Davison & Co., Law Printers, 27 Montgomery st., Jersey City.

N. J. Court of Errors and Appeals.

The State, Jacob Weart, Acting Executor of Mary E. Sisson, dec., Pros., Plaintiff in Error, vs. The Mayor and Aldermen of Jersey City, Defendants in Error.	On Writ of Error to Supreme Court. Assessment for Sewers, A and B.

Brief of JACOB WEART, Counsel for Plaintiff in Error.

Private property under our Constitution is protected by two clauses :

Article 1, § 16. "Private property shall not be taken for public use without just compensation; but land may be taken for public highways, as heretofore, until the Legislature shall direct compensation to be made."

Article 4, Sec. 7. § 9. "Individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners."

1. This assessment is not only voidable, but absolutely void and unconstitutional.

The facts are that a plan of sewerage was mapped out for a large district in Jersey City, embracing a large area of territory to be drained, consisting of a large twin sewer, and two large main sewers emptying

into the same, and branching to different parts of the city, with provision for lateral drains or sewers to empty into the same, and all to be constructed by the Mayor and Aldermen of Jersey City, or under their authority.

The main sewers were constructed, but only one short lateral in Woodward street.

The testimony of the Chief Engineer of the city is:

"This sewer drains a large district on the top of the hill, and either empties in Mill Creek, or in the Hudson river, at the foot of Grand street. It was constructed mainly with the object of draining the property on the hill."

"The property on this marsh is not below the sewer; the top may be above the surface of the property. The sewer is two circular sewers, four and a quarter feet in diameter each."

"I don't know how far the bottom of the sewer is below the surface of Grand street."

"I should think these lots are about three or four feet below the surface of Grand street."

No lateral sewers have been built, and, with the exception of a few lots on Manning avenue, which may have surface drainage, none of the property can ever have surface drainage until it is brought up to the level of Grand street, and the lands all filled to the depth of three or four feet.

All the benefits which the city claim to have given to the property, in return for the assessment, is the right to build private drains under section 92 of the Charter, which is as follows:

"92. And be it enacted, That the said board may permit parties owning lots off the line of any main sewer or lateral to drain the said land into the said sewer or lateral, upon payment of such an assessment as may be deemed just; that where the construction of any such sewer or lateral shall obstruct the natural drainage of any lot or lots, the said board shall

provide an outlet for said water, or permit the owner or owners of any such lot to drain into said sewer, under certain restrictions, or until they provide a sewer."

The prosecutor gets no benefits under this section. The filling of Grand street, to construct this sewer some three or four feet above the level of the land of the prosecutors would cause the lands to be overflowed instead of drained, and to be damaged instead of benefited, and if the lands are filled, so as to be capable of being drained, the main sewer cannot be tapped until a fair assessment is paid.

The Supreme Court held in the case of *The State, Kellogg, pros.* vs. *Elizabeth*, 11 Vroom R. 274, that assessments of land for a main sewer, where the lands front on a contemplated lateral not yet built is unconstitutional, and that the constitution guards it from such a burden only until the compensating benefit is actually received." That is the lateral built.

State, N. J. R. R. & T. Co. Pros. vs. Elizabeth, 8 Vroom, 330.

In matter of drainage along Pequest River, 10 Vroom 433.

2. This assessment being unconstitutional and void, the prosecutor is not chargeable with laches in this cause, but can proceed to remove the cloud on the title at any time. In the case of *Bogert vs. City of Elizabeth*, 12 C. E. Green R. 568, in this court.

A sale had been made under a void and unconstitutional assessment and the bill was to quit title.

The CHIEF JUSTICE said: "Where the proceedings complained of is so entirely *ultra vires* that it could not in any way have been made available, delay in seeking relief is not objectionable. The reason is, it then produces no hardship and inflicts no loss. The complainant was not bound to remove these proceeding by *certiorari*, they were absolutely void, from beginning to end, and he had a right so to treat them; they could not grow by lapse of time into a right. The

city can gain nothing by retaining the shadow of a right under this sale; if retained for half a century, it would be nothing but a shadow still."

The prosecutor is not in laches in this case. The city is in laches. The law imposes upon the city the duty of selling all lands where the assessment is not paid. By the act of March 24, 1873, laws of 1873, page 411, § 11, all lands liable for assessment are to be sold in six months after confirmation, where the assessment remains unpaid, and the sales are to take place on the first Mondays in April and October in each year, the language is, " and for all assessment unpaid after the assessment shall have remained in his hands for six months he shall proceed to sell," etc.

By the act of March 27, 1874, laws of 1874, page 505, § 3. Sales for assessment were to be made in one year after confirmation.

Now the city has failed to sell, they have not inflicted the real injury by proceeding to sell, so that the prosecutor could bring a certiorari to set the sale aside, or file a bill in equity to, quiet the title. The prosecutor has no means of compelling the city to proceed and sell except by an application to the court for a mandamus to compel a sale, and such an application will only be for the purpose of removing the cloud on the title. The court will not put the prosecutor to that trouble and expense.

The Supreme Court in a late case *State, Winants, Pros. vs. Jersey City*, 13 Vroom R. 349, held, that where in a suit of ejectment, the Court would hold the sale void upon which the title vested, there was no laches imputed in taking out a certiorari to review the assessment.

JUSTICE SCUDDER said: "This writ having been allowed to review the proceedings upon which the above named declaration of sale is founded, on objections available in ejectment, delay in the prosecution is not a good cause for dismissal at the hearing."

In the case of *State, Baxter, Pros. vs. Mayor of Jersey City*, 7 Vr. R. 191, DEPUE Justice reviewing the question of laches and the Act of 1879 said, * * * "I think the better construction is, that with respect to such objections as were tenable in the ejectment, the owner is entitled to the writ of *certiorari* at any time." * * *

The following are cases bearing on the questions of laches in applying for a certiorari.

State Woodruf, Pros. vs. Orange, 3 Vroom R. 55.

State, Speer, Pros. vs. City of Passaic, 9 Vroom R. 168.

Evans, Pros. vs. Jersey City, 6 Vroom R. 381.

State, Baxter, Pros. vs. Jersey City, 7 Vroom R. 188.

Foley et al vs. The City of Passaic, 11 C. E. Green R. 216.

State, Graham, Pros. vs. Mayor, &c., of Patterson, 8 Vr. R. 380.

Where the Charter required a certiorari to be brought within thirty days after the assessment was confirmed, the time does not begin to run unless such assessment is legal. *Evans vs. North Bergen*, 10 Vroom 456, *Foley vs. Passiac* 11, C. E. Gr. 216.

Under the act of March 26, 1873, appointing the commission to revise assessment in Jersey City, the commissioners could not make an unconstitutional assessment, or give vitality to an unconstitutional assessment by re-imposing the same. *State, Morris et al, Pros. vs. The Mayor, &c., of Jersey City*, 11 Vroom R. 485.

Where a re-assessment is provided for the laches of the applicant is not fatal. *State, Hoxey, Pros. vs. Paterson*, 8 Vr. 409. *State, Graham vs. Paterson*, 8 Vr. 380.

This case in the Supreme Court was decided upon the theory that the city had adjusted its finances upon the basis of receiving this money. And the city acted upon the delay of the prosecutor to bring his certiorari. The prosecutor was not bound to bring his certiorari; he could wait for the sale; but the city did not sell, as it was bound to do; hence the writ of certiorari.

There is no proof in the case as to the city's finances, and that the city so acted. It is a mere assumption of the Court, and without proof.

In the State of New York, the Court of Appeals have held that a city is liable to repay the money collected on a void assessment, even after the money has been appropriated to pay the bonds issued to pay for the improvement.

Horn vs. the Town of New Lots, 83 New York R. 100.

Folger, Ch. J., said: "If by chance it gets the money of any one without the right to it, for the purpose of meeting its obligations, and applies that money to its own use in meeting them, it follows that it incurs a liability to that person therefore, as well as would a natural person, or any municipal corporation, doing the same thing."

New Jersey Court of Errors and Appeals.

THE STATE,

JACOB WEART, ACTING EXECUTOR OF MARY E. SISSON, DECEASED, PROSECUTOR, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF JERSEY CITY, DEFENDANTS IN ERROR.

On Error to Supreme Court.

POINTS FOR DEFENDANTS.

The assessments which the prosecutor seeks to set aside were completed over five years prior to the application for these writs. The prosecutor is in *laches*.

Wetmore vs. Elizabeth, 12 *Vroom*, 152.

In *the State, Jersey City Land and Basin Company* vs. *Love*, Justice Scudder, delivering the opinion of the Court, says: "The wise rule stated in *State* vs. *Hudson City*, 5 Dutcher, 115; *State, Weart*, pros. vs. *Jersey City*, 12 Vroom, 510, and in other cases should be enforced."

The decision sought to be reversed in this case is also cited in *State, Kirkpatrick* vs. *Commissioners of New Brunswick*, 13 Vroom, 510.

Writs of certiorari allowed in 1880, to bring up assessments made in 1873, 1874 and 1875, were dismissed for *laches—State, United N. J. R. R. Co.* vs. *Binniger*, 13 *Vroom*, 528.

ALLAN L. MCDERMOTT,
Att'y of Def'ts in Error

Davison & Co., Law Printers, 27 Montgomery st., Jersey City.

N. J. Court of Errors and Appeals.

The State, Jacob Weart, Acting Executor of Mary E. Sisson, dec'd, Pros., Plaintiff in Error.	On Writ of Error to Supreme Court.
vs.	
The Mayor and Aldermen of Jersey City, Defendants in Error.	Assessment for Sewer A.

Writ of Error, returnable June 8, 1880.

L. ZABRISKIE, Att'y.

New Jersey, ss.

[SEAL.] The State of New Jersey to the Justices of our Supreme Court of Judicature, Greeting:

Because of the record and proceedings, and also in the giving of the judgment in a plaint, which was in our said court before you, between Jacob Weart, acting executor of Mary E. Sisson, deceased, plaintiff, and the Mayor and Aldermen of Jersey City, defendant, on a certiorari issued out of our said court, to bring before said court a certain assessment against the lands of the plaintiff, made by the defendant, for the construction of a sewer known as main sewer, Section A, second drainage district of Jersey City, as it is said manifest error has intervened, to the great damage of the said Jacob Weart, acting executor as aforesaid, as by his complaint we are informed. We being willing

that the error, (if any there be,) should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be thereupon given, then without delay you distinctly and openly send under your seal, the record and proceedings aforesaid, with all things touching the same, to our Court of Errors and Appeals at Trenton, on the second Tuesday of June, next, together with this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon, what of right, and according to law, ought to be done.

Witness, Theodore Runyon, Esquire, our Chancellor, at Trenton, this twentieth day of May, in the year eighteen hundred and eighty.

HENRY C. KELSEY,
Sec'y of State.

L. ZABRISKIE,
Att'y.

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, C. J.

NEW JERSEY SUPREME COURT.

THE STATE, JACOB WEART, Acting Executor of Mary E. Sisson, deceased, Prosecutor, vs. THE MAYOR AND ALDERMEN OF JERSEY CITY.	FEBRUARY TERM 1880. — On Certiorari. — Rule for Judgment.

A writ of certiorari having been duly allowed and issued in this case, to bring up a certain assessment made by the defendant upon certain lands of the prosecutor therein described, for the construction of a main sewer in Section A, Second Drainage District in Jersey City, confirmed February 26th, 1874, and the said defendant having duly made return to said writ as thereby commanded, and the prosecutor having filed his reasons for the reversal of said assessment, and the case having been moved for argument upon said return, and the depositions taken and filed in said case at the last June Term of said Court, and the Court having read return and said depositions, and heard the arguments of counsel of the respective parties, and being of the opinion that the prosecutor has not used due diligence in bringing his said writ;

It is now ordered that the said writ be, and the same hereby is dismissed out of this Court with the costs of defendant in this suit to be taxed.

Entered, May 5th, 1880.

On motion of

ALLAN McDERMOTT,
Att'y, &c.

I, Benjamin 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 hereunto set my hand and the seal of said Court at Trenton, this first day of June, A. D., eighteen hundred and eighty,

[SEAL.]

BENJAMIN F. LEE,
Clerk.

STATE OF NEW JERSEY, ss.

The State of New Jersey to the Justices of our Supreme Court of Judicature, Greeting:

[SEAL.]

We being willing, for certain causes to be certified whether certain returns to a writ of certiorari issued out of said court, at the suit of Jacob Weart, acting executor of Mary E. Sisson, deceased, prosecutor, against the Mayor and Aldermen of Jersey City, defendants, and also the reasons filed therein by said prosecutor, as well as certain depositions taken therein are filed in said court, do command you, that having searched the files in your custody, what you shall find therein, of the returns, reasons and depositions aforesaid, in said suit between the parties aforesaid, you certify without delay to the judges of our Court of Errors and Appeals at Trenton, together with this writ.

Witness, Theodore Runyon, Esq., president of our said Court of Errors and Appeals at Trenton, this sixteenth day of July, eighteen hundred and eighty.

HENRY C. KELSEY,
Secretary of State.

L. ZABRISKIE,
Attorney.

I herewith return the papers and proceedings aforesaid, as within it is commanded.

BENJ. F. LEE,
Clerk.

NEW JERSEY SUPREME COURT.

THE STATE, JACOB WEART, Acting Ex'r, &c., Pros., v. THE MAYOR, &c., OF JERSEY CITY.	On Certiorari of Assessment for Sewer. Section A. 2d Drainage District.

Writ of certiorari returnable June Term, 1879.

L. ZABRISKIE, Att'y.

STATE OF NEW JERSEY, ss.

[L. S.] The State of New Jersey, to the Mayor and Aldermen of Jersey City, Greeting:

We being willing for certain reasons to be certified of the proceedings had by the said Mayor and Aldermen of Jersey City, the Board of Public Works of said city, and the Commissioners of Assessments, or otherwise, in relation to an assessment for main sewer in Section A, Second Drainage District, in said city, upon certain lands of Jacob Weart, acting executor of Mary E. Sisson, deceased, which said lands are described as follows:

Lots twenty-three to forty-four, both inclusive, in block number 312; lots ten to twenty-five both inclusive, and twenty-seven to thirty-one, both inclusive, in block number 339; lots fifteen to twenty-seven, both inclusive, in block number 341; lots twenty-two, and two thousand three hundred and forty-six (assessor's No.), in block number 319; lot two thousand three

hundred and forty-seven (assessor's No.), in block number 320; lots one and forty-six to sixty-five, both inclusive, in block number 337; lot two thousand five hundred and forty-one (assessor's No.), in block number 302; lots one to thirty-two, both inclusive, two thousand five hundred and fifty-eight (assessor's No.), and two thousand six hundred and seventy-two to two thousand six hundred and seventy-six (Assessor's Nos.), in block number 304; lot two thousand six hundred and forty-one (assessor's No.), in block number 305; lots one to sixteen, both inclusive, and twenty-three to thirty-one, both inclusive, in block number 306; lots one to eighteen, both inclusive, and twenty-five to thirty-five, both inclusive, in block number 307; lots one to thirty-two, both inclusive, in block number 311; lots one to sixteen, both inclusive, in block number 310.

Do command you that you send to the Justices of the Supreme Court, at Trenton, the said assessment upon the lands aforesaid, with all things touching the same, together with this writ, so that it may be before our said Justices at Trenton on the first Tuesday of June next, that we may further cause to be done therein what we shall see fit to be done.

Witness Mercer Beasley, Chief Justice of our said Supreme Court, at Trenton, this twenty-sixth day of April, A. D., 1879.

BENJ. F. LEE, Clerk.

L. ZABRISKIE, Att'y.

I allow this writ. Let it be sealed.

M. M. KNAPP, J. S. C.

April 26th, 1879.

The Mayor and Aldermen of Jersey City herewith send to the Supreme Court of the State of New Jersey copies of all papers in their possession, as by the writ herewith they are commanded.

In testimony whereof, these presents are signed by the Mayor of Jersey City, and the [L. S.] corporate seal is hereto annexed, attested by the City Clerk of said city, this ninth day of May, A. D., 1879.

HENRY J. HOPPER,
Mayor.

JOHN E. SCOTT,
City Clerk.

The following is a copy of a report, map and schedule of assessment, filed in the office of the City Clerk of Jersey City, February 26, 1874, a copy of which report, with map and schedule, were filed by the City Clerk, March 3, 1874, in the office of the City Collector.

SECTION A.

Names of Owners.	Block No.	City Map No.	Com'rs No.	Sq. ft. Ass'ed.	Total.
Est. M. E. Sisson	312	23	2471	2238	$22 87
"		24	2472	2463	25 17
"		25	2473	2688	27 47
"		26	2474	2913	29 77
"		27	2475	3138	32 07
"		28	2476	3363	34 37
"		29	2477	3588	36 67
"		30	2478	3813	38 97
"		31	2479	4038	41 27
"		32	2480	4263	43 56
"		33	2481	2500	25 55
"		34	2482	2500	25 55
"		35	2483	2500	25 55
"		36	2484	2500	25 55
"		37	2485	2500	25 55
"		38	2486	2500	25 55
"		39	2487	2500	25 55
"		40	2488	2500	25 55
"		41	2489	2500	25 55
"		42	2490	2500	25 55
"		43	2491	2157	22 04
"		44	2492	3156	32 25
"	339	31	2139	2500	25 55
"		30	2140	2500	25 55
"		29	2141	2500	25 55
"		28	2142	2500	25 55
"		27	2143	2500	25 55
"					
"		25	2145	2500	25 55
"		24	2146	2500	25 55
"		23	2147	2500	25 55
"		22	2148	2500	25 55
"		21	2149	2500	25 55
"		20	2150	2500	25 55
"		19	2160	2500	25 55
"		18	2161	2500	25 55
"		17	2162	2500	25 55
"		16	2163	2500	25 55
"		15	2164	2500	25 55
"		14	2165	2500	25 55
"		13	2166	2500	25 55
"		12	2167	2500	25 55
"		11	2168	2500	25 55
"		10	2169	2500	22 91
"	341	27	316	2473	91 41
"		26	2036	2500	46 31
"		25	2037	2500	46 31
"		24	2038	2500	46 31
"		23	2039	2500	46 31
"		22	2040	2500	46 31
"		21	2041	2500	46 31
"		20	2042	2500	46 31
"		19	2043	2500	46 31
"		18	2044	2500	46 31
"		17	2045	2500	46 31
"		16	2046	2500	46 31
"		15	2047	2500	46 31

Names of Owners.	Block No.	City Map No.	Com'rs No.	Sq. ft, Assess'd	Total.
B. McMahon	319	22	2345	3250	$33 21
"	.....	.....	2346	10000	102 20
"	320	.....	2347	21715	221 92
Est. M. E. Sisson	337	1	2182	322	3 29
"	.....	65	2183	888	9 07
"	.....	64	2184	1382	14 12
"	.....	63	2185	1876	19 17
"	.....	62	2186	2369	24 21
"	.....	61	2 87	2863	29 26
"	.....	60	2188	3357	34 30
"	.....	59	2189	2500	25 55
"	.....	58	2190	2500	25 55
"	.....	57	2191	2500	25 55
"	.....	56	2192	2500	25 55
"	.....	55	2193	2500	25 55
"	.....	54	2194	2500	25 55
"	.....	53	2195	2500	25 55
"	.....	52	2196	2372	24 24
"	.....	51	2197	1822	18 62
"	.....	50	2198	2009	20 53
"	.....	49	2199	4251	43 44
"	.....	48	2200	3560	36 38
"	.....	47	2201	2332	23 83
"	.....	46	2202	871	8 90
"	.....	302	.....	2541	60500	618 31
"	.....	304	32	2542	2500	25 55
"	.....	31	2543	2500	25 55
"	.....	30	2544	2500	25 55
"	.....	29	2545	2500	25 55
"	.....	28	2546	2500	25 55
"	.....	27	2547	2500	25 55
"	.....	26	2548	2500	25 55
"	.....	25	2549	2500	25 55
"	.....	24	2550	2500	25 55
"	.....	23	2551	2500	25 55
"	.....	22	2552	2500	25 55
"	.....	21	2553	2500	25 55
"	.....	20	2554	2500	25 55
"	.....	19	2555	2500	25 55
"	.....	18	2556	2500	25 55
"	.....	17	2557	2500	25 55
"	.....	.....	2558	40035	409 15
"	.....	16	2559	2500	25 55
"	.....	15	2560	2500	25 55
"	.....	14	2561	2500	25 55
"	.....	13	2562	2500	25 55
"	.....	12	2563	2500	25 55
"	.....	11	2564	2500	25 55
"	.....	10	2565	2500	25 55
"	.....	9	2566	2500	25 55
"	.....	8	2567	2500	25 55
"	.....	7	2568	2500	25 55
"	.....	6	2569	2500	25 55
"	.....	5	2570	2500	25 55
"	.....	4	2571	2500	25 55
"	.....	3	2572	2500	25 55
"	.....	2	2573	2500	25 55

Names of Owners.	Block No.	City Map No.	Com'rs No.	Sq. ft. Assess'd	Total.
Est. M. E. Sisson	304	1	2574	2500	$25 55
Marvin			2672	1318	4 45
"			2673	1509	5 09
"			2674	1703	5 75
"			2675	1638	5 53
"			2676	1397	4 72
Est. M. E. Sisson	305		2641	49565	167 28
"	306	7	2582	2500	25 55
"		6	2583	2500	25 55
"		5	2584	2500	25 55
"		4	2585	2500	25 55
"		3	2586	2500	25 55
"		2	2587	2500	25 55
"		1	2588	2500	25 55
"	307	8	2589	2188	7 38
"		9	2590	2188	7 38
"		10	2591	2188	7 38
"		11	2592	2188	7 38
"		12	2593	2188	7 38
"		13	2594	2188	7 38
"		14	2595	2188	7 38
"		15	2596	2188	7 38
"		16	2597	2188	7 38
"		17	2598	2188	7 38
"		18	2599	2188	7 38
"		25	2606	2188	7 38
"		26	2607	2188	7 38
"		27	2608	2188	7 38
"		28	2609	2188	7 38
"		29	2610	2188	7 38
"		30	2611	2188	7 38
"		31	2612	2188	7 38
"		32	2613	2188	7 38
"		33	2614	2188	7 38
"		34	2615	2188	7 38
"		35	2616	2188	7 38
"		7	2575	2500	25 55
"		6	2576	2500	25 55
"		5	2577	2500	25 55
"		4	2578	2500	25 55
"		3	2579	2500	25 55
"		2	2580	2500	25 55
"		1	2581	2500	25 55
"	306	8	2617	2188	7 38
"		9	2618	2188	7 38
"		10	2619	2188	7 38
"		11	2620	2188	7 38
"		12	2621	2188	7 38
"		13	2622	2188	7 38
"		14	2623	2188	7 38
"		15	2624	2188	7 38
"		16	2625	2188	7 38
"		23	2632	2188	7 38
"		24	2633	2188	7 38
"		25	2634	2188	7 38
"		26	2635	2188	7 38
"		27	2636	2188	7 38
"		28	2637	2188	7 38

Names of Owners.	Block No.	City Map No.	Com'rs No.	Sq. ft. Assess'd	Total.
Est. M. E. Sisson	306	29	2638	2188	$7 38
"		30	2639	2188	7 38
"		31	2640	2188	7 38
"	311	16	2493	2500	25 55
"		15	2494	2500	25 55
"		14	2495	2500	25 55
"		13	2496	2500	25 55
"		12	2497	2500	25 55
"		11	2498	2500	25 55
"		10	2499	2500	25 55
"		9	2500	2500	25 55
"		8	2501	2500	25 55
"		7	2502	2500	25 55
"		6	2503	2500	25 55
"		5	2504	2500	25 55
"					
"		4	2505	2500	25 55
"		3	2506	2500	25 55
"		2	2507	2500	25 55
"		1	2508	2500	25 55
"		32	2509	2500	25 55
"		31	2510	2500	25 55
"		30	2511	2500	25 55
"		29	2512	2500	25 55
"		28	2513	2500	25 55
"		27	2514	2500	25 55
"		26	2515	2500	25 55
"		25	2516	2500	25 55
"		24	2517	2500	25 55
"		23	2518	2500	25 55
"		22	2519	2500	25 55
"		21	2520	2500	25 55
"		20	2521	2500	25 55
"		19	2522	2500	25 55
"		18	2523	2500	25 55
"		17	2524	2500	25 55
"	310	16	2525	2500	25 55
"		15	2526	2500	25 55
"		14	2527	2500	25 55
"		13	2528	2500	25 55
"		12	2529	2500	25 55
"		11	2530	2500	25 55
"		10	2531	2500	25 55
"		9	2532	2500	25 55
"		8	2533	2500	25 55
"		7	2534	2500	25 55
"		6	2535	2500	25 55
"		5	2536	2500	25 55
"		4	2537	2500	25 55
"		3	2538	2500	25 55
"		2	2539	2500	25 55
"		1	2540	2500	25 55

ASSESSMENT FOR IMPROVEMENT.

By the construction of a main sewer in Section "A," Second Drainage District of Jersey City, (formerly City of Bergen,) Hudson county, N. J.

We, Daniel Haines, Jesse Williams and Theodore Little, having been appointed by the Judges of the Supreme Court of the State of New Jersey, under and by virtue of an act entitled, "An Act to adjust unpaid assessments in Jersey City," approved March the twenty-sixth, eighteen hundred and seventy-three, and constituted a board to examine, revise, alter and adjust, as therein provided, all unpaid assessments within a period of five years prior to the approval of the said act, for city improvements theretofore made in Jersey City, and in the former Cities of Hudson and Bergen, which are or may be disputed; and having each taken an oath faithfully and impartially to perform the duties imposed upon us by the said act;

And having caused notice of the time and place of hearing to be given to the owners of property subject to assessment pursuant to the provisions of the said act; and also to the attorney of the said city of Jersey City; and having examined the assessment for the improvement hereinafter mentioned, and having viewed the premises and lots of land assessed, and heard the testimony and proofs relating thereto, and the allegations and arguments of the parties complaining, and of their counsel, and also of the counsel of the said city, and maturely considered the same;

We, the said Board, do determine and adjudge that the reasonable and fair cost of the improvement by the construction of a main sewer in section "A," Second Drainage District of Jersey City, (formerly City of Bergen), Hudson county, N. J., would have been the sum of two hundred and thirty-eight thousand two hundred and seventeen dollars and one cent ($238,217.01), and we do and have assessed the amount of such reasonable cost and expense of the said improve-

ment upon the lands benefitted thereby in proportion of the benefits received by each lot of land; and have caused to be made a map of the said lands, and a schedule of the said assessments, and filed the same in the office of the clerk of Jersey City, as in and by the said map and schedule of assessment signed by us, and made a part of this our determination and adjudication, will more fully appear.

And we do further determine and adjudge that the remainder of the costs, charges and expenses of the said improvement, as fixed by the original assessment, approved on the twelfth day of July, one thousand eight hundred and seventy-two, and which by the said act is required to be paid by the city at large, is the sum of one hundred and twenty-eight thousand two hundred and seventy dollars and sixty-nine cents ($128,270.69.)

In testimony whereof, we have hereunto set our hands and seals the 26th day of February, in the year of our Lord one thousand eight hundred and seventy-four.

DAN'L HAINES, [L. S.]
JESSE WILLIAMS, [L. S.]
THEO. LITTLE. [L. S.]

This is to certify that the foregoing is a true copy of report, map and assessment filed in the City Clerk's office of Jersey City, at the dates therein named.

In testimony whereof, I have hereunto set my hand as City Clerk of Jersey City, and have [L. S.] affixed the corporate seal hereto, this ninth day of May, A. D., one thousand eight hundred and seventy-nine.

JOHN E SCOTT,
City Clerk of Jersey City.

NEW JERSEY SUPREME COURT.

THE STATE, JACOB WEART, Acting Ex'r, &c., Pros., vs. THE MAYOR, &c., OF JERSEY CITY.	On Certiorori of Assessment for Sewer. Section A. 2d Drainage District.

Examination of witnesses, &c., in the above entitled cause, on part of the prosecutor, taken before me, ISAAC ROMAINE, a Supreme Court Commissioner, at my office, No. 245 Washington street, Jersey City, on Monday, May 19th, 1879, at ten o'clock in the forenoon, in presence of LANSING ZABRISKIE, counsel for prosecutor, and ALLEN MCDERMOTT, counsel for defendants.

John W. Soper, a witness produced on part of the prosecutor, being duly sworn on his oath, says:

I was Chief Engineer of the City of Bergen at the time of the building of the sewer in West Grand street. The section in which the sewer is built, is Section A, Second Drainage District.

As such engineer I had charge of this sewer in West Grand street.

This was a main or trunk sewer. It runs from Hudson (now Fairmount) avenue to Mill Creek. The Hudson or Storm avenue sewer ran from Factory street connecting with the main sewer in West Grand street.

There were no laterals built in any of the streets shown on the return to the writ in this case, connecting with the main sewer, excepting the lateral in Woodward avenue, on the map herein.

At the present time none of the land off Grand street on the map is drained in the main sewer, excepting the lots fronting on Woodward and Hudson avenues.

None of the lots off these streets named, receive any benefit from the main sewer at present.

The lots off Grand street were assessed because it was intended at some future time to build laterals to empty in the main sewer.

The assessment of the lots off the main line did not include the cost of building laterals. It included only their cost of building the main sewer.

The character of a majority of the land shown on the map in the return is marsh or salt meadow, some of it is sand.

None of the streets shown on the map north of Hudson avenue and Grand street are opened except Factory street. To the south of Grand street, Manning and Woodward avennes are the only streets opened.

J. W. SOPER.

Taken, sworn to and subscribed this 19th day of May, A. D. 1879, at Jersey City, before me.

ISAAC ROMAINE,
Sup. Ct. Com.

Examination of witnesses, &c., in the above entitled cause, on part of the defendants, taken before me, ISAAC ROMAINE, a Supreme Court Commissioner, at my office, No. 245 Washington street, Jersey City, on Tuesday, May 27th, 1879, at ten o'clock in the forenoon, in presence of ALLAN L. MCDERMOTT, counsel for defendant, and LANSING ZABRISKIE, for prosecutor.

Levi W. Post, a witness produced on part of the defendants, being duly sworn on his oath, says:

None of the lots named in the certiorari have surface drainage except lots numbers 1 to 26, block 341, fronting on Manning avenue, these lots have, however, no sewer drainage.

There are no lots in the certiorari which cannot have direct surface and sewer drainage under Section 92 of an act to reorganize the local government of Jersey City and the rules of the Board of Public Works,

And being *cross-examined*, he says :

None of the lots named in the certiorari have surface drainage, except those on Manning avenue and none of the lots have sewer drainage.

By surface drainage, I mean that the surface water of the lots named, runs into the sewer through the receiving basins on Manning avenue.

There are no lateral sewers or drains running in front of the lots named in the writ of certiorari in this case, and emptying into the main sewer.

None of these lots could have the benefit of the main sewer for sewerage, unless the lateral sewers or drains are built.

When I say some of these lots can be drained under the 92d section of the charter, and the rules of the board, I mean they can be drained by private drains.

These lots are assessed for the cost of the main sewer, that is, a part of the cost for building the main sewer is assessed on these lots for their benefits from the main sewer.

The property referred to in the writ north of Grand street, is all marsh meadow ; that south of Grand street is partly upland and partly meadow, I don't remember how much is upland.

I am engineer of the Board of Works of Jersey City, and as such have charge of the construction of sewers ; I know by reference to maps the location of sewers and their size. I am acquainted with the sewer in the locality of these lots. This sewer drains a large district on top of the hill, and either empties in Mill Creek, or in the Hudson river at the foot of Grand street. It was constructed mainly with the object of draining the property on the hill.

The property on this marsh is not below the sewer ; the top may be above the surface of the property. The sewer is two circular sewers four and a quarter feet in diameter, each.

I don't know how far the bottom of the sewer is below the surface of Grand street.

I should think these lots are about three or four feet below the surface of Grand street.

And being again *examined-in-chief* he says :

If this main sewer had not been built, these lots would have no sewerage, unless some other sewer was built.

Q. The question of whether these lots derive an actual and direct benefit from the sewer, lies with the property owners, does it not; I mean by way of drainage?

A. Yes, by building drains.

Q. Does not the fact that they can build those drains increase the value of the lots mentioned in the return herein.

A. In my opinion, yes.

In my opinion it is on these grounds that the assessment for the main sewer was levied on these lots.

LEVI W. POST.

Taken, sworn to and subscribed this 27th day of May, A. D. 1879, at Jersey City, before me,

ISAAC ROMAINE,
Sup. Ct. Com.

NEW JERSEY SUPREME COURT.

THE STATE, (JACOB WEART, Acting Executor of MARY E. SISSON, deceased, Prosecutors.) v. THE MAYOR AND ALDERMEN OF JERSEY CITY.	On Certiorari of Assessment for sewer. Section A. 2d Drainage District.

The said prosecutor, by his attorney below named, presents the following reasons why the assessment upon the lands of said prosecutor, described in the writ of certiorari in this case, for the construction of the trunk sewer known as main sewer, Section A, Second Drainage District in Jersey City, should be set aside.

1. Because the lands so assessed for the construction of said sewer do not front upon the street wherein said sewer is built, and are not drained thereby; there being no lateral sewers or drains in the streets, or projected streets on which said lands front, running to or connected with said sewer.

2. Because said lands receive, and have received no benefit or advantage whatever from said sewer, and may never receive any benefit therefrom, and that such assessment is an arbitrary charge and burden upon said lands without any corresponding benefit, or any benefit whatever.

3. Because the said assessment is illegal, unconstitutional and void.

L. ZABRISKIE,
Att'y for Prosecutor.

NEW JERSEY SUPREME COURT.

THE STATE, JACOB WEART, Acting Executor of Mary E. Sisson, deceased, Prosecutor, vs. THE MAYOR AND ALDERMEN OF JERSEY CITY.	Opinion of Supreme Court

Argued at June Term, 1879, before Justices Scudder, Knapp and Reid.

For the Prosecutor, J. WEART.
For the Defendant, L. ABBETT.

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

The assessments which the prosecutor of these writs attacks, were made upon property not lying upon the street where the main sewer for the construction of which these assessments are imposed, was constructed, and no laterals, are constructed by which this property can be drained into the main sewer.

It is insisted upon the authority of the case of *State, Kellogg, pros. v. Elizabeth*, 11 *Vroom*, 274, that this property cannot be subjected to these assessments.

There is, however, a preliminary question to be considered, namely, whether from the lapse of time intervening the assessments and the allowance of these writs, taken in connection with the character of these assessments, the prosecutor should now be permitted to urge his objections against their validity.

The report of the board who made these assessments was made, as to the assessment for Section A, on February 26th, 1874, and as to Section B., March 10th, 1874.

These writs, to bring up the assessments, were allowed April 26th, 1879.

Time has ever been an important factor in the consideration of courts, when called upon to exercise their discretion in the allowance or dismissal of writs of certiorari.

That the passage of time should afford some degree of stability to the acts of municipal corporations is, I think, obvious.

The policy of such a rule is very apparent when applied to those acts which concern the revenues of the city. Within this class of acts are those imposing general taxes, upon which the municipality depends for the means of executing its corporate functions, and the levy of special assessments, for any default or failure in the collection of which the city must respond.

Five years passed from the date when the report of the board was filed, until the allowance of these writs. During that time the city has conducted its financial affairs, and provided for its current and future expenses, upon the supposition that it would not be called upon to supply a deficiency caused by the vacation of these assessments. This condition of affairs, when considered in connection with the method in which these assessments were made, presents an instance where the court should, in the exercise of its discretion, illustrate the maxim, *nam vigilantibus et non dormientibus jura subveniunt.*

It was ruled in the case of *State, Wetmore, pros., v. Elizabeth, ante* 152, that five years delay in suing out a writ of *certiorari* is such laches as deprives a party of the right to complain that an assessment made under a valid statute, and of which he had legal notice, is in fact excessive.

The allusion to the manner in which these assessments were made, intimates that they differ from ordinary special assessments for local benefits.

These assessments were really re-assessments or adjustments of former assessments. The board con-

sisted of Judge Haines and Messrs. Williams and Little. They were appointed by this court, by virtue of an act to be found on the laws of 1873, page 442, entitled "An act to revise unpaid assessments in Jersey City." The act was designed to secure an equitable result in the modification and revision of all the unpaid assessments, and so prevent litigation, and cause a speedy payment of such portions of the outstanding assessments as were just.

The act secured to all parties the opportunity of being heard, and conferred upon the board the power to alter or annul any assessment.

On account of the high character of the members of the board, and the object of the statute in directing its organization, this court has felt a reluctance to interfere with the result of their labor.

An allowance of a number of writs designed to test the validity of other assessments made by the same board has been refused, or others allowed have been dismissed. I think these writs should also be dismissed.

The practice of the court to dismiss, even where error may be apparent in the proceedings brought up, if the interest of the public is such that the private right is disproportionate to it, is well settled. *People vs. Supervisors of Alleghany*, 15 *Wend.* 198, *Ruttland v. Worcester*, 20 *Pick.* 71, *State v. Hudson City*, 5 *Dutcher*, 115; *State v. Anderson*, *Coxe*, 318.

It was urged upon the argument that the writ having been allowed, this court would not dismiss it unless some matter appeared now that was not apparent at the time of its allowance. *State, King, pros. v. Manning*, 11 *Vroom*, 461, *State, Vandeef, pros. v. New Brunswick*, 9 *Vroom*, 320.

No rule has been laid down by any court as broad as that stated in the contention of the counsel for the prosecutor. It is undoubtedly true, that whenever it appears that a writ has been allowed after full consideration of a matter which is afterwards urged as a reason for a dismissal, the fact of such an allowance would be a strong, perhaps a controlling reason for

not reviewing the action of the court in granting the allowance. Where, for an instance, upon return to a rule to show cause why an allowance should not be made, full argument has been heard upon the question of laches, and the court then make the order, it is not probable a court would subsequently allow that matter to be reopened upon motion to dismiss. But where the allowance is made upon an *ex parte* application, with none or a hasty and necessarily one-sided presentation of the grounds of the application, less consideration should be given to the act of making the allowance. And again, where the application is made to a judge, and not to the court, and granted, upon the showing that there is a probable legal question involved in the proceedings to be reviewed, as a matter of course, the fact of such an allowance would have still less force in determining the action of the court, in dismissing or refusing to dismiss the writ. So in each case, the manner of the allowance, the consideration then given to the same subject on the motion for dismissal, must control the action of the court in dealing with the latter motion, rather than the fact of the allowance.

In the case of *State, King, pros., v. Manning, supra,* the court was speaking of the allowance in that case, which seems to have been made by the court, and the court say that it is fair to presume that the court, in allowing the writ, considered the importance of the questions raised in connection with the delay, and having passed upon them the writ will now be retained

In *State, Vancleef, pros. v. New Brunswick, supra,* the writs were allowed in open court. The court ruled that it was not usual to dismiss when the writs were granted in open court, upon grounds which were before the court, and which must have been determined in allowing the writ. In that case the writs were retained.

In *State, Wetmore, pros. v. Elizabeth, ante,* 152, the writ was dismissed although the prosecutor urged that his land was assessed largely in excess of benefits, on

the ground that he was in laches in not sooner applying for his writ, a matter which was as apparent at the time of allowance as at the time of the hearing.

The exercise of the right to quash writs of certiorari has been so frequent, that its existence could with difficulty be questioned in any case at this time. *State v. Anderson, supra; State, Vanderbeck, pros. v. Blauvelt*, 5 *Vroom*, 261, and line of cases cited on page 263.

The result is, that while the exercise of the discretion of the court will be influenced by the fact that the writ has been allowed, with the same objection urged as a reason for the dismissal, apparent or even urged at the time the writ was allowed, yet the existence of this fact can never deprive the court of its right to exercise its discretion in this regard, at any stage of the proceedings.

The present writs were allowed by a justice, out of court, and without argument, and even had their allowance received much more consideration, I should still consider this a clear case for a dismissal.

It is also urged that laches should not be imputed to the prosecutor, because the proceedings to be reviewed are unconstitutional. The proceedings, however, are not under or by color of an unconstitutional act. The act of 1873 provided a constitutional method of making these assessments. The invalidity of the assessments consist in the fact that the lands assessed are not located on the main sewer street, and are therefore not benefited in the positive and present degree which the law enjoins. The invalidity of the assessment depends upon a matter of location. It involves a matter of fact, just as does an excessive assessment, or a frontage assessment. Neither is the the fault of the statute, and all are matters which should be speedily remedied by an appeal to the courts.

The writs should be dismissed with costs.

N. J. COURT OF ERRORS AND APPEALS.

THE STATE, (JACOB WEART, Acting Executor of MARY E. SISSON, deceased, Pros.,) Plaintiff in Error, v. THE MAYOR AND ALDERMEN OF JERSEY CITY. Defendant in Error.	On Errror to Supreme Court. Asssignment of Errors.

And the said plaintiff in error, by L. Zabriskie, his attorney, comes and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit: that the writ of certiorari bringing up the assessment against the lands of the prosecutor was dismissed out said Supreme Court without legal cause therefor, as appears by the record and proceedings aforesaid, and also there is error in this, that as appears by the record and proceedings aforesaid the assessment made by the defendants against the land of the prosecutor is illegal and void, because the land of the prosecutor receives no benefit from the sewer for which said assessment was made, and also there is error in this, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for, and not against the said plaintiff in error.

And the said plaintiff in error prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether holden for naught, and that he may be restored to all things which he has lost by occasion of the said judgment.

L. ZABRISKIE,
Att'y for Plaintiff in Error.