NAAR, DAY & NAAR, Printers and Stationers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals.

THE MAYOR AND COUNCIL OF NEWARK AND THE CITIZENS GAS LIGHT COMPANY,
Plaintiffs in Error,
v.
THE STATE, (REBECCA R. ALDEN, PROSECUTRIX,)
Defendant in Error.

On Writ of Error to the Supreme Court

Points for Plaintiffs in Error.

I.

The return made to the writ of certiorari shows that no record was brought to the Supreme Court by the writ. (See *Return, pages 4 and 5.*)

The former certiorari brought up the record itself, and, as a consequence, no record remained with the city on which this writ could operate.

Morris Canal Co. ads. The State, 2 Green, 411, 430 to 438;
Nicholls v. The State, 2 South., 542;
State v. Thomas, 2 Harr., 160;
Browning v. Cooper, 3 Harr., 196;
Morel v. Fearing, Spencer, 670.

II.

The record having been brought to the Supreme Court by a previous writ, and judgment had on it, and no remittitur, the power of the court was spent, and an end was thereby put to the cause of action.

State v. Howell, 4 Zab., 519:
State v. Browning, 3 Dutch, 528;
4 Virier's Ab., 356, Certiorari L.;
State, Malone v. Jersey City, 1 Vroom, 247;
Barnes v. Gibbs, 2 Vroom, 318;
State v. Nirney, 5 Dutch, 189–90;
Marsh v. Pier, 4 Rawle, 273;
Freeman on Judgments, p. 255, sec. 284.

III.

The Legislature, by an act passed April 9, 1875, cured the defect found by the Supreme Court in the proceedings on the hearing of the first certiorari.

Laws of 1875, p. 101;
Revision, p. 1166.

IV.

The reasons relied on for setting aside the tax sale by the Supreme Court is not sufficient in law.

THOMAS N. McCARTER,
Counsel for Plaintiffs in Error.

WARD & TICHENOR, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

N. J. Court of Errors and Appeals.

THE CITY OF NEWARK AND CITIZENS' GAS LIGHT CO.,
Plaintiffs in Error,
vs.
THE STATE, (ALDEN, *Prosecutrix,*)
Defendant in Error.

On Error to Supreme Court.

Points of T. N. McCARTER for Plaintiffs in Error.

I.

The return made to the writ of certiorari shows that no record was brought to the Supreme Court by the writ.

(See return, pages 4 and 5.)

The writ, therefore, brought nothing up.

If diminution had been alleged in that return, it would not have aided the matter, because in law it is well settled that the record itself was removed, and as a consequence no record remained with the parties to whom this writ was directed on which it could operate.

If on an allegation of diminution the city should have again been ordered to send up the record, it could have made no other return.

If in reply to such second requisition the city had sent up true copies, it would not have availed as a return when the record was not with this city.

It makes no difference how many copies the city might procure and certify, if it was not in possession of the record it would not avail.

Morris Canal Co. vs. *State*, 2 Green, 435 to 438.
Nicholls vs. *State*, 2 South., 542.
State vs. *Thomas*, 2 Harr., 160.
Browning vs. *Cooper*, 3 Harr., 196.
Morel vs. *Fearing*, Spencer, 670.
State vs. *Howell*, 4 Zab., 519.
State vs. *Browning*, 3 Dutcher, 527.
4 *Viner's Abridgement*, 356, Certiorari, L.

These last two cases have a bearing on the extra return made to a copy of the writ procured by plaintiff in certiorari.

If certified copies are sent up with the original writ which are not the record, and not sent by the legal custodian of the record, they will not avail.

Much less will they avail when the certified copies are not returned with the original writ, but appear in Court only annexed to a copy of the writ

If two inconsistent returns appear, one to the writ itself, and another to a copy of the writ, the Court can only notice the one annexed to the original writ.

Any other rule would lead to inextricable confusion.

Suppose a sheriff returns a summons with one return and also sends in a copy with an opposite or different return, which could the Court regard as the return? Clearly only that appearing on the original.

If in such a case the sheriff should return the original not found, and with it should certify in a copy that the defendant had been served or summoned, would such a mode of return bring the defendant into Court?

Would not a judgment founded on such a return to a copy be a mere nullity?

Kanouse vs. *Martin*, 3 Sandf., Sup. Court, 593.

It follows, therefore, conclusively, that the Court below did not have the record before it in this proceeding.

II.

The fact that the true return to the real writ showed that the record was in this Court on the prior proceeding, did not enable the Court to set it aside a second time under the new proceeding.

Because,

1. The matter was *res adjudicata.* The Court by its previous judgment setting aside the proceeding had spent its power, and an end was thereby put to the cause of action.

State, Malone, vs. *Jersey City*, 1 Vroom, 247.
State vs. *Nerney*, 5 Dutcher, 189.
Barnes vs. *Gibbs*, 2 Vroom, 318.
Marsh vs. *Pier*, 4 Rawle, 273.
Lawrence vs. *Vernon*, 3 Sumner, 20.
Freeman on Judgment, § 255, page 265.

2. To hold that the Court could in this proceeding again deal with, pass judgment upon, and set aside a record not brought before it by the pending proceeding, because it was in the Court on a former proceeding which was spent and ended, is to convert a certiorari into a sort of foreclosure proceeding, for which I can find no warrant of law, and which, I respectfully submit, will need legislation to legalize it.

On such a practice the setting aside operation could be repeated *ad libitum* as often as the prosecutor in certiorari might find it to his interest to bring in, one after another, new parties, to the complete subversion of the maxim "*nemo debet bis vexari pro eadem causa.*"

Take this very case and see the judgment on pages 13 and 14. It sets aside the declaration with costs—not

How can this be lawful against the city of Newark, which was once before charged with costs in the former proceeding?

Clearly as to this city it was *res adjudicata*. It could not be again set aside as to it.

How, then, with no record lawfully before the Court and the city exempt, could such a judgment be lawfully rendered against the incidental defendant?

Suppose a suit brought against one on a joint contract, or liability by two or more, and a judgment against the one, however irregular or erroneous such a judgment might be, it would, until reversed, effectually bar a subsequent suit against the omitted co-contractor.

Although plaintiff might thereby lose his remedy against the omitted defendant, that result would not alter the law, or prevent such omitted defendant from pleading the former judgment as a bar.

Mr. J. SCUDDER was in error when he declared in his opinion that the Gas Light Company's counsel had agreed to such irregular return.

The stipulation of the Gas Company's counsel related to the regular and proper return made by the city to the writ, and not to the collateral return to a copy.

His error is accounted for by the fact that when the cause was argued, the original writ with its return had been mislaid, and the only papers the Court actually had in hand was the return (so called) to the copy.

III.

There was error in setting aside the tax title, for the cause assigned by the Supreme Court.

The reason relied on by the prosecutrix in this case is on page 5.

Now refer to Justice VANSYCKEL'S opinion, on page

See the city charter, § 84, Pamphlet Laws of 1857, pages 156–7.

This required notice to be given by publication, that unless the taxes are paid within twenty days after *the first publication of the notice*, the treasurer will proceed to collect the same by public sale according to law.

In the present case the notice was prepared for publication, and dated on the 10th of August, 1860, but it did not actually appear in the papers until the 11th.

The notice was that unless the tax was paid within twenty days "from the date," the treasurer would proceed.

The notice was actually published in the Advertiser *twenty-five* days before any further proceedings were taken to collect the tax.

Testimony of O. Woodruff, page 13, line 10.

It was also published in like manner in the Journal *thirty* days before proceedings were taken.

Evidence of Judge Guild, page 11, line 20.

So the time actually allowed the tax payer was not, in fact, shortened.

The question then is, whether when the tax payer was allowed more than the statutory time, the proceedings for sale must be set aside for a mere discrepancy of one day between the date of the notice and its first publication.

The treasurer did not and could not reduce the time; nor did he attempt to, nor was such the effect of the error in the notice.

It was published more than the twenty days, and no one could possibly have been misled or injured by it.

See the cases cited by Mr. J. VanSyckel, *Thatcher vs. Powell*, 6 Wheat., 119.

In *Ronkendorff* vs. *Taylor's Lessees*, 4 Peters, 350, Mr. Justice McLean, on page 359, carefully limits his opinion to the necessity of a *substantial compliance* with the legal requisition.

See, also, pp. 360, 361; also, 364, 365.

Sharp vs. *Speer*, 4 Hill., 76.

In all these cases there were serious jurisdictional difficulties and substantial failures to pursue statutory methods.

No other case can be found where a tax title has been set aside on a reason so attenuated as this.

While the Courts should carefully guard the rights of the citizen, some little regard should also be paid to the rights of the government in its means used to collect taxes.

See *L. V. R. R. Co.* vs. *Dover & Rockaway R. R. Co.*, 14 Vroom, 528, especially pp. 533–4.

In *State* vs. *Saalman*, 8 Vr., 156, Mr. Justice Dalrymple said:

"It has not been suggested that the non-compliance with the precise terms of the statute of 1866 in the particular mentioned, has, in any wise, *impaired the substantial rights of the prosecutor.*" "We do not think for this lack of form we should be justified in avoiding the assessment, or any part of it."

In *State* vs. *Trenton*, 7 Vroom, 499, this Court held in a matter of taxation, that a construction will be adopted to sustain rather than defeat the proceedings when it can fairly be done.

Cooley on Taxation, 360, 361.
Burrows on Taxation, 292–3.

IV.

The act of the legislature, passed April 9, 1875, (Revi-

ing was not commenced until in 1876, that act should have prevented the Supreme Court from setting aside the tax sales.

The only answer to the effect of this act is, that it is not retrospective, and, therefore, did not operate to heal this defect.

See Justice SCUDDER'S opinion, pages 20 and 21 of the case.

Without questioning the propriety of the cases cited by the Supreme Court for construction of retro-active statutes, it is contended that the Court erred in their application to the present case. They cannot be so applied without violating other equally well settled rules of interpretation.

The cases cited by Mr. Justice SCUDDER, show that if a retrospective intention clearly appears on the face of a statute, it could well give it that effect.

Baldwin vs. *Newark*, 9 Vroom, 158.

It is clear that the legislature used the words "shall have been" in the sense of "have been," otherwise they would be superfluous.

To give the act the construction of the Supreme Court, necessarily involves the rejection of the words "shall have been."

See, also, Laws of 1881, page 40.

It is a settled rule of construction that a statute ought to be so construed that if possible *no clause, sentence or word shall be superfluous, void or insignificant.*

Den vs. *Dubois*, 1 Harr., 285.
State vs. *Paterson*, 5 Vroom, 163.
Sedgwick on Statutes, 238.
Smith on Commentaries, § 480, page 628.
Morris Canal Co. vs. *Central R. R. Co.*, 1 C. E. G., 419.

The Supreme Court had no right to reject or render superfluous the words "shall have been."

The argument drawn from the strict grammatical construction of the words is not sound in law.

State vs. *Paterson*, 6 Vroom, 195.

In this case, Mr. Justice SCUDDER held that "the classical derivation of a word will not always give the meaning which use has attached to it."

See also,

C. & A. R. R. Co. vs. *Briggs*, 2 Zab., 623.

Walen vs. *Quinby*, 3 Dutch., 296–311.

Stewart vs. *L. V. R. R. Co.*, 9 Vroom, 517.

See also, on this point, the act of 1881, above cited.

Also, Laws of 1881, page 130.

HOLBROOKS' STEAM PRINTERY, 11 Mechanic St., Newark, N. J.

New Jersey Court of Errors.

THE STATE, *on rel.*,
REBECCA R. ALDEN,
Defendant in Error,
ads.
THE CITIZENS' GAS LIGHT CO.,
Plaintiff in Error,
Impleaded with the City of Newark.

In Error.

A writ of error from judgment for the State, in the Supreme Court, on certiorari.

Brief of RICHARD WAYNE PARKER, for Rebecca R. Alden, Prosecutrix of the certiorari and Defendant in Error.

I. The proceedings reversed were fully before the Supreme Court for adjudication.

A short history of the case is perhaps necessary :—

The tax title set aside was pleaded by the Citizens' Gas Light Company, in defence to a writ of dower, sued by Rebecca R. Alden in 1870. (Case, p 7.)

Thereupon, in 1871, June term, she sued out a writ of certiorari against the city of Newark, who returned the proceedings and declaration of sale as printed, and the affidavits printed were admitted in evidence by consent, the first consent printed (p 12, supplemental case); thereupon the tax title was set aside (see opinion, case, p 16). All this was prior to the writ in this cause, but by stipulation is part of the record therein (case, p 7.)

After this judgment it was suggested, that as the Gas Light Company were not parties, and that as they held the title, the reversal might be ineffectual againt them; accordingly Mrs. Alden sued a new writ against both the city and the Gas Company, teste April 28th, 1876, and returnable to June term of that

year (case, p 1). For convenience of service a copy or duplicate of the writ was delivered to the City Counsel, taking his acknowledgment on the original, which was then served by delivery to the President of the Gas Company.

The city made a prompt return of the writ to the June term, 1876, by certifying formally a transcript of all proceedings, precisely as in the first case and printed. This transcript was filed in Court, together with the duplicate or copy of the writ so left with the city.

Afterwards, on September 16, 1876, the Gas Light Company having made no return, consent was taken, as printed at p. 10 of the case, and p. 12 of the supplemental case, that the return made by the city should be the return of all defendants, and that the affidavits used in the former case should be evidence in this.

Afterwards, November 18th, 1876, Mr. McCarter procured the city to make a new return to the writ left with the Gas Company, that all the proceedings had been sent up in the first case and were still in the Supreme Court (see case, p. 5.)

Afterwards counsel entered into the stipulation, printed on pp. 6 and 7, of the case, not dated, but filed November, 1877, by which the whole record of the first cause was made part of this.

These being the facts, we say the record was fully before the Court. The opinion deals with this question (case, p. 19.)

(*a*) A transcript merely, and not the proceedings themselves, came up on the first writ; a like transcript came up with this.

(*b*) The transcript returned *before* the consent of September, 1876, is the "return MADE by the city," referred to in that consent, and not the other return which was not then made.

(*c*) But if the last return were the true one, and the proceedings were all in the Supreme Court by virtue of the first cause, they have been brought into this cause by consent and can be used there as the record.

(*d*) Certainly no fuller record can be got before the Court by any process that can be devised. If the Supreme Court are to adjudge on this tax title at all, as between the prosecutrix and the Gas Company, it must be on this record. It cannot be improved.

II. The proceedings were defective and were rightly set aside.

(*a*) Because the advertisement of the completion of the transcript of unpaid taxes was not according to the charter.

The opinion deals fully with this point (case, p. 17). It is settled law that every proceeding in a tax title must be strictly pursued.

(*b*) Because the description of the property in the advertisement of sale was not sufficient to identify it. That description was (supplemental case, p. 5):

FIRST WARD.

* * * * * *

980 Joseph L. Alden, Front street.....
16 House, lot and stable.....$90.75

* * * * * *

J. HARTSHORNE,
City Treasurer.

The Court in their opinion *assume* that the *lot* was designated as *No. 16 Front street.*. Not so. There is nothing to show what the numbers mean, whether index numbers, city map numbers, street numbers, or what not. The Court must have looked at another part of the book.

III. The Act of 1875, Revision, p. 1,166, did not make this tax title good. The act was drawn to cut out the prosecutrix, but a little too cleverly. All the verbs are future, or future perfect, and do not apply to past transactions (see opinion, case, p. 20.)

(*b*) This case would not come under the proviso of the statute. *Notice* was not given twenty days, for on the last days of its publication it was no longer a notice, for the time therein mentioned had expired; it was no longer a *notice* when it had run out.

(*c*) This is not the case mentioned in the statute. There is no provision for notice for a specified time, but notice of a particular *form*, which form was not followed. The statute does not remedy that.

IV. The Act of 1881 (pamphlet case, p. 32), did not affect the judgment of the Supreme Court already passed, nor render it erroneous, for the reasons above *b*, &c., and also—

(*a*) The plaintiff in error must prove that the judgment was wrong when given. The act speaks of future, not of past judgments, and does not affect decisions rendered or render them erroneous.

(*b*) By the act concerning statute, the act does not apply to this cause (Revision, pp. 1,120, 1,121; section 3). It is claimed to be a *repealer pro tanto* of the city charter, and does not affect any right accrued or suit pending.

(*c*) So far as these acts operate to take away the dower of Mrs. Alden they are unconstitutional. By the Act of 1870 she was deprived of her right to impeach these proceedings collaterally, but given the *right at any time to review the same by certiorari.* This is a remedy which is a substantial *right* which cannot be affected by legislation *pendente lite* without taking away her right.

New Jersey Supreme Court.

NOVEMBER TERM, 1873.

REBECCA R. ALDEN,

vs.

THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK, AND DAVID H. TICHENOR, who was admitted to defend, &c.

In Certiorari.

The Court having inspected the return brought up by this certiorari, to wit, the declaration of sale, dated November 17th, 1869, made by the Mayor and Common Council of the city of Newark to David H. Tichenor, and purporting to lease certain premises situate in the city of Newark, on Front street therein, recorded in the office of the clerk of the Common Council of Newark, in Index Book A, page 367, of the records of declarations of sale for unpaid taxes of said city, together with the proceedings upon which the same was founded, and having heard counsel for and against the reasons in certiorari, do now, on this fifth day of November, one thousand eight hundred and seventy-three, order and adjudge that the said declaration and proceedings aforesaid, be and the same are set aside and for nothing holden.

Entered February 24th, 1874,
as of November 5th, 1873.
On motion of
PARKER & KEASBEY, *Att'ys, &c.*

I, BENJ. F. LEE, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of an order made in the above stated cause by said Court, and entered in the minutes thereof.

In testimony whereof, I have hereto set my hand and the seal of said Court, at Trenton, this twenty-second day of February, A.D. eighteen hundred and seventy-seven.

[L.S.]

NAAR, DAY & NAAR, Printers and Stationers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals.

THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK, ET ALS.,	Writ of Error.
vs.	
THE STATE, (REBECCA R. ALDEN, PROSECUTRIX.)	

Writ of Error.

[Filed March 19, 1881.]

New Jersey, *ss.*—The State of New Jersey to our Justices of our Supreme Court, greeting:—Because in [L. S.] the record and proceedings, and also in the giving of the judgment in a plaint, which was in our said Supreme Court, before you, between the State of New Jersey, (Rebecca R. Alden being the prosecutrix,) and the Mayor and Common Council of the city of Newark and the City Gas Light Company, defendants, on a certiorari issued out of our said Supreme Court to the said defendants directed, as is said, manifest error hath intervened to the great damages of the said defendants, as we are informed, we being willing that the error, if any there be,

should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you send distinctly and openly under your seal the record and proceedings and plaint aforesaid, with all things touching and concerning the same to our Court of Errors and Appeals, before the judges thereof, on the nineteenth day of March, A. D. 1881, and this writ, and that the records and proceedings aforesaid being inspected, we may cause to be further done thereupon what of right and according to law ought to be done.

Witness, the Honorable Theodore Runyon, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, in the State aforesaid, the first day of March, in the year of our Lord one thousand eight hundred and eighty-one.

HENRY C. KELSEY,
Clerk.

McCARTER & KEEN,
Attorneys.

The answer of the justices of the Supreme Court of New Jersey within named: The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals, in a certain schedule to this writ annexed, as within we are commanded.

M. BEASLEY. [L. S.]
C. J.

Affidavit for Certiorari.

[Filed June 1, 1876.]

NEW JERSEY SUPREME COURT.

The State, Rebecca R. Alden, Pros'x. v. The Mayor and Common Council of the City of Newark, et als., Def'ts.	On Certiorari.

New Jersey, Essex County, *ss.*—Cortlandt Parker, being duly sworn, saith, that this writ is applied for to remove the same proceedings as those set aside on certiorari in the case of the State v. the Mayor and Common Council of the City of Newark, to which David H. Tichenor was a party; and in order that the same may be removed as to the Citizens' Gas Light Company who are said to be the present parties in interest, and who are the owners at this time of the premises sold under said proceedings for the tax, the lawfulness of which is objected to.

CORTLANDT PARKER.

Sworn and subscribed this twenty-eighth April, 1876, before me.

F. K. HOWELL,
M. C. C. of N. J.

New Jersey, *ss.*—The State of New Jersey to the Mayor and Common Council of the City of Newark, [L. S.] and to the Citizens Gas Light Company, claiming rights under proceedings hereinafter mentioned, greeting:—We being willing for certain reasons to be certified of a certain declaration of sale of land for unpaid taxes

made by you to Mr. David H. Tichenor, recorded in Book A, page 36, of Records of Declarations of Sales for Unpaid Taxes in the office of the city clerk of the City of Newark, and of the said record and the proceedings whereon said declaration is founded, including the levy and assessment of the tax therein mentioned upon the land purporting to be conveyed therein; and the list containing the names of the owners of said land as delinquent, and the tax warrant assessed to collect said tax and the returns thereon, and also any order of the common council for the collecting of said taxes, and the transcript of unpaid taxes for the year eighteen hundred and fifty-nine and all advertisements, if any were made, of the completion of said transcript, and of the sale of said lands in said declaration described, do hereby command you that you the said ordinances, records, proceedings and advertisements with all things touching and concerning the same as they remain before you the said the mayor and common council of the city of Newark, unto the judges of the Supreme Court of Judicature of New Jersey, to be held at Trenton on the first Tuesday in June next, do certify and send together with this writ, that therein may be done what of right and according to the constitution and laws of this State ought to be done.

Witness the Honorable Mercer Beasley, Chief Justice of our said Supreme Court, the twenty-eighth day of April, in the year one thousand eight hundred and seventy-six.

B. F. LEE,
Clerk.

CORTLANDT & R. WAYNE PARKER,
Attys.

We, the mayor and common council of the city of Newark, in answer to the within writ, do certify and return to the Supreme Court that in obedience to a writ of certiorari issued out of said Supreme Court, tested on the first Tuesday of June in the year eighteen hundred and seventy-one, and returnable on the second Tuesday of June in the year last aforesaid, we did certify and send to the said court all the ordinances, records, proceedings and advertisements with all things touching and concerning the same, which, by the

annexed writ, we are commanded to certify and send as fully as they then remained before us, and as we are by the annexed writ commanded to certify and send the same, which ordinances, records, proceedings and advertisements, with all things touching and concerning the same so certified and sent by us, still remain with the said Supreme Court.

Witness the seal of the said the mayor and common council of the city of Newark, the eighteenth
[L. s.] day of November, A. D. eighteen hundred and seventy-six.

J. L. SUTPHEN,
City Clerk.
HENRY J. YATES,
Mayor.

I acknowledge service of a copy of the within writ for the mayor and common council of the city of Newark. May 31, 1876.

HENRY YOUNG,
City Counsel.

Reasons in Certiorari.

[Filed November 11, 1876]

This case brings up the same proceedings brought up by a previous certiorari against the city alone determined in *7 Vroom, page 288.*

The plaintiff alleges a reason for setting aside said proceedings that the notice prescribed in the eighty-fourth section of the charter of the said city, that the transcript of unpaid taxes had been made was not published as required by law.

CORTLANDT & R. WAYNE PARKER,
Attorney of Relator.

See opinion of Judge Van Syckel in *State (Alden, Pros'x,) v. Newark, 7 Vroom, 289.*

Statement.

[Filed November 9, 1877.]

For the purposes of this argument, but subject to objection on the ground of competency, it is hereby admitted, that the property covered by the declaration of sale which is sought to be set aside by this writ of certiorari, became the property of the Citizens Gas Light Company, defendant, by the following chain of title:

1. Elias N. Miller, Sheriff, to David H. Carey.	Deed dated Nov. 1, 1861. Deed recorded Dec. 12, 1861. P. 11, 102.
2. David H. Carey and ux. to David H. Tichenor.	Deed dated Oct. 5, 1864. Deed recorded May 5, 1865. O 12, 64.
3. David H. Tichenor and ux. to John McGregor.	Deed dated Sept. 1, 1868. Deed recorded Sep. 1, 1868. B 14, 191.
4. John McGregor and ux. to The Citizens Gas Light Company.	Deed dated Jan. 27, 1869. Deed recorded Jan. 27, 1869. Book E 14, 417.

That when the property was acquired by the Citizens Gas Light Company, the improvements on it consisted of a dwelling house and stable. After it was acquired by the gas company these buildings were removed, and in the years 1869 and 1870 the gas works of the company were erected on this and the adjoining properties, without regard to the division lines formerly existing between the lot in question and the adjoining lot, formerly owned by others; on this lot are a portion of the gas holder and tank, built of iron and brick, and also a portion of the company's purifying house, built of the same materials; that during the years 1869 and 1870 there was expended on these and

other improvements on said gas company's property, of which the Alden lot is part, not less than sixty thousand dollars.

That Joseph L. Alden died.

That the first certiorari was sued out by the present prosecutrix against the city of Newark on the first Tuesday of June, 1871; that the printed paper in this cause, which purports to have been a copy of the return to such writ of certiorari, is a correct copy of such return, and that the papers therein contained were true copies of and abstracts from the papers and proceedings removed by the said writ, and that a judgment was rendered therein, of which the annexed is a true copy.

That the prosecutrix married the said Joseph L. Alden before the assessment of the tax on which sale is founded.

That said Rebecca R. Alden brought her action of dower against the Citizens Gas Light Company in the Circuit Court for Essex county, on the nineteenth day of March, 1870, in which suit the defendants pleaded the proceedings brought up by this certiorari, and that, September 1, 1868, David H. Tichenor assigned his estate to John McGregor, and he to the Citizens Gas Company, by the deeds numbered three and four herein.

That the plaintiff demurred to the plea on general grounds and for insufficiency of averments. The demurrer was argued, but no decision has been rendered.

That thereupon the original certiorari was brought in this court against the mayor and common council of the city of Newark, and thereupon, May 31st, 1872, application was made by Thomas N. McCarter, on behalf of David H. Tichenor, to be admitted to defend the certiorari, on the ground that he was interested; that he was admitted and judgment rendered as annexed.

CORTLANDT & R. WAYNE PARKER,
Att'y of Prosecutrix.

THOMAS N. McCARTER,
Of Counsel for Citizens Gas Light Company.

Affidavits.

Essex County, *ss.*—Oba Woodruff of the city of Newark, County of Essex and State of New Jersey:—I am managing clerk in the office of the Newark Daily Advertiser, a newspaper published daily in Newark, New Jersey, and which was so published in and before the year one thousand eight hundred and fifty-nine and ever since; I have examined the files of said paper for the year one thousand eight hundred and fifty-nine, and find in the issue thereof, published the eleventh day of August, one thousand eight hundred and fifty-nine, a notice in the words and figures following, that is to say:—

"TAX NOTICE. Notice is hereby given to all parties interested, that the transcript of unpaid taxes for the year 1859 has been made, and that unless the said taxes shall be paid at my office, No. 1 Council Hall, within twenty days from this date, I shall proceed to collect the same by public sale according to law.

"Newark Aug. 10, 1860.

"I. HARTSHORNE,
"*City Treasurer.*"

The said notice was not published in said newspaper on the day on which it bears date, but was first published therein on the said eleventh day of August in the year one thousand eight hundred and fifty-nine; I was then and ever since have been employed in the office of said Newark Daily Advertiser.

OBA WOODRUFF.

Sworn and subscribed before me this third day of June, A. D. 1872.

L. SPENCER GOBLE,
Master in Chancery.

Essex County, *ss.*—William B. Guild, of the city of Newark, county of Essex and State of New Jersey, being duly sworn saith:—I am proprietor of the Newark Daily Journal,

a newspaper published in Newark, New Jersey, and have been such for four years past; files of said newspapers are preserved in the office; I find published in the journal of the issue of August eleventh, 1860, an advertisement in the same words and figures of that copied in the affidavit of Oba Woodruff, above contained; it appeared in the paper for the first time on said day; it was not published before; and there is at the bottom a direction "au.11.20t" which shows that it was not brought into the office to be published till the eleventh day of August of said year; and further deponent saith not.

WILLIAM B. GUILD.

Sworn and subscribed this third day of June, 1872, before me.

L. SPENCER GOBLE,
Master in Chancery.

New Jersey, Essex County, *ss.*—Rebecca R. Alden, of Newark, being duly sworn, saith, that she is the widow of Joseph L Alden, dec'd, and entitled to dower in his real estate, including his homestead property in Front street, Newark.

REBECCA R. ALDEN.

Sworn and subscribed this third day of June, 1872, before me.

W. BRADSHAW,
Justice of the Peace.

Consent.

[Filed September 23, 1876.]

It is agreed between the attorneys of said prosecutrix and the attorney of said defendants, that the affidavits within contained may be read upon the argument of the above

stated cause as if evidence duly taken before a commissioner on due notice given, and as proof of the fact of publication and non-publication therein stated, as if the newspaper files referred to were themselves presented before such commissioner, without prejudice, however, to the right of any party in interest who may be admitted to defend, hereafter to examine said witnesses, or any other, upon said subject matter, if so permitted.

PARKER & KEASBEY,
Attys of Prosecutrix.
W. H. FRANCIS,
Atty of Defdts.

It is agreed between the attorneys of said prosecutrix and the attorneys of said defendants that the return made by the city be the return of all parties defendant, and that the affidavits hereto annexed may be read upon the argument of the above stated cause as if evidence duly taken before a commissioner on due notice given.

Dated Newark, September 16th, A. D. 1876.

CORTLANDT & R. WAYNE PARKER,
Atty of Relator.
HENRY YOUNG,
Atty of Defendants.
TITSWORTH, FRANCIS & MARSH,
Attys of City Gas Lt. Co.

Depositions

[Filed November 10, 1877.]

Taking of depositions and marking of exhibits in the above stated cause, before me, Henry J. Mills, Supreme Court Commissioner, at the office of T. N. McCarter, Esq., 800 Broad street, Newark, N. J., on this twenty-second day of October, A. D. eighteen hundred and seventy seven, in pursuance of notice given and on behalf of Citizens Gas

Light Company, service of which is admitted. Present—Mr. McCarter, for Citizens Gas Light Company, Mr. Parker, for prosecutrix.

William B. Guild, a witness produced on the part of defendants, being duly sworn according to law, deposeth and saith—

[Counsel of prosecutrix here makes objection to this examination, on the ground that the case was already argued.]

Witness. I am the publisher of the Newark Daily Journal.

[The witness is shown a printed paper, entitled in this cause, and his attention is called to the printed copy of an affidavit previously made by him in this cause, and found at line 10, on page No. 2, of said printed paper.]

Quest. Have you examined the files of the Journal to ascertain how long the notice referred to in that affidavit continued to be published, from the time of its first insertion—if so, please state how it was?

Ans. Thirty times; every day, except Sundays; it was in for thirty successive issues of the paper; my paper is published daily, Sundays excepted.

Being cross-examined—

Quest. What does the direction "Aug. 11, 20t," which you said in your affidavit was at the bottom of the advertisement, mean?

Ans. It means that we should know the day it was brought in, 11th Aug., and the number of times it was to be published, that is twenty times; that was the order; I could not swear that I saw the order, but that is what it means.

Quest. Did you look to see whether the publication of that advertisement was renewed after it stopped on the thirtieth time?

Ans. I did not.

Quest. Have you any memory as to how it came to be published ten times oftener than it was ordered?

Ans. I have not.

Quest. In the practice of your office how do these directions come to be set at the bottom of the advertisement?

Ans. The foreman in the composing room attends to that, he takes it from the paper sent up from the office, and that paper is received from the person ordering the advertisement.

Being re-examined in chief—

Quest. Does the date "11 Aug." thus put on by the foreman necessarily indicate the date of the advertisement coming into the office, or does it indicate the day of its first insertion?

Ans. It indicates the day of the first insertion; if the advertisement had come in the day before Aug. 11. too late for insertion it still would be marked Aug. 11; we publish legal notices, and notices come in to commence at a future day; we make a charge in our books, "this advertisement to commence on such a day."

Quest. If the advertisement had come in the day previous without any direction as to when it was to commence, and before your paper had gone to press, when would you have put it in?

Ans. We should have put it in on the 10th; and then the foreman would have marked it Aug. 10th.

WILLIAM B. GUILD.

[The printed paper shown to witness is offered in evidence and marked as *Exhibit No. 1* for the Citizens Gas Light Co.]

Sworn and subscribed before me this 22d day of October, A. D. 1877.

HENRY J. MILLS,
Sup. Ct. Comr.

Oba Woodruff, a witness produced for defendant, being duly sworn according to law, deposeth and saith—

I am the business manager of the Newark Daily Advertiser.

[Witness being shown *Exhibit No. 1* shown to previous witness and his attention being called to the printed copy

of an affidavit previously made in this cause by the witness]—

Quest. Have you, since that affidavit was made, again examined the files of the Newark Daily Advertiser with reference to the publication of the notice therein mentioned?

Ans. I have; that printed copy does not correctly state the time when the advertisement of the notice therein referred to was first published; it was first published on the eleventh day of August, 1860; and continued therein for twenty-five consecutive insertions, daily, Sundays excepted.

Being cross-examined—

Quest. Did the advertisement have beneath it any printers direction; if so, what was it.

Ans. It had "Au.11.20t." meaning August 11th, 20 publications. I will state here that in all instances where the figures 1859 (except in the copy of the tax notice) are used it should be 1860; it is a mistake.

OBA WOODRUFF.

Sworn and subscribed before me this 22d day of October, A. D., 1877.

HENRY J. MILLS,
Sup. Ct. Comr.

I certify the above to be the depositions taken befere me in the above stated cause.

HENRY J. MILLS,
Comr.

Copy of Judgment.

The court having heard the arguments of counsel, and inspected the assessment for taxes and the proceedings had thereunder, removed into this court by the writ of certiorari in the cause, and duly considered the reasons filed:—

It is ordered, that said assessment and the proceedings

had thereunder be set aside, made void and for nothing holden, with costs.

Entered March 8, 1878.

On motion of

C. & R. WAYNE PARKER,
Att'ys.

I, Benj. F. Lee, clerk of the Supreme Court of the State of New Jersey, do certify, that the foregoing is a true copy of an order made in the above stated cause by said court, and entered in the minutes thereof.

In testimony whereof, I have hereto set my hand and the seal of said court, at Trenton, this second day of May, A. D. eighteen hundred and eighty-one.

[L. S.]

BENJ. F. LEE,
Clerk.

Assignment of Errors.

[Filed July 7, 1881.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

The Mayor and Common Council of the City of Newark and the Citizens Gas Light Company,
Plaintiffs in Error,
vs.
The State of New Jersey, (Rebecca R. Alden, Prosecutrix,)
Defendant in Error.

Assignment of Errors.

Afterwards, that is to say, on the third Tuesday of June, in the year of our Lord one thousand eight hundred and eighty-one, in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, come the said

the Mayor and Common Council of the city of Newark and the said the Citizens Gas Light Company, by McCarter & Keen, their attorneys, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

First. That the ordinances, records, proceedings and advertisements, with all things touching and concerning the same in the writ of certiorari in this cause mentioned, were not returned to or brought before the Supreme Court by virtue of the said writ of certiorari, and that the said Supreme Court had not the said records before them by virtue of said writ, and could not lawfully set aside the said proceedings or give any judgment therein.

Second. For that the said Supreme Court, in a certain cause wherein the said defendant in error was plaintiff, and the said the Mayor and Common Council of the city of Newark, one of the plaintiffs in error, was defendant, heretofore depending before them, to wit, on the fifth day of November, in the year one thousand eight hundred and seventy-three, at the November Term of said court, and before the allowance or issuing of the writ of certiorari in this cause, by the consideration and judgment of said Supreme Court reversed and set aside the same declaration of sale for taxes and proceedings which were by the said Supreme Court attempted to be set aside in the judgment removed by this writ of error, and that said former judgment of the Supreme Court still remained in full force, never having been reversed, set aside, or in any way vacated, and for that the said Supreme Court had therefore no power, jurisdiction or authority to give judgment a second time reversing the same proceedings.

Third. For that the reason assigned by the defendant in error for setting aside the said proceedings was not valid in law, nor sufficient to justify the court in setting aside the same.

Fourth. Because by the record aforesaid it appears that the judgment aforesaid was rendered against the plaintiffs in error, when it ought to have been given in favor of the plaintiffs in error.

And the said the Mayor and Common Council of the

city of Newark and the Citizens Gas Light Company, plaintiffs in error, pray that the judgment aforesaid, for the errors aforesaid, and for divers other errors in the record and proceedings, may be reversed, annulled, and held for nothing, and that the said plaintiffs in error may be restored to all things which they have lost on account of the said judgment, &c.

McCARTER & KEEN,
Att'ys of Plaintiffs in Error.

Opinion of Justice Van Syckel.

[7 Vroom, page 288.]

VAN SYCKEL, J. The validity of a declaration of sale of certain lands of Joseph L. Alden, for unpaid taxes, in the city of Newark, for the year 1859, and of the proceedings touching the same, is controverted in this case.

The subject matter of the litigation is certified into this court by virtue of the act of April 2d, 1869. (*Pamph. Laws, p. 1238.*)

The question whether there is a legal foundation for the tax title, is to be determined by this court on certiorari, and not as formerly, in an action of ejectment.

The stringent rule which applies to titles devised under tax sales, is clearly stated by Justice Depue, in *The State, Baxter, prosecutor, v. Jersey City, ante p. 188.*

"The sale of lands for taxes or assessments, is the execution of a naked power. Every requirement of the statute imposing the liability and prescribing the procedure to enforce it, which tends to the security of the owner, or is for his benefit, must be strictly conformed to. No intendment will be made in favor of the legality of the proceedings. To support the title, the burden of showing compliance with the law is on the purchaser."

The first alleged defect upon which the plaintiff relies is, that in the assessment the property assessed is not described with sufficient certainty.

The act concerning taxes, (*Nix. Dig., 952, pl. 92,*) requires a designation of the real estate assessed by such short description as will be sufficient to ascertain the location and extent thereof."

The description in this case is, "Joseph L. Alden, No. 16 Front street, real estate. H., L. and stable."

All that the statute requires, is a description which will identify the real estate. Abbreviations may be used as long as they are intelligible, and leave no uncertainty as to the property upon which the imposition is intended to be placed.

In this case, the real estate consisted of H., L. and stable, No. 16 Front street, evidently meaning house, lot and stable.

There can certainly be no difficulty in locating this lot, and it would burden the assessor with unnecessary labor to require a more extended description.

The second reason assigned for reversal is, that the notice of unpaid taxes was not published as required by law.

The eighty-fourth section of the charter of Newark directs that the city treasurer, after completing the transcript of unpaid taxes, shall cause a notice to be published in two daily newspapers in said city, stating that said transcript of unpaid taxes has been made, and that unless said taxes shall be paid at his office within twenty days after the first publication of said notice, he will proceed to collect the same by public sale, according to law.

The cases hold that these publications are indispensable preliminaries to the legality of a tax sale, and if so, they must, necessarily, be made in strict accordance with statutory requirement. *Thatcher v. Powell, 6 Wheat., 119; Ronkendorff v. Taylor's Lessees, 4 Peters, 349; Sharp v. Speir, 4 Hill, 76.*

The notice given in this case was, that unless the tax was paid within twenty days from the date of the notice, the land would be sold to pay the same.

The notice was dated August 10th, 1860, but was not published until August 11th, and consequently, but nineteen days were given the tax payer, after the first publication, in which to pay the tax. If the treasurer could reduce the time to nineteen days, there is no reason why he might

not have made it ten, or any less number. It was the right of Alden to have twenty days' notice, and in this respect the course of procedure prescribed by the statute has not been complied with.

The object of the notice is to apprise the owner of a proceeding which, if not arrested by the payment of the tax, will divest him of his title. The manner in which notice shall be given is regulated by positive law, and there can be no departure from it. The power of sale will attach only when every prerequisite has been complied with. Its basis is the regularity of all anterior proceedings.

In my opinion, therefore, the sale cannot be supported, and judgment should be entered accordingly.

Justices SCUDDER and WOODHULL concurred.

The Opinion of Justice Scudder.

[11 Vroom, page 92.]

SCUDDER, J. These proceedings were before this court on certiorari at the suit of the prosecutrix, *Rebecca R. Alden v. Mayor, &c., of Newark, 7 Vroom 288.* On motion, David H. Tichenor, who had become owner of the land in controversy, by declaration of sale, and who had warranted the title to another to whom he had conveyed the land sold for taxes, was admitted to defend the title. At that time the Citizens' Gas Light Company had become purchasers of these lots of land, but were not mentioned or defended in that action. Why it was so, does not appear. After the death of Joseph L. Alden, the former owner of these lots at the time they were assessed for taxes, the prosecutrix, his widow, on March 10th 1870, brought an action in the Essex Circuit Court. In June, 1871, the first writ of certiorari was sued out by her in aid of her action of ejectment, which was still pending. This practice of attacking the tax title directly by certiorari, instead of indirectly by action of eject-

ment, was made necessary by the act passed April 2d, 1869, (*Rev., p. 1045, § 15,*) which enacts that "the proceedings upon which such deeds, declarations of sale and conveyances are founded, shall not be subject to be questioned collaterally, but may be at any time reviewed by certiorari, or other proceeding in the Supreme or Circuit Courts." *State, Graham. pros., v Paterson, 8 Vroom 380.*

The former writ of certiorari in this case failed in its purpose, because the Citizens' Gas Light Company were not made parties to it, and were not, therefore, bound by its adjudication. *Fleischauer v. West Hoboken, 10 Vroom 421.*

Hence this writ has been prosecuted to test the title of the gas light company. It is defended by them, and their counsel has made a preliminary motion to set aside and dismiss the writ on the technical ground that there is no record brought here by the writ. The return contains a certified copy of the ordinance, assessment, warrant, return of collector of taxes, notices, advertisements and proceedings, which are in the nature of records, under which the sale of Joseph L. Alden's house and lot of land was made for taxes assessed in 1859. There is technically no record, and these certified copies and papers have been returned for the record. Transcripts are often returned as the record, and sometimes, in judgment of law, are such. *Nichols v. State, 2 South 540: Morrel v. Fearing, Spencer 670; Browning v. Cooper, 3 Harr. 196; Morris Canal ads. State, 2 Green 411; Stone v. Mayor, &c., of New York, 25 Wend. 157.*

But the specific objection is, that the record being already in this court in the former suit, it is, in legal contemplation, not in the custody of the city of Newark, to be sent here in answer to the writ. But the record is only removed as to the parties in the former certiorari, and a second writ may now be used to bring in other parties, to conclude them by the record. If the record were actually here, there can be no objection to issuing a second writ of certiorari as an auxiliary writ to bring in these new parties.

This reason, however, if it were valid, should not prevail in this case, because the respective attorneys of the prosecutrix and of the defendants have signed an agreement in writing that the return made by the city to this writ shall be

the return of all parties defendant. The Citizens' Gas Light Company have, by this agreement, joined with the city in making this return, and are bound by it. They cannot object to the validity of their own return.

It is an answer to the further objection that the prosecutrix was not entitled to the writ against these defendants, by reason of the delay in its prosecution, to say that this was a proper matter for the consideration of the justice who allowed the writ, and was passed upon by him. This court will not, therefore, dismiss the writ for laches, unless there is manifest error in its allowance. The act of 1869, above cited, says these proceedings may be, "at any time," reviewed by certiorari. With this liberal statutory allowance, the time should be extended in cases like this to at least the period limited for an action of ejectment, otherwise the statute might, in effect, shorten the limitation of time for the recovery of possession of lands within the statutory period of twenty years. As the title cannot be disturbed collaterally by ejectment, the denial of this writ would abridge the prosecutrix's remedy, which does not appear to be the purpose of the act. The certiorari is intended to be in aid of the ejectment, not to defeat it.

There is also legal excuse for the delay in prosecuting this writ, in the fact that the prosecutrix was under this disabilty of coverture when the sale was made, and her action for dower did not accrue until her husband's death, which occurred some time after th deed had been delivered.

In *7 Vroom 288*, the tax title under which the gas company claim by deed of conveyance, was declared to be invalid, because the notice to delinquent tax-payers to pay tax within twenty days from the date thereof, was dated August 10th, 1860, but was not advertised until August 11th, reducing the time to nineteen days. This was held to be insufficient under the charter, which required twenty days' notice.

Since this decision, in June Term, 1873, an act of the legislature has been passed, (*Rev., p. 1166,*) which enacts that in all cases where public notice for a specified time is required by law to be given, before proceedings are had for the public sale of lands for unpaid taxes, no certificate of sale or tax title shall be set aside and holden for naught,

by reason of any variance between the date of such notice and the actual publication thereof, provided that notice *shall have been*, or shall be actually given for the specified number of days prior to such proceedings for public sale. It repeals all acts and parts of acts inconsistent with or repugnant to it. It is claimed that the words "shall have been," in the proviso, relate to the past; that their effect is to heal all irregularities in notices named in the act, which have occurred prior to its passage, and that the statute is intended to be retrospective. It is, however, obvious that all the terms used in this act are prospective, and apply only to the future. This is so, without dispute, in that part of the section which precedes the proviso. In the latter part of the sentence, the only words that are alleged to have a retroactive signification are those already quoted—"shall have been." These words, and the following words "shall be," will not, however, relate to acts that were past when the law was enacted. "Shall have been" is the future perfect tense, which represents an event as completed in future time, and "shall be" represents what will take place in future time. If the legislature had intended to make the law retroactive, it wonld have been easy to express it by the use of the words *has been* or *had been*, in the present or past perfect tense, or other equivalent words. For an instance of such expression, see the act of November 16th, 1795, concerning wills, section nine, construed in *Corlies v. Little, 2 Green, 384.* The words there used are "where any lands have been or shall be given or devised, &c., or have been or shall be thereby ordered or directed to be sold," &c. The court will not assume that the draughtsman of the act was a bad grammarian, in order to make the law retroactive, when there is no other expression in it which indicates such a purpose. There will be no intendment in favor of a retroactive construction. The rule is to construe all legislative acts prospectively, unless there be a clearly expressed purpose to make them retrospective, and the language used must be so clear and imperative as not to admit of doubt. This intent must appear by express words or by necessary implication. *Belvidere v. Warren R. R. Co., 5 Vroom, 200; Baldwin v. Newark, 9 Vroom, 158;*

Deegan v. Morrow, 2 Vroom, 136; Sedgwick on Stat. and Const. Law, 188, &c.

This statute being ineffectual to cure these defects, and the proceedings upon which the declaration of sale and conveyances are founded having been heretofore decided by this court to be invalid, they remain so, as to this prosecutrix, and will be set aside so far as they affect her dower right in the land sold, with costs.