clerk.

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#### REASONS.

The prosecutor presents the following reasons for setting aside the ordinances, resolutions, orders, assessments and all proceedings of the Common Council in the matter of the curbing of Warren street, in the said city:

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1st. Because the ordinance for said improvement is in

excess of the authority conferred upon Common Council by the charter of said city, in that it makes the charges or assessments made for such improvements a lien on the property fronting said improvement, and provides for the collection of such charges or assessments by a sale of the said property.

2d. Because said ordinance was repealed by an ordinance passed by said Common Council December 2d, 1886.

10 3d. Because said ordinance, in and by the second section thereof, provided that "the said Common Council shall, by resolution, direct or determine the streets, lanes, alleys or sidewalks so intended to be filled up, graded, curbed, paved or flagged, the kind of material to be used and the nature and extent of the work to be done," in which respect said ordinance is in excess of the authority conferred upon the Common Council by the charter of said city.

20 4th. Because said ordinance does not contemplate the changing of the curb from wood to stone, and is, therefore, not applicable to Warren street, which was curbed with wood before the adoption of the said resolution under which the curbing with stone was done.

5th. Because said ordinance does not prescribe, direct or determine what street shall be curbed or paved, nor is there anything therein specifying the kind of materials to be used.

30 6th. Because section 2 of said ordinance provides that the costs and expense of curbing, paving and flagging shall be "charged or assessed by the Street Committee upon the owners of the lots fronting or bordering on such streets, according to its valuable proportion of the same," and not according to the actual benefit received.

7th. Because notice of the charges or assessments for

said improvements was not given to the owner of the property advertised for sale, as required by said ordinance.

8th. Because said charges or assessments were not made against the owner of the property advertised for sale.

9th. Because said property is not sufficiently described in said assessment or in said advertisement of sale.

10th. Because there is no authority in Common Council to issue said warrant of sale, dated March 3d, 1892. 10

11th. Because there is no authority in the City Collector of said city of Beverly to advertise said lands for unpaid assessments for curbing sidewalks or to sell said lands for said assessment.

12th. Because the act of the Legislature, approved April 14th, 1891, assumed by said Common Council and said City Collector to issue said warrant and advertise and make sale thereunder for unpaid assessments, as aforesaid, is unconstitutional. 20

13th. Because if said act of the Legislature, approved April 16th, 1891, is constitutional, this assessment cannot be collected under its provisions, because the right to collect this assessment as taxes is barred by the statute of limitations, in such case made and provided.

14th. Because said proceedings are in divers other respects irregular, illegal unjust and oppressive to the prosecutor. 30

HOWARD FLANDERS,  
Attorney for Prosecutor.

## TESTIMONY.

Depositions of witnesses taken in the above stated cause, before George A. Vroom, a Supreme Court Commissioner, by agreement of counsel, at the offices of Messrs. Gilbert & Atkinson, in the city of Camden, on Saturday, the 22d day of October, 1892, at the hour of 10 o'clock in the forenoon of said day.

Appearances—

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HOWARD FLANDERS, ESQ., for the prosecutor.

MESSRS. GILBERT & ATKINSON, for the defendant.

It is agreed between counsel that the examination may be taken stenographically, and the signatures of witnesses are waived.

CLARENCE L. HAZZARD, SWORN.

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Q. (By Mr. Flanders) Where do you reside?

A. In the city of Beverly.

Q. Do you hold any position there?

A. I am Clerk of the Common Council and City Clerk.

Q. How long have you held that position?

A. This is my fourth term; nearly four years.

Q. You have the possession of the books containing the minutes of Common Council, have you?

A. Yes, sir.

Q. And also the book of ordinances of the city of  
30 Beverly?

A. Yes, sir.

Q. Have you it here with you?

A. Yes, sir.

Q. Will you turn to the ordinance book, to the ordinance passed August 6th, 1874, entitled "An ordinance respect-

ing the grading, curbing and paving of sidewalks in the city of Beverly?"

MR. ATKINSON—I object to any proof of this ordinance in this case, or the offer of any evidence concerning it, on two grounds—First, because any questions raised under that ordinance and pertaining to the assessment now contested, or the sale in pursuance of that assessment of the prosecutor's property is *res adjudicata*; and second, because the prosecutor is barred from raising any questions under it by laches.

Q. Do you find in the ordinance book an ordinance so entitled?

A. I do.

Q. Do you find that that ordinance has been signed?

A. Yes, sir.

Q. How signed?

A. "Attest: Jos. H. Britton, City Clerk."

Q. Do you find in that book, the book that you hold in your hand, any other ordinance referring to the same subject—that is, grading, curbing and paving of streets in the city of Beverly?

A. I find such an ordinance.

Q. How is it entitled?

A. "An ordinance relating to the improvement of the streets in the city of Beverly."

Q. When was it passed?

A. Passed December 2d, 1886.

Q. Do you find a certificate at the bottom of that ordinance signed by John C. Jennings, City Clerk?

A. I do.

Q. Will you read it?

A. "I, John C. Jennings, Jr., Clerk of the city of Beverly, do hereby certify that the above ordinance was duly passed

by the Common Council of said city December 2d, 1886; that the same was published December 11th, 1886, and recorded on December 22d, 1886, with the seal of the city attached, 'John C. Jennings, Jr., City Clerk, and Edwin S. McElroy, Mayor.'"

Q. Do you find a certificate signed by Edward S. McElroy at the bottom of that ordinance?

A. Signed by E. S. McElroy without any title to it.

Q. Will you read that certificate?

10 A. "This is to certify that the above ordinance has been approved and passed according to the requirements of the city charter. E. S. McElroy."

Q. Was E. S. McElroy Mayor of the city of Beverly at that time?

A. I have every reason to believe that he was Mayor at that time; I know he was the Mayor at one time.

Q. Have you the book of minutes also with you?

A. Yes, sir.

Q. When was the first action relating to the curbing  
20 Warren street taken?

A. June 21st, 1883.

[The question and answer are objected to on the same ground as the former objection.]

Q. State the action that was taken at that meeting of Council.

A. "The following resolutions were read: Resolved by the Common Council of the city of Beverly, That Cooper  
30 street shall be curbed with stone not less than four inches thick, from the south side off Warren street to the north of the Camden and Amboy Railroad, and Warren street from Front street to the western side boundary line. Carried."

Q. Do you find any other resolution relating to the curbing of Warren street, passed at that meeting?

A. No, sir.

Q. Will you turn to the minutes of the meeting held July 5th, 1883, and state whether you find an action recorded on those minutes relating to the curbing of Warren street or Cooper street?

A. I find the following resolution was read and adopted: "It is moved and seconded that the Clerk shall forthwith have notice served upon each of the resident owners of lots on Cooper and Warren streets of the resolution passed by Council requiring their sidewalks to be curbed with stone, 10 and that he be directed to have the notice printed."

Q. Turn to August 2d, 1883—what do you find?

A. "The Street Committee reports progress. Mr. James D. Bennett also presented a report, which was, on motion of Mr. Osmond, received as a minority report. On motion of Mr. Bennett: Resolved by the Common Council of the city of Beverly, That the Street Committee be and is hereby authorized to contract or enter into a contract to purchase a sufficient number of feet of stone for curbing Cooper and Warren streets, in pursuance of the resolution for that pur- 20 pose adopted, and the amount of the contract price is hereby appropriated. Carried." The next action was taken December 6th, 1883: "A bill from Mr. E. M. Stevenson of \$753.97, for curbing, was laid over until the next meeting." The next action was January 3d, 1884: "The bill of Edward M. Stevenson was laid on the table for the present." "On motion of Mr. Osmond: Resolved, That an appropriation of \$1 be made for having curbing notice printed." The next action is April 3d, 1884: "On motion of E. C. Eeed: Resolved, That an order be drawn in favor 30 of E. M. Stevenson for \$438.72, on curbing account. Carried." The next action is April 15th, 1884: "On motion of Mr. Bennett: Resolved, That the City Treasurer be requested to furnish Council at the next regular meeting a list of the names of all persons who have not paid for curbing in

front of lots, and also all who have not paid for flagging and grading." The next action is May 1st, 1884: "The City Treasurer reported delinquents on flagging and curbing accounts."

Q. Is the list of delinquents in the minute book, after the minute of that meeting?

A. No, sir. "On motion of Mr. Bennett: Resolved, That the list be given to the City Solicitor for collection. Carried." The next action is December 4th, 1884: "On motion, the City Solicitor was instructed to commence proceedings for the collection of the curbing and flagging bills in his hands." The next action is July 11th, 1889: "On motion of Mr. McElroy, the City Solicitor sue out, in the name of the City Treasurer, the delinquent curbing bills of 1883 and 1884, to make a test case." The next action is August 1st, 1889: "Mr. McElroy offered the following resolution: 'Whereas, Several charges and assessments due the city of Beverly, the same being for curbing and flagging sidewalks during the years 1883 and 1884, still remain a lien upon the lots of land benefitted by such improvements; therefore be it Resolved, That the President of Common Council proceed to advertise and sell according to law the said lots upon which the charges and assessments are a lien.'"

Q. Do you find any other motion further?

A. "On motion of Mr. Peart, the resolution be adopted."

Q. Do you find from that time to the present any other action of Council in relation to collecting the assessment?

A. I do not recall any.

30 Q. Do you find any minute by which the warrant was issued to B. Franklin Soby, dated the 31st day of March, 1892, or do you find the warrant?

A. March 3d, 1892: "The Clerk then read warrant to sell land for assessments. On motion of Mr. Read, the President of Common Council and the Clerk were ordered

to sign the warrant under the seal of the city." The following resolution read and adopted: "Resolved, That the warrant for the collection of the unpaid assessments for curbing lots on Warren street for the year 1884 be recorded in the book known as 'Record of Tax Sales' by the City Clerk, and after he has recorded said warrant to deliver the same to the Collector. John A. Payne."

Q. That signature Payne indicates the member of Council who offered the resolution?

A. Yes, sir.

10

MR. GILBERT—There is no objection to the taking of testimony relating to the issuing of the warrant and proceedings thereunder.

Q. On January 15th, 1892, do you find anything?

A. "The business in relation to delinquent curbing was laid over until next meeting." On February 4th, 1892, the report on delinquent curbing was, on motion of Mr. Morrell, laid over until next meeting.

Q. Do you know whether any other action in relation to curbing on Warren street appears upon these minutes?

A. In the meeting of August 6th, 1891: "The following is an extract of the opinion delivered by Justice Scudder, of the Supreme Court of New Jersey, in the suit of Robert W. Waln et al. against The Common Council of Beverly, filed July 27th, 1891, and read this evening: 'The resolution of August 1st, 1889, that the President of Common Council proceed to advertise and sell according to law upon which the charges and assessments are claimed to be a lien should be set aside, but without costs, and that the city of Beverly, under their charter, cannot make assessments for street improvements upon lots benefitted, the lien must be endorsed according to the act of April 16th, 1891.'"

Q. That is all you find in the book of minutes relating to this assessment?

30

A. At the meeting of June 2d, 1892, the following appears : "Return of Treasurer's warrant to sell land for assessments read. The clerk then read the writ of certiorari that had been served from the Supreme Court in which the State, Robert W. Waln, was prosecutor, against the Common Council of the city of Beverly, defendant, said writ being returnable June 1st, 1892. It was stated that the Clerk had made the return of the city under the direction of the City Solicitor. On motion of Mr. Read, City Solicitor Gilbert was directed to look after the city's interest in the above matter. The following resolution, signed by John A. Payne, was read and adopted: 'Resolved, That the returns to the tax warrant be recorded by the Clerk in the tax record book.'"

Q. Have you the warrant dated the 3d of March, 1892, issued to B. Franklin Soby, Collector?

A. I know I mailed it to Mr. Soby as instructed in the resolution.

Q. Has it been returned to you, and have you got it with you?

A. No, I have not got it with me.

Q. You remember issuing that warrant signed by you, and it was issued to Mr. Soby?

A. Yes, sir.

MR. FLANDERS—On behalf of the prosecutor, I offer the ordinance of August 6th, 1874, and the ordinance of December 2d, 1886.

[Objected to on the ground that the ordinances should be produced.]

Q. The book of ordinances which you had in your hand here is the book in which are recorded the various ordinances passed by the city of Beverly, is it not?

A. Yes, sir.

Q. And is that the only book, so far as you know, in which said ordinances are recorded?

A. The only book.

Q. And as far as you know, are the ordinances that have been passed and now in existence in the city of Beverly as laws, in that book?

A. I can only vouch for the ordinances passed since I was clerk.

Q. Do you know of any other book in which ordinances have been recorded—is such a book in your hands as City Clerk?

A. No, sir; that is the only book of ordinances that I have.

Q. Have you in your possession the original ordinances of the city of Beverly and an ordinance entitled "An ordinance relating to the improvement of the streets of the city of Beverly," passed December 2d, 1886?

A. I can only answer that after a search among the city records.

Q. Have you in your possession, as such City Clerk, the 20 original ordinance, entitled "An ordinance respecting the grading, curbing and paving of sidewalks in the city of Beverly," passed August 6th, 1874?

A. I make the same answer as to the preceding question.

ROBERT W. WALN, affirmed and examined.

Q. (By Mr. Flanders) Where do you reside?

A. In the city of Burlington, New Jersey.

Q. Are you the prosecutor in this case?

A. I am.

Q. Do you own lots on the south side of Warren street, in the city of Beverly?

A. I do.

Q. How long have you owned them?

A. Since March, 1881.

Q. Does your wife own any property on Warren street or in the city of Beverly?

A. I never heard of her owning any there.

Q. Do you know of any other person by the name of Mrs. R. W. Waln?

A. I do not.

[Objected to on the ground that this matter has already been passed upon by the Supreme Court in the case of Robert Waln, prosecutor, against the city of Beverly.]

Q. Did you ever receive a bill from the city of Beverly for work done to your property, situate on the south side of Warren street in Beverly?

A. A bill made out in my own name never came to me; there was a bill made out to Mrs. R. W. Waln for property, without designating what the property was; the bill was dated December 4th, 1884.

Q. Was the sidewalk of this property curbed prior to 1883?

[Objected to on the ground that prosecutor is barred from giving evidence on this subject on account of laches.]

A. There was.

Q. What was the style of curbing?

A. It was a wooden curb.

Q. Save the proceedings which were started by you, together with Jacob Wilson, on the 4th day of March, 1890, have any proceedings been taken against you or against your wife to collect the assessment, or the money claimed to be due, in the bill you have just referred to?

A. There was a sale advertised for property there on the south side of Warren street, which property described is evidently my property; the sale was advertised to take place May 18th, 1892.

Q. Saving that exception, what is your answer?

A. There have been no other proceedings, as far as I am aware.

Q. Will you look at that deed [deed Joseph Parker and wife to Robert W. Waln for a lot of ground on south side of Warren street, dated March 11th, 1881,, recorded March 15th, 1881, in Book H 10 of Deeds, page 210,] is that the deed conveying the property owned by you on Warren street?

A. It is.

10

Q. And is the property described in that deed, so far as you know, the same property upon which the assessment was made?

A. I do not know about the assessment, but it is the same property described in that advertisement that they proposed to sell by reason of the warrant.

Q. Are you now the owner of the property named in that deed?

A. I am.

[Deed offered in evidence and marked "Exhibit A," for the prosecutor.]<sup>20</sup>

Cross-examination by Mr. Atkinson.

Q. How long have you known that there has been an assessment against your lot for this curbing bill?

A. I cannot say that I have ever known, unless the previous proceedings were a knowledge to that effect.

Q. The bill for the amount of the assessment came to your knowledge as early as 1884, did it not?

30

A. Somewheres about that time.

Q. And at that time did you know that your wife owned any property in the city of Beverly?

A. I did not know of her owning any property there.

Q. Therefore, when the bill for work came to your house,

before your eyes, and in your hands, you knew that there was an assessment for land owned by you?

A. I did not know it was an assessment.

Q. Why didn't you?

A. Because, as far as I am aware, there was nothing to indicate it was an assessment; it was simply a bill for work done, without anything that would convey to me an idea it was an assessment.

Q. Who did you expect was going to pay for that work, 10 if not yourself?

A. I can't say I had any expectation about it.

Q. You knew there was a charge against the property then?

A. I say no, I did not.

Q. Why didn't you?

A. I have no knowledge of anything that would indicate there was a charge against the property.

Q. What did you tell your wife this was for when it came to the house?

20

[Objected to on the ground that what this witness told his wife is not relevant.]

A. I did not tell her anything.

Q. Any conversation about it?

A. No conversation about it.

Q. What became of that paper?

A. It was given to Mr. Sooy, I believe.

Q. He was your counsel in the former case?

30 A. He was.

Q. Have you got all the papers back from Mr. Sooy?

A. I have not that paper.

Q. Where is that paper?

A. I presume Mr. Sooy has it.

Q. Left it with him, did you?

A. That was the last I saw of it.

Q. I will show you a paper book used in the case before, the paper dated December 3d, 1884, "Mrs. R. W. Waln to city of Beverly, Dr., 193 feet curbing at 34½, \$66.10. Carting 2 loads gravel, 50 cts., \$1. Surveying 193 feet at 1 c. per ft., \$1.93; total, \$69.03." You remember that paper being an exhibit in the former suit, do you not?

A. I think that is an incorrect copy of that paper; it was Mrs. R. U. Waln; with that exception, yes.

Q. And that came to your knowledge in 1884? 10

A. I presume about that time.

Q. And yet you say that it gave you no information that the city of Beverly had any charge for curbing and grading against land held by you in Beverly?

A. Yes; that was a bill made out to a person, indicating no property whatever; I would say from that there was nothing to indicate any charge against any particular land.

Q. Your evidence now is a technical construction of the law, is it not?

A. It is a matter purely of opinion. 20

Q. You answer the question and the Court will decide what the opinion is on it?

A. I cannot say whether that would be a technical construction or not; it is a matter of what information was given by the bill?

Q. You are a lawyer?

A. I am.

Q. And when you are making these statements, it is on the basis that the notice, not being directed to you and, therefore, not such a notice as the law would require, is 30 not that what you mean?

A. No.

Q. Tell us what you do mean.

A. Your question was whether that did not convey a notice of the assessment or charge.

Q. You are going back to something else.

A. My answer is, it is not in my name and does not convey any notice of the assessment or charge against the property.

Q. Did you go to see about this bill, or did you see any of the city authorities about it?

A. I think not until I saw the Solicitor sometime afterwards, and he told me the thing was illegal and would not be collected.

10 Q. Who told you that?

A. Mr. Alfred Flanders.

Q. How long afterwards?

A. I don't know—quite a while afterwards.

Q. Fix the time?

A. I have nothing to fix the time by.

Q. How long has Alfred Flanders been deceased?

A. I could not say—it would be guess work.

Q. Guess at it as near as you can?

A. About four or five years, as near as I can guess.

20 Q. You saw the work had been done there at your property as early as 1885?

A. Well, possibly so.

Q. Didn't you say, in your testimony before, that in the course of the next year you knew of it referring to the work being done probably within a year?

A. It is very likely.

Q. Did you say it or did you not?

A. Very likely I did.

Q. The question is—did you or did you not?

30 A. I cannot answer that any more than I think probably I did say it.

Q. And why can't you answer it directly?

A. I don't remember.

Q. You can remember whether you had notice or not, can't you?

A. I can remember what I have testified to.

Q. You say you can't remember what you testified to about a year ago—can you remember that eight years ago you didn't have notice of a thing, and a proper notice?

A. I have had such notice as I have testified to.

Q. Answer the question, please.

A. I will say that I did not say that I can't remember all I testified to a year ago; there was one particular thing you asked me, and whether I testified to that in the way you indicated or not, I cannot answer. 10

Q. I will show you a printed copy of the testimony taken in your former suit over this matter and refer you to page 24 of that paper book. The question is there asked you, "When did you first learn that some curbing had been put on your property on Warren street?" your answer was, "I don't recall any particular time when I first knew it; I was not there when the work was going on; in the course of things I knew it, probably within a year, and it may have been within a few months;" now, I ask you the question—did you then say that, or did you 20 not?

A. I think it very probable I said it; further than that I can't answer.

Q. Then if you said it at that time, you had notice, didn't you, that the work had been done to your property within a year after the work had been done?

A. Whether you call it a notice or not, I can say I knew the work had been done.

Q. You are discriminating between an actual notice and your knowledge of a technical legal notice, are you not? 30

A. I don't know that I am; I understood you to want me to indicate that knowledge was notice.

Q. Is knowledge notice of a thing?

A. Knowledge may not be notice of the work claimed, but I knew the thing was done, as I have stated.

Q. You knew it was done. The work had been done and the bill came to your house for payment for that work; now, do you say that you had no notice of it and that it was a charge against your property?

A. I did not say any bill came to the house for that work; only the bill came; there was nothing to indicate what it was for.

Q. What inquiry did you make to find out what the bill was for?

10 A. I don't think I made any inquiry.

Q. What brought about this conversation between you and Alfred Flanders, deceased?

A. I can't say now; he was talking generally about these claims for curbing done there and told me he knew I had some property on that street, and he told me that he had advised the Council at different times that it was illegal and they could not collect it.

Q. As a matter of fact, they have all paid but you, have they not?

20 [Objected to.]

A. You know that I don't know what other people have done in regard to it.

Q. Those who joined with you in prosecuting this writ before have not joined this time?

[Objected to.]

A. No.

30 Q. And as a matter of fact, they have all paid but you—do you know that or not?

[Objected to as irrelevant.]

A. I cannot say that I know it.

Q. Have you not talked with them?

A. I have talked with them ; I understood they intended to pay.

Q. And you don't intend to pay ?

[Objected to.]

A. It was more a question whether City Council was inclined to do the fair thing ?

Q. What is the fair thing ?

[Objected to as calling for an expression of witness' 10 opinion.]

A. I made a proposition to compromise ; if they had taken it, it would have been paid.

Q. They would not compromise with you ?

A. It was declined.

Q. It is an improvement to your property there, is it not ?

A. Very little improvement ; I don't think the property would bring any more, or is worth any more, than in the previous condition. 20

Q. It was better with the old wooden curb there ?

A. It was as good as to market value, and it is a property that is for sale.

Q. As a matter of fact, now, you had knowledge of this lien, or assessment charge, the bill for curbing the city had against your property there as early as 1884, and within a year after the work was done, did you not ?

A. I had knowledge about the year 1884, or the subsequent year, that the work was done ; as to whether it was a lien or charge, I had no knowledge. 30

Q. And your discrimination against the paper notice sent you is because of what you construed to be on that paper notice a "Mrs." and not a "Mr.," is it not ?

A. I should say no to that.

Q. Then what is your discrimination against this paper notice—that it was only a bill and no notice at all?

A. Only a bill and no notice at all.

Q. When that paper spoke of one hundred and ninety-three feet of curbing, what did you understand curbing to mean?

A. I have no distinct recollection of, any special understanding about it at that time.

Q. You understood the word curbing as you would get to the word curbing out of "Webster's," or out of any good dictionary, did you not?

A. If my opinion had been asked, I would have taken the dictionary definition.

Q. And the same as to the words "grading," "gravel" and "surveying," would you not?

A. I certainly should.

MR. FLANDERS: I offer in evidence the original ordinance of December 2d, 1886.

20 [Marked Exhibit B. Objected to.]

[It is admitted that the ordinance of August 6th, 1874, cannot be found.]

[Ordinance as contained in the book of ordinances offered in evidence. Marked Exhibit C. Objected to.]

[Warrant issued by the Common Council of the city of Beverly to B. Franklin Soby, Collector, issued March 31st, 1892, offered in evidence. Marked Exhibit D.]

30 [Also notice of sale, dated April 14th, 1892. Marked Exhibit E.]

It is agreed between counsel that this case shall not be moved for argument before the Supreme Court before the February Term, 1893.

## WARRANT TO SELL LAND FOR ASSESSMENTS.

To the Collector of the City of Beverly, in the County of Burlington :

County of Burlington, City of Beverly, ss.—Whereas, It appears to the Common Council of the said city of Beverly that the persons hereinafter named were each of them assessed the several sums hereinafter stated, as to each respectively, for curbing land on Warren street in said city in the year 1884, as follows :

Lot of land situate on the north side of Warren street, adjoining property of John C. Henry, \$25.03, assessed in the name of Mrs. Miercken.

Lot of land situate on the south side of Warren street, adjoining property of St. Stephen's Protestant Episcopal Church, \$42.65, assessed in the name of Jacob Wilson.

Lot of land situate on the south side of Warren street, adjoining property of William C. De Armond, \$69.03, assessed in the name of Mrs. R. N. Waln. 20

Lot of land situate on the south side of Warren street, adjoining property of William C. De Armond, \$44.23, assessed in the name of Mrs. T. Henderson.

And the said several assessments and the costs, fees, charges and expenses in relation to the assessment and collection of the same have become and remain unpaid more than six months from and after the time when payable. You are therefore hereby commanded to make the said several assessments and the following fees, costs, charges and expenses for each name on this warrant, to wit : Fif- 30  
teen cents for the fees of the Common Council and Clerk, together with your lawful fees for the execution hereof of the lands, tenements, hereditaments and real estate on account of which the same were so assessed as aforesaid, by selling each of the said several parcels of land, or such

parts thereof as will be sufficient for the purpose, for the shortest term for which any person or persons will agree to take the same and pay such assessment and all costs, fees, charges and expenses. Such term to be for a period not longer than thirty years.

And you are further commanded to pay the moneys raised by such sales to the Common Council of the city of Beverly, and to make return of this warrant and your proceedings thereunder to the said Common Council within four  
10 months from the date hereof.

Witness the seal of the said city and the hand of the President of the said Common Council and of the City Clerk, this 3d day of March, A. D. 1892.

ADDISON W. TAYLOR,  
President of Common Council.

Attest :

CLARENCE L. HAZZARD, [l. s.]  
City Clerk.

2) This is to certify that the above is a true copy of a warrant to sell land for assessments as is now on record in the Clerk's Office of the city of Beverly, N. J.

CLARENCE L. HAZZARD,  
City Clerk.

SALE OF LANDS  
FOR UNPAID ASSESSMENTS

CITY OF BEVERLY.

Public notice is hereby given by B. Franklin Soby, Collector of the city of Beverly, in the county of Burlington, that by virtue of a warrant issued on the 3d day of March, A. D. 1892, by the Common Council of said city, he will sell at public vendue all the lands, tenements, hereditaments and real estate hereinafter mentioned, for the shortest term for which any person or persons will agree to take the same and pay the assessment for curbing laid in the year 1884, and all costs, fees, charges and expenses.

10

The said sale will take place at the City Hall, in said city, on

WEDNESDAY, MAY 18th, 1892,

at 2 o'clock in the afternoon of said day.

The said lands, tenements, hereditaments and real estate to be sold and the name of the person against whom the said assessment has been laid on account of the same and the amount of assessment laid on account of such parcel, is as follows, viz. :

20

Lot of land situate on the south side of Warren street, adjoining property of William C. DeArmond, \$69.03, assessed in the name of Mrs. R. N. Waln.

B. FRANKLIN SOBY,  
Collector.

Dated April 14th, 1892. 5t

30

An ordinance relating to the improvement of the streets in the city of Beverly.

Be it ordained and enacted by the Mayor, Clerk and Common Council of the city of Beverly, in Common Council

assembled, and it is hereby enacted by the authority of the same.

SEC. 1. That it shall be lawful for the Common Council of the city of Beverly to require all or any portion of the streets to be filled up, graded, graveled, curbed, paved, macadamized or flagged in such manner and agreeably to such regulations as are now or may hereafter be established.

SEC. 2. That whenever it is deemed necessary to have  
10 any portion of the streets so filled up, graded, graveled, curbed, paved, macadamized or flagged, the said Common Council shall, by resolution, direct or determine the streets so intended to be filled up, graded, graveled, curbed, paved, macadamized or flagged, the kind of material to be used, and the nature and extent of the work to be done, the materials for the work so ordered to be done to be provided  
by and the work done under the supervision and control of the Street Committee, and the cost and expenses thereof to be assessed upon the land and real estate benefited by such  
20 improvements, and in proportion to the benefits thereby received, except the sidewalks ; then the property in front of which said work is done shall be assessed the whole expense of doing the same ; provided, that if the owner of any lot opposite the sidewalk ordered to be graded, curbed, paved, macadamized or flagged, shall, by notice in writing to the Street Committee, within ten days after the notice of the passage of such resolution by the Common Council, signify his desire to furnish the materials and do the said work himself, and shall proceed promptly to the execution  
30 thereof, then the same to be done by the owner thereof at his, her or their own expense, but under the immediate supervision and control of the Street Committee, who shall see that the materials used and the work done shall be in manner and form corresponding with other portions of the

street so being graded, graveled, curbed, paved, macadamized or flagged.

SEC. 3. That assessments for benefits from any such improvements shall be made, levied, collected and be a paramount lien upon the lands and real estate especially benefited thereby, in conformity with the provisions of existing law in force in such city with respect to making and collecting assessments therein.

SEC. 4. That all ordinances heretofore passed in conflict with the provisions of this ordinance, be and the same are hereby repealed.

I, John C. Jennings, Jr., Clerk of the city of Beverly, do hereby certify that the above ordinance was duly passed by the Common Council of said city [L. S.] December 2d, 1886; that the same was published December 11th, 1886, and recorded December 22d, 1886.

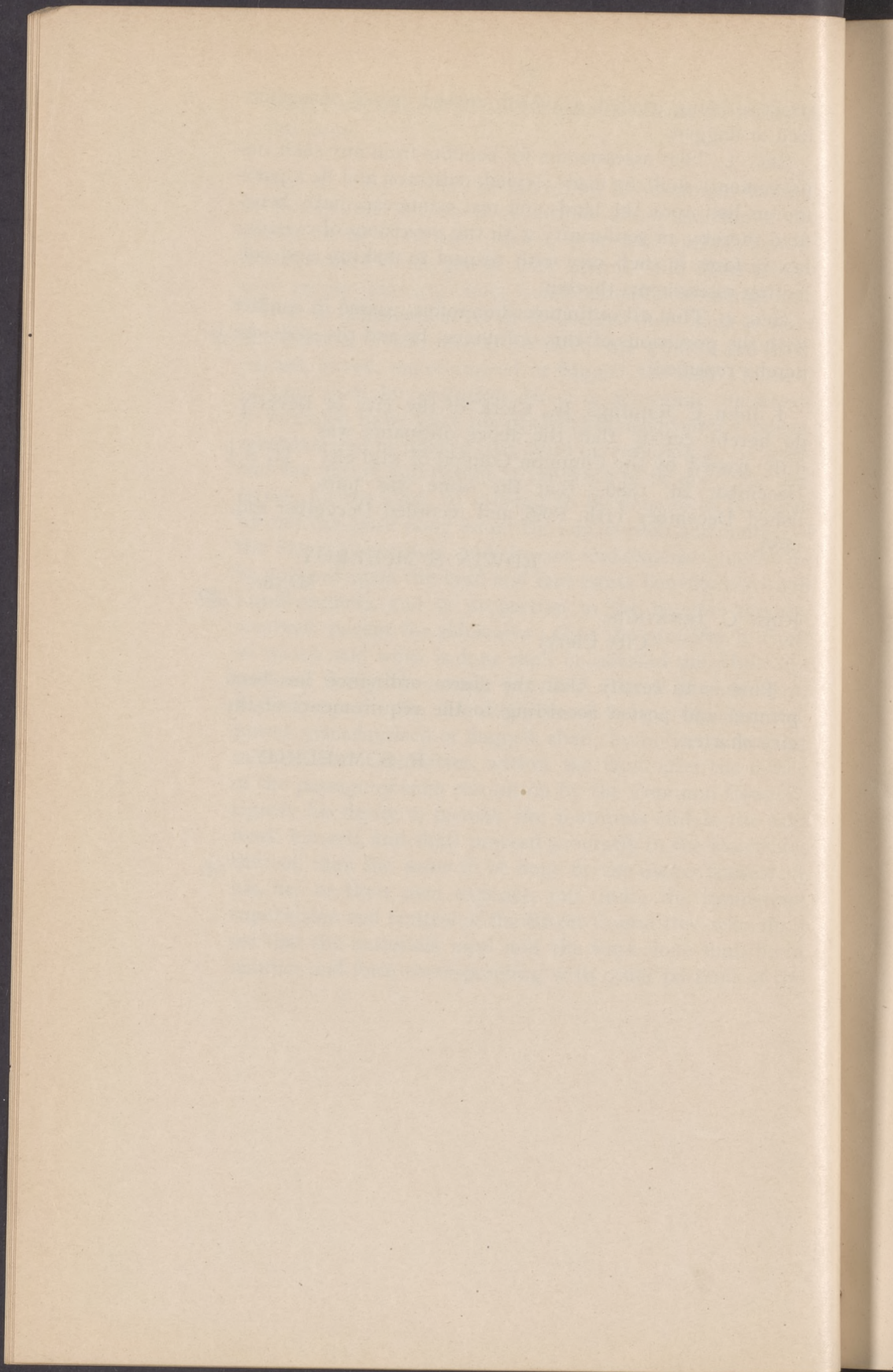
EDWIN S. McELROY,

Mayor. 20

JOHN C. JENNINGS,  
City Clerk.

This is to certify that the above ordinance has been printed and posted according to the requirements of the city charter.

E. S. McELROY.



# New Jersey Court of Errors and Appeals.

THE COMMON COUNCIL OF

CITY OF BEVERLY,

Plaintiff in Error,

vs.

ROBERT W. WALN,

Defendant in Error.

10

ON ERROR.

BRIEF OF

PLAINTIFF IN ERROR.

I.

20

The only question involved in this case is: whether or not the act of the Legislature of this State, P. L. 1891, p. 480, is constitutional?

In the opinion of the late Justice Scudder, for the Supreme Court, some doubt was expressed as to the constitutionality of the law in question. The doubt then expressed was upon a question whether the law was retroactive in effect. *Waln vs. City of Beverly*, 24 *Vroom*, 560.

The opinion we attack puts the unconstitutionality of the act on the ground that the law is local and special. 30 *Case*, p. 6.

The Legislature said the law should apply to cities of the third class.

The law is based upon the Classification Act. *Randolph vs. Wood*, 20 *Vr.*, 91. *Warner vs. Hoagland*, 22 *Vr.*, 62.

The principle of interpretation involved in the decisions of our Courts, governing statutes applicable to classified municipalities is this: that a distinguishing feature must be found to exist in the classified municipality to which the law in question is applicable. *Matheson vs. Caminade*, 26 Vr., 5. *In re. Haynes*, 25 Vr., 6. *Freeholders vs. Buck*, 22 Vr., 160. *Long Branch vs. Sloan*, 20 Vr., 356. 10 *Warner vs. Hoagland*. *Paul vs. Gloucester County*, 21 Vr., 585. And *Anderson vs. City of Trenton*, 13 Vr., 486, and *American and English Encyclo. of Law*, vol. 23, pp. 148-151.

1. The Legislature enacted the law, and from the passage thereof *ipso facto* declare in favor of the existence of such distinguishing feature.

The Judiciary are bound to respect this finding of the legislative branch of the government; and therefore the rule is:

20 Every presumption and intendment is in favor of the constitutionality of an act of the Legislature, and the Courts will not be justified in pronouncing it invalid, unless satisfied beyond a reasonable doubt of its repugnance to the Constitution. *American and English Encyclo. of Law*, vol. 3, p. 674, and the *Collocation of Cases*, in Note 1.

30 "The rule which has governed Courts ever since the adoption of our Constitution, both Federal and State, in relation to the exercise of the power to declare an enactment of the legislative body unconstitutional, has been laid down in many reported cases, and has been rigidly adhered to by both the Federal and State Courts. Before Courts deem it their duty to declare an act of the Legislature void as in violation of some provision of the Constitution, a case must be presented in which there can be no

rational doubt. The incompatibility of the legislative enactment with the Constitution must be manifest and unequivocal." *People ex. rel. Carter vs. Rice*, 135 N. Y., 483-484.

## 4.

1. A statute is general when it operates equally on all persons who are brought within the relations and circumstances provided for, though it may not affect every citizen or every portion of the State. Vol. 3, *Amer. and Eng. Encyclo.*, p. 697.

2. There are characteristics evincing a peculiar relation to the legislative purpose. Vol. 23, pp. 148-149, *Encyclo.*

(a) Cities of the third class must have a less expensive means of improving their sidewalks than larger cities.

(b) These cities frequently improve the walk on one side of the street and not on the other.

(c) Cities of the third class, where, frequently, on one side the street is built upon, should have the right of lien on the abutting lots for the construction of the sidewalk. 20

(d) An effective and cheap method of ~~street~~ <sup>sidewalk</sup> improvement is indispensable to the development of cities of the third class.

(e) Cities of the third class have, by law, but one collector of taxes and assessments, and could not stand the expense of Public Board, or kindred governmental institutions of larger cities for enforcing local improvements.

(f) It might be said to cities of the third class, enforce your lien under the Martin Act, but, like the Indian's gun, it would cost more for enforcement than it would come to. 30

## 5.

1. The law in question only gives cities of the third class an inexpensive machinery for obtaining the same improvements of larger cities, which larger cities can afford

Public Boards and separate officers in the making of street improvements.

2. To put upon cities of the third class an embargo against local improvements, the Legislature would only have to attempt to fasten upon them Boards or separate officers for the attainment of such local improvements.

## 6.

1. Justice Garrison, in the opinion of the Supreme  
10 Court, says it "must rest on some more salient feature than inland situation or number of inhabitants." The law in question enacted no "exclusive right," as fourth-class cities had such right. See P. L. 1890, p. 340.

2. In a few words, the law in question is only parallel to the similar law applicable to fourth-class cities. The same kind of legislation is seen on p. 225, P. L. 1890.

3. It would appear by the opinion of the Supreme Court that exclusion of fourth-class cities rendered invalid the law in question. But why include them? Such cities  
20 already possessed the machinery the Legislature sought to confer on third-class cities. Therefore, the Supreme Court was in error in its conclusion that this law was peculiar to "inland cities or number of inhabitants."

4. If the opinion of the Supreme Court in this case is right, then a law for the improvement of streets in cities of this State must apply alike to all cities as to lien, method of enforcement, collection of cost, officers making and collecting same, or else it is unconstitutional.

5. That portion of the opinion about the burden im-  
30 posed "irrespective of the benefit it may be to the land owner," is contrary to the established precedent of this Court and the Supreme Court. *State, Sigler, Pros., vs. Fuller, Collector*, 5 Vr., 227. *State, Agens, vs. Mayor, &c.*, 8 Vr., 415.

An improvement to side-walk and curb is a burden

belonging to the ownership of land, and as such within the police regulation. *Ibid.*

Thus, by Syllabus, in the Agens case: "Improvements of the side-walk are subservient to the premises to which it is attached, and the expense of improving which may be charged wholly to the owner."

The rule as to assessing the property of abutting owners according to benefits does not apply to improvements of side-walks, but only to the road-bed of the street. *Ibid.*

10

## 7.

The constitutionality of this act was attacked in the Court below on the ground that the title was defective.

1. That there is nothing whatever about the title of the act in question to invalidate the said act on constitutional considerations.

It is an "act relating to the cost of improving sidewalks in cities of this State."

It is to be observed:—

1. That it is not entitled an act to improve, or an act 20 for improving side-walks.

2. Nor as to the costs of improving.

3. That there is a specific subject matter, viz. : (1) Side-walks. (2) Incidental objects thereto; cost of improving. (3) The ascertainment or index, to wit: Relating—which is relation to; to stand in some relation; to pertain; to refer. See Webster's Unabridged Dictionary. And the standing in some relation is "the carrying back and giving effect or operation to an act or proceeding from some previous date or time by a sort of fiction as if it had hap- 30 pened or begun at the time. Wharton & Burrill are cited by Webster as his authority for the law meaning.

Again, by Bouvier: Relation—"When an act is done at one time and it operates upon the thing as if done at another time, it is said to do so by relation."

The title to this act is specific.

It operates upon the particular subject matter, as ascertained by the index words of the title, which direct the mind to the complex idea, that a legislative act is before it, with a single subject matter, and some pertaining relative, "relating" enactment.

The relation may be as to past, present or future.

You observe A and B in conversation; C asks, "What are they doing?"

10 You say, "A is relating to B the general condition of the climate in Canada." It could be last year's, this year's or next year's.

It would relate to the subject matter.

"Relating to improvement"; relating to the incidental subject matter of the act.

Improvement, means "the act of improving or state of being improved; as the improvement of land," &c.

It would read then an act relating to the costs of sidewalks being improved, or to the act of improving—or im-  
20 proving.

When? Relating to, as before, past, present or future.

The word "relating" prevents any one being misled or deceived, and makes the act absolutely plain.

Without the word "relating" in this title, there would be no doubt as to its sufficiency. But "relating" is there, and we are directed to visit the body of the act and find how it relates, or what relation it has to the cost of improving. Whether improving is already done, to be done, or both.

30 The word "concerning" could be used for "relating," as is done in very many acts of our Legislature.

We come then to the question:

Does the title express the object of the act?

In the language of Judge Dixon, in *Bumsted vs. Govern*,  
13 Vr., 373, "the title fairly indicates the general object,

although it does not indicate the means or method of obtaining this object."

The general object is indicated "relating to the cost of improving side-walks." *Grover vs. Ocean Grove*, 16 Vr., 399, relied on by counsel for prosecutors, is a very different case. These specific matters were declared in the title.

The act then legislated on subjects distinct and unrelated in any way to those pointed out in the title.

The general rule in the last case is restated by Justice Van Syckle: "The degree of particularity which must be used in the title of an act vests in legislative discretion, and is not defined by the Constitution. The generality of the title will not be fatal to the act, if by fair intendment it can be connected with it." *State, Walter, vs. Town of Union*, 4 Vr., 354.

The act of April 15th, 1868, entitled "An act to amend and revise the charter of the city of Newark, approved March 11, 1857."

The first four sections thereof refer to assessments theretofore made by defendants for certain improvements made in said city and which, on account of certain informalities and defects in the proceedings, could not be collected, and provided for a new assessment therein set forth and others of like character, &c. Held object was sufficiently expressed in title. *State, Doyle, vs. Newark*, 5 Vr., 236.

If such power of retrospective execution can be had under a title to amend a charter, *a fortiori*, it is plainly pertinent under the title directly, and *eo nomina* "relating to the specifically pointed out subject matter." See also *Doogan vs. Morrow*, 2 Vr., 136.

It is unnecessary to further collate authority on this point.

This is not a tax; the law does not declare it to be a tax; it is only costs, to be collected, &c., as taxes are collected.

The title of the act does not contravene the Constitution. It embraces but one subject expressed in the title. *Walter vs. Town of Union*, 4 Vr., 350.

It is a general law, embracing no matter of private, special or local character not warranted by the established classifications of law. *Randolph vs. Wood*, 20 Vroom, 91.

The Court says, while a more specific statement of the object of the act might be desirable, and more closely in accord with the constitutional provision, yet the practice  
 10 in this State of employing general titles in public laws regulating municipal government has come to be so established that we ought not, on this ground, to hold the act invalid.

The assessment for the cost of the improvement was made December 3, 1884.

On March 4th, 1890, the writ of certiorari was sued out in former case by the Prosecutor, making a lapse of five years three months and one day. It was pending until  
 20 June 27, 1891, when Justice Scudder filed his opinion. And the act which the Prosecutor seeks to have declared unconstitutional was approved April 16, 1891.

Statutes of Limitations do not run against any claim while it is in litigation. Vol. 13, *Amer. and Eng. Encyclo.*, 745.

In the city of Beverly, taxes that are a lien on real estate are collected under act of March 14, 1879, and the several supplements thereto. See P. L. 1879, p. 340, also P. L. 1889, p. 357.

Respectfully submitted,

GILBERT & ATKINSON,

Counsel for Plaintiff in Error.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

THE COMMON COUNCIL OF THE  
CITY OF BEVERLY,  
v.  
ROBERT W. WALN. } ON ERROR. 10

The Writ of Error in this case is brought to review a judgment of the Supreme Court on a certiorari removing an ordinance, resolution, warrant of sale, and proceedings thereon, passed, issued and taken by the Common Council and certain officials of the City of Beverly. 20

The assignments of error are seven which may be most conveniently taken up in order.

1. This assignment seems to answer itself, as the portion of the Act of 1891 which is quoted therein distinctly shows that the statute is retroactive in effect, and the expression of the Court that it is retroactive seems to be the point of this assignment.

However, even were it true that the statute is not retroactive, it would make no difference in the decision of the case as the Court's opinion that it is retroactive forms no part of the *ratio decidendi*. 30

2. If it be admitted that the second assignment is true and

that both the brief and argument of the defendants below did suggest what they now say the Court says was not suggested it would scarcely, it is deemed, be a sufficient reason for a reversal. It does not occur to us that the case was decided upon that ground.

3. If the second section of the act of March 4th, 1882, Sup. Rev , p. 506, making the classification of cities, is to be relied upon for the basis of classification, there is no force in the third  
 10 assignment. The cases recognizing this as the basis of classification are so multiplied and familiar that it is unnecessary to cite them here.

4 and 5. That there must be some relation between the basis of classification and the purposes to be affected by the act has been so frequently decided by the Supreme Court and has become so thoroughly settled as a principle that it would be practically a work of supererogation to cite authorities or make argument in its support. Suffice it to say that it has been  
 20 distinctly decided in two cases:

Richards, v. Hammer, 13 Vr. 433.

State v. Borough of Somer's Point, 23 Vr 32.

Both of which cases have been affirmed by this Court, the former in 15 Vr. 667, and the latter in Vr.

That there is no possible relation between inland situation, or number of inhabitants, and "the exclusive right to subject private property to sale for the improvements done by the municipality irrespective of the benefit it may be to the landowner," needs no argument whatever.

30

6. Unless in all cities of this State, except cities of the third class, power is given to assess *cost* of improving said works as distinguished from the benefits conferred upon the landowner by the improvements, and the act of 1891 is intended to place cities of the third class within that general rule, this act is

clearly as the Court said within the constitutional prohibition; for, as before said, it affects a class of cities in which the basis of classification bears no relation to the proposed objects of the act.

In the Supreme Court other reasons were urged in support of the certiorari than those which formed, or other than those upon which the decision of the Supreme Court is based; it may not be inappropriate to suggest them here.

1. The act is unconstitutional because the object is not expressed in the title. 10

Const., art. 3, sec. 7, pl. 4.

The title states the act to be, "An act relating to the cost of improving sidewalks in the cities of this State," while in fact the act is an act making the cost of improving sidewalks in cities of the *third class* a lien upon the abutting lands.

Not only does the word "relating" used in the title altogether fail to even hint at the purpose of the act, but the title is an absolute misstatement of the object of the act, for the act is declared by the title to be relative to all cities in this State, while the real object was to affect, exclusively, cities of the third class. 20

A similar circumstance is found in the case of *Coutieri v. New Brunswick*, 15 Vr., p. 58, where the title to the act was, "An act to fix and regulate the salaries of the city officers in cities of this State," while the real object was to fix and regulate exclusively, the salaries of the officers of the City of New Brunswick.

The Chief Justice said, page 59, "The purpose of the Constitution in this requirement is to prevent frauds upon the legislation by means of false and deceptive titles to statutes. In this instance the title is both false and deceptive; false, as it imparts a regulation of a class of cities, when in truth it is applicable to a single city; deceptive, because none reading 30

such title could reasonably understand that the body of the act was to have so limited an effect."

As it was said in the act last referred to in *Grover v. Trustees of Ocean Grove*, 16 Vr. 399-404,—"in a general sense, the subject of the act was indicated in its title; but this Court held the act to be unconstitutional."

While it is true of the act now under consideration that in a general sense the subject of the act is indicated by its title, it is certainly false and deceptive in the very particulars named  
10 by the Chief Justice in the *New Brunswick* case.

It is true of course that the *Coutieri* case was decided upon the ground that it was a special legislation, but it will be observed also that a part of the decision, as above quoted was based on the exact ground mentioned here: *that the title did not express the object.*

But in another respect the title fails to express the object of the act.

The act provides that the cost of improving sidewalks, both heretofore incurred and hereafter to be incurred shall be a lien,  
20 &c. It certainly must be admitted that there is no suggestion in the title that the object of the act embraces costs theretofore incurred.

The plain sense of the title is suggestive only of "cost" thereafter to be incurred, and of "improving" thereafter to be done, and when it is remembered that the rule is that acts are never construed to be retrospective unless it is *necessary* from the language used, it must be true that one reading the title would be of the opinion that the title did not only embrace but actually excluded anything of the past.

30 This being true it must follow that the title of this bill is not such as will "inform the public and the members of the Legislature of the object of the enactment, and that this purpose is not here accomplished by fairly indicating the entire object or even the actual object to be attained.—*Bumstead vs. McGovern*, 18 Vr., 373.

The word "relating" adds uncertainty to falsity.

These later cases are cases in the Supreme Court but they are so clearly pertinent to the argument that they are included as a part of them.

If the act of April 16th, 1891, is unconstitutional, under the authority of *Waln v. Common Council of the City of Beverly*, 24 Vr., 560, the issuance of the warrant of sale brought up for review by the certiorari was unauthorized. The decision in that case was not brought into this Court, and we presume it is not proposed to even attempt an attack upon it at this time; if however, such attack is contemplated, or made, we are satisfied to rest our case upon the opinion of the Court. 10

2. It is further submitted that even should there be found to be error in the opinion of the Supreme Court as to the unconstitutionality of the act, the warrant of sale, which is the subject of the complaint made by prosecutor, should be set aside for other reasons.

(1.) This claim is barred by the statute of limitations. 20

(a.) The act of 1891 makes the cost of improving sidewalks collectible in the same manner as taxes.

By the General Tax in 1879, since extended to cities, P. L. 1889, p. 357, a sale of land for taxes must be made within two years after the time when the taxes are payable.

This cost was incurred in 1884, and any assessment for it, it being collectible as taxes, would have been payable not later than December 19th, 1884, and a sale of land for the same must have been made within two years thereafter to be effectual. The statute is very clear as to that, and is particularly noted in *Johnson v. Van Horn*, 16 Vr. 136. 30

(b.) By the statute of 1880, as amended by the act of 1882, (Rev. Sup., p. 996, sec. 85,) taxes in cities, not otherwise provided for are made a lien for three years after their assessment.

If the act of 1891 is to be applied retrospectively in this case,

the lien created thereby would relate back to the time of the assessment, and the lien would exist for three years therefrom, and no longer, and therefore must be held to have expired with 1887.

(c.) Giving to the opinion of this Court in this same matter, 24 Vr., p. 56, the strongest application adverse to us, it holds the cost of improving, &c., to be nothing more than a debt for money laid out and expended for the use of land owners.

If only such *debt*, an action in debt for the same incurred in 1884 could not have been maintained after the expiration of six years, i. e., after the year 1890, as the claim was not founded upon a statute giving a remedy or requiring the payment of claims; in which cases only the statute of limitations does not apply.

While we are aware that it has been held in this State that the maxim *nullum tempus occurrit regi*, applies in some causes to municipal corporations, as well as to the sovereign powers, we submit that it is not applicable here, as that which is sought by the municipal corporations is neither the protection of a right of sovereignty nor the exercise of a delegated governmental function, but the collection of a mere *private debt* based, as already suggested, upon a common count. See Woods Lim. Actions, 53.

The statute of 1891 could not revive this debt nor mark out a way to collect that which was already barred by the statute of limitations

*Ryder vs. Wilson*, 12 Vr., 11,

Quoting Cooley's Const. Lim., 369.

*Dillon v. Dougherty*, 2 Grant's Cases, 99.

*Gardner v. Stephens*, 1 Heiok, (Tenn.), 280.

3. Retroactive acts are not to be construed to extend further than the act clearly indicates.

*Williamson vs. N. J. S. R. R.*, 2. Stew., 335.

*Elizabeth vs. Hill*, 10 Vr., 555.

As there is nothing to indicate that the act intended to include claims arising under ordinances repealed years before its passage. (See Ord. December 11th, 1836, paper book, p 39, repealing ordinance of 1875, under which the claim was made, without any restraining clause as to existing claims thereunder, which is itself a matter of estoppel against the city.—*Kansas City vs. Clark*, 68 Mo.; *Naylor vs. City of Galesburg*, 66 Ill., 285; *Kaine vs. Hartly*, 4 Mo. App., 357; *Barlow vs. Godsden*, 76 Ala., p. 495,) and claims against which the statute of limitations had previously run, and claims which never had 10 been liens and were too old to come within the limit of two or three years within which taxes are a lien, the act did not include the claim for which the warrant of sale was made.

4. We can safely assume it to be established, as stated in the opinion of this Court, in *Wain vs. Beverly*, 24 Vr, 562, "by section 9, of the Charter it is lawful for the Council to pass ordinances, among other things, 'for compelling the occupiers and owners of lots to grade curb and pave the sidewalk opposite their lots,' and 'to enforce the observance of all such ordinances by prescribing a forfeiture (or penalty) not exceeding fifty dollars, to be recoverable by action of debt, &c.' There are no supplements to this charter, or other statutes which enlarge the power of the Common Council in collecting assessments for such improvements, or for making these assessment; liens on the lands benefited, with a summary method for collection." 20

This being true it is submitted that it was entirely beyond the power of the Common Council of Beverly to enforce their ordinance by improving the sidewalks themselves and attempting to assess the costs upon the landowner, but the only means 30 given them to enforce the observance of such an ordinance was by "prescribing a forfeiture (or penalty) not exceeding fifty dollars," and not only is any assessment unlawfully assessed, but the incurring of the costs was *ultra vires*, or possibly, in other words, there was really no "costs" to the city, and if

they made it so by assuming it, not only was the act upon which it was founded, *ultra vires*, but so also was the assumption.

It is submitted that the act of 1891 can only include that which was a proper and lawful *cost* or charge against the city, and not what unlawfully they might have chosen to assume.

Under the cases cited on the previous point it certainly would take very clear words to include a cost which was no  
10 cost in the retroactive sweep of a statute.

It should be noted that the sum sought to be collected is not in the nature of a penalty, and as a matter of fact exceeds the amount which might legally be imposed as such penalty.

Any landowner has a perfect right, knowing the charter, to refrain from obeying the mandate of the ordinance, resting upon the belief that no more could be imposed upon him than the penalty to which the charter limited the Common Council.

Possibly, further it should be noted that the ordinance of  
20 1886 makes no provision for a penalty.

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