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NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.

GLOUCESTER COUNTY.

BENJAMIN F. MOORE,
Plaintiff,
v.
BOROUGH OF PITMAN,
Defendant.

Action at Law.
Notice of Appeal and Grounds.

To Willis Tullis Porch, Attorney of Plaintiff, or to whom it may concern:

Sir:

Please take notice that the defendant in the above-entitled cause appeals, to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause on the following grounds, to wit:

Because the Supreme Court erred in giving judgment to the plaintiff instead of the defendant, in that:

(A) The Court permitted plaintiff to be asked and to answer the following question:

"Did you get another job?"

This was irrelevant, immaterial and prejudicial to the defendant. The defendant could not legally be charged for the plaintiff's failure to secure other employment and said question and answer were not within the issues raised by the pleadings.

(B) The Court permitted George P. Mayhew, a witness for the plaintiff, to be asked and to answer the following question:

"Well, under those items is a salary provided for Mr. Moore?"

Testimony had been offered that an item in the budget of the municipality provided for employees' salaries and because of this fact the above testimony was surplusage. It was also prejudicial to the rights of the defendant to permit this witness to testify that specific compensation for the plaintiff had been provided for in the budget.

(C) The Court permitted George P. Mayhew, a witness for the plaintiff, to be asked and to answer the following questions:

1. "What date were those appointments made?"

2. "By whom?"

These questions were entirely irrelevant, immaterial and were not within the issues made by the pleadings. The answers of the witness to these questions were read from a record or notes that did not constitute the official minutes of the Borough of Pitman, and were not binding upon the defendant.

(D) The Court permitted counsel for the plaintiff to offer in evidence a record or notes of certain councilmanic meetings that had been kept by one George P. Mayhew. The admission of these notes was prejudicial to the defendant and created a new issue not within the purport of the pleadings. It was error to admit said notes as they did not constitute the official minutes of the duly constituted municipal governing body and were not binding upon the defendant.

(E) The Court refused to non-suit notwithstanding the fact that the plaintiff's case did not establish a right to recover.

(F) The Court permitted William B. Brown, a witness for the defendant, to be asked and to answer the following question on cross-examination by counsel for the plaintiff:

"And how many officers were attacking Mr. Nichols?"

This was irrelevant, immaterial and not within the issues raised by the pleadings.

(G) The Court refused to direct a verdict for the defendant notwithstanding the fact that the cases in our courts disclose that the plaintiff was not entitled to recover. The plaintiff's own case and the defendant's case negatived a recovery by the plaintiff and warranted a directed verdict in favor of the defendant.

(H) The Court refused to direct a verdict for the defendant notwithstanding the fact that the evidence in the cause clearly established the fact that the plaintiff was not hired by the *de jure* councilmanic body and continued to perform duties contrary to the wish of the *de jure* councilmanic body.

(I) The Court refused to direct a verdict for the defendant notwithstanding the fact that the testimony disclosed that the plaintiff was neither a *de jure* or *de facto* employee but on the contrary was an intruder and usurper and as such was not entitled to recover.

(J) The Court refused to limit the amount of recovery by the plaintiff, from the defendant, and to instruct the jury accordingly contrary to the testimony that was offered in the cause and to the prejudice of the defendant.

(K) The Court refused to charge defendant's first request in the following manner:

> "If you determine from the evidence offered that the plaintiff was not a *de jure* or *de facto* employee of the Borough of Pitman in 1930, he would then be a usurper and mere volunteer, and not entitled to recover even though services were actually rendered."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(L) The Court refused to charge defendant's second request in the following manner:

"In order to recover, the plaintiff must prove to your satisfaction that he was either a *de jure* or a *de facto* employee.

Plaintiff must prove that the Mayor and municipal governing body officially designated and hired him to fill the position or perform the work, in order to establish himself as a *de jure* employee.

If plaintiff is entitled to be designated as a *de facto* employee, he must prove to your satisfaction that he had some color of title, that he acted and rendered the services in good faith without any notice to the contrary, and that his services as rendered were acquiesced in and agreeable to the Mayor and municipal governing body."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(M) The Court refused to charge defendant's third request in the following manner:

"The plaintiff cannot legally contend that because he was an employee in 1929, that he held over in 1930 because no successor was appointed, as the office or position he held in 1929 was not provided for by statute or Ordinance of the Borough."

The tendered request was proper and one that

the defendant was entitled to have charged in the light of the issues and testimony produced.

(N) The Court refused to charge defendant's fourth request in the following manner:

"Under the law and undisputed testimony in this case your verdict should be for the defendant—no cause for action."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(O) The Court refused to charge defendant's fifth request in the following manner:

"Under the undisputed testimony, it appearing that the plaintiff was discharged by an act of the duly constituted Council of the Borough of Pitman on January 2nd, 1930, such action being ratified and confirmed by a meeting of said duly constituted Council, consisting of the Mayor and three Councilmen, on January 13th, 1930, the plaintiff cannot recover."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(P) The Court refused to charge defendant's sixth request in the following manner:

"Under the testimony in this case the plaintiff cannot occupy or hold the position of a *de facto* officer or employee."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(Q) The Court refused to charge defendant's seventh request in the following manner:

"Under the testimony in this case, it appearing that there was in existence in the Borough of Pitman on January 1st, 1930, a duly constituted Council of the Borough of Pitman consisting of a Mayor and three Councilmen authorized to transact all municipal business, that they having exercised the functions of said office and having by their action confirmed the action of the Mayor in discharging the plaintiff on January 13th, 1930, there can be no recovery by the plaintiff in this case for any services rendered by him after January 13th, 1930, and that from and after January 13th, 1930, the plaintiff by his act became an intruder and usurper in the office in which he alleged to have performed services."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(R) The Court refused to charge defendant's eighth request in the following manner:

"Under the undisputed testimony in this case it appearing that the plaintiff having admitted receipt of his notice of discharge and having elected to act in disobedience to the commands and instructions of the legally constituted mu-

nicipal body of the Borough of Pitman, consisting of the Mayor and three Councilmen, cannot be said to have been acting in good faith and thereby base an action for services rendered."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(S) The Court refused to charge the defendant's ninth request in the following manner:

"The said plaintiff in this case has rendered no services to the Borough of Pitman authorized or acquiesced in by the legally constituted municipal body of the Borough of Pitman, consisting of the Mayor and three Councilmen."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(T) The Court refused to charge the defendant's tenth request in the following manner:

"The undisputed testimony in this case shows that the plaintiff by the minutes of the Council, presided over by the Mayor, was discharged by action of the Mayor on January 2nd, 1930, and that said discharge was ratified and confirmed by action of the said legally constituted body on January 13th, 1930, and in the absence of any corporate act as evidenced by any minutes of any alleged body functioning in the Borough of Pitman *de facto* or otherwise, there is nothing upon which the jury could base a finding

that the employment of the said plaintiff was result of any act of said alleged *de facto* body or otherwise."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(U) The Court refused to charge the defendant's eleventh request in the following manner:

"Under the evidence in this case, there being no contest with respect to the position which the plaintiff alleges in his complaint to hold during the year 1930, and the case being predicated upon the theory that the said plaintiff might be entitled to recover by virtue of being a *de facto* employee, there can be no recovery under Chapter 239, P. L. 1925, relating to compensation of public officers and employees, and, this in view of the fact, that from the testimony there does not appear to have been appointed, during the term that the plaintiff alleged to have performed services, any other employee to have performed the said services, which would have a tendency to create any contest over said office, whereby the said plaintiff could occupy the position of a *de facto* officer or employee."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

(V) The Court refused to charge the defendant's twelfth request in the following manner:

"The minutes of the regularly constituted body of the Borough of Pitman governed by the Mayor and three Councilmen cannot be challenged by any minutes of any alleged body in the Borough of Pitman attempted to be governed by the President of Council and the remaining Councilmen."

The tendered request was proper and one that the defendant was entitled to have charged in the light of the issues and testimony produced.

Respectfully yours,
MORTON C. HAIGHT,
GEORGE B. MARSHALL,
Attorneys for Defendants.

SUMMONS.

(Filed Sept. 5, 1930.)

THE STATE OF NEW JERSEY, TO BOROUGH OF PITMAN:

(L. S.) You are summoned to answer the annexed complaint of Benjamin F. Moore, in an action at law in the Supreme Court. And take notice that unless you file your answer to the said complaint with the clerk of the Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, HONORABLE WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this twenty-ninth day of August, nineteen hundred and thirty.

FRED L. BLOODGOOD,
Clerk.

WILLIS TULLIS PORCH,
Attorney.

COMPLAINT.

SUPREME COURT OF NEW JERSEY.

GLOUCESTER COUNTY.

BENJAMIN F. MOORE,
Plaintiff,
v.
BOROUGH OF PITMAN,
Defendant.

Action at Law.
Complaint.

The plaintiff, Benjamin F. Moore, of the Borough of Pitman, County of Gloucester and State of New Jersey says that:

FIRST COUNT.

1. At the times herein stated defendant was, and still is, a municipal corporation of the State of New Jersey.

2. From January 1st, 1929, to July 1st, 1930, plaintiff rendered services to the defendant, at its request, as Clerk in the office of the Tax Collector, Clerk of the Water and Sewer Department, Tax Search Officer, and Borough Clerk, and performed clerical services during said time for the defendant.

3. For said services, defendant undertook and agreed to pay to plaintiff the sum of thirteen hundred dollars per year, and during the year 1929 said defendant paid the plaintiff the sum of thirteen hundred dollars, but since January 1st, 1930, the defendant has refused and neglected to pay the wages to the plaintiff for the services rendered by plaintiff for the benefit of the defendant.

SECOND COUNT.

1. All the statements contained in the first count are repeated and made part hereof.

2. For services rendered, defendant undertook to pay plaintiff what the same were reasonably worth.

3. Plaintiff has always been, and still is, capable, anxious, ready, and willing to perform*ed* the work

he was employed to do, but since the month of June, 1930, he has been prevented from doing said work by the acts of the defendant, without any fault upon the part of the plaintiff, and the plaintiff further says that he has never been legally discharged or removed from the office he was occupying, but that through unlawful acts and conduct of the defendant he has been interfered with and prevented from performing the duties he was engaged to do.

4. The services rendered by the plaintiff to the defendant were reasonably worth thirteen hundred dollars per annum, or twenty-five dollars per week, and wages, or salary on that basis is due the plaintiff from January 1st, 1930, to the present time.

5. Defendant has not paid the same.

THIRD COUNT.

1. In the month of January, 1929, the plaintiff was engaged by the defendant to perform clerical work in the office of the Tax Collector, Clerk of the Water and Sewer Department, Tax Search Officer, and Borough Clerk, and that at the time of his said employment the defendant undertook and agreed to pay the plaintiff the sum of thirteen hundred dollars per annum, and during the year 1929, wages or salary at the said rate was paid the plaintiff.

2. Since January 1st, 1930, the plaintiff has held *de facto,* or otherwise, an office or position in the Borough of Pitman, and has performed all the duties

of such office or position and is entitled to the compensation appropriate to such office or position for the time he has, in fact, held the same, performed the duties of said office or position and rendered services to the defendant, as well as for the time he has been illegally and improperly prevented by the defendant from doing the work and performing the services he was engaged to do.

3. That plaintiff has always been capable, anxious, ready and willing to perform the duties and render the services which he was engaged to do for defendant, and faithfully perform said duties and render said services each and every month of the year of 1930, until the month of June, 1930, when he was prevented from further performing his said duties, without any fault on his part, and without any charges being preferred against him, hearing held or plaintiff otherwise lawfully or properly removed from said office or position, by reason whereof plaintiff claims that he is still entitled to the compensation and salary that he would have been entitled to receive if the defendant had not illegally and wrongfully prevented him from performing the duties of said office or position.

4. Defendant has refused and failed to pay plaintiff the said salary or compensation which it agreed to pay him, or to pay plaintiff what said services were reasonably worth, or, in fact, to pay the plaintiff anything for work done and services rendered and performed by the plaintiff, for its benefit, at its

request, which were necessary and proper in and about the business of the defendant.

Plaintiff demands: On the first count fifteen hundred dollars damages; on the second count fifteen hundred dollars damages; and on the third count fifteen hundred dollars as damages.

WILLIS TULLIS PORCH,
Attorney for Plaintiff.

[ENDORSED]

To the within named defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the service hereof upon you, and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days; and that, in case you file said affidavit, unless you file an answer within twenty days from the date of service hereof upon you, judgment by default will in such case be entered against you at the end of said twenty days.

(Note:—Lawful service upon a corporation defendant is personal service for the above purpose.)

Attorney.

Duly served September 2, 1930, on Borough of Pitman by delivering a copy of the same to William B. Brown, Mayor of Borough of Pitman, personally in the Borough Hall, in the Borough of Pitman, Gloucester County, New Jersey.

Fee $4.26

Jacob K. Tryon,
Sheriff.
By Joseph B. Owen,
Under Sheriff.

ANSWER.

(Filed Sep. 19, 1930.)

NEW JERSEY SUPREME COURT.

GLOUCESTER COUNTY.

BENJAMIN F. MOORE,
Plaintiff,
v.
BOROUGH OF PITMAN, a municipal corporation,
Defendant.

Action at Law.
Answer.

The defendant, Borough of Pitman, a municipal corporation, existing under and by virtue of the laws of the State of New Jersey, answering the complaint filed in the above entitled cause, says that:

FIRST COUNT.

1. It admits paragraph 1 of the first count of the complaint.

2. It denies paragraph 2 of the first count of the complaint.

3. It denies paragraph 3 of the first count of the complaint.

SECOND COUNT.

1. The answers to paragraphs 1, 2 and 3 of the first count are herein and hereby repeated in answer to paragraph 1 of the second count of the complaint.

2. It denies paragraph 2 of the second count of the complaint.

3. It denies paragraph 3 of the second count of the complaint.

4. It denies paragraph 4 of the second count of the complaint.

5. It denies any obligation of any kind and character that is alleged to be due and owing from this defendant to the plaintiff.

THIRD COUNT.

1. It denies paragraph 1 of the third count of the complaint.

2. It denies paragraph 2 of the third count of the complaint.

3. It denies paragraph 3 of the third count of the complaint.

4. It denies any obligation of any kind and character that is alleged to be due and owing from this defendant to the plaintiff.

10

FIRST DEFENSE.

1. Defendant herein avers and alleges that it did not at any time during the period alleged in the complain, or prior or subsequent thereto, hire, employ, appoint or elect the plaintiff, Benjamin F. Moore, to render any service to the defendant as a Clerk of the Water and Sewer Department, Clerk in the office of the Tax Search Officer and Borough Clerk, or in any other capacity.

20

2. Defendant denies that it undertook and agreed to pay the plaintiff, Benjamin F. Moore, any sum of money, at any time during the period of time alleged in the complaint, as an employee, clerk or in any other capacity.

3. Defendant, therefore, avers and alleges that it is not indebted to the plaintiff, Benjamin F. Moore, in any sum.

30

SECOND DEFENSE.

1. Defendant herein avers and alleges that if the plaintiff, Benjamin F. Moore, rendered any service

from January 1, 1930, as an assistant or clerk to the Collector of Taxes and Borough Treasurer, that he did so at the request of one George P. Mayhew, individually, and that no hiring or employment of any kind or character was negotiated or entered into by or between the plaintiff, Benjamin F. Moore, and the defendant.

2. Defendant further alleges that any sum or sums of money alleged to be due to the said plaintiff, Benjamin F. Moore, are due and owing to said plaintiff by the said George D. Mayhew, and are not due and owing by this defendant.

THIRD DEFENSE.

1. Defendant herein alleges that the plaintiff was an intruder, usurper and mere volunteer in the office of the Clerk of the Water and Sewer Department, Tax Search Officer and Borough Clerk from January 1, 1930, and is not, therefore, entitled to any salary, compensation or remuneration even though he did perform and render some services in said office.

2. Defendant further avers that on January 2, 1930, and at other times subsequent thereto, the plaintiff was instructed, advised and directed that his presence in the municipal building was no longer required or desired, and by virtue of said notification that plaintiff is not entitled to receive any sum or sums of money for alleged services rendered,

either as a volunteer, employee, appointee or otherwise.

FOURTH DEFENSE.

1. Defendant further avers that said plaintiff, Benjamin F. Moore, has not held any office, position or employment *de facto* or otherwise in said municipality since January 1, 1930, nor has he performed any duties or rendered any service since said date that has been beneficial to the defendant, or at its direction or request.

2. Defendant further avers and alleges that said plaintiff, Benjamin F. Moore, arbitrarily and without any request or direction of the defendant, attempted to render services contrary to and in violation of the municipal governing body, to all of which said plaintiff had knowledge.

3. Defendant further avers that it has not refused and failed to pay the plaintiff for alleged services rendered because of the fact that there was never any negotiations entered into between the plaintiff, Benjamin F. Moore, and the defendant for the rendition of any alleged services.

FIFTH DEFENSE.

1. Defendant herein avers and alleges that it is not indebted to the plaintiff, Benjamin F. Moore, in any sum, during the period of time alleged in the

complaint or at any time prior or subsequent thereto, as an employee, clerk, appointee or otherwise, and be it *de facto* or *de jure*.

MORTON C. HAIGHT,
GEORGE B. MARSHALL,
Attorneys for Defendant.

REPLY.

(Filed Sept. 22, 1930.)

NEW JERSEY SUPREME COURT.

GLOUCESTER COUNTY.

BENJAMIN F. MOORE, *Plaintiff,* v. BOROUGH OF PITMAN, *Defendant.*	Action at Law. Reply.

The plaintiff denies each and every allegation in the answer and the several defenses contained therein, except insofar as same admit the truth of the statements in the complaint.

WILLIS TULLIS PORCH,
Attorney for Plaintiff.

SIXTH DEFENSE.

(Filed Feb. 18, 1931.)

NEW JERSEY SUPREME COURT.

BENJAMIN F. MOORE,
Plaintiff,
v.
BOROUGH OF PITMAN, a municipal corporation,
Defendant.

Action at Law.
Sixth Defense.

The defendant, a municipality, in and by its appropriation for the year 1930 appropriated wages for the payment of the office contended for by the plaintiff herein, which wages have been paid and fully discharged to the incumbent of said office, appointed by the Mayor and Borough Council of the Borough of Pitman, and that the said wages or emoluments of said office having been paid to the said employee other than the said Benjamin F. Moore no further moneys remain in the Borough Treasury for the payment of said wages and said plaintiff has no right of action therefor.

MORTON C. HAIGHT,
Attorney of Defendant.

SUPPLEMENTAL REPLY.

(Filed Feb. 18, 1931.)

NEW JERSEY SUPREME COURT.

BENJAMIN F. MOORE,
Plaintiff,
v.
BOROUGH OF PITMAN, a municipal corporation,
Defendant.

Action at Law.
Supplemental Reply.

The plaintiff denies each and every allegation in the sixth defense.

WILLIS TULLIS PORCH,
Attorney for Plaintiff.

TESTIMONY.

NEW JERSEY SUPREME COURT.

GLOUCESTER COUNTY.

BENJAMIN F. MOORE, *Plaintiff,*		Action at Law.
v.		#33.
BOROUGH OF PITMAN, *Defendant.*		February Term, 1931.

February 10 and 11, 1931.

APPEARANCES:

For the plaintiff, WILLIS TULLIS PORCH, ESQ.

For the defendant, MORTON C. HAIGHT, ESQ., and GEORGE B. MARSHALL, ESQ.

Before ELDREDGE, J., and a jury.

Mr. Marshall: With the permission of the Court, before the jury is sworn may I ask a question? Are

any of this panel related to Benjamin F. Moore, of Pitman, either by blood or marriage?

(No answer.)

(Jury sworn.)

(Mr. Porch opens the case for the plaintiff to the jury.)

(Mr. Haight opens the case for the defendant to the jury.)

THE CASE FOR THE PLAINTIFF.

BENJAMIN F. MOORE, sworn.

By Mr. Porch:

Q. Mr. Moore, where do you live?

Mr. Porch: Mr. Moore is a little hard of hearing, and I will have to speak loud.

The Court: All right.

Q. Where do you live, Mr. Moore?
A. 516 Highland Terrace, Pitman.
Q. How long have you lived in Pitman?
A. Between twenty-one and twenty-two years.
Q. What is your occupation?
A. Bookkeeper.

Q. How long have you been a bookkeeper?
A. About forty years.
Q. And worked at it steady at times?
A. Most of the time; twenty-nine years in one place.
Q. Were you engaged to work for the Borough of Pitman in 1929?
A. I was.
Q. Did you work there during that year?
A. I did.
Q. Were you paid?
A. I was.
Q. By whom?
A. By the Borough.
Q. How much?
A. $1300.00 a year, or $25.00 a week.
Q. How did you get paid that year, in what way?
A. Checks passed by Council.
Q. Borough checks?
A. Yes, sir.
Q. Well, after 1929 did you continue to work for the Borough of Pitman?
A. I did.
Q. Now, what were your duties in 1929?
A. I had charge of the several departmental books of the Borough; I made the postings; I made out tax bills; made out assessment bills; I made searches; I checked up the deposits that Mr. Mayhew turned over to me, counting the cash and checking off the checks and seeing they were correct in their additions and in the totals; also, I carried the money to bank and deposited the money for Mr. Mayhew; I went to the post office; I attended many times the telephone and took charge of the books of

delinquents, which required three or four extra books for the different years, and any other duties that applied there, I took charge of them.

Q. You would do that work all through the year 1929?

A. I did.

Q. And in 1930, what did you do?

A. I did the same character of work.

Q. What time did you go to work in the morning?

A. At eight o'clock in the morning.

Q. What time did you get through?

A. Some times at five o'clock; at other times ten, eleven, and it has been a few times up until one o'clock in the morning, the following morning.

Q. Doing Borough work?

A. All doing Borough work, yes, sir.

Q. How long did you work in 1930?

A. Well, over five months.

Q. How much over five months, do you know? Do you know the day you stopped work in 1930?

A. I think it was about the 23rd of June.

Q. And why did you stop?

A. Well, the locks on the doors had been changed and the lock on the safe had been changed, and we were debarred from going in.

Q. Were you willing to work?

A. Yes, sir. I was always willing to work.

Q. Were you willing to work all through the year 1930?

A. I was, I needed the work. For one thing, I sent my wife to Oregon for her health, and I felt that I had ——

Mr. Marshall: I object to this, may it please the Court; it has no bearing on this issue.

Mr. Porch: All right.

Q. Why didn't you work all through the year 1930?
A. Well, I didn't receive any money.
Q. Were you prevented from working?
A. Yes.
Q. Because you were locked out?
A. I was locked out.
Q. Who did you work under? Who else was in the office?
A. I was under Mr. Mayhew.
Q. Who is he?
A. He was the Borough Tax Collector.
Q. He was or is?
A. Is and was.
Q. All the time that you worked there, he was Tax Collector?
A. Yes, sir.
Q. And he is the present Tax Collector?
A. Yes, sir.
Q. Did he assign work for you to do?
A. Yes, sir.

Mr. Marshall: I object to the leading character of the question. I think he might tell what he did.

The Court: The question is leading, Mr. Porch.

Q. Was he there or not when you were doing this work?

A. There were a few times he wasn't there, and at that time I took his place, collected different moneys that were handed in the window and made the proper entries and took care of the cash for him.

Q. Did anyone else connected with the Borough of Pitman tell you to keep on with your duties?

Mr. Marshall: I object to that, may it please the Court, unless it be shown it is something of a character that would be binding upon the municipality. The question is, "Did anyone else tell him?"

Q. Did any member of Council tell you?

Mr. Marshall: I object.

Mr. Porch: I think that is competent, to show he was working under the authority of Councilmen, men who have charge of the affairs of the Borough.

Mr. Marshall: Not unless it can be shown it was an act of Council.

The Court: Their individual instruction wouldn't be binding upon the municipality; it would have to be a corporate act.

Q. Well, do you know whether Council made provision for your wages in 1930?

A. I understood they did, yes, sir.

Mr. Marshall: I object to that, may it please the

Court; the records of the Council would be the best evidence of that, if such provision were made.

Q. Was a budget passed in 1930?

A. Yes.

Q. And were you ever forbidden to work there up until the time that you actually stopped by being barred out?

A. No, after the first of the year I continued, and there wasn't anyone made any remarks nor tried to discharge me, or anything else. I continued on with the work, and it seemed to be agreeable to all of them, even the opposition members of Council didn't say anything about it.

Q. They didn't tell you ——

A. Not a word to me. I still continued on, because there wasn't anything done nor said to deprive me of that.

Q. Did you ever talk to anyone about your wages?

A. Yes, I spoke to Mr. — to the Mayor about my wages. I went over to his home and I said to him, "Mayor," I said, "I need some money," I said, "I am short now. I have been using what little money I had and my wife is in Oregon and I want to send for her and bring her home." I said, "I am losing the companionship of my wife," and I had to lock my home up because I was alone, and for that reason I went to him and I said, "Mayor, can't you do something for me?" and after a little conversation with him, he said he would do what he could, but he didn't do anything.

Q. Have you ever been paid any of this money?

A. No, sir; I have not.

Q. While you were doing this work for the Bor-

ough of Pitman—I mean, during 1930—did anybody else attempt to do the same work?

A. There wasn't anyone there that was doing the same work; I was alone doing it.

Q. Did anyone else ever attempt to come in and do that work that you were engaged to do?

A. What?

Q. Did anyone else ever attempt to do the same work?

A. No; no one ever attempted to.

Q. After you were barred out of the office, did you attempt to get another job?

A. I did; I have been trying ever since.

Q. Were you able to?

A. I am able to, yes, and willing to; I want work.

Q. Did you get another job?

A. Sir?

Mr. Marshall: I object to this, may it please the Court, as not being material to the issue.

Mr. Porch: I think it is competent to show on our proof that he is entitled to compensation that he tried to get other work and was unable to get it.

Mr. Marshall: I submit it is not framed in the pleadings, as I understand it.

Mr. Porch: It is in the pleadings he was prevented from doing other work, that he tried to get it, he wanted to perform this work. Now, the law is, I think, as your Honor said yesterday in a ruling if conditions are made impossible for a man to perform the duties, why, he is excused from the per-

formance of this duties, and I think that is the case here, that he was prevented through no fault of his own from further performing those duties, and if he was and had been engaged to do this work during the year and tried to get other work and could not get it, the question is whether he is not entitled to compensation.

The Court: I think the testimony is competent, Mr. Porch, on the theory or on the assumption that the municipality was liable, and if this man had had other work, the municipality would be entitled to a reduction of that amount. I will permit the answer to stand, if it has been answered; if not, I will permit it to be answered.

(Exception noted for the defendant.)

Mr. Porch: What was the question and answer?

(Question and answer repeated.)

Q. Will you answer that question, Mr. Moore?
A. What was that?
Q. Did you get another job?
A. No, I did not.
Q. Did you try to get another job?
A. I did; I tried very hard. I put several applications in several places, and one of them unfortunately where I had apparently the best opportunity was the Bankers' Trust, and when I saw the sign on the door, I knew I was finished there, naturally.
Q. That was recent; shortly after you were kept

out of your office down there, did you immediately start in to look for other work?

A. Immediately, yes; I asked my friends to help me. It seems conditions was so you couldn't get a job nowhere.

Mr. Marshall: I object to the volunteering of the witness.

Q. Did anyone complain to you about your work not being satisfactory there?

A. There wasn't anyone that I ever heard nor did they ever say anything to me detrimental to my work.

Q. Either faction?

A. Either faction.

Q. And all the work that you did was in and about Borough affairs while you were there?

A. It was for the benefit of the taxpayers of the Borough that I did what work I did.

Q. And was it all necessary and proper work?

A. It was necessary and proper to keep up the records, for the simple reason that when I made my entries in the several departmental books, it was necessary to balance, so that I could balance with Mr. Mayhew as to his numerous deposits; otherwise we couldn't have told where we were.

Mr. Porch: All right, cross-examine.

Cross-examination.

By Mr. Marshall:

Q. Now, Mr. Moore, you started work at the Municipal Building in Pitman in 1929, didn't you?

A. Yes, sir.

Q. Who engaged you to work there?

A. The Borough, the members of Council.

Q. Mayor Stanton?

A. Members of Council.

Q. Did the whole six members of Council come see you about it?

A. Well, I presume it was; I wasn't there at the time, but I presume they did.

Q. You mean you were sent for, or what? How were you notified?

A. I was notified by Mr. Mayhew that Council had appointed me.

Q. That was in January, 1929?

A. Sir?

Q. That was in January, 1929?

A. Yes.

Q. At that time Mr. Mayhew was the Borough Tax Collector, wasn't he?

A. Yes.

Q. And also the Borough Clerk?

A. Yes.

Q. And your work was divided, was it, between assisting him in his duties as Borough Clerk and Tax Collector?

A. He had all he could do to attend to the collection of taxes, and so forth, so it required my undivided time to do the work, keep the work up.

Q. I say, you divided your time, you assisted him in his work as Clerk of the Borough, as well as Tax Collector, didn't you?

A. Yes, I did.

Q. Now, you were paid promptly your salary all during the year 1929, weren't you?

A. Yes.

Q. And were you present at the Council meeting at the Borough of Pitman held on January 1, 1930?

A. Yes, I was there.

Q. And you knew at that time that there was a new Mayor, Mayor Brown, didn't you?

A. Well, I didn't know that; I wasn't sure; the conditions was so I wasn't sure. He wasn't sworn in in Council.

Q. There wasn't any question about there being a new Mayor, was there, Mr. Moore?

A. Well, I always think there is a new Mayor after he is sworn in; he isn't the Mayor until he was sworn in, and he wasn't sworn in in Council that day.

Q. He was not?

A. No.

Q. You don't know whether he had been sworn in before Council and filed his oath or not, do you?

A. No, because for twenty years that I have been going there, it was the rule and the custom to have the Mayor sworn in in the presence of Council and the public, and the public were seated there to see it done and this wasn't done at this time.

Q. And your later conduct was based upon the fact that you didn't look upon Mr. Brown as the Mayor of Pitman?

A. Not particularly, no.

Q. No, you say?

A. No, not particularly. I was an employee and I didn't get into the fight any more than I did at election time, that is all.

Q. Did the fact that you didn't think he was Mayor have anything to do with you continuing your employment?

A. Sir?

Q. Did the fact that you didn't think Mr. Brown was the Mayor of Pitman have anything to do with you continuing your employment?

A. No, because I was told by the four Councilmen to continue to work.

Q. What four Councilmen told you to continue to work?

A. Mr. Napier and Nichols and Bone and Mrs. Chalfant.

Q. And Mrs. Chalfant?

A. Yes.

Q. Well, you knew on January 1st that there was a contest over the seat of Mrs. Chalfant, didn't you?

A. Yes, I knew that.

Q. And that it was to be determined whether Mrs. Chalfant or Mr. Briggs was the proper member of Council?

A. Yes, sir.

Q. And you chose on that date to follow the instructions of Napier, Nichols, Bone and Mrs. Chalfant—that constituted the four Councilmen?

A. Yes, they said to keep up the work, because we didn't want it to go back the same as it had been in former years, and I did.

Q. And you didn't undertake to take any instructions from the Mayor or the other three Councilmen, did you?

A. They didn't approach me in any way.

Q. Didn't approach you at all?

A. No, they never said a word to me one way or the other.

Q. On this date, on January 1st, Mr. Mayhew continued to be the Tax Collector, didn't he?

A. Yes.

Q. And on that date there was a new Borough Clerk, was there not, appointed?

A. Well, there was a rumor; I didn't know positively that there was. There was a rumor to that effect.

Q. Did you stay at the meeting?

A. Yes.

Q. Could you hear?

A. I heard, yes, but there was such a commotion amongst them that I couldn't tell one way or the other, whether one was appointed or not.

Q. Didn't you know that Mr. Doughty on that day had been appointed the new Borough Clerk of the Borough of Pitman?

A. Not positively, no.

Q. Well, why do you say not positively; did it depend upon whether Mrs. Chalfant or Mr. Briggs was the Councilman?

A. No, but there was such a contention, as I say, at that time in Council that I wasn't sure whether he was appointed or whether he wasn't; they were flashing back and forth.

Q. What you mean to say is that you weren't sure whether the appointment made by the Mayor of Mr. Doughty, with the support of three Councilmen would be heavier in weight than the appointment

of Mr. Mayhew with the four Councilmen, whose advice, you say, you sought?

A. Let me get that right.

(Question repeated.)

A. Appointment of Mr. Mayhew?

Q. Was Mr. Mayhew appointed Clerk by the four Councilmen who told you to continue to act?

A. Was he appointed Clerk?

Q. Yes.

A. No, not by them.

Q. Did you attend the meetings that were held from time to time by the four Councilmen, Napier, Nichols, Bone and Chalfant?

A. Did I what?

Q. Attend those meetings?

A. I attended all the meetings, yes.

Q. Attended all the meetings, but you didn't attend the meetings held by the Mayor and the three Councilmen, Briggs, Kersey and Burkett, did you?

A. Well, once or twice I did, but the majority of the times I did not, because there wasn't a full complement of Council there, of the members of Council.

Q. Now, were you there at any time when Mr. Doughty came into the Borough Hall where you were stationed in an effort to get possession of the books?

A. He came in there and walked around and sat down, but he didn't offer to do any work.

Q. Were you instructed by Mr. Mayhew to prevent Mr. Doughty or anyone deputized by him ——

Mr. Porch: I object, if your Honor please, as incompetent; it is not proper cross-examination.

Mr. Marshall: He says he fully performed his duties. I want to see whether part of his duties was to guard the Borough books.

The Court: I will permit the question.

(Question repeated.)

Q. ——to go in and take charge of the office of Borough Clerk?

A. No.

Q. Or do any duties there?

A. What?

Q. Or to perform any duties there?

A. No.

Q. Did you ever see Mayor Brown come into the Borough Hall?

A. I have seen him come in.

Q. Do you recall any occasions when you yourself locked him out?

A. I did.

Q. And you knew he was the Mayor of the Borough of Pitman?

A. I did that under instructions.

Q. From whom?

A. From Mr. Mayhew. We had $2800.00 in the safe, and Mr. Mayhew was called away on a little business, and he said to me, "Don't let anybody in here while I am away." I asked him then, I said, "What do you mean? I want you to specify that." He said, "I told you I didn't want anybody to come

in," and when Mr. Brown came there, I talked to him just as quietly and as gentlemanly as I could. I said, "Mr. Brown, I am under instructions, I was told not to let anybody in the office," and I said, "I have got to follow out my superior's instructions," and he tried to burst the door open by throwing himself against it, but the partition and the lock held and it didn't burst it open.

Q. Now, you continued, Mr. Moore, to go to the Borough Hall and perform these duties that you spoke of up until the Supreme Court decided that Mrs. Chalfant was not entitled to her seat and that Mr. Briggs was in fact the Councilman, didn't you?

A. Yes.

Q. And just as soon as you knew that was decided, you quit, didn't you?

A. No, I did not.

Q. Just as soon as that was decided, there was force then used to evict you from the office, wasn't there?

A. I wasn't evicted from the office.

Q. Well, your accounts were taken, weren't they? Weren't the books locked in the safe with the locks changed on the safe?

A. I was taking into consideration the fact that they wouldn't let me work by locking me out.

Q. In other words, they had removed the records from yourself and from Mr. Mayhew, did they not, after that decision?

A. They did take some books, yes. The reason they did that, they came in between Saturday night and Sunday morning and changed the lock or combination of the big safe and some of the books were in there. That is the way they got them.

Q. That was after this decision, wasn't it?

A. The vague decision.

Q. That is your criticism of the Supreme Court's decision, is it?

A. Well, there wasn't either one of them, I guess, to judge what the tenor of it was.

The Court: When was that decision rendered?

Mr. Marshall: I think it was May.

Mr. Porch: The rule for judgment was entered ——

Mr. Haight: May 22nd.

Mr. Porch: The rule for judgment was entered May 22nd.

The Court: May 22nd, 1930?

Mr. Porch: Yes.

Q. Well, after that date, Mr. Moore, there was no work for you to do because you were prevented then from having access to the books?

A. Part of them, yes.

Q. Now, on January 2nd, 1930, you were at the Borough Hall, were you?

A. Yes.

Q. Do you recall Mr. Brown, the Mayor, coming into the Borough Hall on that day?

A. I saw a gentleman come in; I was busy.

Q. Did you know Mr. Brown?

A. I only knew him after he was prominent in politics; that is the only time I ever got acquainted with him.

Q. How long have you lived in Pitman?

A. Twenty-two years; about between twenty-one and twenty-two years.

Q. And when did Mr. Brown become prominent in politics?

A. It was only just here lately, only since this last election.

Q. You mean to say that prior to that last election which was held when—in September, 1929, or November, 1929?

A. Yes.

Q. Prior to that time, you didn't know Mr. Brown?

A. No, I never had spoken to the man, never knew who he was.

Q. Didn't know who he was on the street?

A. Didn't know who he was when I saw him on the street, because I don't think he was in town much through the day.

Q. You saw the man who said he was Mr. Brown, the Mayor, at the meeting on January 1st, didn't you?

A. Yes.

Q. And did you see that same man in the Borough Hall the following day?

A. That was the man, yes.

Q. And did he come in with Mr. Doughty, the Borough Clerk?

A. No, he didn't come in with Mr. Doughty that time.

Q. Was Mr. Doughty in the Borough Hall when Mr. Brown came in?

A. It is highly possible he was; I couldn't say that.

Q. Do you know Constable Crosson?

A. What?

Q. Do you know Constable Crosson?

A. Yes.

Q. Was he in the room at the time that Mr. Brown came in?

A. No, I didn't see him; he may have been there, but I didn't see him.

Q. Did Mr. Brown at that time come in and tell you that you were discharged, that your services were no longer required?

A. He did.

Q. What did you say to him?

A. I didn't say anything to him, because I had been instructed by the four Councilmen to continue on with my work.

Q. But you didn't give the Mayor—you knew that this man was the man that professed to be the Mayor—you knew that, didn't you?

A. Yes.

Q. And you made him no reply whatsoever?

A. I did not; I didn't think it was necessary for me to make a reply.

Q. You didn't tell him at that time or at any other time that you were following the instructions of the four Councilmen?

A. I did afterwards, but not just at that time.

Q. Now, these four Councilmen whose instructions you were following were holding stated meetings, weren't they?

A. What do you mean?

Q. Twice a month?

A. You mean two sets of Councilmen?

Q. Two sets of Councilmen?

A. Oh, yes, we had that right along.

Q. And these four Councilmen, consisting one of Mrs. Chalfant, who was later deposed, was the body that was endeavoring to function as the municipal body in the Borough of Pitman?

A. Yes.

Q. And it was their advice that you were seeking —it was by them that you were employed, was it?

A. No, by the Borough; I always considered I was employed by the Borough.

Q. When you reported the fact to these four Councilmen under whose direction you were working, did they instruct you to continue on with your work?

A. They told me to continue on.

Q. And did they also tell you you would be compensated for your work?

A. Why, I naturally expected that.

Q. And did you hand in your bills?

A. Did I what?

Q. Did you hand in your bill for your services to them?

A. No, I never did hand any in; Mr. Mayhew always made those out.

Q. What did you do when your first pay check didn't put in its appearance?

A. Well, there was two pay checks given to me and they were for the January salary, and I went to the bank and the bank wouldn't honor them because they didn't have Mr. Brown's signature on there.

Q. Who made the checks for your January salary?

A. What?

Q. Who made the checks for your January salary?

A. Mr. Mayhew.

Q. Mr. Mayhew?

A. Yes.

Q. And he was also working under the jurisdiction of these same four Councilmen that you were?

A. No, he was not; Mr. Mayhew wasn't that kind of a man.

Q. Was Mr. Mayhew working under the instructions of Mayor Brown and Mr. Briggs, Kersey and Burkett?

A. No, because Mr. Mayhew was elected to office. He didn't have to take any of that from him as Collector of Taxes.

The Court: Is Pitman a borough?

Mr. Marshall: Yes.

The Court: The Tax Collector is elected, then?

Mr. Marshall: Yes, the Tax Collector is elected.

Q. The check that you received was signed only by Mr. Mayhew, was it?

A. At the time, yes.

Q. And all the previous checks that had been signed disbursing the Borough's funds—do you know whose names were on the checks?

A. Mr. Stanton, in 1929.

Q. The Mayor; and all the checks which you received from the Borough on which you got any

money bore the signature of the Mayor as well as the Borough Clerk, didn't they?

A. There wouldn't have been any.

Q. Isn't that right?

A. What do you say now?

(Previous question repeated.)

A. Yes.

Q. Now, on those checks that you claim that you received from the Borough of Pitman for pay in January bore the signature only of Mr. Mayhew?

A. Yes, awaiting the signature of the Mayor.

Q. Just a minute; you have answered the question.

A. Because the three wouldn't sign. That is where the contention was; otherwise I would have probably got my money.

Q. There was a question in your mind as to whether Mr. Mayhew was the Clerk or whether Mr. Doughty was the Clerk, wasn't there? Was there any question in your mind as to whether Mr. Doughty or Mr. Mayhew was the Borough Clerk?

A. Well, I thought until the case was settled by the Supreme Court that Mr. Mayhew was the Borough Clerk.

Q. You learned when the case was settled in Supreme Court that Mr. Doughty was the Clerk, didn't you?

A. No, I didn't think anything of the kind; I paid no attention to that.

Q. Did you learn that later to be the fact?

A. No, it never affected me that way, I never

bothered with Mr. Doughty's affairs in any way, never made it bother me.

The Court: Mr. Marshall, may I interrupt again? Was there a judicial decision on the question of who was Clerk?

Mr. Marshall: No, there was not, but those matters were more or less brought into prominence by reason of the fact that the Mayor and the three Councilmen had made their Councilmanic appointments. Now, I am interrogating this witness only as to his knowledge as to whether or not Mr. Mayhew, who had been suspended by Mr. Doughty and who had been barred from functioning in the office —whether Mr. Mayhew was still undertaking the functions of Borough Clerk or in what capacity he had signed the checks.

The Witness: I want to say this ——

Mr. Marshall: No, I haven't asked you any questions.

The Witness: —that between Mr. Doughty and myself there was never any contention.

Q. All right; you didn't get your pay on the check that Mr. Mayhew had signed. Now, did you get any checks for February or March or April?

A. No, no, they were made out, but they wasn't handed out to us.

Q. And you continued to work just the same?

A. Yes.

Q. Did you complain to these four Councilmen under whose jurisdiction you were working that you weren't getting your money?

A. I complained to the four Councilmen and I complained to the Mayor.

Q. I am asking you now about the four Councilmen. Did you complain to the four Councilmen under whom you were working that you hadn't gotten your money?

A. Of course I did; they knew I hadn't gotten it.

Q. And did you complain to them and ask them when you were going to get it?

A. I didn't ask them where I was going to get it, because I anticipated I would get it from the Borough, when that misunderstanding or whatever you might call it was settled.

Q. Did they say you would get it from the Borough?

A. That was my understanding. They didn't say so, but that was my understanding.

Q. And then when was it, Mr. Moore, that you went to see the Mayor, after you had been unable to get the money?

A. That was long after I had quit.

Q. After ——

A. Long after I had been out of there.

Q. Then you didn't go to Mayor Brown about any of this until after the decision of the Supreme Court and after you had quit?

A. I didn't feel that there was any chance for me to see him, because there was so much contention in Council at the time, and I didn't believe I would get any answer, and I made up my mind then, through a personal friend of his who instructed me to go

see Mr. Brown and see if I could get him to do something for me, as my wife was out in Oregon and I wanted to bring her home.

Q. Yes, I understood that before.

A. And he said he would do what he could.

Q. When was that, Mr. Moore?

A. Well, I can't just recall what month it was; it was sometime after I had—I can't tell you the month. It was probably six weeks or two months afterwards that I went to him. I had used up all my finances and I had to get something.

Q. These three Councilmen didn't offer to help you out, eh?

Mr. Porch: I object to that as immaterial.

Q. Where did you see Mr. Brown?

A. At his home, on his porch.

Q. Did anyone go with you?

A. No, he and I were alone.

Q. And this is the same man that you went to see that had come into the Borough Hall on January 2nd and told you that you were discharged and that your services were no longer required—that is the same man, isn't it?

A. After he had been in the chair all that while, then I made up my mind that I would try to appeal to his generosity to see whether he could do something for me.

Q. You were appealing to his generosity as Mayor, were you?

A. Sir?

Q. You were appealing to his generosity as Mayor, were you?

A. Yes, I asked him to do what he could for me, not as Mayor, but as a man. I retract that "as Mayor." I said as a man. I went to him as man to man.

Q. You made no reports, did you, Mr. Moore, to the Mayor and the three Councilmen who were functioning twice a month—you made no reports to them, did you?

A. It wasn't necessary, because they knew of it.

Q. You took no orders from them, did you?

A. They never tried to order me to do anything.

Q. And between you and Mr. Doughty—or between you and Mr. Mayhew, your immediate superior, you kept the books and records under lock and key, so that no one else could have access to them, excepting yourself and Mr. Mayhew, didn't you?

A. We had to do that, yes, naturally. If there was any of the Councilmen came in there or any of the citizens came in to make any inquiries, those books were always shown to them and given the best information we possibly could give them.

Q. You had positive instructions not to permit Mr. Doughty or anyone representing him to have possession of those books or records?

Mr. Porch: I object; that is incompetent and immaterial.

Mr. Marshall: I submit it is competent for this reason, if nothing else: Here is a man claims he was injured by reason of the fact he didn't continue this employment. We shall undertake in our defense to show that they by force practically kept anybody else from going in to do the same work

that they are now claiming that they did, rather laboriously, and wanting compensation for.

The Court: I will permit the question.

(Question repeated.)

A. No, I had no such——. I was not ordered in any case to do anything of the kind, as I said before. Mr. Doughty and I had very pleasant relations while we were there. He had no reason in the world to have me deny him anything. The books were on the desk and he could have looked at them, if he chose.

Q. You weren't ordered to keep the Mayor out of there at any other time other than this one occasion, were you?

A. That is the only time, and I only did that under positive instructions.

Q. Did you report, Mr. Moore, to the four from whom you say you were taking instructions the fact that the Mayor had called at your office on January 2nd and instructed you that you were discharged and that your services were no longer required?

A. Now, I don't know whether I told them or not. I may have told them, but I can't recall whether I told them or not, but they seemed to know it through some medium outside of my own.

Q. You say they did know it?

A. They seemed to know it, yes.

Q. Did you hear them discuss it?

A. No, I didn't hear them discuss it.

Q. How do you know they knew it?

A. Well, simply because it was noised around.

There seemed to be some people out in the front of the office who happened to hear some of the remarks, and it was noised around everywhere, and I suppose they got on to it in that way.

Q. But in spite of that, you continued just the same, because your four men, Councilmen, told you to stay?

A. I continued after they told me, because I made up my mind that for the benefit of the taxpayers and those people in Pitman it was necessary to keep the work up, and I did it for that reason as much as anything else. I tried to be a good citizen and do my work honestly and justifiably.

Mr. Marshall: That is all.

By Mr. Porch:

Q. I show you two checks, one dated January 22nd, 1930, for $50.00.

A. Yes.

Q. Is that the check you referred to as being delivered to you by the Borough?

A. Yes.

Q. And another one, dated January 28th, for $50.00; and is that the second check?

A. Yes.

Q. And were those two checks in the aggregate sum of $100.00 paid to you for salary, given to you for your salary?

A. Yes.

Q. Were they collected?

A. I tried to collect them, but they wouldn't pay

me, the bank wouldn't pay me, as they did all the others.

By Mr. Marshall:

Q. You say these were the two checks given you. Were you present when this resolution was passed by the four Councilmen who constituted themselves the Councilmanic body? I observe that the check bears the notation, "Executed in accordance with resolution duly adopted by the Council of the Borough of Pitman, and in pursuance of P. L. 1897, page 296, and supplements thereto and amendments thereof." Now, were you present at the meeting of Council when this resolution was offered?

A. I couldn't say, because even though they met, I employed my time to do the work so I wouldn't run behind in it in any way.

Q. Do you know whether or not the resolution to which this check refers was a resolution passed by the four Councilmen constituting themselves a body, from whom you were taking instructions, or whether it was the Councilmanic body consisting of the Mayor and three Councilmen?

A. I couldn't answer that myself, because I might have heard something but my mind being on my work while they were meeting, I probably didn't pay any attention to it.

Q. You went to the bank with these checks, didn't you?

A. Yes.

Q. And the cashier, Mr. Morris, told you that they could not be paid. Did he tell you why?

A. Didn't say anything about why; he just said they couldn't be paid.

Q. Did he tell you they couldn't be paid because they didn't bear the signature of the Mayor?

A. They didn't, because my former checks were all in that shape, that I got in 1930, and I didn't think there was any question about it—1929.

Q. All the checks that you received in 1929 were like these checks?

A. With Mr. Mayhew's signature.

Q. Yes, but were they in any other respects different?

A. They had Mr. Stanton's name on it.

Q. That is a big difference, isn't it?

A. Well, I suppose it is, but then I didn't pay any attention to that.

Q. You have been a bookkeeper for a good many years—twenty-five years, did you say?

A. Yes.

Mr. Porch: I will offer these checks in evidence.

Mr. Marshall: I don't know for what purpose they would be offered, but I am rather glad to have them in. What is the purpose of the offer?

Mr. Porch: To verify his statements that he received the checks from the Borough.

Mr. Marshall: I, of course, will object to it on the ground that they are not checks of the Borough of Pitman, and cannot be offered for that purpose. They are clearly not checks of the Borough of Pitman. As your Honor will later see, the body that

was meeting at that time consisting of the four people probably if the Supreme Court decision had been that Mrs. Chalfant was entitled to her seat might or might not have been a Councilmanic body for the purpose of the transaction of business, but the determination of that case in the Supreme Court declaring that Mr. Briggs was and always had been the elected Councilman had left them with simply three Councilmen. You know three Councilmen cannot perform Councilmanic acts. So if these are offered for the purpose that they are checks presented by the Borough of Pitman for that salary and then not paid or not honored, I shall objected to them.

Mr. Porch: Mr. Marshall in his cross-examination has continually referred to "four Councilmen" for whom Mr. Moore was working, practically, under whom he took these orders, referred specifically to "four Councilmen." I submit that regardless of any later decision, that the four Councilmen under whom he was working at that time was the Council and that this resolution was properly adopted, and it is a question of law certainly for your Honor.

The Court: I hardly see how it could be, under the decision of the Supreme Court. I suppose you cannot have a de facto officer and a legal officer at the same time performing the same functions, can you? It seems to me this decision of the Court, as I read it, "is and always has been at all times since the commencement of his term of office entitled to his office as a member of Council." I will permit the admission of the checks for what they are worth.

Mr. Marshall: Just so they shall be offered in evidence as being the checks ——

The Court: As being the checks received by this man, which were not honored.

Mr. Marshall: Well, I have no objection to that. The offer as stated by Judge Porch was he offered the checks as checks of the Borough of Pitman.

The Court: I suppose it does not matter what Judge Porch offers them for. It is for me or the jury to say what the checks actually are.

(Said checks marked respectively Exhibits P-1 and P-2.)

By Mr. Porch:

Q. During all this time that you were there doing your work, these other men knew it, Mayor Brown and Briggs?

A. What?

Q. During the time that you were there working for the Borough, these other Councilmen knew all about it, didn't they?

Mr. Marshall: I object to this, may it please the Court, as not being binding upon the Council of the Borough of Pitman whether they knew he was or was not in the office, and I further submit it is repetition.

Mr. Porch: It is perfectly competent to show that these men who are apparently resisting payment of these bills knew that this man was working all the time for five months.

Mr. Marshall: I submit, may it please the Court, that that would be a matter, I suppose, eventually for the Court to decide, or ultimately for the jury. It might be a question, as I have outlined in my statement, of them knowing he was there when by force they were prevented from going in. Surely they knew they were there, but knowing they were there and acquiescing in their being there would be two different things.

The Court: I don't see that the question has a great deal of probative value, or the answer, one way or the other. What is the purpose?

Mr. Porch: My purpose is simply to show this man was working with their knowledge, not necessarily with their consent, but with their knowledge; that is my point, to show that.

The Court: Well, working with their knowledge would have no effect, one way or the other, would it?

Mr. Porch: It seems to me if people know a thing is going on and have knowledge of what is going on, and let a man keep on working there week in and week out and month in and month out ——

The Court: No, I think the question would be

whether or not he had been properly discharged in January, that is, as the proof stands at the present time. If he was employed, which does not seem to be denied, in 1929, and continued in 1930, he would, would he not, be entitled to recover for the services he rendered in 1930, unless he had been properly discharged in 1930. The knowledge of the three members of Council and the Mayor, it seems to me, would not constitute a corporate act, ——

Mr. Porch: All right.

The Court: —one way or the other which would bind the municipality at all. In fact, I don't see how the acts of individual Councilmen can affect the outcome of this suit to any extent at all. This man's right to recover must depend upon the corporate acts of the municipality, plus his own acts, which might or might not constitute him a de facto officer. I am not passing upon that question, but what may have been said or done by individual members of the governing body would not bind the municipality. It would have to be a corporate act to do that.

Mr. Porch: That is all.

GEORGE P. MAYHEW, sworn.

By Mr. Porch:

Q. Mr. Mayhew, where do you live?
A. 122 Columbia Avenue, Pitman, New Jersey.

Q. Do you hold any official position there?

A. I am the Collector and Treasurer, sir.

Q. When were you elected to that office?

A. In the year 1929, November.

Q. And when did you take office, assume the office?

A. On appointment, January 1, 1929, to fill out the unexpired term for one year, and by election starting January 1, 1930.

Q. As Tax Collector?

A. As Tax Collector.

Q. You know Mr. Moore?

A. I do, sir.

Q. Did he work in your office?

A. He did.

Q. And in what capacity?

A. As a bookkeeper and clerk, various types of work.

Q. How long did he work there?

A. From January of 1929 on until June of 1930.

Q. What were his hours?

A. Why, they started at eight o'clock in the morning and there was no definite hour for the finish.

Q. Did he do his work properly?

A. Very well.

Q. By virtue of the fact that you are the Tax Collector of Pitman, you are also the Treasurer?

A. Correct.

Q. You have the records of the Borough showing the payments made?

A. I do.

Q. Were payments made for salary to Mr. Moore all through the year 1929?

A. They were.

Q. And how long did he continue to work after the year 1929?

A. Until after the middle of June.

Q. Was any payment made to him in 1930 for salary?

A. There were no payments made that he realized on, sir.

Q. These checks—did you sign those?

A. I did.

Q. Were they drawn for the purpose of paying his salary?

A. They were.

Q. For services rendered?

A. Yes, sir.

Q. And did he render the same services through 1930, up until June, as he did in 1929?

A. Identically.

Q. Was an appropriation made to pay his wages in 1929?

A. There was money provided under administrative and executive in the budget.

Q. And the same in 1930?

A. Yes, sir.

Mr. Marshall: I object to this; the budget would be the best evidence.

Mr. Porch: Well, I would like to have the budget.

Mr. Marshall: Did you give anybody notice to produce the budget?

Mr. Porch: Well, I gave Mr. Doughty notice to produce it.

Mr. Marshall: I don't seem to have it. Do you want it at this time?

Mr. Porch: Yes.

Mr. Marshall: I understand, if it please the Court, that this is the budget prepared by the so-called Councilmanic body trying to function. I suppose they know more about it than we do.

Mr. Porch: It was the only budget of the Borough of Pitman in 1930, it was the budget taxes were assessed upon and people paid their taxes; it is the budget upon which all money was used and expended in 1930. Whether it is good, bad or indifferent, it is the only one, and the people paid their taxes under it.

Mr. Marshall: I would have no objection to the production of the budget, if we had it.

Q. Where is the budget, Mr. Mayhew?

Mr. Marshall: I am willing that the newspaper reprint should be used.

Q. Where is the budget?

A. The budget was mailed to the Mayor for his signature and he never returned it.

Q. He still has it?

A. I assume he has it yet.

The Court: As I have already stated to Mr. Marshall, you having called for it, he is obligated to pro-

duce it or explain why he can't. Of course, he can't explain what he doesn't have.

Mr. Porch: You say it is not in your possession?

Mr. Doughty: Mr. Mayhew gave the only answer I know.

Mr. Porch: Then we are at liberty, I take it, to use secondary evidence?

Mr. Marshall: I would have no objection to it being used for that purpose, none whatsoever.

The Court: I think the newspaper reprint of it could be introduced in evidence by consent.

Q. You had the original minute book, Mr. Mayhew, when you were Borough Clerk?

A. I did.

Q. And did they have records of the minutes of the meeting of Council attended by four members on January 1st and subsequent meetings?

A. They do have it.

Q. And the minutes of the passage of this budget and the introduction of the budget and the hearing upon the budget?

A. They have it.

Q. And what became of those records?

A. They were in the safe at the time the safe was opened on Sunday and the combination changed.

Q. In the Borough safe?

A. In the Borough safe.

Q. And after that, have you had access to them?

A. I have not; they still have some Collector and Treasurer records in the safe that have never been turned over to me, sir.

Q. And this combination was not disclosed to you and you never opened the safe since?

A. I have not the combination and have not made any effort to open it.

Q. They were in the safe when you locked it up?

A. That is correct.

The Court: Was the budget spread upon those minutes, Mr. Mayhew?

The Witness: The printed exact copy of the budget was attached in the minutes, as was customary in years past.

Mr. Porch: Have you those minutes?

Mr. Marshall: Mr. Porch hasn't made any demand on me for the production of papers. I don't like the embarrassment of this. If he had told me or wants them for this afternoon, I will be glad to get them.

Mr. Porch: The subpoena was served on the Borough Clerk for the production of these records, and that is what I am calling for now.

Mr. Marshall: I thought you were calling for us to produce them by virtue of a notice.

Mr. Porch: No, it was by a subpoena. We call for the minutes. It isn't for him to say whether

his minutes are good or Mr. Mayhew's minutes are good. They are both minutes of the Borough of Pitman.

Mr. Marshall: No, we contend they are no more notes than if a police officer on the corner would write something up and say, "These are the minutes of the Borough of Pitman." We never have looked upon those minutes as being minutes ——

The Court: The only question we are involved in at the present time is the proof of the budget of 1930. Can there be an agreement that the newspaper reprint of that can be introduced in evidence as proof of that budget? If not, we will have to let this present situation stand aside and have the Clerk produce those minutes at the afternoon session.

Q. Was an appropriation made in the budget of 1930 to take care of the salary of Mr. Moore?

Mr. Marshall: I object to that, may it please the Court; the budget would speak for itself, or the copy thereof.

Mr. Porch: These budgets, as your Honor knows, are made up in lump sums, and they cannot simply say—there would have to be an explanation of this.

The Court: I think you would have to introduce the budget first, and if the budget is ambiguous, then anyone having knowledge of the amounts which it comprises might testify with respect to them.

Q. Is this, to the best of your collection, a copy of the budget, Mr. Mayhew?

A. That is correct.

Q. And was that the only budget prepared in the Borough of Pitman in 1930?

A. That is correct.

Q. Was a copy of that budget sent to the Department of Municipal Accounts, Trenton?

A. It was.

Q. Was that budget the basis upon which taxes were assessed and collected throughout the year of 1930?

A. It was and is still collecting them, sir.

Q. Does that budget include an appropriation for the salary of Mr. Moore?

Mr. Marshall: I object to that, may it please the Court.

Q. If you know?

Mr. Marshall: I object to that. I think the budget——

The Court: I think the regular way would be to offer the budget.

Mr. Porch: Well, we will offer the budget now, if the Court please.

(Newspaper reprint of budget marked Exhibit P3.)

Mr. Porch: The budget, if your Honor please, includes various items, like governmental expense.

The Court: All right, if he knows, he may testify what items are included in governmental expense.

A. Are the salaries in there of the officials of the Borough of Pitman and clerical hire?

A. In the break-down, constituting these total subdivisions, items are listed as salary.

Q. As Collector and Treasurer, you were familiar with the preparation of the budget?

A. I assisted in the preparation of it, sir.

Q. And do you know what items were allowed in the budget for salary?

A. I do.

Q. How were those items taken care of in the budget—how are they made up?

The Court: Now, is this under the item of governmental expense that you are talking about?

The Witness: Administrative and executive and assessment and collection of taxes.

The Court: Yes.

Q. Well, under those items is a salary provided for Mr. Moore?

Mr. Marshall: I object to that, may it please the Court.

Q. For the work of the nature that Mr. Moore did?

Mr. Marshall: I object to that, may it please the Court.

The Court: On what ground?

Mr. Marshall: On the ground that he already has stated that that is covered in the budget, an amount for the purpose of covering salaries for Borough employees. Now, to single out Mr. Moore, Mr. Jones or Mr. Smith and ask whether he is included in there is surplusage.

The Court: If surplusage is the only objection to it, I will admit it. The question may be asked.

(Exception noted for the defendant.)

(Question repeated.)

Mr. Marshall: Now, just a minute. I object to it on the further ground that the question should be framed to cover the expense for the work of the office. I would have no objection to that, but when it is in reference to an appropriation being made for Mr. Moore, then I do object.

The Court: I think the qualification asked for by Mr. Marshall is perhaps a correct one and the objection well taken in that particular. The appropriation is not for a particular man; it is for an office or for the service rendered.

Mr. Porch: That was the latter part of my question, I think.

The Court: Reframe your question.

Q. In the 1930 budget, was there an appropriation made to pay wages or salary to someone for the type of work that Mr. Moore had done the previous year?

A. There was.

Q. As Treasurer and Collector, has that money been expended?

A. It has not.

Q. Neither to Mr. Moore or anyone else?

A. It has not.

Q. Was there any charge made against that item in the budget in 1930?

Mr. Marshall: Pardon me just a moment. May I have that question?

(Question repeated.)

A. Yes, there was a charge made against that item as it appeared in the budget, but not against the particular break-down portion of the item as provided for originally. There are numerous items, in other words, involved in the administrative and executive as contained in the budget.

Q. You saw the original budget, a copy of which has been offered in evidence?

A. Yes, I prepared it.

Q. You prepared it; and who signed it?

A. Why, I signed it, sir.

Q. Yes.

A. The Mayor didn't sign it, to the best of my knowledge.

Q. Did anybody else sign it when it was offered?

A. I believe it was signed by members of Council.

Q. Who?

A. Bone, Nichols, Napier and Chalfant.

Q. That would appear on the original ordinance, if it was in evidence, would it not?

A. I believe it would; that is my recollection, that they did sign it.

Cross-examination.

By Mr. Marshall:

Q. Were you present when this budget was prepared, Mr. Mayhew?

A. I was.

Q. Who prepared it?

A. Individuals, you mean?

Q. Yes.

A. Bone, Nichols, Napier, Chalfant, Porch, Mr. Dorset, of the State Department, and myself.

Q. You speak of Mr. Porch, the counsel for the plaintiff here?

A. I do.

Q. The Mayor wasn't consulted on the budget?

A. He was given special notice to be present at that meeting.

Q. That is, your body invited the Mayor, that he could be present if he cared to be?

A. It wasn't that way. It was a notice to him that the budget meeting was to be held.

Q. And you had the records, didn't you?

A. I had the records, of course.

Q. The budget couldn't be made without access to those records, could it?

A. I don't know why it couldn't.

Q. Do you think that it could?

A. Well, they did it this year, largely.

Q. Do you think that without having access to the records of the Borough of Pitman that the Mayor and the other three Councilmen could have made up a successful budget for the year 1930?

A. I think they could have made a pretty good stab at it.

Q. It would be a stab, wouldn't it?

A. With the assistance of the State Department, who has all data.

Q. You had all the records, didn't you?

A. All the records were in the Borough Hall.

Q. And you refused to turn them over to Mr. Doughty, who had been appointed Borough Clerk on January 1st?

A. His appointment was questioned.

Q. Was questioned then, but later found to be a correct one, wasn't it?

Mr. Porch: There is no proof of that.

A. I don't believe so.

Q. You don't believe so?

A. I don't believe it has ever been found to be correct or legal, sir, proven to be.

Q. The dispute arose over the seat of Mrs. Chalfant and Briggs—that precipitated the question that you have spoken of, didn't it?

A. The whole question hinges, as I saw it, on

whether Mrs. Chalfant was a de facto member of Council from the first of the year until the Supreme Court decision.

Q. I see; in other words, if there had been no question relative to Mrs. Briggs—or Mr. Briggs and Mrs. Chalfant being the Councilman, there would have been no question concerning your appointment or the appointment of Mr. Doughty?

A. There would still have been a question in my mind.

Q. Still?

A. Positively, because there was but three votes obtained by Mr. Doughty and other appointments of the Mayor.

Q. And that question persisting in your mind, you kept possession of the books and would not turn them over to Mr. Doughty, did you?

A. I didn't turn them over and no positive demand was made on me to turn the books over.

Q. You took pretty good care to see they were under lock and key?

A. As always prior to that time.

Q. Did you have an officer stationed there to see they wouldn't be taken from you by force?

A. I didn't have that done.

Q. Did you know officers were stationed there?

A. There was for a couple of days.

Q. In making up your budget for the year 1930, you and Mr. Napier, Nichols, Bone, Mr. Porch and Mr. Dorset—you had access, of course, to the Borough records for the purpose of preparing the Borough budget, didn't you?

A. Correct.

Q. The work that Mr. Moore did during the year 1930—do you know whether any portion of that was obliged to be done over again?

A. Whether it was necessary to do it over again?

Q. Yes.

A. I don't believe it was necessary. I know that it was done, but it wasn't necessary, sir.

Q. That is your opinion?

A. I know that it wasn't necessary.

Q. And the work that he formerly did has been done by others since he left the Borough Hall?

A. Only in a small part.

Q. And there has been nothing paid, you say, for it?

A. To ——

Q. The services, so far as you know, have been paid for, have they not?

A. Paid from water and sewer account, but not from the budget.

Q. Paid from a water and sewer account?

A. Not from the budget.

Q. Now, the checks that you referred to as having been given by you, signed by you, to Mr. Moore were ordered paid by whom?

A. The de facto government of Council.

Mr. Marshall: I ask that be stricken out as being a conclusion on the part of this witness as to whether it is or is not a de facto government.

The Court: That may be stricken.

Q. Who instructed that the checks be given by

you to Mr. Moore for payment of services alleged to have been performed by him?

A. The four members of Council before mentioned.

Q. That is, consisting of Napier, Nichols, Bone and Mrs. Chalfant?

A. Correct.

Q. Who was determined in June not to be a member of Council?

A. After that date, after the Supreme Court decision had determined that she was no longer of Council.

Q. And these checks were issued not upon any order from the Mayor or the other three Councilmen, to wit, Burkett, Kersey or Briggs?

A. That is correct.

Mr. Marshall: I think that is all.

By Mr. Porch:

Q. Did the Mayor ever demand any records of you, so he could prepare a budget?

A. No, he did not.

Q. And he knew of the proposed budget meeting?

A. Yes, indeed.

Q. He didn't attend it?

A. It was sent around by police, the notice.

Q. Were you under bond, Mr. Mayhew?

Mr. Marshall: I object to that, may it please the Court.

Mr. Porch: To show why he guarded the records, I think it is competent.

The Court: I don't know that it is necessary to show that. He is entitled to guard the records, he is responsible for them as long as he is in office.

Mr. Porch: That is all.

By Mr. Marshall:

Q. The budget hearing you are speaking of is one that you and the four Councilmen that you have named had decided to hold, wasn't it—that is the only budget hearing that you are referring to?

A. I didn't get that.

Q. The only budget hearing that you are referring to, that you had given the Mayor notice to attend, was one that the four Councilmen of whom you have spoken, Napier, Nichols, Bone and Chalfant, had decided to hold?

A. Right.

Mr. Marshall: That is all.

By Mr. Porch:

Q. And it was the only budget throughout the year?

Mr. Marshall: I object to that, may it please the Court, as repettion; it has been gone into on direct examination.

The Court: I think that is already in the testimony.

Q. You were Borough Clerk in 1929?

A. I was.

Q. And you continued to exercise that office in 1930?

A. I did.

Q. And were minutes made of the meetings in 1930?

A. They were.

Q. Complete, full minutes of the meetings?

A. In minutest detail, sir.

Q. And those minutes were left in the safe?

A. They were in the safe at the time it was broken into, sir.

By Mr. Marshall:

Q. Mr. Mayhew, were you shortly after the first of January, 1930, served with a written notice to turn all your books and records as Borough Clerk over to your successor, Mr. Doughty?

A. I was.

Q. When was that, about?

A. I could not tell you the date, sir.

Q. Prior to the time that you made up the budget?

A. I couldn't answer that, either; I don't recall.

Q. But you refused to do it because you doubted the appointment of Mr. Doughty?

A. I didn't refuse to do it, sir.

Q. Did you do it?

A. I didn't do it.

Q. How is that?

A. I did not do it, but I didn't refuse to do it.

Q. What did you do, just remain quiescent?

A. Yes, naturally, under the circumstances that existed.

Q. That is, you gave no answer to the demand for the books—you didn't say either, "I won't," or "I will?"

A. That is right.

Q. And you continued as Borough Clerk down until what time?

A. 20th of June.

Q. And then who has had charge of your office from that time, do you know, as Borough Clerk?

A. Mr. Doughty has assumed the duties, sir.

Mr. Marshall: That is all.

By Mr. Porch:

Q. Well, were you re-appointed Borough Clerk in 1930?

A. I was.

Q. And the records of the Council that you prepared as Borough Clerk shows that?

A. It does.

Q. You qualified as Borough Clerk?

A. I did.

Q. But those records are not in your possession?

A. They are not.

Q. And you cannot get hold of them?

A. That is correct.

Q. And you endeavored to get hold of them and found the safe locked?

A. That is correct.

Q. And the combination changed on the lock?

A. Correct.

Q. And there is no question but the records, the minutes of the meeting of January 1st, shows your appointment?

Mr. Marshall: I object to that, may it please the Court.

Mr. Porch: It is secondary evidence.

Mr. Marshall: No, there is no question about that, that it calls for an opinion.

Mr. Porch: That the minutes show that?

Mr. Marshall: It is a question of fact for the jury to determine.

The Court: I suppose the form of that question is objectionable.

Q. The minutes show your appointment as Borough Clerk in 1930?

Mr. Marshall: I object to that, unless it be shown the minutes you are asking for are not produced.

Mr. Porch: Well, they are not produced; we have asked for them.

Mr. Marshall: There might be a question as to whether or not we would be obliged to produce the

minutes. We have the minutes of Council, but you are talking about the other minutes.

Mr. Porch: We are talking about the minutes Mr. Mayhew made.

Mr. Marshall: We will have the minutes here, if you want them.

Mr. Porch: They were called for, "other papers, documents" ——

Mr. Marshall: They are not minutes. I don't want to be quarrelling about it, but they are the written memorandum of what these three men continued to do. Now, if they want them—we know they want them, and I will see they are produced, and I think that would be better than to have this witness recite ——

The Court: I suppose that is the best evidence. Of course, when you say they are not minutes, I suppose after all that is a question yet to be decided, isn't it?

(After further argument):

The Court: I will sustain the objection to the question and wait for the production of the best evidence.

Mr. Porch: Yes, with the understanding the minutes will be produced?

The Court: Yes. If not, you may recall your witness and produce the secondary evidence.

Mr. Porch: That is all.

ELMER ELWOOD BONE, sworn.

By Mr. Porch:

Q. Where do you live, Mr. Bone?
A. Pitman, New Jersey.
Q. How long have you lived there?
A. Twenty years.
Q. Are you a member of Council?
A. I am.
Q. Were you a member of Council during the years 1929 and 1930?
A. I was.
Q. What committees did you serve on in 1929?
A. 1929? Why, on the finance committee, I was director of water and sewer, and two other miscellaneous committees.
Q. You know Benjamin F. Moore?
A. Yes, sir.
Q. Did he work for the Borough of Pitman?
A. He did.
Q. All through the year 1929?
A. He did.
Q. And how much longer?
A. In 1930, when they took the records by changing the lock on the safe, of course, he couldn't get anything to work with, and that absolved him.

Q. What was he to be paid for services?
A. $1300.00, provided for in the budget, a year.
Q. And was he paid?
A. 1929 he was; nothing in 1930.
Q. Should he be paid?
A. He should, in my estimation.

Mr. Marshall: I object to that, may it please the Court.

The Court: That is a legal conclusion; that is what we are here for, to find the answer to that question.

Q. Did he do the work?
A. Did very well.

Mr. Marshall: I object to that as not responsive. The question was, "Did he do the work?" and it calls for a yes or no.

The Witness: Yes.

Q. How did he do it?
A. Well, ——
Q. In what way?
A. Well, in what way? The same as any other good bookkeeper would do it, if that answers your question.

Mr. Porch: Cross-examine.

(No cross-examination.)

HAROLD D. NICHOLS, sworn.

By Mr. Porch:

Q. Where do you live, Mr. Nichols?
A. Pitman, New Jersey.
Q. How long?
A. About thirteen years.
Q. Were you a member of Council in 1928, 1929 and 1930?
A. I was.
Q. And your term expired December 31st, ——
A. 1930.
Q. You know Benjamin F. Moore?
A. I do.
Q. Did he work for the Borough of Pitman?
A. He did.
Q. In 1929 and 1930?
A. He did.
Q. What committees were you on?
A. Highway, public safety, finance, audits and accounts—everything, in fact, except sewer and water.
Q. You knew he was working in 1930?
A. I did.
Q. And what was he to receive for his wages?
A. $25.00 a week, or $1300.00 per annum.
Q. And you participated in the meetings of Council that were held in 1930?
A. I did.
Q. All your minutes were kept by Mr. Mayhew?
A. They were.

Q. And this budget was passed by the Council that you attended?

A. It was.

Q. Taxes collected under that budget?

A. Correct.

Mr. Porch: Cross-examine.

Cross-examination.

By Mr. Haight:

Q. Mr. Nichols, you testified on direct examination that you knew Moore had worked in 1930. Who authorized him to do that work?

A. Council.

Q. When you say "Council," do you mean the individual members of Council or at the Council meeting?

A. Well, he received directions to work under the same man he had the year before.

Q. You mean 1929?

A. In other words, it wasn't a direct motion of Council for ever one of his instructions. It was customary to receive his instructions from the finance committee and the members of Council, and the custom was followed out in 1930.

Q. I understand that, that there might not be a Councilmanic action for every one of his duties, but what I mean is this: Was there Councilmanic action for hiring him in 1930?

A. He was never dismissed.

Q. By whom?

A. By no one.

Q. Wasn't there ever any Councilmanic action taken on his discharge?

A. Not that I know of.

Q. You are pretty sure of that?

A. Not that I know of, and I attended every meeting of Council, and there was nothing done in the budget.

Q. When you say you attended every meeting of Council, you mean the meetings presided over by the Mayor?

A. Yes, at which he refused to function, and, of course, we went on and operated under the President of Council. It was all one meeting—you recall that—it wasn't two separate meetings; just a continuation.

Q. Who employed Moore in 1929?

A. Why, the Borough Clerk was instructed—The fact of the matter is—Mr. Briggs, I will say, instucted the Borough Clerk to employ Mr. Moore. That is the best of my recollection.

Q. In conformity with Councilmanic action?

A. Yes.

Q. You are pretty sure of that?

A. Yes.

Q. You say at some meeting of Council in 1929, authority was conferred upon the Borough Clerk or the Collector to employ Moore?

A. That is correct. Mr. Robins and Mr. Briggs were present.

Mr. Haight: That is all.

By Mr. Porch:

Q. You don't remember just what meeting that was, but it was a regular meeting of Council—is that right?

A. I am not positive about that. I know all were present, however. It might possibly have been the budget meeting.

Q. And regardless of that fact, he was as a matter of fact paid through the year?

A. There was no question about his being employed, no protest at all. It was done by full accord of Council.

Q. And he was paid by Borough checks?

A. In the usual manner, the same as all other warrants for expenditures.

Mr. Porch: That is all.

By Mr. Haight:

Q. A few more questions on this question of your attendance at Council meetings. Did you attend and participate in all meetings presided over by the Mayor in 1930?

A. Up until June. I think I attended the first meeting of July. After that I was indisposed and absent, I think, three consecutive meetings.

Q. Did you perform your duties as a Councilman and continue to take part in the entire Councilmanic meeting on each occasion?

A. I did.

Q. Did you do that on the annual meeting, January 1st, 1930?

A. I did. That was held on the first floor of the building, instead of the Council chamber.

Q. Did I understand you to testify that you remained in constant attendance at all meetings in 1930 presided over by the Mayor?

A. Yes, that is correct, but, of course, with the exception of that meeting on the first of the year. It was never properly opened, I didn't consider it was a regular meeting. That meeting was held on the first floor.

Q. Your other answer was wrong?

A. No, my answer was correct. Every properly constituted Council meeting, I was present, where it was opened in proper form for the transaction of Borough business.

By Mr. Porch:

Q. You weren't present at the meetings over which the Mayor presided after January 1st, 1930?

A. No.

Q. In fact, you weren't present when any of the alleged appointments were made by the Mayor at that time?

A. No, I have no knowledge of that.

Q. Nor was Mr. Bone nor Mrs. Chalfant nor Mr. Napier present?

A. The President of Council called a meeting on the first floor of the building.

Q. Just answer that question. Were you present when the alleged appointments were made by the Mayor on January 1st, 1930—were you in that room?

A. I was not.
Q. Was Mr. Bone in the room?
A. To the best of my knowledge, he was not.
Q. And Mr. Napier?
A. He was not.
Q. Or Mrs. Chalfant?
A. No.
Q. But you had a meeting in another part of the Borough Hall?
A. We did.
Q. Presided over by the President of Council?
A. That is correct.
Q. And Mr. Mayhew was the Clerk?
A. That is correct.
Q. And took the minutes of that?
A. That is correct.
Q. And at that time, was Mr. Mayhew appointed Clerk?
A. Yes, that is my recollection.

Mr. Porch: That is all.

The Witness: Of course, the minutes will show that.

JOHN M. NAPIER, sworn.

By Mr. Porch:

Q. Where do you live, Mr. Napier?
A. In Pitman, 203 Pitman Avenue, Pitman.

Q. How long have you lived there?

A. About twenty-eight years in that house, but I have been a resident of Pitman for about forty years.

Q. Are you a member of Council?

A. I am, sir.

Q. How long have you been a member of Council?

A. On the first day of last January, I filled in five full terms, fifteen years.

Q. Then you were a member of Council consecutively ——

A. I missed three years during that, one term; I missed one term.

Q. For the past three years you have been continuously a member of Council?

A. Yes, sir.

Q. You know Mr. Moore?

A. Sure; yes, sir.

Q. Was he employed by the Borough in 1929?

A. He certainly was; yes, sir.

Q. In 1930?

A. Yes, sir; he served in 1930 for the first six months.

Mr. Marshall: I ask that be stricken out as not responsive.

The Court: Read the question and answer.

(Question and answer repeated.)

Mr. Marshall: He is asking first about his employment in the year 1929, and he says, "Yes, sir."

Now, he says as to 1930. Now, he is now talking about employment as one item and service as another.

The Court: You may reframe your question.

Q. Was he working for the Borough in 1930?
A. Yes, sir.
Q. Was he paid?
A. No, sir, not to my knowledge.
Q. What did he receive in 1929?
A. $25.00 per week.
Q. And in 1930, what type of work did he do as compared with 1929?
A. He continued with the same job as 1929.
Q. He worked under Mr. Mayhew, did he?
A. Positively, yes, sir.
Q. Mr. Mayhew was the Tax Collector?
A. Yes, sir.
Q. And he was also the Borough Clerk?
A. To the best of my knowledge he was; yes, sir. The reason I always thought him the Borough ——

Mr. Marshall: I object to that.

Mr. Porch: All right.

Q. He was appointed in 1929 as Borough Clerk, wasn't he?
A. Mr. Mayhew; yes, sir.
Q. And in 1930?
A. 1930 ——

Mr. Marshall: I object to that, may it please the Court.

Mr. Porch: It is in the minutes we can't get, if the Court please.

Mr. Marshall: Oh, you will get them.

The Court: What was the question?

(Question repeated.)

Mr. Marshall: I object to this.

The Court: I suppose that is a conclusion, Mr. Porch?

Q. Well, he acted as Borough Clerk?
A. He acted as Borough Clerk; yes, sir.
Q. And he took the minutes of the meets that were held by yourself as President of Council?
A. Yes, sir.
Q. And Mrs. Chalfant?
A. Yes, sir.
Q. And Mr. Bone?
A. Yes, sir.
Q. And Mr. Nichols?
A. Yes, sir.
Q. Those minutes were taken?
A. Taken by Mr. Mayhew, acting as Borough Clerk.
Q. In 1929, Mr. Moore was paid by the Borough?
A. Yes, sir.

Q. Under authority of Council?
A. Yes, sir.
Q. And why wasn't he paid in 1930?
A. The Mayor wouldn't sign no checks, he refused to sign checks.

Mr. Porch: That is all.

Cross-examination.

By Mr. Marshall:

Q. Mr. Napier, did I understand you to say you were President of Council?
A. I beg your pardon?
Q. Did I understand you to say you were President of Council?
A. Yes, sir.
Q. And you are now, aren't you?
A. I am now, yes, sir.
Q. And you were such on January 1st?
A. Yes, sir.
Q. Did you as President of Council and the body that you were presiding over employ Mr. Moore for the year 1930?
A. I beg your pardon? I didn't quite get your question.

(Question repeated.)

A. We gave Mr. Moore instructions to go ahead. May I answer the reason why we did that?
Q. No, I am not asking that.
A. There was a reason for doing it, all right.

Q. At the time you were functioning, on January 1st, as President of Council, the Mayor, William P. Brown, was in Pitman, wasn't he?

A. Yes, sir.

Q. In the Borough Hall?

A. Yes, sir.

Q. And you were setting up and conducting a meeting over which you presided as President of Council in the same building and at the same time he was presiding over a meeting, didn't you?

A. Yes, sir.

Q. Now, did Mr. Moore report to you and your body the fact that he had received notice from Mayor Brown that he was discharged and that his services were no longer required?

A. He told me about that, but I don't know just when he told me. I have no recollection of the day and date he told me on.

Q. Can you recall it was some time during the month of January?

A. I couldn't say that it was in January, I wouldn't want to say, because I got no memory of how far back. I know I heard that; that is all I know, is what I heard about it.

Q. Did you undertake to take any action with respect to it?

A. Well, only just the same action that had been taken. We told Mr. Moore to remain where he was, that we had reason for doing that.

Q. And what was your reason for doing that?

A. The reason was Mr. Doughty had never qualified for Borough Clerk, he never presented the bond or never sent his signature, to the best of my knowledge, to the Secretary of State, never qualified and

didn't qualify until away in June. Therefore, we didn't consider Mr. Doughty as Borough Clerk. Mr. Doughty had the appointment but never qualified.

Q. And that is the reason you decided—that is, you and the meeting over which you were presiding decided to instruct Mr. Moore to continue?

A. That was one of the reasons and one of the reasons why there was no money paid. We wouldn't recognize Mr. Doughty as Borough Clerk signing a check, because he had never qualified for his appointment.

Q. Is that another reason why you decided to continue Mr. Moore in his office?

A. We continued Mr. Moore—if you want to bring it right out, I will give it to you straight from the shoulder. There was a shortage in the office, and we wanted to find that shortage and we didn't want to take Mr. Moore out until we did find the shortage, and we did find the shortage.

Q. Why did you hesitate to tell us that with the very beginning, if that is the only reason?

A. I beg your pardon?

Q. Why did you hesitate to tell us that with the very beginning, if that is the only reason?

A. I didn't know that I had the authority to do it.

Q. I was asking the reason.

A. You asked me a question, but you didn't ask me why we continued with Mr. Moore.

Q. Is that the only reason?

A. That was one of the points. Another of the points was we felt that Mr. Moore was very important to remain in the office, because he had gone through on this work and had known the conditions

and would be more able to with it than a new man that was put there.

Q. Do you know of any of these meetings that you were presiding over as President of Council—whether they were held on the same dates that Mr. Brown, as Mayor, held his meetings?

A. On what date do you refer to?

Q. On all the dates you had your meetings.

A. Never, only on the first of January. That was all, but our meetings—we always attended Mr. Brown's meetings. When he called a meeting to order, we were there and attended his meeting, and he would come there and call a meeting, call the roll and adjourn, and we would continue with the meetings.

Q. He transacted some business, didn't he?

A. Well, never to my knowledge was there any business of the Borough transacted in Mr. Brown's meetings.

Q. At none of his meetings?

A. There may have been, but I have no knowledge of any, if there was.

Q. The minutes would disclose that, wouldn't they?

A. I beg your pardon?

Q. The minutes would disclose the transaction of business?

A. Yes, if you can find them.

Q. You mean the minutes of the Council over which Mayor Brown presided?

A. That is the ones.

Q. Are you questioning whether those minutes can be found or not?

A. I don't know; we never could get hold of them.

Q. Did you ever try?

A. I haven't tried, but there has been several efforts there.

Q. For what purpose?

A. Wanted to see what it was.

Q. You attended the meetings, didn't you?

A. I attended the meetings, but there was no minutes taken. The roll was called and there was no business transacted. The roll was called and there was an adjournment. Mr. Brown would say, "An adjournment is in order," and they would adjourn.

Q. Was that the order of business at all meetings that Mr. Brown held from the first of the year?

A. I am not prepared to say it was, but that is the way it is in my recollection. I don't know every time, but on one occasion, Briggs and Mr. Burkett and the Mayor come in and tried to preside over Council with two men and did preside over Council, opened it and called the roll and adjourned and went out.

Q. Now, Mr. Napier, you have been very pleasant about it. Can you tell us any meeting that Mr. Brown presided over at which any business was transacted?

A. To the best of my knowledge, I couldn't.

Q. And you attended every meeting, I expect, didn't you?

A. I have attended every meeting, never missed a meeting.

Q. And after the Mayor and Mr. Briggs and Kersey and Burkett had met, you immediately called Council to order as President of Council, did you?

A. No, sir, I never called that Council to order.

Q. Well, after the Mayor would adjourn, then you would start to function?

A. While I presided the first day of January, we went downstairs because it became so unruly we couldn't stay in the room, and we went downstairs and held a meeting of our own and nominated Mr. Bone as President, and Mr. Bone presided over those meetings.

Q. I thought you said you were President of Council?

A. So I was President of Council and elected President of Council by Mr. Brown's members of Council, but I didn't recognize that because I felt that there wasn't enough of them to do it, and I wouldn't recognize the honor of being elected.

Q. Mr. Bone then was the man that called the meeting to order after Mayor Brown's meetings, and presided over them as President of Council?

A. Yes, sir.

Q. That is it, is it?

A. Yes, sir.

Q. And you attended those meetings?

A. Oh, yes, sure.

Q. And your body—at the meeting presided over by Mr. Bone, was the fact of Mr. Moore's dismissal and discharge by the Mayor discussed?

A. Yes, sir.

Q. And in spite of that, you instructed him to hold on to the job and wait to see what the Supreme Court said?

A. Yes, sir.

Q. And that is what you decided to do?

A. Yes, sir.

Mr. Marshall: That is all.

By Mr. Porch:

Q. These meetings that were presided over by Mr. Bone—were they held in the regular Council Chamber of the Borough of Pitman?

A. Yes, sir.

Q. Where Council had been held right along, continuously for years?

A. Yes, sir.

Q. And they were held on the same night?

A. The same night. In my estimation, they were a continuation of the adjourned meeting by Mr. Brown as Mayor and his members of Council. We weren't satisfied, we felt we had a majority, as it stood, and we wouldn't adjourn the meeting. We went on and transacted the business.

Q. Was the Mayor invited to remain?

A. Yes, sir, every time he was asked to preside over our meetings, every time.

Q. Did he remain?

A. I think he did on one or two occasions, but outside of that I don't think he did.

Q. And it was at one of these meetings that the budget was passed?

A. Yes, sir.

Mr. Porch: That is all.

By Mr. Marshall:

Q. Did Mr. Doughty also attend these meetings?

A. Yes, sir.

Mr. Marshall: That is all.

(At this point a recess was taken until 1:30 o'clock P. M.)

(Trial of the cause resumed at 1:30 o'clock P. M., pursuant to adjournment, in the presence of counsel for the respective parties.)

GEORGE P. MAYHEW, recalled.

By Mr. Porch:

Q. Mr. Mayhew, you now have the minutes that were made by you during 1930?

A. I haven't checked through to see if I have them all, but I have most of them.

Q. And when do they start?

A. Start January 1st.

Q. And to what date do they continue?

A. These extend to April of 1928, I am pretty sure——

Q. April, 1928?

A. April 28th, 1930.

Q. Among those minutes is there a record of the introduction of the budget and tax ordinance?

A. There is.

Q. And the adoption and approval of it?

A. There is.

Q. Do those minutes show a meeting was held—a hearing held on the tax ordinance and budget?

A. It does.

Q. Do those minutes show the appointment to office of anyone?

A. Yes, it shows all the appointments we made.

Q. What date were those appointments made?

A. February 10th.

Q. By whom?

Mr. Marshall: I object to this, may it please the Court, as having no bearing upon this issue, unless it appears that they are the minutes of the regularly constituted Council of the Borough of Pitman.

Mr. Porch: We claim they were made by Mr. Mayhew, whose office as Borough Clerk in 1929 was unquestioned, and there is a dispute as to whether he was lawfully succeeded by anyone else, whether anyone else had been duly appointed. There is no proof of that in the case; that is a matter of defense, and I think we are entitled to show that not only did he hold that office in 1929, but also in 1930, by these minutes.

The Court: I will overrule the objection.

(Exception noted for the defendant.)

Q. Now, what appointments were made, according to the records?

A. Appointments by resolutions which were properly adopted for myself as——

Mr. Marshall: Are you reading now?

The Witness: I am trying to read.

Mr. Marshall: I didn't know whether what you just said——

The Witness: I am just trying to summarize what is in the minutes.

Mr. Marshall: I didn't know whether the witness was reading or giving us a resumé of what was there.

Q. Just read it.

A. "Moved by Nichols, seconded by Napier, that Council make the appointments. Carried. A resolution was then offered by Councilmen Nichols, Bone, Napier and Chalfant, appointing George P. Mayhew Clerk of the Borough of Pitman, which appointment carries with it the position of Clerk of the Water and Sewer Departments and also as Tax Search Officer, to serve until January 1, 1931, and until his successor shall have qualified. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

"A similar resolution was offered appointing Willis Tullis Porch Borough Solicitor to serve until January 1, 1931. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chal-

fant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

"A similar resolution was offered appointing Robert S. Hickman Supervisor of Highways to serve until January 1, 1931. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

"A similar resolution was offered appointing Messrs. Carter, Edgar and Wittwer Borough Engineers to serve until January 1, 1931. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

"A similar resolution was offered appointing Robert Q. Dawson Janitor Municipal Building to serve until January 1, 1931. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

"A similar resolution was offered appointing A. V. Peterson a Member of the Board of Health to serve for three years. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

"A similar resolution was offered appointing T. A. Goodwin a Member of the Board of Health to serve for three years. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted."

Q. That is enough.

Mr. Marshall: Now, may I ask to have the question?

(Question repeated.)

Mr. Marshall: I, of course, objected to it, and there was an objection—or an exception to my objection noted, wasn't there?

The Court: Yes, I think so.

Mr. Porch: I didn't know there was any exception taken to any of this testimony.

The Court: There was an objection to your first question in respect to it.

Q. Now, at these meetings, according to your minutes, was the Mayor there at the time?

A. He was not.

Q. At some of these meetings, I mean, during 1930? These minutes—are they from the opening of the whole meeting?

A. From the very beginning, when the Mayor opened the meetings.

Q. And it included what he did and what was done——

A. From the start of the affair until the end.

Q. Those minutes were all taken by you?

A. They were.

Q. Transcribed by you and signed by you?

A. Correct.

Q. And they correctly recite the record of the proceedings on the various dates that have been enumerated?

A. Yes, sir.

Q. Were all these meetings held on the stipulated Council nights?

A. Second and fourth Monday evenings, regularly stated meetings. There were some special meetings.

Q. I mean, the regular meetings of Council were held at the appointed time and hour and place?

A. That is correct.

Q. In the Municipal Building of the Borough of Pitman?

A. In the Council Chamber.

Mr. Porch: I offer the minutes in evidence.

Mr. Marshall: I object to them on the same ground, that they do not constitute the minutes of the duly constituted body and are not binding upon the defendant.

The Court: Same ruling.

(Exception noted for the defendant.)

(Large number of typewritten sheets marked together as Exhibit P4.)

Mr. Porch: Cross-examine.

Cross-examination.

By Mr. Marshall:

Q. You, of course, were vitally interested in the outcome of the appointments, weren't you, Mr. Mayhew?

A. Me, personally interested?

Q. Yes.

A. Not necessarily.

Q. You either were or were not the Borough Clerk?

A. That is correct.

Q. And if you were the Borough Clerk, that of course, carries with it a salary, and if you weren't Borough Clerk, you didn't get the salary?

A. If I hadn't been acting Borough Clerk, I would have produced more money in 1930 than I did, decidedly more.

Q. You might have had another job?

A. I did have another job on furlough that I could go back to any minute that I chose to, and I chose to go back on the 23rd of June and have been there ever since.

Q. You say you chose to go back. That was after the case was decided in the Supreme Court?

A. After the Briggs case was decided, that is right.

Mr. Marshall: I think that is all.

By Mr. Porch:

Q. Where are you working now, Mr. Mayhew?
A. Pennsylvania Railroad, General Manager's Department.
Q. And how long have you been working there?
A. Between twenty-eight and twenty-nine years, aside from the year and a half that I was on furlough attending to the duties in Pitman.

Mr. Porch: That is all.

By Mr. Marshall:

Q. Were you functioning, Mr. Mayhew, contrary to the wishes and instructions and the three Councilmen, to wit, Briggs, Kersey and Burkett?
A. I suppose it was contrary to their wishes, sir.

Mr. Marshall: That is all.

PLAINTIFF RESTS.

(At this point Court and counsel retired to side bar.)

Mr. Marshall: May it please the Court, I move for a non-suit, on the ground that the plaintiff, Mr. Moore, in his case, and the witnesses supporting him have testified that he was continuing to work and perform his labors for the Borough of Pitman in 1930 in spite of his discharge and his notice that his

services were no longer required; and that the only compensation, if at all, that he would be entitled to as a result of the services he performed would be compensation for the first day of the year. I make that upon the theory that he in his own statement has said he continued to work on the advice of four people who were functioning, one of whom was declared to be not in office, and contrary to the wishes of the remaining three Councilmen and the Mayor, and this in spite of the fact that he knew that his services were no longer desired or required. That is my motion.

(After further argument.)

The Court: The motion is overruled, for the reason that the original employment of the plaintiff was in 1929; that regardless of the manner in which he was appointed during that time, he rendered services during the period of 1929 for which he was compensated by Council; that the only evidence at the present time of a discharge is that which was brought out on cross-examination, to the effect that the Mayor had told him that his services were no longer required. Now, in the absence of proof that the Mayor was duly authorized by the governing body of the Council to discharge an employee, that would not constitute a valid discharge, and for the services performed from the first of the year 1930 until the 23rd day of June, the plaintiff would be entitled to recover.

(Exception noted for the defendant.)

(At this point Court and counsel returned to the court room.)

THE CASE FOR THE DEFENDANT.

WILLIAM B. BROWN, sworn.

By Mr. Marshall:

Q. Mr. Brown, you are a resident of Pitman?
A. Yes.
Q. And as such, how long have you lived there?
A. Sixteen years.
Q. You are in the commission business in Philadelphia?
A. I am.
Q. And in the fall of the year 1929, you were elected to the office of Mayor of the Borough of Pitman?
A. Yes.
Q. As such, did you file the qualifying oath for yourself as Mayor?
A. I did.
Q. And assume your duties as Mayor on the first of January, 1930?
A. I did.
Q. With respect to your Councilmanic body on that day, did you meet in the —— Just describe what you did, please, and that will save time.

Mr. Porch: I object, if the Court please; if there is a record of it, that is the best evidence.

Q. Did you call the meeting to order?

A. I did.

Mr. Porch: I object; the minutes will speak for themselves.

The Court: The minutes are the best evidence, if you want to know what transpired at that meeting.

Mr. Marshall: That is not necessarily what I was after.

Q. On the day that you assumed office, was the plaintiff, Benjamin F. Moore —— Did you know Mr. Moore?

A. Yes.

Q. Did you know what position he had held during the year 1929?

A. I did.

Q. What position was it?

A. Clerk to the Borough Clerk and the Tax Collector.

Q. On January 2, 1930, did you go to the Borough Hall?

A. I did.

Q. And who was there when you went there, or who went with you?

A. Mr. Doughty went with me.

Q. And who is Mr. Doughty?

A. Borough Clerk of the Borough of Pitman, who was appointed the day before.

Q. And who else was there?

A. At the inner door there was a man whom I

learned afterwards his name was Johnson, a constable from Mantua Township.

Q. Anybody else?

A. Mr. Mayhew was in there, and Mr. Moore.

Q. And did you speak to Mr. Moore?

A. I did.

Q. What did you say to him, if anything?

Mr. Porch: I object, if your Honor please, as to what he said to him, unless it shows in what capacity he was speaking, for whom he was speaking, and that he was speaking with some authority other than the authority he might possess as Mayor.

Mr. Marshall: We are prepared to show —— We will follow that up, may it please the Court.

The Court: I will admit it upon the theory that it is to be followed up.

Mr. Marshall: And if not followed up, there will be no question about it.

The Court: It will be stricken.

Q. Mayor, did Mr. Moore speak to you when you came in that morning?

A. He may have, but not that I remember.

Q. What did you say to him?

A. I told him, "Mr. Moore, your services are no longer required."

Q. And to that, what did he reply, if anything?

A. "Mr. Mayor, I am here under instructions."

Q. And was there any further discussion with him about the position that he was then holding?

A. No, not that I remember.

Q. Did you go to the Borough Hall on any other occasions after that?

A. Yes, I went there most every morning for several days.

Q. Now, was Mr. Doughty there?

A. Yes.

Q. And Mr. Mayhew was there?

A. Yes.

Q. Were you, as the Mayor, able to have access to any of the Borough records?

A. I was not.

Q. Did you, as the Mayor, make any effort to obtain possession of the Borough records?

Mr. Porch: I object, if your Honor please, because there is nothing in the law that shows his authority to have the Borough records. The Borough records are kept in the custody of the Borough Clerk. There is no reason the Clerk should hand out the Borough records.

Mr. Marshall: The witness was just about to state, I think, when Mr. Porch objected that he either served or caused to be served. I suggest that he, as the Mayor of the town, would have some right to supervise. Certainly, in the tremendous dead-lock they had in Pitman, somebody had to take the lead. Now, this man is undertaking to tell what he did, some of which might be and some of which might not be binding upon the Councilmanic body, but there has been considerable said this morning with

respect to this budget. Now, it would almost appear that the Mayor and the three Councilmen had stepped aside and permitted these other three, with the doubtful one, to pass a budget for the Borough of Pitman. It would almost appear as though they were good enough for that, they were good enough for something else. Now, I feel that the Mayor, as the governing power, one of them, should be permitted to say what effort he made, if any, to obtain for the Borough of Pitman its property.

Mr. Porch. If the Court please, we would like to know what he is talking about. There are lots of records belonging to the Borough that the Mayor would have no access to, has no right to.

The Court: Just a moment. Do you mean no access to, or no right to the custody of?

Mr. Porch: Well, I would say no right to the custody of.

The Court: Yes, I was going to say I think any citizen would have access.

Mr. Porch: That is true, they are public records, but I mean demanding the records. The question was, I think, whether he demanded the records.

Mr. Marshall: No, I think I used the word "access."

The Court: Repeat the question.

(Question repeated.)

Mr. Porch: Then I renew my objection.

The Court: I will sustain the objection to the question in that form.

Q. Did you make any effort, Mayor, to obtain access to the records, so far as they related to the Borough of Pitman, in the custody of Mr. Mayhew, in which office Mr. Moore was employed, so far as they related to his office as Borough Clerk?

A. I did.

Q. Did you gain access to any of the records of the Borough of Pitman pertaining to that office?

A. I did not. At that time, you mean?

Q. Yes, at that time; and you were denied access to those records, Mayor, up until what time?

A. Sometime the forepart of June. I was denied at all times, as far as that goes, but I gained possession of them in June.

Q. In other words, you were denied access to them and possession up until June, and in June —— After the decision of the Supreme Court case you have reference to, haven't you?

A. Yes.

Q. Then you had access and possession of the records you had sought access to?

A. I had access, but they were in the possession of the Borough Clerk.

Q. Mayor, for what reason did you desire to obtain access to the records?

A. For the Borough Clerk, so the Borough Clerk could enter into his duties as Borough Clerk.

Q. Did the securing of the records, so far as they related to the office of the Borough Clerk, have any bearing upon your ability to prepare the 1930 budget?

A. It did.

Q. Were you able, without access to those records—were you in a position to prepare the 1930 budget?

A. I was not.

Q. Do you recall a visit made to your house by Mr. Moore sometime after the decision was handed down by the Supreme Court, with respect to his compensation?

A. I do.

Q. Do you remember about when it was that he called?

A. He called about the money which he claimed was due him up until the time which he claimed to have served in the Borough Hall.

Q. Had he said anything to you about that until that time?

A. He had not.

Q. And what was your reply to him, if you can recall?

A. I told him as Mayor I could do nothing for him, but as a man I could.

Q. By that what do you mean?

A. I gave him $5.00.

Q. He sought your service as Mayor; did he say what he wanted you to do?

A. He wanted pay for the period of time between that time and the former January 1st from the Borough.

Q. He sought your aid as Mayor?

A. Yes.

Q. Was there any further demand made on you by him, excepting the institution of this suit?

A. There was no further demand made, no, not that I remember; I believe that was all.

Q. You didn't sign any checks during the month of January, 1930?

A. I did not.

Q. I show you two checks marked Exhibits P1 and P2, and ask you whether or not those checks were issued under any authority of yours and the Council of the Borough of Pitman?

A. They were not.

Q. Did you report to Council your actions with Mr. Moore?

A. I did.

Q. Did Mr. Moore ever appear before your Council, yourself or your men constituting Council, with respect to his compensation?

A. He did not.

Q. Did you as the Mayor or the three constituting your Council at any time in 1930 employ Mr. Moore to act in the office of the Water Superintendent or the Borough Clerk or Tax Collector?

A. No.

Q. Did he at any time during the year 1930 perform service or labor in that office with your sanction and approval?

A. He did not.

Q. Of yourself or your Councilmanic body?

A. He did not.

Mr. Marshall: Cross-examine.

Cross-examination.

By Mr. Porch:

Q. You knew he was working there?
A. I knew he was there.
Q. Well, was he working there?
A. I don't know.
Q. Never saw him working?
A. I couldn't say that I did.
Q. Were you there very often?
A. I was there quite often.
Q. And did you stay there?
A. At times.
Q. Considerable time?
A. Considerable time, yes.
Q. How long would you be there at one time?
A. Oh, I suppose I was there a half hour.
Q. And during that time, what would Mr. Moore be doing?
A. At times he would be looking at a book.
Q. What kind of a book, a picture book?
A. No, a book more like a book of records.
Q. Sitting down or standing up?
A. Mostly sitting down.
Q. A Borough book
A. Apparently.
Q. So that he was looking over some books of record when you were there?
A. They looked like books of record.
Q. That is what you thought they were?
A. Yes.

Q. Was he always doing that, or what else did you did see him do there?

A. Well, I have seen him answer the telephone.

Q. Yes, he did that; and what else?

A. Well, that is all I call to mind, looking at a book and answering the telephone.

Q. But he was busy around the office?

A. Apparently.

Q. Apparently busy around the office?

A. Apparently.

Q. Were there any checks issued on the Borough of Pitman for five months signed by you?

A. No.

Q. And you say when he talked to you, you say he claimed to have served the Borough. You know as a matter of fact he did serve the Borough, don't you?

A. No.

Q. You don't know that?

A. No.

Q. Well, you say you didn't get access to the books until after this decision came down?

A. That is what I testified to.

Q. Is that true?

A. That is true.

Q. And how did you get them then?

A. By having the safe opened by an expert.

Q. And how else?

A. How else?

Q. Yes; how did you get access to the books?

A. By having an expert to open the safe and by having them shown to me by Mr. Doughty, the Borough Clerk.

Q. Is that the way you got access to the books?
A. Yes.
Q. And custody of the books?
A. Yes.
Q. And when was that?
A. Well, it was sometime about a week after the Court decision.
Q. And what day was it?
A. What day was it?
Q. Yes, what day of the week?
A. On Sunday.
Q. On Sunday?
A. Yes.
Q. And you had a safe opener come down to the Borough on Sunday?
A. Yes.
Q. And open the safe?
A. Yes.
Q. And that is when you got the records?
A. Yes.
Q. And then were they put back in the safe?
A. Yes, they were.
Q. And was the combination changed?
A. It was.
Q. And how did you next get the custody of the records when Mr. Doughty got them, if he did get them?
A. Mr. Doughty opened the safe and took them out.
Q. Were you there when he opened it?
A. Yes.
Q. And who else was there?
A. Mr. Moore.

Q. Was Mr. Moore there that day, too?

A. Yes, Mr. Moore, Mr. Bone, Mr. Mayhew, Mr. Doughty and Mr. Welker.

Q. Is that all?

A. Mr. Nichols was there.

Q. This gentleman here?

A. Yes.

Q. All right; who else?

A. Well, I was there. Did I mention Mr. Bone?

Q. Yes.

A. Well, he was there.

Q. Well, now, was there anybody else there?

A. Well, there may have been others there.

Q. Any policemen there?

A. Oh, yes, policemen.

Q. Well, why didn't you tell us who was there, then?

A. I am telling you, when you ask me.

Q. I have asked you two or three times to tell us who was there. Now, can you do it or not?

A. Yes, you wanted to know if the policemen were there, and I said yes.

Q. What policemen were there? Now, go ahead and tell us the rest of the people there.

A. Mr. Crosson was there and Mr. Parks, Mr. Lloyd.

Q. Who is Mr. Crosson and Mr. Parks and Mr. Lloyd?

A. They are policemen of the Borough of Pitman.

Q. And on that day, Mr. Nichols was there in the office in front of the safe, wasn't he?

A. He was.

Q. And you told these officers to remove him?

A. I asked him to move first.

Q. Yes; then what?

A. Then after a time, perhaps a half hour or longer, I commanded the officers to remove him.

Q. You commanded the officers?

A. Or instructed them to.

Q. By whose authority?

A. Authority as vested in me as Mayor of the Borough of Pitman.

Q. And did they remove Mr. Nichols?

A. They did.

Q. Gently or otherwise?

A. As gently as possimle, as I had instructed them to use as little force as possible to have him removed from in front of the safe.

Q. As a matter of fact, you told them to go ahead and you would stand back of anything they did, didn't you?

A. Under the instructions that they was to be careful with him.

Q. Did you tell them to remove him carefully?

A. I told them not to hurt him.

Q. Did they hurt him?

A. I think not.

Q. Did they have him on the floor?

A. They did, and he had them on the floor.

Q. And how many officers were attacking Mr. Nichols?

A. Two.

Mr. Marshall: I object and ask that that be stricken; there is no evidence of him having been attacked.

Mr. Porch: Well, he was being gently handled.

Mr. Marshall: He was removed, but I object to the use of the word "attacked."

The Court: This is cross-examination, Mr. Marshall I will permit it to stand.

(Exception noted for the defendant.)

Q. And there were three there?
A. There was.
Q. Now, you say that you qualified as Mayor and filed your oath?
A. I did.
Q. Where did you file your oath of office?
A. With ex-Mayor McGowan.
Q. You filed it there?
A. No, I filed it with the Borough Clerk; that is, the Borough Clerk of 1929.
Q. Who was that?
A. Mr. Mayhew.
Q. And where did you take your oath of office?
A. In the theatre building of the Borough of Pitman.
Q. When?
A. About 11.40 or 11.45 A. M. of January 1st.
Q. But before twelve o'clock on January 1st?
A. 11:40 or 11:45 A. M., January 1st.
Q. And what time was the reorganization of Council to take place?
A. Twelve o'clock noon, January 1st.
Q. That was the public meeting, wasn't it?

A. It was.

Q. And when you came there, you had already been sworn in, is that right?

A. I had been.

Q. And the only conversations you had with Mr. Moore was the one on January 2d and the one at the house?

A. I wouldn't say that was the only ones, but that is the only ones I recall at this time. I had other conversations prior to that.

Q. Prior to January 1st?

A. Yes.

Q. Now, you were invited to attend the meeting of the Councilmen who prepared the budget, weren't you?

A. You mean of Bone, Nichols and Napier?

Q. I mean just what I asked you.

Mr. Porch: Read the question.

(Question repeated.)

A. Yes.

Q. Did you attend?

A. I did not.

By Mr. Marshall:

Q. Why didn't you attend?

A. Because I didn't consider it a properly constituted body of the Borough of Pitman.

Q. Did you go to the Borough Hall at any time

when you were confronted by Mr. Moore and your entrance there denied?

A. I did.

Q. About when was that?

A. Oh, that was — I couldn't tell the date, probably April or May, probably.

Q. How far did you get in the building?

A. Got in as far as the door which goes into the office part.

Q. And that was locked?

A. That was locked.

Q. And he refused to unlock it?

A. I requested him to open it and he said he had orders not to let anybody in.

Q. And he obeyed those orders?

A. I did.

Q. I say, he obeyed those orders?

A. Yes, he did.

By Mr. Porch:

Q. Did you do anything toward preparing the budget?

A. 19——

Q. 1930?

A. I did not.

Mr. Porch: That is all.

By Mr. Marshall:

Q. Why didn't you?

A. I nor the properly constituted body of Council

had not access to the records of the Borough of Pitman until after the time it was proper to prepare the budget.

By Mr. Porch:

Q. How did the Borough of Pitman run in 1930—where did it get the money, if an improperly constituted body prepared the budget which, in your mind, was illegal, I suppose—is that right?

A. That is correct.

Q. What did you do with all this money that this budget appropriation provided for—where did you get the money to run the Borough of Pitman in 1930?

A. You will have to ask somebody who has the collection of that money; I don't handle the collection of that money.

Q. Taxes were collected under this illegal budget, weren't they?

A. I believe so.

Q. You know so, don't you—or don't you know it?

A. I know there was some collected under it.

Q. Taxes were assessed under that budget, weren't they?

A. I believe so.

Q. And the only money, practically, that the Borough of Pitman had to spend in 1930 was the money collected under that budget, to a large extent?

A. Yes.

Mr. Porch: That is all.

By the Court:

Q. Did the municipality borrow in anticipation of that budget, Mayor?

A. I believe they did.

Q. Do you know how much?

A. No, but the minutes of the Borough will show how much.

By Mr. Marshall:

Q. Your budget must be prepared by a certain date, must it not, Mayor?

A. So I understand, yes.

Mr. Marshall: That is all.

JOHN T. CROSSON, sworn.

By Mr. Marshall:

Q. Mr. Crosson, you are a member of the police force of the Borough of Pitman?

A. Yes, sir.

Q. And as such, were you employed by the Borough in January, 1930?

A. Yes, sir.

Q. Were you at the Borough Hall on January 2d?

A. Yes, sir.

Q. Can you tell us who was there?

A. Mayor Brown, Mr. Mayhew, Mr. Moore and a

constable named Johnson from Mantua Township, and Mr. Doughty are the only ones I know was there.

Q. Do you remember any conversation had on that occasion between Mayor Brown and Mr. Moore?

A. He notified Mr. Moore ——

Mr. Porch: I object; that is a conclusion.

Q. I am asking what he said, just what he said.

A. Mr. Brown told Mr. Moore that his services were no longer required in the Borough of Pitman as Clerk.

Q. And did Mr. Moore make any reply?

A. He said, "I am here under instructions."

Q. And that is all that was said?

A. That is all that was said.

Mr. Marshall: Cross-examine.

Cross-examination.

By Mr. Porch:

Q. Who appointed you an officer of the Borough of Pitman?

Mr. Marshall: I object to this, may it please the Court.

Mr. Porch: He says he is an officer; I want to know who appointed him.

Mr. Marshall: I object to it as not being material to this issue.

The Court: I will permit the question.

A. Mayor Stanton appointed me.
Q. When?
A. In 1929, November.
Q. And who did you work under?
A. Oren Lloyd, Chief of Police.
Q. Who was the Director of Public Safety?
A. Harold C. Nichols.
Q. This gentleman here?
A. That gentleman there.
Q. You were also in the Borough Hall on other occasions with the Mayor, weren't you?
A. Several.
Q. You were there the time you attacked Mr. Nichols?

Mr. Marshall: I object to that, may it please the Court; there is no evidence of anyone attacking Mr. Nichols.

Q. Were you there at the time you and Mr. Nichols were in some sort of a conflict?
A. I was there, but I was never in any conflict with Mr. Nichols.
Q. You never were?
A. Never was.
Q. Who was?
A. Two other officers.
Q. And who were they?

A. Officers Parks and Lloyd removed Mr. Nichols from in front of the safe.

Q. What did you do?

A. I stood in front of the safe while Mr. Doughty opened it.

Q. You took no part in it?

A. I took no part in it.

Q. Didn't your clothes get dusty or anything?

A. My clothes didn't get dusty.

Q. On whose orders were you there?

A. Chief of Police's.

Q. Anybody else?

A. I don't know; I only take orders from the Chief of Police.

Q. Don't take orders from the Mayor?

A. From the Chief of Police.

Q. You don't take any orders from the Mayor?

A. From the Chief of Police.

Q. Now, will you answer my question?

A. The Mayor has never issued me any orders.

Q. You don't take any orders from him?

A. He has never issued me any.

Q. In fact, he issued orders that time you removed Mr. Nichols from in front of the safe, didn't he?

Mr. Marshall: I object to that, because it has not been shown that this man helped to remove him.

Mr. Porch: He was there.

The Court: He was present.

The Witness: What was the question?

(Question repeated.)

A. Not to my knowledge.
Q. You didn't hear him?
A. I didn't hear him.

Mr. Porch: That is all.

Mr. Marshall: That is all.

WENDELL J. BURKETT, sworn.

By Mr. Marshall:

Q. Doctor, you are at the present time a member of the Borough Council, aren't you?
A. I am.
Q. And as such, you were also a member of Council on January 1st, 1930?
A. That was the time that I entered into my office.
Q. That was the date you entered your office?
A. Yes, sir.
Q. Did you know Mr. Moore, Doctor—Benjamin F. Moore?
A. I do.
Q. Did you know him prior to that date?
A. I did.
Q. Did you know where he was working in 1929?

A. I did.

Q. Where?

A. Working in the office of the Borough Hall.

Q. Did Mr. Moore, to your knowledge, appear at any of the meetings of which you were a member over which Mayor Brown presided?

A. I can recall that I saw him there, yes, sir, at the meetings.

Q. Do you remember on how many occasions?

A. No, I couldn't answer that exactly, not how many.

Q. Do you know whether or not the Council of the Borough of Pitman as constituted by the Mayor, yourself, and Messrs. Kersey and Briggs engaged Mr. Moore during the year 1930?

Mr. Porch: Just a minute; I object.

Q. To perform any labor or services in the office of the Tax Collector or Water Superintendent or Borough Clerk?

Mr. Porch: I object to it, on the ground that the records would be the best evidence.

The Court: Repeat the question.

(Question repeated.)

The Court: Now, what is your objection, Mr. Porch?

Mr. Porch: My objection is that the records, the

minutes, would be the best evidence of what Council did.

The Court: Well, this witness may testify, if he knows; if he doesn't, he may say so.

A. We did not.

Q. Do you know whether or not Mr. Moore at any time appeared before your body for compensation for services he had rendered?

A. He did not.

Q. And you, of course, haven't paid him anything?

A. I understand he has not been paid.

Mr. Marshall: Cross-examine.

Cross-examination.

By Mr. Porch:

Q. He did render services, Doctor?

A. You mean in 1930?

Q. Yes.

A. I know he was in Borough Hall.

Q. Were you there?

A. Was I there?

Q. Yes.

A. I was in the Tax Collector's office in front when I paid my taxes; that is when I saw him in there and that is the only time.

Q. Is that the only time you were in the Borough offices, when you paid your taxes?

A. No.

Q. You were a member of Council last year?

A. That is right.

Q. And in the course of your duties as a member of Council, did you have occasion to go to the Borough offices often or not?

A. Not under the circumstances, no, as prevailed in Pitman.

Q. You didn't go to the Borough offices?

A. No.

Mr. Porch: That is all.

SYLVANUS DOUGHTY, sworn.

By Mr. Marshall:

Q. Mr. Doughty, what official position do you hold in the Borough of Pitman?

A. Borough Clerk, Water and Sewer Clerk, Tax Search Officer.

Q. And as such, how long have you served the Borough of Pitman?

A. Since January 1st, 1930—January 1st or second, whatever you want.

Q. And as such, you have had custody of the records and the minutes of Council of the Borough of Pitman from that date, have you?

A. I have not. I have some of those; I have the minutes from that date, but not the records.

Q. Not the records; you also obtained sometime in June, did you not, some minutes or records of

meetings held by three other Councilmen, to wit, Napier, Nichols and Bone? The papers that you received purporting to be the minutes of Mr. Mayhew—was or was not the budget that was prepared for the year 1930 among those papers?

A. I don't recall it in there. I didn't go thoroughly through those minutes; I never had occasion to.

Q. But the minutes you produced to Mr. Porch are the minutes, are they?

A. Positively.

Q. Now, on January second, Mr. Doughty—or rather, take your minutes on January 1st. You say you were sworn in on that date?

A. Yes, sir.

Q. And immediately began to function as the Borough Clerk of the Borough of Pitman?

A. Yes, sir.

Q. Was anyone else in the Borough of Pitman undertaking to function as Borough Clerk also?

A. Yes, sir.

Q. And who was that?

A. Mr. Mayhew.

Q. Now, do the minutes of your meeting of that day show your appointment?

A. Yes, sir.

Q. Will you refer to them, please?

A. "I hereby nominate and with the advice and consent of Council appoint Sylvanus Doughty to the office of Borough Clerk (including Clerk of Water and Sewer Department and Municipal Search official) of the Borough of Pitman"——

Q. What meeting was that?

A. January 1st, 1930. "——Borough of Pitman, for the year 1930 and to serve until January 1, 1931, at 12 o'clock."

Q. Yes; now, have you continued from that time to the present time to serve as the Borough Clerk of the Borough of Pitman?

A. I have.

Q. Now, on January 2nd ——

The Court: Right there, Mr. Marshall—is that your complete record of the appointment?

The Witness: I have a confirmation here.

Q. Read it.

A. "It was moved by Burkett and seconded by Kersey that the appointment be confirmed. On roll call Messrs. Burkett, Kersey and Briggs voted in favor of confirmation and Messrs. Bone, Napier and Nichols refused to vote, because the Mayor refused to recognize Mary S. Chalfant as a member of Council. Mayor Brown then cast his vote in favor of confirmation and the oath of office was duly administered to the new Clerk by the Mayor. At this time while the oath was administered, Councilmen Bone, Napier and Nichols, together with Borough Treasurer Mayhew, Mr. Porch and Mrs. Chalfant left the Council Chamber."

Q. Now, on January 2nd, 1930, were you at the Borough Hall?

A. Yes, sir.

Q. And what time of the day were you there?

A. About eight o'clock I was there, a few minutes before.

Q. Eight o'clock in the morning?

A. Eight o'clock in the morning.

Q. And who else was there?

A. My entrance to the door was barred by a man by the name of Johnson. Mr. Mayhew and Mr. Moore were inside. Of course, the Mayor was with me, Mr. Crosson was there, I think Mr. Bone was there—I am not positive about him.

Q. You say Mr. Moore was there?

A. Yes, sir.

Q. What, if anything, did Mayor Brown say to Mr. Moore and what did Mr. Moore say to him?

A. Mayor Brown said to Mr. Moore that his services were no longer required.

Q. And to that, what did he reply?

A. His reply was that he was there under instructions.

Q. And that is all that was said about it?

A. Yes, sir.

Q. And how long did you stay there?

A. Oh, stayed there for an hour or more.

Q. And that is all that was said about it?

A. That is all I recall.

Q. When was your next Council meeting after this one of January 1st?

A. The second Monday night. Now, let me see—I think that will figure the 13th of January.

Q. Were you present at that meeting?

A. Yes, sir.

Q. At that meeting on January 2nd—or January

13th, was there any reference to that which had transpired at the Borough Hall on January 2nd?

A. Yes, sir.

Q. What do your minutes disclose in that respect?

A. The Mayor made some remarks which were on a typewritten form that he had and handed it to me, and after he finished those remarks, my minutes go on: "At this time the Mayor advised Council that he had told B. F. Moore that his services were no longer required. On motion of Briggs, duly seconded and passed, the action of the Mayor was approved."

Q. And what follows?

A. "Moved by Burkett and seconded by Mr. Kersey that the meeting be adjourned. The Mayor so declared."

Q. That was the meeting of what date?

A. January 13th.

Q. At any time prior to that date or at any time after that date, did Mr. Moore either himself or through counsel appear before the Council consisting of the Mayor and Messrs. Briggs, Kersey and Burkett?

A. No, sir.

Q. Do your minutes disclose any hiring or the employment of Mr. Moore as Clerk in the office of the Tax Collector or Clerk of the Water and Sewer Department, or as Tax Search officer or Borough Clerk—in any of those capacities or all of them for the year 1930?

A. No, sir.

Q. Well, now, Mr. Doughty, with respect to the preparing of the budget for the year 1930, did you

have access to the Borough records for the year 1930?

A. No, sir.

Q. Who did have them?

A. Mr. Mayhew and Mr. Moore.

Q. And when you first secured access to the custody of those records was when?

A. The date I don't remember; it is after the Supreme Court decision.

Q. Without the aid of the records that were in the custody of the Borough Clerk, were you able to prepare your 1930 budget?

A. No, sir.

Mr. Marshall: Cross-examine.

Cross-examination.

By Mr. Porch:

Q. The funds under which the Borough was operated through 1930 were largely obtained through the 1930 budget?

A. So far as I know.

Q. You were in the office—you made collections based on that, didn't you?

A. Why, Mr. Mayhew is Tax Collector.

Q. You received money at times?

A. I have received some checks there, yes; people leave checks for him.

Q. For 1930 taxes?

A. Yes.

Q. And the budget that was prepared was the

only budget that was prepared and published and accepted in 1930, wasn't it?

A. That is the only one prepared.

Q. And the only one used in 1930?

A. It looks that way.

Q. And money was borrowed from the banks in 1930 in anticipation of taxes?

A. I think the minutes disclose that there was one time where they borrowed.

Q. Did you write up these minutes?

A. All but January 1st. I wrote these and they were written on another typewriter; I didn't use the typewriter.

Q. Who wrote them up?

A. I took the minutes.

Q. Yes, but who wrote them, who transcribed them?

A. They were written on Mr. Haight's typewriter. I didn't have access to any typewriter at that time, I was barred from the Borough office, and they were written on Mr. Haight's typewriter.

Q. In his office?

A. In his office, yes, with my supervision.

Q. Under your supervision?

A. Positively. I read every word and signed them.

Q. Have you the original minutes from which these are transcribed? These aren't the original minutes, are they, of January 1st?

A. A notation is all I had.

Q. Where are they?

A. I don't need them; they are the minutes approved.

Q. Never mind telling me what we need.

A. I don't know where they are.

Q. But there were minutes prepared by you?

A. That is the minutes prepared by me.

Q. You say there were minutes?

A. Prepared from my notations, yes.

Q. Well, there were original minutes first prepared?

A. That is the original minutes prepared ——

Q. Do you call ——

A. —— from my notations.

Q. What is that?

A. That is the original minutes prepared from my notations.

Q. From your notations?

A. Yes, sir.

Q. And when were they prepared?

A. Oh, within a day or so.

Q. And the same way with several of these minutes?

A. The same way with all of them; that is the way I prepared all of them.

Q. They are all prepared by Mr. Haight?

A. No, I had access to the typewriter, after that, in the Borough Hall and would use the typewriter.

Q. Did you write them yourself on the typewriter?

A. Mostly.

Q. After the first meeting?

A. Mostly, yes, sir.

Mr. Porch: That is all.

Mr. Marshall: I want to offer the minute book in evidence.

By the Court:

Q. I want to ask the witness whether, so far as his examination of the minutes of prior meetings are concerned, he knows how it was first determined that there should be help in the office of the Clerk and Collector of Taxes?

A. No, I can't say.

Mr. Marshall: I have asked for an examination of them for the purpose of seeing what the character of the employment was in 1929. That is what your Honor has reference to?

The Court: Yes.

Mr. Marshall: There doesn't seem to be any record of it at all. I might ask the witness that.

By Mr. Marshall:

Q. Did you examine the minutes for that purpose?

A. To see if Mr. Moore was appointed?

Q. Yes, and who was responsible for his appointment?

A. There is nothing in the record.

The Court: I am not speaking of his appointment. I am speaking of the creation of the position. When was the position created?

The Witness: There isn't anything in the minutes creating that position.

Mr. Porch: He was hired in the early part of 1929.

The Court: Had there been prior clerks in the office?

Mr. Porch: No, the facts are, as I understand it, the auditors, the State auditors made a report deploring the condition that existed, and suggested that help be obtained, and based on their recommendation, the recommendation of the State Department, help was procured. That was the reason for it. I think we have the original audit here recommending that.

The Court: What I had in mind was this, it might be interesting to know if the office was actually created and just who had the power of employment and discharge. For instance, if it were created by ordinance, the ordinance itself might provide for that.

Mr. Porch: There was no ordinance.

The Court: There was no ordinance? That is the thought I had in mind.

(Said minute book marked Exhibit D1.)

Q. Mr. Doughty, as Borough Clerk, did you have knowledge of the issuance of two checks, one dated

January 22nd and one January 28th, to the order of B. F. Moore, as shown by Exhibits P1 and P2?

A. Only there, is all.

Q. Is there any record in your minutes authorizing the issuance of those checks?

A. No, sir.

HARRY B. BRIGGS, JR., sworn.

By Mr. Marshall:

Q. Mr. Briggs, you are a member of the Borough Council of the Borough of Pitman?

A. I am not.

Q. Not now?

A. No.

Q. You are sort of an in-and-out man, aren't you?

A. Yes.

Q. Your term of office expired December 31st, did it, or January first of this year?

A. January 1st of this year, yes.

Q. And were you a Councilman—one of the Councilmen of the Borough of Pitman during the year 1930?

A. I was.

Q. And did you attend the various meetings of the Council of the Borough of Pitman?

A. I did.

Q. And were you in attendance at the meeting on January 1st, 1930?

A. I was.

Q. Do you know Mr. Moore, Benjamin F. Moore?

A. Very intimately, yes.

Q. When you say "very intimately," that means you have known him for a number of years?

A. Number of years, yes.

Q. And you know that in some capacity he was working in the office of the Borough Clerk?

A. Yes, sir.

Q. And the Water Department during the year 1929?

A. Yes, sir.

Q. Now, you were in attendance at the meetings during the — Withdraw that. Do you have any recollection of having been absent from any of the meetings during the months of January, February and March?

A. I am positively sure I was there, attended all meetings.

Q. Did Mr. Moore, to your knowledge, at any time appear before your body consisting of yourself, Kersey, Burkett, and the Mayor, to be compensated for services he alleged to have performed?

A. No.

Q. Was Mr. Moore at any time during the year 1930, to your knowledge as a Councilman, employed in any capacity to serve the Borough of Pitman?

A. No.

Q. Do you recall whether or not the matter, so far as it relates to Mr. Moore, was ever discussed before Council?

A. It was.

Q. On how many occasions, if at all ?

A. Well, if I can recall, on the 13th of January, the first meeting after the organization meeting, it was discussed by the Mayor and there was formal action taken by the Council. In fact, I made that motion.

Q. Was Mr. Moore present?

A. I cannot recall that he was or was not.

Q. You weren't with the Mayor on January 2nd, were you, the day he went to the Borough Hall?

A. On January 2nd? No, no.

Q. Do you know whether or not the body, so far as it relates to you—that is, the Mayor and the body consisting of yourself, Kersey and Burkett—ever authorized any disbursement to Mr. Moore during the year 1930?

A. No, they have not, no.

Q. The two checks which have been offered in evidence and marked Exhibits P-1 and P-2—were they to your knowledge ever authorized by the Councilmanic body of which you were a member?

A. They were never authorized, no, sir.

Q. Mr. Briggs, your seat—the seat to your office was in dispute, was it not?

A. It was.

Q. And it was carried to the Supreme Court?

A. It was.

Q. During the time that your office was in dispute, did you continue in attendance at the meetings?

A. I attended every meeting, absolutely every meeting.

Q. Every meeting from the first of January down until the time after the decision of the Court?

A. I want to qualify that. I was absent one meeting, on the 25th of November.

Q. Of this past year?

A. Of 1929.

Q. 1929?

A. Yes. Were you speaking of 1929?

Q. Your seat did not become in dispute, did it, until January, 1930?

A. That is right.

Q. Now, may we go back a moment? Did I understand you to say you had been in attendance at all meetings excepting in November?

A. That was in November, 1929. I attended all the meetings in 1930.

Q. When were the stated meetings of the Borough Council?

A. Second and fourth Mondays.

Q. And at those meetings, would the regular Borough business be transacted?

A. All that could be transacted up until after May 23rd, and then all the regular business was transacted, all of it.

Q. Did Mrs. Chalfant also come to the meetings?

A. She came to the meetings up until the time the decision was rendered.

Q. Did you two sit in one seat?

A. No, I offered that, but she didn't accept.

Q. I thought maybe you held her on your lap, or something like that. But she attended at the meetings, did she?

A. Oh, yes.

Q. And you would vote at different times?

A. Yes.

Q. And what was done with her vote?

A. Usually my vote was challenged.
Q. Challenged by whom?

Mr. Porch: I object, if your Honor please; I think this has gone far enough. The records will disclose it, if they want to bring it out. The minutes will show it.

Q. You held meetings? Even if there were difficulties ahead, you held meetings on your regular, stated nights, did you?
A. Oh, yes, yes.
Q. And you attended every one of them and transacted such business as you were able to transact?
A. Absolutely.

Mr. Marshall: That is all.

Cross-examination.

By Mr. Porch:

Q. And the other faction was there at the same time, wasn't it?
A. Any particular meeting, Judge?
Q. No, all of them; generally speaking, I mean?
A. Part of the time, yes.
Q. Well, generally speaking, the other members of Council, Messrs. Bone, Napier, Nichols and Mrs. Chalfant, were at the same meeting?
A. Generally speaking, but not entirely.
Q. No, maybe once in a while one or the other would be out, but I mean they were all held at the same time as the meetings you refer to?

A. Yes, sir.

Q. The meetings you attended, they generally attended, too?

A. Yes.

Q. And you say you knew Mr. Moore very well?

A. Very well.

Q. In fact, the appointment was made with your knowledge and consent, wasn't it?

Mr. Marshall: I object to that.

Q. The original appointment in 1929?

Mr. Marshall: I object to the use of the word "appointment," because that generally relates to an office.

Mr. Porch: Well, employment, then.

Q. Mr. Moore's employment in 1929 was made with your knowledge and consent?

Mr. Marshall: I object to that as not being germane here. We admit the man was working in 1929.

The Court: I think that has no value, Mr. Porch, so far as that is concerned.

Q. Well, there was need for that kind of work?

Mr. Marshall: I object to that, may it please the Court; that isn't in dispute here.

Mr. Porch: It is in dispute whether or not he was employed in 1930 and whether they needed the work and he did the work.

The Court: I didn't think there was any dispute, but what he was needed and did the work. I don't think there is any dispute so far on that question. The question involved is whether he was legally entitled to do it.

Q. You never told Mr. Moore not to work, did you?

A. I didn't tell him not to work, but on one occasion when I went in there, about the middle of April, I said, "I am very much surprised to see you here, Ben."

Q. And there is nothing else in the minutes about his employment, is there, only that one reference?

A. In which minutes, Judge?

Q. Any minutes?

A. Yes.

Q. Except that one reference?

A. January 13th.

Q. I say, that is the only reference?

A. As far as my knowledge goes.

Q. So far as you know, that was never communicated to Mr. Moore, was it?

A. As far as I know, it was, prior to ——

Q. No, after that.

A. Yes, I am positive he had knowledge of it.

Q. Of your own personal knowledge, you know that?

A. Yes.

Q. Did you give it to him?

A. I didn't give it to him, no.

Q. Then how do you know it?

A. I happened to be coming down the stairs when Mr. Moore was talking to another party, and they said to him, "Well, Ben, I guess you are through."

Q. Who was that he was talking to?

A. I can't positively say.

Q. No member of Council?

A. No, no, a citizen.

Mr. Porch: That is all.

By Mr. Marshall:

Q. When was that—what meeting was that?

A. That was the meeting of the 13th.

Q. The 13th?

A. Yes.

Q. And where was this conversation you are speaking of?

A. On the stairway leading from the second floor to the first floor; really, the entrance to the Council Chambers.

Mr. Marshall: That is all.

BOTH SIDES REST.

(At this point, Court and counsel retired to side bar.)

Mr. Marshall: May it please the Court, I move for the direction of a verdict on the ground that the undisputed proof in this case as it exists now is that this plaintiff was discharged in the month of January, 1930. I base that upon his own testimony and the fact that he had repeated knowledge of the fact, and the fact also in his testimony that he reported to the men who were backing him and under their instructions had proceeded to hold on to the job, and in addition to that, to others who said that it was current talk coupled with the fact that the undisputed proof of the defendant is that he was so notified and the action of the Mayor was, on motion, duly confirmed. That is my first motion. The second is that if that does not prevail, that such services as Mr. Moore is entitled to, if any, could not be beyond the period of the 13th, at the time that the motion was made and the action of the Mayor confirmed. They are my two motions.

(After further argument.)

The Court: Mr. Marshall, I am going to overrule your motion and submit this question to the jury, under Pamphlet Laws of 1925, page 670.

(Exception noted for the defendant.)

Mr. Marshall: In order to get it on the record, will you rule upon the ground that the body of Council constituted by Bone, Nichols, Napier and Mrs. Chalfant, who was later removed by the action

of the Supreme Court, was not a legally constituted body, de facto or de jure, in the Borough of Pitman to authorize the employment or to engage the services of the plaintiff, and that expressly so against the instructions of the de jure body?

The Court: Are you making that motion for a direction?

Mr. Marshall: Yes.

The Court: That is overruled on the ground that the employment of the plaintiff in this case was not originally chargeable to the four Councilmen, namely, Bone, Nichols, Napier and Chalfant, but was a continuation of an employment that had theretofore been made.

(Exception noted for the defendant.)

Mr. Marshall: I would like to move to have the decision of the Supreme Court spread on the records.

The Court: I was going to ask whether or not those decisions of the Supreme Court ought not to be made part of this record, unless there may be a stipulation here.

Mr. Marshall: We have been more or less assuming they were in it. I would like to open the case to get those in.

Mr. Porch: I will consent that they go in.

The Court: Yes, I will permit that.

(Said decisions of the New Jersey Supreme Court marked Exhibits D-2 and D-3, respectively.)

(At this point, a recess was taken until Wednesday, February 11th, 1931, at ten o'clock A. M.)

Woodbury, N. J., February 11, 1931.

(Trial of the cause resumed at ten o'clock A. M., on the above date, pursuant to adjournment, in the presence of counsel for the respective parties.)

(At this point, Court and counsel retired to side bar.)

Mr. Haight: If your Honor please, we would like to renew our motion for a direction this morning on other grounds, if you will hear us for a few moments.

The Court: All right.

Mr. Haight: If my interpretation of your conclusion yesterday afternoon is correct, you feel that this case should go to the jury primarily because of this 1925 Act, which counsel offered to you concerning the rights of anyone who may be a de facto officer or employee to recover for services which are actually rendered. We feel that probably that is correct, if this man can be considered to be de facto, but we submit that the pleadings and the evidence negative that idea that he is de facto. I have here in 22 Ruling Case Law, Lord Ellenborough has de-

fined an officer de facto as a person without any known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action supposing him to be the officer he seemed to be. Corpus Juris defines an officer de facto in this manner, "a person will be held to be a de facto officer when and only when he is in possession and is exercising the duties of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office"—which your Honor concluded yesterday—"or has acted as an officer for such a length of time and under such circumstances of reputation or acquiescence by the people and public authorities as to afford a presumption of appointment or election." Now, in our answer filed in this case, we deny any rights of the plaintiff, either as a de jure officer or employee de facto, de jure or de facto employee or officer, but allege he was a usurper or intruder. We do not contest the point that has been raised that he was employed and actually rendered service under some authority in 1929, but he cannot contend that he holds over, because he was rendering service not by virtue of any appointment or election of the official Councilmanic body, he was not there—he was not filling a position or office that had been provided for by statute or ordinance in the sense that he could contend that he held over until a successor had qualified. The only evidence offered is the minutes of the Councilmanic body presided over by the Mayor and three eligible members of Council, which indicate that he had been discharged in January. Now, our contention is this: It is my understanding

that in addition to having some color of title, a person in order to substantiate their contention that they are de facto must also establish that they exercised the duties and performed the work in good faith and with the acquiescence and consent of the Mayor and municipal governing body. We have the notice that was given to this man on January 2nd by the Mayor, and even though he exceeded his authority at that time, his action was later confirmed at a regularly constituted meeting of Council. That, it seems to me, put the plaintiff on notice, and whether the Mayor had authority or not on January 2nd, his action was later confirmed, and he certainly cannot contend, legally or otherwise, that he was acting with the acquiescence of the Mayor and the municipal governing body. We feel, in view of those facts, which are uncontroverted, that he cannot even contend that he is an officer or employee de facto to come within the meaning of this Act. Corpus Juris says that "a usurper is not an officer for any purpose. Where, however, an occupant of an office has for a considerable time exercised the powers thereof, with the acquiescence of the public authorities"—That is repeated in here on numerous occasions. There are some cases here in New Jersey, an authorized person gaining possession of a public office by force or fraud has no right of action against the public for the prescribed fees or salary for services rendered during such usurpation. We do not say he gained possession of it by fraud, but we do say he retained possession of it in bad faith and with notice that his services were no longer required. That is Gaskill against

Atlantic City, 89 Law 269. The same rule applies where one by force retains possession of a public office after the expiration of his term against the lawful demand of his legally appointed successor. Now, in this case, at that time there was no legally appointed successor, but it certainly can be read into this case that a successor who had been legally appointed could demand possession. There being no successor to demand the position, then certainly the Mayor and municipal governing body who had authority to fill the position could discharge a man and demand he cease to perform any duties. Therefore, we say that this man is not de jure or de facto and is a usurper, and we feel that the evidence has substantiated that. It seems to me this is very important. The only evidence offered which can be termed official, from the standpoint of the municipal governing body of the Borough of Pitman is the testimony of the Mayor, admitted on cross-examination by the plaintiff, that he was told on January 2nd that his services were no longer required, and the minutes of the meeting presided over by the Mayor ratifying his action and approving what the Mayor had done. Therefore, we submit that this plaintiff is a usurper and is neither de facto or de jure.

Mr. Marshall: I would like to also add there that there is further no minutes of even the alleged de facto government employing or acquiescing in the employment of this man.

(After further argument.)

The Court: I am going to overrule the motion made this morning, but I have indicated to you what my present state of mind is with respect to how I think I shall charge the jury, that the question involved here is whether or not Moore was discharged from his position prior to May or June, as the case may be, and that is dependent upon whether or not the action of the Mayor was confirmed by a regular meeting of Council held on the 13th day of January, and that if the minutes which you have introduced here are the correct minutes of what actually transpired, and that that meeting was adjourned, it could not then be called together again and subsequent action taken which would be legal action.

(Exception noted for the defendant.)

(At this point, Court and counsel returned to the court room.)

CHARGE OF THE COURT.

ELDREDGE, *J.*

Ladies and Gentlemen of the Jury:

Regardless of what the passion or prejudice may have been with respect to the two political factions in Pitman, or the heat of the argument of counsel, you and I will have, as officers of the Court, to consider this matter entirely upon its merits. Benjamin F. Moore has brought suit against the Borough of Pitman to recover compensation for services which he rendered to the Borough, or which he alleges he rendered to the Borough, between January 1st, 1930, and either May or June of the same year, as the case may be, that being a question of fact for you to determine. There is a claim in the complaint for compensation beyond that date, but under the proof it seems to the Court that should there be any award by you to the plaintiff Moore, it could not extend beyond the time when he actually rendered the service to the Borough.

The matter grows, as you have had indicated to you, out of a family quarrel in one of the major political parties in Pitman. Your verdict, however, as I have already indicated, is not to be influenced either by political bias on the one end or by sympathy for the plaintiff on the other. I am sure that it is perhaps unnecessary to say that much to you, but I make that statement in order that there may be no misunderstanding and that the matter may be considered upon its merits entirely.

The questions involved—or the case which we are trying has involved a number of rather difficult legal questions, which, of course, the Court has had to decide. Having decided those questions, it seems to the Court that the case resolves itself to a single question, so far as your determination of the matter is concerned, and that is whether or not the plaintiff in this case, Benjamin F. Moore, was legally discharged from the office which he occupied or the position which he occupied in the government of the Borough of Pitman.

Now, it is undisputed that he was employed during the year 1929 and was compensated at the rate of $25.00 per week. It is to be noted that no term was prescribed for his employment, so that he would continue to serve legally in the office until he was legally discharged. I think the question of reappointment has no place whatever, so far as his position is concerned, in this case. He was not an office-holder, with a term which expired, but was, under the facts as they have been presented in this case, an employee of the Borough and would, as I have already indicated to you, continue in that employment until he was legally discharged.

What occurred, so far as the testimony is concerned, was that on either the first or the second day of January, 1930, the Mayor went to the plaintiff Moore and told him that his services were no longer required. That much seems to be undisputed. As I recall the testimony, Moore himself admits that the Mayor came to him and made such a statement. The Mayor's right, however, to convey that information to Moore or to discharge Moore

from his employment would not exist unless he had been authorized to discharge Moore or unless his action had been confirmed by the governing body. It was not a part of the official duties of the Mayor of Pitman to employ and discharge men, except, as I have said, insofar as his action was either authorized originally or confirmed by the members of the governing body after his action had been taken. There was nothing in the records as presented in this case which indicated any prior authorization to the Mayor to discharge Moore, so that his action on the first or second of January would be nugatory unless that action was confirmed by the governing body at a later period.

That brings us, in the judgment of the Court, to the question which you will have to determine; namely, the action of Council as it took place on January 13th, 1930. You will recall that there are two sets of minutes introduced in evidence here. One set of minutes was kept by Mayhew, who was the Clerk during 1929, who was alleging that he held either as hold-over Clerk or that he was appointed by the Council which was presided over by the President of Council—that is, the four members meeting and presided over by the President of Council—and there are also the minutes which were kept by Doughty, whose appointment, under the minutes which he kept, took place on January first or January second— I do not recall which, but that raises a question for your determination as to what transpired at the meeting held on January 13th. If the action of the Mayor on that date in discharging Moore from the employment of the Borough was

confirmed by Council, then there can be no recovery. In order for one to recover as what we know as a de facto officer, the services which that de facto officer was rendering would have to be acquiesced in or consented to by the governing body. Rather than the action of Moore being consented to, it was, as the testimony shows, opposed by the governing body, which was meeting with the Mayor presiding. So again I say to you that the question comes back to whether or not the action of the Mayor was confirmed on January 13th.

Now, you will have to take with you in your jury room these two sets of minutes, the one showing that the action was taken, the other alleging or stating that what was done at that meeting was to call the meeting together fifeen minutes earlier than the prescribed time, or 7:45, by a resolution of members being present, then containing a long statement read by the Mayor, and following that, an adjournment at 8:05. If that is what actually transpired at the meeting in question, then your verdict should be in favor of the plaintiff for what amount you find he is entitled. If the other minutes are correct and the action of the Mayor was confirmed by the Council, your verdict should be no cause for action.

It is a principle of our law that the burden of proof rests upon the plaintiff, and you must find by a preponderance of the believable evidence, if Moore is to recover, that he was not discharged, legally discharged from the service of the Borough. That fact, that question, is to be taken into consideration with the other questions involved in the case; or rather, to put it in another way, in de-

termining whether or not he was legally discharged, you are to consider all the facts and circumstances in the case, and then you are to find, if you do find in his favor, that fact by a preponderance of the evidence, by the greater weight of the believable evidence.

Now, if you so find, that he was not discharged, legally discharged, then you come to the second question, as to the amount you will award. It is also admitted in this case that he was paid $25.00 per week for the services which he rendered during the year 1929, and there is testimony to the effect that that was reasonable compensation. There is, however, one question involved in the matter of compensation which you will have to decide. There is testimony to the effect that Moore worked in the office of the Borough until June 23, 1930. There is also testimony to the effect that his services ceased at the time or immediately after the rendition of the opinion by the Supreme Court. Now, that opinion was rendered May 22nd or May 23rd —not June 23rd, so that it is for you to say whether or not he was employed or whether or not he served in the office until May 22nd or 23rd, or June 22nd or 23rd, and to make your award, if you award him compensation under the law as I have stated it to you, in accordance with the period of service.

I think there is nothing further I desire to say to you. You may retire, deliberate, and return with your verdict.

I have been asked to make several charges to you by counsel for the defendant, all of which are refused.

DEFENDANT'S REQUESTS TO CHARGE.

1. If you determine from the evidence offered that the plaintiff was not a de jure or de facto employee of the Borough of Pitman in 1930, he would then be a usurper and mere volunteer, and not entitled to recover even though services were actually rendered.

2. In order to recover, the plaintiff must prove to your satisfaction that he was either a de jure or a de facto employee.

Plaintiff must prove that the Mayor and municipal governing body officially designated and hired him to fill the position or perform the work, in order to establish himself as a de jure employee.

If plaintiff is entitled to be designated as a de facto employee, he must prove to your satisfaction that he had some color of title, that he acted and rendered the services in good faith without any notice to the contrary, and that his services as rendered were acquiesced in and agreeable to the Mayor and municipal governing body.

3. The plaintiff cannot legally contend that because he was an employee in 1929, that he held over in 1930, because no successor was appointed, as the office or position he held in 1929 was not provided for by statute or ordinance of the Borough.

In order to be entitled to this claim the plaintiff must have been occupying an appointive office pro-

vided for by statute or by ordinance of the Borough.

4. Under the law and undisputed testimony in this case your verdict should be for the defendant—no cause for action.

5. Under the undisputed testimony, it appearing that the plaintiff was discharged by an act of the duly constituted Council of the Borough of Pitman on January 2nd, 1930, such action being ratified and confirmed by a meeting of said duly constituted Council, consisting of the Mayor and three Councilmen, on January 13th, 1930, the plaintiff cannot recover.

6. Under the testimony in thise case the plaintiff cannot occupy or hold the position of a de facto officer or employee.

7. Under the testimony in this case, it appearing that there was in existence in the Borough of Pitman on January 1st, 1930, a duly constituted Council of the Borough of Pitman consisting of a Mayor and three Councilmen authorized to transact all municipal business, that they having exercised the functions of said office and having by their action confirmed the action of the Mayor in discharging the plaintiff on January 13th, 1930, there can be no recovery by the plaintiff in this case for any services rendered by him after January 13th, 1930, and that from and after January 13th, 1930, the plaintiff by his act became an intruder and usurper in

the office in which he alleged to have performed services.

8. Under the undisputed testimony in this case it appearing that the plaintiff having admitted receipt of his notice of discharge and having elected to act in disobedience to the commands and instructions of the legally constituted municipal body of the Borough of Pitman, consisting of the Mayor and three Councilmen, cannot be said to have been acting in good faith and thereby base an action for services rendered.

9. The said plaintiff in this case has rendered no services to the Borough of Pitman authorized or acquiesced in by the legally constituted municipal body of the Borough of Pitman, consisting of the Mayor and three Councilmen.

10. The undisputed testimony in this case shows that the plaintiff by the minutes of the Council, presided over by the Mayor, was discharged by action of the Mayor on January 2nd, 1930, and that said discharge was ratified and confirmed by action of the said legally constituted body on January 13th, 1930, and in the absence of any corporate act as evidenced by any minutes of any alleged body functioning in the Borough of Pitman, de facto or otherwise, there is nothing upon which the jury could base a finding that the employment of the said plaintiff was a result of any act of said alleged de facto body or otherwise.

11. Under the evidence in this case, there being

no contest with respect to the position which the plaintiff alleges in his complaint to hold during the year 1930, and the case being predicated upon the theory that the said plaintiff might be entitled to recover by virtue of being a de facto employe, there can be no recovery under Chapter 239, P. L. 1925, relating to compensation of public officers and employes, and this in view of the fact that from the testimony there does not appear to have been appointed during the term that the plaintiff alleged to have performed services any other employe to have performed the said services, which would have a tendency to create any contest over said office, whereby the said plaintiff could occupy the position of a de facto officer or employe.

12. The minutes of the regularly constituted body of the Borough of Pitman governed by the Mayor and three Councilmen cannot be challenged by any minutes of any alleged body in the Borough of Pitman attempted to be governed by the President of Council and the remaining Councilmen.

DEFENDANT'S EXCEPTIONS.

Mr. Marshall: I desire, may it please the Court, to take an exception to your Honor's refusal to charge the defendant's requests to charge as presented.

The Court: All right.

(Exception noted for the defendant.)

EXHIBIT P1.
2/10/31
JCK

Borough of Pitman, New Jersey
PITMAN NATIONAL BANK AND TRUST COMPANY

Check No. 2. . Dated January 22, 1930

Pay to the order of B. F. MOORE $50.00

Fifty and 00/100 ..... Dollars.

For Salary 1/1/30 to 1/14/30 Incl.

Borough of Pitman

Executed in accordance with resolution duly adopted by the Council of the Borough of Pitman and in pursuance of P. L. 1897, Page 296, and supplements thereto and amendments thereof. ..... Mayor.

George P. Mayhew—Clerk-Treasurer

Charge Acct Salary Account.

EXHIBIT P2.
2/10/31
JCK

Borough of Pitman, New Jersey
PITMAN NATIONAL BANK AND TRUST COMPANY

Check No. 56 Dated January 28, 1930.
Pay to the order of B. F. MOORE..... $50.00
Fifty and 00/100 ..... Dollars.
For Salary 1/13/30 to 1/25/30.
Borough of Pitman
Executed in accordance with resolution duly adopted by the Council of the Borough of Pitman and in pursuance of P. L. 1897, Page 296, and supplements thereto and amendments thereof. .....Mayor.
Charge Acct Salary Account.
George P. Mayhew—Clerk-Treasurer

EXHIBIT P3.

AN ORDINANCE

Local Budget of Borough of Pitman, County of Gloucester, for the fiscal year 1930.
This Budget shall also constitute the Tax Ordinance.
An Ordinance relating to taxes for the year 1930.
BE IT ORDAINED, By the Council of the Bor-

ough of Pitman, County of Gloucester, that there shall be assessed, raised by taxation, and collected for the year 1930, the sum of One Hundred One Thousand, Eight Hundred Ninety-One Dollars and Fifty-Nine Cents ($101,891.59) for the purpose of meeting the appropriations set forth in the following statement of resources and appropriations for the fiscal year 1930.

	Estimated	Actual
Amount of Surplus Revenue	$ 26,630.00	$ 18,178.87

RESOURCES

	Anticipated Revenues 1930	1929
Surplus Revenue Appropriated	$ 7,800.00	$
Miscellaneous Revenues Anticipated:		
Licenses	400.00	400.00
Street Permits	200.00	300.00
Building Permits	200.00	400.00
Unexpended Capital Bond Funds	8,000.00	
Interest and Costs on Taxes	6,000.00	4,300.00
Interest and Costs on Assessments	4,000.00	1,500.00
Franchise Tax	6,000.00	5,400.00
Gross Receipts Tax	3,000.00	2,500.00
Sewer Operating Surplus	3,000.00	
Poll Taxes	1,200.00	1,200.00

Bus Receipts	250.00	200.00
N. J. Conf. Camp Meeting Association (Garbage Contract)	360.00	300.00
Water Operating Surplus	1,000.00	
Rentals	600.00	500.00
Refund by Shade Tree Commission		250.00
Tax Searches	200.00	150.00
Total Miscellaneous Revenue Anticipated ..	$ 34,410.00	$ 17,400.00
Amount to be Raised by Taxation	$101,891.59	$124,369.07
TOTAL RESOURCES	$144,101.59	$141,769.07

APPROPRIATIONS

	1930	1929
General Government:		
Administrative and Executive	$ 4,250.00	$ 3,250.00
Assessment and Collection of Taxes	4,500.00	3,700.00
Tax Sale	1,500.00	1,500.00
Dept. of Finance	500.00	500.00
Int. on Current Loans .	4,000.00	3,000.00
Streets and Highways..	13,500.00	14,000.00
Preservation of Life and Property:		
Police	8,000.00	8,000.00
Police Telephone	150.00	100.00
Ambulance	500.00	
Nurse	800.00	

Fire Protection	2,000.00	2,200.00
Fire Hydrant Service ..	3,400.00	4,000.00
Health and Charities:		
Board of Health	800.00	1,400.00
Poor	800.00	700.00
Street Lighting	10,000.00	9,800.00
Upkeep of Borough Hall	3,300.00	5,000.00
Parks	700.00	1,000.00
Collection of Garbage .	1,800.00	1,500.00
Int. on Temporary Improvement Notes	7,000.00	7,500.00
Interest on Bonds	17,533.75	18,936.25
Public Library	600.00	600.00
Building Inspection ...	200.00	400.00
Printing & Elections ..	1,300.00	1,600.00
Serial Bond Redemption	13,500.00	14,000.00
Temporary Imp. Note Redemptions	27,942.03	11,655.00
Contingent	2,000.00	1,500.00
Shade Tree Comm.	250.00	250.00
Publicity	1,800.00	1,500.00
Insurance and Surety Bonds	1,600.00	1,100.00
Remitted Assessments .	200.00	
Emergency Revenues ..	2,959.94	
Unpaid Bills of 1927 ...	40.00	200.00
Deficit in Tax Revenue—1929	4,951.45	
Capital Costs	1,724.42	
Utility Deficit (water) .		766.00
Sewer Operating Deficit —1927		1,126.28
Over-expenditure of 1927		8,389.07

Over-expenditure of 1928		5,644.59
Over-expenditure of 1927—Reserves		10.00
Deficit Misc. Revenues of 1927		2,241.88
Estimated Deficit—Sewer Oper. 1928 ...		1,200.00
Estimated Deficit—Water Oper. 1928 ...		2,500.00
Tax Map Revision & Grade Maps		1,000.00
Total Appropriations	$144,101.59	$141,769.07

Anticipated Revenue from Tax on Dogs, $100.00, to be used for payment of claims for damages by dogs to sheep, domestic animals or poultry, pursuant to the provisions of Chapter (149) P. L. 1922. Chapter (216) P. L. 1926.

This Ordinance shall take effect as provided by law.

Approved February 10, 1930.

GEO. P. MAYHEW,
Borough Clerk.

EXHIBIT P4.

Council Chamber, Borough Hall,
January 13, 1930—Pitman, N. J.

In accordance with resolution adopted at the Annual Meeting of Council of the Borough of Pitman, held Jan. 1, 1930, Councilmen Bone, Napier, Nichols and Chalfant arrived in the Council Chamber promptly at 8:00 o'clock. Mayor Brown, and Councilmen Burkett and Kersey were already present.

As soon as all members were seated, Mayor Brown called the meeting to order, stating that since everyone was present he would open Council 15 minutes ahead of schedule as per resolution presented by Messrs. Brown, Burkett and Kersey.

The Mayor then made some brief remarks concerning the regrettable conditions which surrounded the Inaugural Exercises on New Year's Day and then directed attention to affidavits of H. B. Briggs, Jr., and Mayor Wm. B. Brown; also, the order of Hon. Frank T. Lloyd, Justice of the Supreme Court, on Certiorari, rule to show cause.

Mayor Brown then read the following:—

"As Mayor and Chief Executive of the Borough of Pitman, I desire to comment very briefly on the situation that exists in connection with our municipal government, and I will ask that those in attendance tonight refrain from any public exhibition and remarks either in favor of or opposed to the action of myself and any member of Council so that we may have

an orderly meeting and will not have any undue and improper publicity.

The circumstances are very regrettable and the publicity which our Borough is receiving because of this situation is very distasteful. I am interested in the welfare and progress of our community and so long as I remain as Mayor and Chief Executive it shall be my purpose to refrain from any action that would operate to the detriment of the Borough.

We are citizens and taxpayers in a municipality that has achieved a reputation for thrift and progress, and it is our duty as residents of the Borough to be proud of this success and to use our every effort in upholding this tradition.

I understand that legal proceedings have been instituted in the Supreme Court of this State for the purpose of obtaining an adjudication of the status of our municipal government, and I have been assured that every possible effort will be made to expedite the matter and bring the issue to an early hearing and determination on Jan. 21, 1930. I am glad that such action has been resorted to and will welcome the proper determination of the rights of all the individuals who claim to be aggrieved. I feel satisfied that a decision by the Court in the matter at issue can be procured very promptly and until such time it behooves the members of this municipal governing body to refrain from the transaction of any and all business.

I know of no municipal matter which necessarily must be acted upon tonight, and it is my

thought in the matter that we should not participate in or transact any municipal business, which by virtue of an adverse legal decision might be illegal and invalid.

In addition to this, it is very evident that this body could not transact any business tonight without a recurrence of the situation that existed at our Organization Meeting and this would only result in unfair, unjust and unwarranted publicity for our Borough.

I am sure that all of the member of this Council are interested only in the progress and success of our community and because of this fact are not desirous of having our differences aired in the press of this and neighboring States.

I feel that this expression of opinion will be favorable received by those in attendance and by our people at large, and I will, at this time, entertain a motion to adjourn."

Moved by Burkett, seconded by Kersey, that Council adjourn. Councilman Napier requested a roll call be made, the result being as follows: "Aye", Burkett, "Here" Kersey. Mr. Briggs endeavored to vote "Aye. Councilmen Napier and Nichols voted "Nay". Councilman Bone was not given an opportunity to vote, that is, the Mayor did not give him time to vote before declaring Council adjourned at 8:05 P. M. Councilman Chalfant's name was not called.

Attest:

Geo. P. Mayhew
Borough Clerk.

Council Chamber, Borough Hall.
February 10, 1930—Pitman, N. J.

In attempting to open Borough Council at 8:00 P. M., Monday evening, February 10th, 1930, Mayor Wm. B. Brown announced that he desired to make a few statements to Council and to the assembled citizens. He stated that he appreciated the importance of paying Borough obligations and had arranged a plan which he believed would make such a course possible, viz: that of checks being signed by himself as Mayor, by Geo. P. Mayhew as Borough Treasurer, and by both Geo. P. Mayhew and Sylvanus Doughty as Borough Clerks. Mayor Brown stated this arrangement met with the approval of both local banks, and that he had been advised by them that they would only honor checks signed in the foregoing manner.

Councilman Nichols challenged the Mayor to produce a letter from the Pitman National Bank & Trust Co. wherein it was stated that they required the signatures as stated by Mayor Brown. The Mayor replied by saying "I have a communication, no matter whether it is written or not." Councilman Nichols inquired—"Isn't it a fact, Mr. Mayor, that Mr. Morris refused to give you a written statement to that effect. Mayor Brown replied—"See the President of the bank."

Mayor Brown then said "I am still obligated to recognize Mr. Briggs as a Councilman until the Courts decide otherwise, and I cannot recognize Mrs. Chalfant." In connection with the proposed 1930 Budget and Tax Ordinance, he stated that since the municipal records were not available to him nor Councilmen Burkett and Kersey, he could

not go into the matter in detail, but said he presumed that since the matter would be taken up tonight, it would be possible to pass the budget on second and third readings so that it could be forwarded to Trenton in ample time to meet the requirements of the State laws on the subject. Also, "I sincerely hope that there will not be a repetition here tonight of what occurred at the previous meeting.

Councilman Bone then took the floor and asked the Mayor if he believed in abiding by the law, cautioning him that if he did it would be impossible to proceed with the regular order of business with Mr. Briggs seated in the Council Chamber, as Council had not been opened in the regular way. Mayor Brown replied by saying that he did not consider it necessary to discuss that matter any further.

For an hour or more, the Mayor and various members of Council argued pro and con with respect to the disputed seat in Council held by Mrs. Chalfant, who was appointed and sworn into office at regular meeting of Council held Dec. 23, 1929.

Councilman Nichols commented upon the Mayor's remarks to the effect that he and Councilmen Burkett and Kersey had not had the privilege of examining the Borough records and taking part in the preparation of the 1930 Budget, by reminding the Mayor that he had been notified of all meetings and requested to attend, but that for some reason unknown to those members who were in attendance at these meetings and who had had a hand in the preparation of the Budget, the Mayor and Councilmen Burkett and Kersey had absented themselves, thereby virtually compelling the old Councilmanic

body to proceed with the preparation of the Budget by themselves. Councilman Nichols further stated that at these meetings the same books and records from which we made the Budget were open on the table and had you been present you would have had the same information that we had.

Councilman Nichols also commented upon the action of the two local banks in declaring that they would only accept checks and vouchers for payment which had been signed by Mr. Brown as Mayor, Geo. P. Mayhew as Borough Treasurer, and by both Geo. P. Mayhew and Sylvanus Doughty as Borough Clerks, by saying it seemed very peculiar that these two banking institutions should have now become so particular about requiring so many signatures to the Borough checks, when formerly they were so careless. He then exhibited a number of checks which he declared had been improperly signed during the Gurk administration. These checks ranged in value from $6. to $10,000. One of them had only the signature of "J. E. Peterson, per E. M. P." as Borough Clerk and also as Borough Treasurer, while others were signed only by J. E. Peterson, and not by the Mayor or Councilmen. One bore the signatures of ex-Councilman H. J. Mockett and J. E. Peterson as Borough Clerk and Treasurer. Another check had been cashed without any endorsement. Several others with irregular signatures were produced and passed through the audience for their inspection. The checks in question were honored by both local banks. Councilman Nichols declared he desired the citizens and taxpayers to thoroughly understand and appreciate in what a loose and irregular manner

the Borough's financial affairs had been previously conducted. One check produced for $1,500. bore no signature whatever except J. E. Peterson as Clerk and Treasurer, with no signature of the Mayor or Councilmen. Mr. Nichols said in conclusion, "It has taken me a long time to learn something about the Borough's affairs and it is going to take a much longer time to hush up what I do now know. Mr. Mayor you deliberately solicited the interference of the two banks, in an effort to pass the buck to us as an excuse for yourself in not paying the bills."

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Councilman Nichols then made reference to the writ issued to H. B. Briggs, Jr., on Thursday, Jan. 23rd, but which was not served until the following Friday, Jan. 31st, at the end of the week, after the regular meeting of Council on Monday, Jan. 27, 1930. Mr. Nichols reminder the Mayor that at the meeting on Monday night Borough Solicitor Porch and others members of Council had urged that this writ be served at once. On Monday evening, Jan. 27th, our Borough Solicitor and ourselves felt that this procedure was irregular and unfair and that if the writ had been issued it should be served at once. When the writ was served on Friday, Jan. 31st, we discovered the reason for the delay in serving it, as incorporated on the last page was a paragraph which had been inserted by Briggs' attorney to act as a restraint against permitting Mrs. Chalfant to hold her seat in Council.

This clause had been crossed out, making the fact clearly apparent that Judge Trenchard of the Supreme Court would not sign the writ with such a clause in it. Mr. Nichols pointed to this act of the Supreme Court as evidence that the Court recognized the fact that Mrs. Chalfant is now occupying Mr. Briggs' seat in Council. Mr. Nichols then proceeded to read the writ, as follows:—

New Jersey Supreme Court,

Camden County.

Harry Beck Briggs, Jr., Prosecutor,
vs.
David S. Stanton, Mayor, and Stacy M. Robbins, Philip Shafto, John M. Napier, Elmer E. Bone, Harold C. Nichols, and Mary S. Chalfant, constituting the Common Council of the Borough of Pitman, Defendants.

Writ of Certiorari.

The State of New Jersey to the Ex-Mayor and Common Council of the Borough of Pitman, County of Gloucester, Respondents. GREETING: We being willing for certain reasons appearing by the affidavits of Harry Beck Briggs, Jr., and William P. Brown, heretofore filed in this cause, to be certified of a certain action of the Mayor and Common

Council, passed by the Common Council of the Borough of Pitman, County of Gloucester, State of New Jersey, on the 23rd day of December, 1929, to wit, "A motion made and passed ousting the aforesaid affiant, Harry Beck Briggs, Jr., as Councilman of the said Body as being a non-resident, and appointing Mary S. Chalfant for Councilwoman in his place:

We do command you that the aforesaid action of the Common Council of the Borough of Pitman, County of Gloucester, State of New Jersey, on the 23rd day of December, 1929, with the records of the meeting of the said Council on the date aforesaid, together with all things touching and concerning the passing, approving and enacting of the said action as fully and entirely as before you they may remain, to our Justices of the Supreme Court of Judicature, at Trenton, on the 11th day of February, next, you certify and send, together with this our writ, that therein may be done what of right and according to the laws of this State should be done.

THE FOLLOWING PARAGRAPH WHICH WAS ORIGINALLY MADE A PART OF THE WRIT BY BRIGGS' ATTORNEYS WAS ORDERED CROSSED OUT BEFORE APPROVAL BY JUSTICE TRENCHARD.

We further command you that the defendant, Mary S. Chalfant, be restrained from participating in the deliberations of the Council of the Borough of Pitman and from participating in the prosecution of any municipal business, and for this purpose this writ shall operate as a stay; and pending the taking of depositions and hearing in said cause,

that the prosecutor, Harry Beck Briggs, Jr., shall be taken to be and deemed the incumbent, and shall continue to exercise and perform his duties as a member of the Common Council of the Borough of Pitman.

The writ continued—WITNESS, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, this twenty-third day of January, in the year of our Lord, one thousand nine hundred and thirty.

Fred L. Bloodgood, Clerk.
Walter S. Keown,
Morton C. Haight,
Attorneys for Prosecutor.

Councilman Bone asked Mayor Brown how he intended to pay the public school teachers $5,000 Mayor Brown stated that he was ready to sign Bone replied by saying "I am glad to hear you say that." Councilman Bone then asked the Mayor if he would now sign checks for bills amounting to $7,136. which had previously been submitted to him for his signature and which he had thrown back. Mayor Brown denied throwing the checks back, stating that he had handed them to Mr. Mayhew.

Bone—"Mr. Mayor don't you think that you have innured the credit of the Borough by refusing to sign checks in payment of coupons on bonds.

Brown—"No."

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Bone—"Have you paid any interest on the Borough bonds?"

Brown—"No." "I did not sign these checks because Mr. Mayhew asked me not to, stating that if I did, in company with Mr. Doughty's signature, they would be void and he would have to make them out all over again."

After Councilman Bone insisted that the meeting be called to order in regular manner and form, Mayor Brown called upon his Committee Chairmen appointees for a report. Burket, Briggs and Kersey said they had nothing whatever to report.

Councilman Nichols then called particular attention to the fact that it would appear to the public from these reports that the Borough was at a standstill. On the contrary, however, he said, the water is still running through the mains, the Fire Co. still functioning normally, the Police Dept. still working, Street and Highway Dept. still collecting ashes, Borough Clerk in usual place to receive money and make bank deposits, which are being made as usual and in the regular way, and that every department is functioning normally except the Mayor's office.

Councilman Bone then referred to Mr. Briggs and said he felt Briggs should take himself out of the picture. Mr. Briggs then made a statement to the effect that he did not feel justice had been done him on Dec. 23rd. Councilman Bone then asked Briggs, "Didn't you have to admit to the Supreme Court that you were out of office in order to secure your writ, and will you kindly tell me why you did not

turn your copy of the audit over to the Borough Solicitor in accordance with your promise made to us here in open Council on several occasions?'' Briggs replied, ''I had a copy of the audit but because of the nasty situation which developed, I decided I would hold on to it as I might need it.'' Bone—''You promised to turn this copy of the audit over to the Borough Solicitor about the middle of November, but evidently you were not in Pitman long enough to do so.'' Briggs—''That is beside the question.'' Napier—''Mr. Briggs, you know better than that. You apologized to Council on several occasions for failure to turn the audit over to Borough Solicitor Porch prior to December 23rd. There was absolutely no malice that I know of between us prior to that time.''

Ex-Mayor Stanton arose from the audience and said—''After Briggs volunteered to furnish his copy of the audit to the Borough Solicitor to send to the Bonding Co., but failed to do so, I told Borough Solicitor Porch that I had a copy of it and would see that he got it. This I did and I did not wait for Mr. Briggs to do it as he had lied to me too many times before.'' Briggs—''When did I lie to you?'' At this point Mayor Brown called for order, and again both sides argued over Briggs seat, until Councilman Burkett finally took the floor and referred to comments which he had made earlier in the evening concerning the uselessness of attempting to proceed with regular business with the two factions unable to get together.

The Mayor finally recommended the meeting adjourn, whereupon Councilman Bone said—''Why, Mr. Mayor, the meeting has not been started as

yet." Director Burkett made a motion to adjourn and suggested no attempt be made to hold any more meetings until the Court had decided the Briggs' case. Kersey seconded Burkett's motion to adjourn, and Mayor Brown declared the meeting adjourned without calling the roll, at 9:08 P. M.

As President of Council, Mr. Bone immediately called the meeting to order and asked for a roll call. As he did this Councilmen Burkett and Kersey; also Briggs and Doughty left the room together, followed by Mr. Haight. Mayor Brown remained in his seat.

In response to roll call by Borough Clerk Mayhew, Mayor Brown did not answer; Councilmen Nichols, Napier, Bone and Chalfant answered "present"; Burkett and Kersey absent.

President Bone directed the Clerk to read the minutes of regular meeting of Council held Jan. 27, 1930. The minutes were read and approved. Then by direction of the President of Council the Clerk read the minutes of special meeting of Council held Friday evening, Feb. 7th, for the purpose of a public hearing of the 1930 budget. These minutes were approved as read.

REPORTS OF COMMITTEES:

FINANCE COMMITTEE:

Director Bone said—"We have plenty of money to spend, but cannot spend it. There is a check in the amount of $5,000. transferring funds from taxes to the Custodian of the Schools for school purposes, which will be signed and presented for the

signature of the Mayor. This covers payment of the school teachers salaries. Bills have already been presented for the Mayor's signature amounting to $7,136., and $10,631., making a grand total of $17,767.28. They will be turned over to the Mayor for his signature, as usual, with Mayhew signing as Borough Clerk and Treasurer."

HIGHWAY COMMITTEE:

Director Napier reported that the Street and Highway Dept. is functioning the same as though nothing ever happened. Doing all that is necessary. Ash and rubbish collections heavier last week than ever. Streets are clean of ashes and rubbish.

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PUBLIC SAFETY:

Director Nichols stated the Public Safety Dept. has been functioning as usual and perfectly normal. He supplemented his remarks by a comprehensive and detailed report of the department's activities during the month of January, 1930; and also read the annual police report for 1929. He advised that the reading of this report had been delayed because of the unusual circumstances which had existed in Council since the first of the year. Mr. Nichols reported 143 arrests in 1929, with 133 convicted. Fines paid County $1,254; Borough $105.

WATER & SEWER COMMITTEE:

Director reported that none of the bills for the year 1930 have been sent out. He further said—"The other day I walked into a local business establishment and was surprised to have the proprietor ask me the following question—'Mr. Bone, what is the matter down at Borough Hall? I am told that I cannot pay my bills for curb and gutter assessments.' When I asked this party where such information was obtained, the reply was 'I do not recall who told me.' Mr. Bone commented upon this instance by saying "I would like to say right here as a matter of public record that if the people are not paying their bills they are only cheating themselves, because they will be charges 8% annually on all overdue amounts. Anyone can pay such bills who call at Borough Hall or who mails a check to that address."

PROPERTY COMMITTEE:

Director Nichols commented in quite some detail concerning the condition of the heating plant in Borough Hall.

LIGHT COMMITTEE:

Director Kersey was absent; therefore, no report was made.

Moved by Nichols, seconded by Napier that all bills be taken up at the close of the meeting. Carried.

By direction of the President, the Clerk then gave

the Tax Budget ordinance a second reading. Moved by Napier, seconded by Nichols that the ordinance pass on second reading and be advanced to the third reading. On roll call Councilmen Nichols, Bone, Napier and Chalfant voted "Aye"—Burkett and Kersey absent. President Bone declared the ordinance passed on second reading, and directed the Clerk to read it the third time, which was done. Moved by Napier, seconded by Nichols that the ordinance pass on third reading. On roll call Councilmen Nichols, Bone, Napier and Chalfant voted "Aye"; Absent Burkett and Kersey. President Bone declared the ordinance enacted.

A communication was read by the Clerk from Borough Solicitor Porch dated Jan. 8th, concerning contract between the Borough and James Scanlon, garbage collector. A bond for $500. was enclosed. On motion of Nichols, seconded by Napier, the contract was ordered executed and filled. Carried.

A communication was read by the Clerk from Borough Solicitor Porch dated Feb. 4th, enclosing an agreement between the Borough and the N. J. Conference Campmeeting Assn. for $360. representing the Camp Meeting Assn's share of the garbage contract. Moved by Nichols, seconded by Napier, that the agreement be ordered executed and filed. Carried.

A communication dated Dec. 23rd addressed to the Borough Clerk from the State Highway Dept. was read, regarding the $14,000. appropriated by the State toward the paving of the extreme westerly end of West Holly Ave. Moved by Napier, seconded by Nichols, that the Borough Clerk be in-

structed to advise the Borough Engineers to proceed with plans for building the road in accordance with the regular routine of law, and State requirements. Carried.

A communication from the Empire Tire & Rubber Co. was read regarding three 50′ sections of damaged fire hose. According to the Company, they had made an investigation of the hose and found only one piece of it was Empire hose, the other two sections bore Eureka trade mark. The Company further stated that the damage to the piece of Empire hose was caused through misuse. A second communication from the Empire Co. was read wherein the Borough was urged to advise disposition of the hose. Moved by Nichols, seconded by Napier that the matter be referred to the Fire Committee. Carried.

A communication from the N. J. League of Municipalities dated Feb. 5th was read relative to a certain bill now before the State Legislature pertaining to gas tax. Councilman Nichols commented upon the subject by advising that formerly all automobiles were taxed under the personal tax and that this money had been turned over to the Borough, but when this practice was discontinued the revenue to the Borough was cut off. He said it is the purpose of the present bill to give the Boroughs a certain percentage of revenue from the gas tax; also, to impose a larger tax on trucks and heavy vehicles such as are used for commercial purposes, and that if this bills is passed Pitman will receive approximately $3,500. additional annually.

Councilman Nichols then said—"Inasmuch as the Mayor has failed to make his appointments and

have them confirmed up-to-date, and since the 30-day period has passed, I would suggest the President of Council take it up at this time, and that Council make the appointments in accordance with the provisions

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of the State law governing municipalities.

Moved by Nichols, seconded by Napier, that Council make the appointments. Carried.

A resolution was then offered by Councilmen Nichols, Bone, Napier and Chalfant, appointing Geo. P. Mayhew, Clerk of the Borough of Pitman, which appointment carries with it the position of Clerk of the Water & Sewer Depts.; and also as Tax Search Officer, to serve until Jan. 1, 1931, and until his successor shall have qualified. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

A similar resolution was offered appointing Willis Tullis Porch Borough Solicitor to serve until Jan. 1, 1931. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

A similar resolution was offered appointing Rob-

ert S. Hickman Supervisor of Highways to serve until Jan. 1, 1931. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

A similar resolution was offered appointing Messrs. Carter, Edgar and Wittwer Borough Engineers to serve until Jan. 1, 1931. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

A similar resolution was offered appointing Robert Q. Dawson Janitor Municipal Bldg., to serve until Jan. 1, 1931. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

A similar resolution was offered appointing A. V. Peterson a Member of the Board of Health to serve for three years. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

A similar resolution was offered appointing T. A. Goodwin a Member of the Board of Health to serve for three years. Moved by Nichols, seconded

by Napier that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

A similar resolution was offered appointing Miss Julia H. Elton a Member of the Shade Tree Commission to serve three years. Moved by Nichols, seconded by Napier, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

A similar resolution was offered appointing H. C. Nichols a Member of the Shade Tree Commission to serve three years. Moved by Napier, seconded by Nichols, that the resolution be adopted and that Council make the appointment. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

A resolution was then offered by Councilmen Bone, Chalfant and Nichols, authorizing the Mayor and Clerk to renew note dated Feb. 16, 1929, due Feb. 16, 1930, for an additional 12 months, to Feb. 16, 1931, covering the borrowing on short term notes or bonds of the Borough of Pitman, the sum of $5,000., at 5%, to pay contractors and engineers, for construction of storm water sewers, in accordance with the contract of Fernow Cons. Co. Moved by Nichols, seconded by Napier, that the resolution be adopted as read. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent,

Burkett and Kersey. President Bone declared the resolution adopted.

A resolution was then offered as follows:—

"Whereas, an audit of the accounts of the Borough of Pitman is required to be made for the year 1930, and whereas, it is deemed advisable to have said audit made periodically during the year, in order that information may be made available for the use of the Finance Committee, Borough Treasurer and Clerk.

THEREFORE BE IT RESOLVED, that N. D. Dorsett of the Department of Municipal Accounts of the State of New Jersey be authorized to make the 1930 audit of the books and account of the Borough of Pitman."

This resolution was signed by Councilmen Bone, Chalfant, Nichols and Napier. Moved by Nichols, seconded by Napier, that the resolution be adopted

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as read. Roll call resulted as follows: Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey. President Bone declared the resolution adopted.

The following resolution was then offered by Councilmen Bone, Chalfant, and Nichols:—

BE IT RESOLVED by the Council of the Borough of Pitman that —

WHEREAS, bills duly audited and approved by Council of the Borough of Pitman at regu-

lar meetings have been presented to the Mayor of the Borough of Pitman more than five (5) days ago (Sundays excepted); and,

WHEREAS, the Mayor of the Borough of Pitman has failed to sign and approve the checks within five days (Sundays excepted) after receipt of same by him;

BE IT RESOLVED, upon re-consideration of these bills, and checks in payment of same, that said checks and payments shall be made by the Council of the Borough of Pitman over the veto of the Mayor of the Borough of Pitman:

BE IT FURTHER RESOLVED, that the Banking Institutions upon which the said checks are drawn be and the same are hereby authorized and directed to pay the same, upon the signature of Geo. P. Mayhew, as Borough Clerk and Treasurer, without liability upon their part, upon a certified copy of this resolution being filed with them; and that the checks and payments to be made under and by virtue of this resolution are all checks and payments authorized by Council of the Borough of Pitman up to and including Feb. 1, 1930."

Moved by Napier, seconded by Nichols, that the resolution be adopted as read. Roll call resulted as follows:—Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey.

An ordinance was then introduced on first reading fixing the Borough Recorder's salary at $400. annually, payable in equal monthly installments. On motion of Nichols, seconded by Napier, the ordi-

nance was passed on first reading, and ordered published as prescribed by law. Roll call resulted as follows: Aye, Nichols; Bone, Napier and Chalfant. Absent, Burkett and Kersey.

Moved by Nichols, seconded by Chalfant that legal advertising be inserted in both local newspapers. Roll call—Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey.

A resolution was then offered appointing Samuel B. Hines, Recorder of the Borough of Pitman for a term of five years. Roll call—Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey.

Moved by Nichols, seconded by Chalfant that the list of Fire Chief and personnel of the Fire Dept. be confirmed as per list submitted. Roll call—Aye, Nichols, Bone, Napier and Chalfant. Absent, Burkett and Kersey.

Councilman Bone then referred to the cut of $3.10 per thousand of assessed valuation which had been made in the local Borough budget by Council, stating that he had previously advised that this cut would be possible only if the school budget remained the same as last year. Bone pointed to the fact that the 1930 school budget which has just been published calls for an increase of $11,125 over that of the 1929 budget. Should this 1930 budget be approved by the Taxpayers at the school election on Tuesday night, February 11, it means a reduction of only $1.50 or $1.60 per thousand of assessed valuation instead of $3.10.

Councilman Nichols then said, "I want to recall to the citizens of Pitman some of the chaotic conditions which existed in Council when Mayor Stanton and I took office. During my first year I was

appointed chairman of the Public Safety Committee. I knew little about the work so just had to take the bull by the horns and go ahead. We had a fairly efficient police force, better than most towns in fact. Our police are now patrolling in the neighborhood of 28 miles of homes. No other town in all the state is to be found where so few officers are required to cover so much territory. One man works an average of eight hours out of the 24 and he is subject to call for the performance of duty during the entire 24 hours. Frequently it occurs when a man goes off duty for a few hours of recreation and rest, he is called right out again. Members of our police force are now called upon to perform a considerable lot of extra work. Westville is putting on eight additional men to handle the summer traffic. Most of this traffic will pass through Pitman, but because of existing financial conditions, we cannot afford extra protection at this time."

"I have heard it said many times on the street that the present shortage in our Borough accounts was merely an error in bookkeeping. In this connection I desire to call to the attention of our citizens the clear cut distinction between a deficit and a shortage. A deficit is a sum of money which is spent by Council in excess of the amount provided in the budget for any current year. A shortage is an entirely different matter. By a shortage we mean a sum of money that has been paid into the Borough by check or cash in settlement of a bill such as taxes, or which has been received through the cashing of one of the Borough's checks at a bank and is not credited to the

PAGE 7—Minutes of meeting of Council, held Feb. 10, 1930:

Borough's account.

The deficit of the Borough of Pitman amounting to $31,000 at the end of the Gurk administration was absorbed in our 1928-1929 and 1930 budgets. The people have been compelled to dig down into their pockets and pay this sum much of which was incurred illegally. It was money that the Gurk administration had spent in excess of the amount of its budget. Referring to the subject of shortages again Nichols continued by saying: "When we speak of a shortage we mean sums of money which have actually been paid into the tresaury for which a receipt was given and the funds have disappeared. In other words receipts for actual cash have turned up for which there is no money. Over $10,000 of the Borough's money has been stolen.

"This is a bold statement and I am willing to make it because I am in a position to substantiate my remarks with proofs. I will again show you some of the checks which were issued during the time that ex-Borough Clerk John Peterson was in office to give you some idea of the way the Borough's business has been transacted in the past.

Checks exhibited were $6.00 signed by E. H. Gurk and John E. Peterson per E. M. P.; $1,500 signed J. E. Peterson; $385 signed by H. J. Mockett and J. E. Peterson; $115.31 which had never been endorsed, and one for $10,000 signed by J. E. Peterson only; $6.00 signed by Mrs. Peterson. "Mrs. Peterson was not Borough Clerk and she was not responsible morally or legally. This is the loose

method in which money was handled. If anyone could cash a check for $6.00 they could cash one for a million. The Borough Clerk handles a quarter million dollars and yet he was only bonded for $10,000. That is not sound business. Not that we doubt Mr. Mayhew's honesty and integrity but the Finance Committee considered it sound business to increase the bonded indemnity and they have done it. While the present shortage is in excess of $10,000, we do not believe the bonding company is going to pay half of it.

"Now the banks are alleged by Mr. Brown to have said that they will only honor checks that bear the signature of two Borough Clerks. Heretofore they cashed checks without any signature. I want you to think these matters over and use your own judgment."

"I want you to realize the seriousness of the situation here. Pitman is by no means on easy street. The town has a very large bonded indebtedness which must be paid off by taxation. It also costs a lot of money to pay the ordinary current operation expenses of the town. This, too, must be raised by taxation. We men in Council find it impossible, if we are conscientious with ourselves about our jobs, to perform our duties as Councilmen in our spare time. The work cannot be done in spare time only. We are required to perform a large amount of our work in time which rightfully should be devoted to our own business interests rather than to that of the town. Pitman is a big community. It represents an investment of approximately $7,000,000 according to the assessed valuation. In order to perform our duties properly we

must have a certain amount of co-operation from our fellow citizens and taxpayers. If you people wish and desire a continuance of the policy which has brought you a tax cut of $3.10 per thousand of assessed valuation then you must give us your support. It is practically impossible to please any of you 100%, but we are willing to try. If you do not like what we do come and tell us. We can only sense your desire. If you do not tell us what you want we may make the same mistakes over again.

At a meeting in Trio Motors Bldg. a lot of statements were made which could not be backed up. You will recall that the statement was made that that meeting was called to order by a neutral chairman, if you know what that is. I have never seen one. The chairman said with his arms raised in the air, 'we are not here to build political fences for anyone.' Yet, at the very next primary election all those who took active part in that meeting were on the ticket for nomination to office.

"The State Department which is appointed by the government to care for the interests of municipalities saw fit to turn over a copy of their audit to the Gloucester County Prosecutor showing that a criminal act had been committed by an official of the Borough of Pitman. This act was committed during the administration of Edward H. Gurk, as Mayor. Peculiarly Edward H. Gurk was on the Grand Jury which investigated the acts of his own office. Certainly this was not good business.

"Another point, Mr. Briggs made every possible effort which he could to hold up the activities of the Councilmanic body last year in connection with their efforts to effect collection of the $10,000 short-

age from the bonding company. He did not want the matter to go to the bonding company. As your representative, I do not feel that I have the right to say that you shall be compelled to pay over again for something which has been taken wilfully and unlawfully, yet Mr. Briggs, at an open meeting of Council last July, openly advocated that the Borough shortage which was then approximately $7500 should be absorbed in the 1930 budget and forgotten. By this Mr. Briggs meant that we taxpayers would be compelled to pay that sum twice when we already had paid a substantial premium to a bonding company to protect us

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against just such a loss.

"Back, on November 16th, Mr. Briggs agreed to resign from his office as Councilman. He had moved out of town and transferred his daughter to a public school at Westfield, N. J. When a man changes his residence the law says he is not entitled to hold office in the Borough from which he moved. As far as Mr. Briggs himself is concerned, the matter is not a personal one with the members of our Council. I felt that I was responsible and if Mr. Briggs did not do his duty I had to. On the evening of November 16, the night of the American Legion celebration in Pitman Mayor-elect Brown and Councilmen-elect Burkett and Kersey in company with Councilmen Bone, Napier, Briggs and myself met in the Pitman Title and Trust Company. From then up

until the last meeting of Council we waited to be consulted about the policy for the coming year. We felt that a Mayor and two new Councilmen could not come in and oppose everything we had done. Due to Briggs moving to Westfield, Council recognized a vacancy existed in Mr. Briggs' seat and in strict accordance with the law, Mayor Stanton named Mary S. Chalfant as his successor, and Council, by a majority vote, filled the seat which Briggs had vacated, by confirming the Mayor's appointment. We positively did not oust Briggs. Everything points to the fact that Briggs changed his residence. We have nothing to support the contrary. People do not give farewell parties, presents and flowers to their friends when they are merely going away from town for a few weeks.

"On January 1 the carry-over members of Council held a perfectly legal meeting and Councilmanic committees were appointed."

Councilman Nichols then said, "The Mayor has advised that Mr. Mayhew was to have been appointed Borough Clerk, but he failed to tell the public that another clerk for the Water and Sewer Departments was to be appointed, taking away from Mr. Mayhew a salary of $1,500 per year, thus making it impossible for him to remain in office on the small amount of salary that remained from the Borough Clerk's office."

Mr. Charles Foster, in the audience asked—"Mr. Bone, didn't you say the ousting of Briggs was a matter of political expedience?" Bone—"No, I did not." Foster—"Mr. Nichols, were you a member of Council in 1927?" Nichols—"No—1928, 1929 and 1930."

Ex-Mayor Stanton arose from the audience and said—"I would like to advise the assembled citizens that I would have been only too glad to answer Mr. Briggs if I had been given an opportunity, but as he is not here, I would rather tell him what I have to say right to his face."

Councilman Bone then said—"I have been brought up in business and I am not going to say whether I believe business and politics will mix. However, it is very discouraging for any man to try to do something for some one which is not appreciated. As a matter of fact, I rather like criticism because it teaches one something, and as Mr. Nichols says, if we are wrong we will stand corrected.

"Mr. Mayhew's work as Borough Clerk and Clerk of the Water and Sewer Departments is wonderful. When his name was mentioned as a candidate for the Borough Clerkship I had no personal interest in him. One night before he was appointed, I met Mr. Mayhew in front of the cigar store at the corner of Broadway and First avenue. At that time I said to him 'George, how are you fixed to take the Borough Clerkship if it is offered to you?' He replied 'I will think it over.' While he was thinking it over I went to the officials of the Pennsylvania Railroad. They gave Mr. Mayhew one of the best recommendations that any one could wish as to his efficiency, honesty and ability. They said he was splendidly suited for and thoroughly capable of handling a job such as we had in mind for him. In fact, one of the officials said 'If Mr. Mayhew lived in our neighborhood he would be an official of our township in some capacity or other, not from

a political standpoint but from the standpoint of real business economy.'

"After these recommendations were weighed, we took into consideration the political side of the situation. For a man to give up a real position such as Mr. Mayhew had with the Pennsylvania Railroad, it really meant something to him to take a position as Borough Clerk in Pitman. Mayhew's name was brought up with several others and because of his references and splendid qualifications for the job, Mayor Stanton picked Mr. Mayhew for the Borough Clerkship and it was the best move Mayor Stanton made during his entire term of office. There was absolutely no politics back of the decision.

"Mr. Mayhew went into the muddle. He had the help of state auditors who understood everything about the handling of municipal affairs from the legal end of it as well as the regular routine work. As a result Mayhew was tremendously helped by the State Auditors and he has learned in one year under their guidance what it would take any other man, no matter how competent, at least five years to learn without the assistance of the auditors. After Mr. Mayhew had been defeated by only 2 votes, had we not been misinformed as to the proper procedure to take we would have had a recount. It was very discouraging to him to be defeated after working eighten hours out of 24 for a whole year to get his office into running order and then be taken off the job.

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"Mayhew was a good sport, however, and continued his furlough. In the Fall at the General Election he ran for Tax Collector and Treasurer on a sticker and was returned victor by approximately 300 majority. This showed him the attitude of the people; that they appreciated his efficient business conduct while in the office of Borough Clerk, Treasurer and Collector.

"Why shouldn't we support a man like that? That is one of the principal things that this fight is about. It isn't Briggs so much, because I feel that from Mr. Briggs' remarks he only wanted to hold his seat until the first of January to see his successor appointed.

"Mayhew is not costing this Borough one penny, nor his assistant nor stenographer, for the simple reason that he is doing what John Peterson failed to do. He is collecting interest on bills which are overdue and by doing so pays the salary of the entire office force at Borough Hall at this time.

"I am sorry that this present fight has occurred, but I shall stick to George Mayhew as Borough Clerk and Clerk of the Water and Sewer Departments through thick and thin. If Mayhew continues in office the people of Pitman will soon know where Pitman stands."

Addressing his remarks to Mayor Brown Bone said: "The Borough has been run on a real business efficiency basis, one to be proud of. I again plead with you Mr. Mayor to weigh your thoughts with yourself. Throw your politics out of the win-

dow and let us help you to have a wonderfully prosperous administration such as will be a credit to you when you leave office or succeed yourself. I believe you are a man of business. We have our thoughts and you have yours, but I really believe that if you will carefully weigh what has been accomplished in this town from a standpoint of good business, we will be able to get together. For the best interests of Pitman we must get together and we must forget a lot of political things. We are willing to work with you, you may be assured of that. I want you to weigh these things that I have said because I am sincere. We are anxious to get together with you."

Frank D. Kirby of Wildwood Ave., took the floor and commented upon the present situation by describing a number of blunders which he claimed had been made by the Mayor and the two new members of Council. In concluding his remarks he said —"The new administration never said they would do anything. What have they done? They have done nothing."

Moved by Nichols, seconded by Napier, that the Council go into the consideration of bills. Carried.

Council recessed at 11:26 P. M., and re-convened at 11:40 P. M.

Moved by Chalfant, seconded by Nichols, that all bills properly signed be ordered paid. Carried.

Moved by Nichols, seconded by Chalfant, that Council adjourn. Council adjourned at 11:41 P. M.

Attest:

Geo. P. Mayhew
Borough Clerk.

EXHIBIT D1.

Council Chamber, Pitman, N. J.
January 13, 1930.

The regular semi-monthly meeting of Borough Council was called to order by Mayor William B. Brown at 8 P. M. The Mayor read his remarks to Council and to the taxpayers in attendance as follows:

"As Mayor and Chief Executive of the Borough of Pitman, I desire to comment very briefly on the situation that exists in connection with our municipal government, and I will ask that those in attendance tonight refrain from any public exhibition and remarks either in favor or opposed to the action of myself and any other member of Council so that we may have an orderly meeting and will not have any undue and improper publicity.

The circumstances are very regrettable and the publicity which our Borough is receiving because of this situation is very distasteful. I am interested in the welfare and progress of our community, and so long as I remain as Mayor and Chief Executive it shall be my purpose to refrain from any action that would operate to the detriment of the Borough.

We are citizens and taxpayers in a municipality that has achieved a reputation for thrift and progress and it is our duty as residents of the Borough to be proud of this success and to use our every effort in upholding this tradition.

I understand that legal proceedings have been in-

stituted in the Supreme Court of this State for the purpose of obtaining an adjudiciation of the status of our municipal government, and I have been assured that every possible effort will be made to expedite the matter and bring the issue to an early hearing and determination. I have just learned the date of hearing is Tuesday, January 21st, 1930. I am glad that such action has been resorted to and will welcome the proper determination of the rights of all individuals who claim to be aggrieved. I feel satisfied that a decision by the Court in the matter at issue can be procured very promptly and until such time it behooves the members of this municipal governing body to refrain from the transaction of any and all business.

I know of no municipal matter which necessarily must be acted upon tonight and it is my thought in the matter that we should not participate in or transact any municipal business which by virtue of an adverse legal decision might be illegal and invalid.

In addition to this, it is very evident that this body could not transact any business tonight without recurrence of this situation that existed at our Organization meeting and this would only result in unfair, unjust and unwarranted publicity for our Borough.

I am sure that all members of this Council are interested only in the progress and success of our community and because of this fact are not desirous of having our differences aired in the press of this and neighboring states.

I feel that this expression of opinion will be fa-

vorably received by those in attendance and by our people at large."

At this time the Mayor advised Council that he had told B. F. Moore that his services were no longer required. On motion of Briggs, duly seconded and passed the action of the Mayor was approved.

Moved by Burkett and seconded by Mr. Kersey that the meeting be adjourned. The Mayor so declared.

Mr. Napier said there should be a roll call and on roll call, called by Clerk Doughty

Mr. Nichols and Mr. Napier responded No.

Mr. Kersey, Mr. Briggs and Dr. Burkett responded Aye.

Mr. Bone did not answer.

Adjournment 8:03 P. M.

Attest:

SYLVANUS DOUGHTY

Borough Clerk

EXHIBIT D2.

New Jersey Supreme Court.

No. 229 May Term 1930.

10

Henry B. Briggs, Jr.,
Prosecutor,
v.
David S. Stanton, et al.,
Defendants.

On Certiorari.
Rule.

20

A writ of certiorari having been allowed herein to review certain action taken on December 23, 1929 at a meeting of the borough council of the Borough of Pitman in the County of Gloucester purporting to be a declaration that the office of councilman theretofore held by said prosecutor had become vacant by reason of his alleged removal of his residence from said borough, and purporting to appoint the defendant Mary S. Chalfant as councilman in
30 his place and stead, to serve until January 1, 1931; and depositions under said writ having been duly taken and other evidence produced, and the matter having been argued before this court at the May term 1930 upon said evidence and the return to said writ and upon stipulation that if the court should be of opinion that this action should have been in

quo warranto a record should be made up accordingly, to the end that the opposing claims of said prosecutor and said Mary S. Chalfant to said office should be definitely settled and finally adjudged by this court:

And the court having considered the matter and being of opinion that said Henry B. Briggs had never ceased to be a resident of said borough of Pitman, that his office of councilman had never become vacant that said Mary S. Chalfant had wrongfully intruded therein and unlawfully interfered with the exercise of said office by said prosecutor, but that the judgment between said parties should be in an action of quo warranto.

It is now on this nineteenth day of May A. D. 1930 ordered that a record in quo warranto under action of the act relating to the action of quo warranto be made up under the direction of this court, to consist of information, return, and such other pleadings as shall be required, and concluding with judgment of ouster in favor of said Henry B. Briggs and against said Mary S. Chalfant, and that said Briggs is entitled to all the rights and emoluments of the office of councilman of said borough for the balance of the term for which he was elected and qualified.

It is further ordered in view of the special circumstances of the case that neither party recover costs as against the other.

Let this rule be entered.

C. W. Parker,
J. S. C. for the Court.

Entered May 22, 1930,
On motion of Walter S. Keown,
Atty.

A true copy,
FRED L. BLOODGOOD,
Clerk.

(Endorsed)

New Jersey Sup. Ct.
No. 229 May Term 1930.
Henry B. Briggs,
Prosecutor
v.
David S. Stanton, et al.
Defendants.
Rule moulding the record
as in quo warranto.
Walter S. Keown,
Atty.
Filed May 22, 1930.
Fred L. Bloodgood, Clerk.

EXHIBIT D3.

NEW JERSEY SUPREME COURT.

The State of New Jersey, ex rel. Harry Beck Briggs, Jr., Relator, vs. Mary S. Chalfant, Respondent.	RULE FOR JUDGMENT. IN QUO WARRANTO.

It appearing to the Court that proceedings in this cause were originally instituted in certiorari, and the Court having determined, and counsel having stipulated, that the said proceedings would in case the court should think proper, be treated and determined as if upon Quo Warranto, and this cause having been regularly set down and noticed for hearing, and having been argued before the Court by Walter S. Keown and Morton C. Haight, counsel for the relator, and Willis Tullis Porch, counsel for the respondent, and the Court having considered said cause and rendered an opinion therein directing that the record be molded into a Quo Warranto proceedings under Section 4 of the Statute with judgment of ouster in favor of relator and against respondent, and an order made under Section 11 of the

Quo Warranto Act, and subject to the requirements of that Section, whereupon an information in the nature of Quo Warranto having now been filed in the above entitled cause by Harry Beck Briggs, Jr., as relator, and against Mary S. Chalfant, as respondent, and return made thereto by the respondent and other pleadings therewith waived.

It is thereupon on this 21st day of May, 1930, ORDERED that judgment final be entered in favor of the relator, Harry Beck Briggs, Jr., and against the respondent, Mary S. Chalfant, and it is further ORDERED and ADJUDGED that the said relator, Harry Beck Briggs, Jr., is and always has been at all times since the commencement of his term of office entitled to the office of member of Council of the Borough of Pitman, and to enjoy the privileges thereof and that the said relator, Harry Beck Briggs, Jr., is entitled at once upon the entry of this judgment to enter into, possess, and enjoy the office of member of Council of the Borough of Pitman, and that the respondent, Mary S. Chalfant be ousted therefrom.

And it is further ordered that neither party recover costs herein as against the other.

Let the above rule be entered.

Charles W. Parker
Presiding Justice, Supreme Court,
for the Court.

Entered May 22, 1930,
On motion of Walter S. Keown,
Atty.

A true copy,
Fred L. Bloodgood,
Clerk.

(Endorsed)

NEW JERSEY SUPREME COURT.
The State of New Jersey, ex
rel. Harry Beck Briggs, Jr.,
Relator.

vs.

Mary S. Chalfant,
Respondent.

RULE FOR JUDGMENT
IN QUO WARRANTO.
Walter S. Keown, Atty.
Judgt. of Ouster.
Filed May 22, 1930.
Fred L. Bloodgood, Clerk.

POSTEA.

(Filed Feb. 13, 1931.)

SUPREME COURT OF NEW JERSEY.

GLOUCESTER COUNTY.

BENJAMIN F. MOORE,
Plaintiff,
v.
BOROUGH OF PITMAN,
Defendant.

Postea.

This case was tried before Judge Henry H. Eldredge and a jury at the Gloucester Circuit on February 10 and 11, 1931, and a general verdict rendered in favor of the plaintiff, Benjamin F. Moore, and against the defendant, Borough of Pitman, in the sum of six hundred twenty-five dollars ($625.00).

HENRY H. ELDREDGE,
Judge.

AFFIDAVIT.

(Filed Feb. 13, 1931.)

NEW JERSEY SUPREME COURT.

GLOUCESTER COUNTY.

BENJAMIN F. MOORE,
Plaintiff,
v.
BOROUGH OF PITMAN,
Defendant.

Action at Law.
Affidavit.

STATE OF NEW JERSEY,
COUNTY OF GLOUCESTER, } *ss.*

WILLIS TULLIS PORCH, being duly sworn according to law, upon his oath deposes and says:

I am the attorney for the plaintiff in the above entitled cause; that the following expenses were necessarily and properly incurred in the trial of this cause, viz:

Transcript of Pleadings	$3.56
Notice of Trial	1.50
Two original Subpoenas and two tickets	1.40

Witness fees for two witnesses at 50¢ each 1.00

$7.46

WILLIS TULLIS PORCH.

Sworn and subscribed to before me this 11th day of February, A. D. 1931.

EMMA SCHOENING,
Notary Public.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

BENJAMIN F. MOORE,
Plaintiff,
v.
BOROUGH OF PITMAN,
Defendant.

Action at Law.
On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of six hundred and twenty-five dollars, besides costs to be taxed *nisi.*

Entered February 13, 1931.

On motion of,

WILLIS TULLIS PORCH,
Attorney.

Damages	$625.00
Costs	72.22
	$697.22

JUDGMENT.

NEW JERSEY SUPREME COURT.

BENJAMIN F. MOORE,
Plaintiff,
v.
BOROUGH OF PITMAN,
Defendant.

Action at Law.
On Postea.
Willis Tullis Porch,
Attorney.

Judgment entered this thirteenth day of February, A. D. nineteen hundred and thirty-one in favor of plaintiff and against the defendant for the sum of six hundred and twenty-five dollars damages and seventy-two dollars and twenty-two cents costs.

WM. S. GUMMERE,
C. J.

$625.00
72.22
$697.22

NEW JERSEY COURT OF ERRORS AND APPEALS.

BENJAMIN F. MOORE,
Plaintiff-Respondent,

v.

BOROUGH OF PITMAN,
Defendant-Appellant.

ON APPEAL FROM SUPREME COURT.

BRIEF OF DEFENDANT-APPELLANT.

STATEMENT.

The plaintiff-respondent, Benjamin F. Moore, instituted an action at law against the defendant-appellant, Borough of Pitman, for wages and compensation alleged to have been due for services rendered to the said Borough of Pitman by the said Benjamin F. Moore, covering a period from January, 1929, to July 1, 1930.

The defendant-appellant contended that at no time did it employ, hire or engage the plaintiff-re-

spondent to render any services to the defendant but on the contrary that said plaintiff-respondent was an intruder, usurper and mere volunteer, particularly from and after January 1, 1930.

The defendant-appellant further contended that said plaintiff-respondent was relieved and discharged from any employment that he alleged to exist on or about January 2, 1930, and said discharge being duly ratified and confirmed by lawful action of the municipal governing body on January 13, 1930.

This cause was tried at the Gloucester Circuit, with Judge Henry H. Eldredge presiding, and resulted in a verdict being rendered by the jury against the defendant-appellant, and in favor of the plaintiff-respondent, in the sum of six hundred twenty-five dollars ($625.00) damages and seventy-two dollars twenty-two cents ($72.22) costs.

From this verdict rendered as aforesaid, the defendant-appellant respectfully appeals and assigns twenty-two separate grounds of appeal, consisting of the trial Court's ruling with respect to the admission of certain testimony—oral and documentary—the trial Court's refusal to grant a non-suit, the trial Court's refusal to direct a verdict for the defendant-appellant and the trial Court's refusal to make certain charges as requested by the defendant-appellant.

ARGUMENT.

The defendant-appellant will undertake to advance argument on each exception noted at the trial of this case in the order of the grounds as they appear in the State of the Case (pages 1 to 10).

(A)

The first exception and ground of appeal has to do with the trial Court permitting the plaintiff to be asked and to answer the question: "Did you get another job?" (S. C., page 32).

This was entirely irrelevant, immaterial and prejudicial to the defendant-appellant as the municipality could not legally be charged for the failure of the plaintiff-respondent to secure other employment and said question and answer were not within the issues raised by the pleadings.

We submit and contend that under no circumstances would the defendant-appellant be responsible in this respect unless it could be proven and substantiated that the plaintiff-respondent's failure to secure employment was due to some overt act upon the part of the defendant-appellant but no such proof was offered at the trial of this cause. Further the testimony produced by the defendant-appellant clearly indicated that the plaintiff-respondent had been relieved and discharged from any employment or position that he alleged to hold or occupy.

(B)

The second exception and ground of appeal has to do with the trial Court permitting George P. Mayhew, a witness for the plaintiff, to be asked and to answer the following question: "Well, under those items is a salary provided for, Mr. Moore?" (S. C., page 65).

A copy of the 1930 budget of the Borough of Pitman was offered in evidence, by consent of counsel, and constituted the best evidence of the character and purpose of the items and appropriations set forth therein (S. C., page 167).

The testimony of this witness for the plaintiff-respondent was to the effect that the compensation and wages of municipal employees was included in the budget as administration expenses and to permit the asking and response to the above question was surplusage and extremely prejudicial to the rights of the defendant-appellant to testify that any specific appropriation had been made for the purpose of compensating the plaintiff-respondent.

We contend that at the most the plaintiff-respondent could only offer evidence that an appropriation had been made for the position or employment that was alleged to have been filled by him.

(C)

The third exception and ground of appeal has to do with the trial Court permitting George P. May-

hew, a witness for the plaintiff, to be asked and to answer the following questions:

1. "What date were those appointments made?" (S. C., page 99).

2. "By whom?" (S. C., page 99).

We respectfully contend that these questions and answers were most improperly permitted and that they were entirely irrelevant, immaterial and not within the issues raised by the pleadings.

The position or employment alleged to have been filled by the plaintiff-respondent, and the subject-matter and basis of this suit, was not an appointive office under the provisions of the statutes of this State or any ordinance of the municipality. Further an examination of the record, at the pages above indicated and subsequent pages, will disclose that the answers to these questions had to do with appointive offices in the municipality.

Further the answers of this witnesses, to these and subsequent questions relating to the same subject-matter, were read by him from a memorandum or notes that did not constitute the official minutes of the municipality and we submit and contend that under no circumstances could this oral and documentary evidence be binding upon the defendant-appellant.

(D)

The fourth exception and ground of appeal has to do with the trial Court permitting counsel for the

plaintiff-respondent, to offer in evidence a memorandum or notes of certain meetings that had been kept by one George P. Mayhew (S. C., page 103).

We submit and contend that the admission of these notes was prejudicial to the defendant-appellant and created a new issue not within the purport of the pleadings.

We further contend that the memorandum or notes disclosed that under no circumstances could they be constituted or considered as an official record of a municipal meeting as said gatherings were not presided over by the Mayor and were only attended by three regularly constituted Councilmen.

We further submit, for the purpose of argument, that should said memorandum or notes be considered as the official minutes of the municipality that they would have no evidential value in support of the claim of the plaintiff-respondent in that they were silent as to the hiring, discharge and any arrangement of employment as between the parties to this cause of action.

(E)

The fifth exception and ground of appeal has to do with the trial Court refusing to non-suit the plaintiff-respondent notwithstanding the fact that he had not established a right to recover (S. C., page 105).

We submit and contend that the plaintiff-respondent had not, under the testimony offered and both oral and documentary, established a case that called for a defense on the part of the defendant-appellant.

We further contend that the primary and sole question involved at the trial of this cause was whether or not there had been an employment and a discharge of the plaintiff-respondent, by the defendant-appellant during the period of time alleged in the complaint.

The plaintiff-respondent in his own case did not offer any testimony—oral or documentary—of his employment by the municipal governing body and in his own testimony (S. C., page 44) acknowledged that he had been advised by the executive officer of the municipality that his services were no longer required. We submit that the employment in question was not one within the statutes of this State or any ordinance of the municipality that would require the discharge of an incumbent for cause and after a hearing but on the contrary that the incumbent of such a position is subject to discharge and the termination of his employment without cause and a hearing.

(F)

The sixth exception and ground of appeal has to do with the trial Court permitting William B. Brown, a witness for the defendant, to be asked and to answer the following question on cross-examination by counsel for the plaintiff-respondent: "And how many officers were attacking Mr. Nichols?" (S. C., page 119).

We submit and contend that this question was entirely irrelevant, immaterial and not within any issues raised by the pleadings.

(G)

The seventh exception and ground of appeal has to do with the trial Court's refusal to direct a verdict for the defendant-appellant notwithstanding the fact that the cases in our courts disclose that the plaintiff-respondent was not entitled to recover.

We submit and contend that the plaintiff-respondent's own case, and the defendant-appellant's case, negatived a recovery, and warranted the direction of a verdict in favor of the defendant-appellant.

We further submit and contend that the plaintiff-respondent did not by a preponderance of the evidence establish any right to recover but on the contrary that the evidence and case of the defendant-appellant clearly, unquestionably and beyond a shadow of doubt established the fact that any contract or agreement of employment that existed between the parties had been terminated in a legal manner.

We further submit and contend that the case of the defendant-appellant established that the plaintiff-respondent had at no time been hired or employed by the *de jure* councilmanic body, but notwithstanding this fact that he continued to perform certain duties and render certain services contrary to the wish of the *de jure* councilmanic body and because of this fact said plaintiff-respondent was an intruder, usurper and mere volunteer, and was neither a *de jure* or *de facto* employee.

(H)

The eighth exception and ground of appeal raises the same questions as under the last ground referred to and the same comments are made thereupon.

(I)

The ninth exception and ground of appeal raises the same questions as under the seventh ground referred to and the same comments are made thereupon.

(J)

The tenth exception and ground of appeal has to do with the trial Court's refusal to limit the amount of recovery by the plaintiff-respondent and to instruct the jury accordingly contrary to the testimony that was offered in said cause and to the prejudice of the defendant-appellant (S. C., page 149).

We submit and contend that the plaintiff-respondent in his own case (S. C., page 44) and the case of the defendant-appellant clearly established the fact that any right of recovery that might have been vested in the plaintiff-respondent terminated upon his discharge, and because of this fact that the trial Court, in view of the evidence offered and uncontradicted, should have limited the amount of recovery to a period of time not extending beyond January 13, 1930, and that said trial Court should have so directed and instructed the jury.

(K)

The eleventh exception and ground of appeal has to do with the trial Court's refusal to charge to the jury the first request to charge of the defendant-appellant.

We submit and contend that this request to charge was a proper and legal request on behalf of the defendant-appellant and particularly in the light of the issues and testimony produced at the trial of this cause.

We respectfully direct the attention of this Court to the decisions in this State in this regard and the same will be commented upon in the subsequent pages of this brief.

We further submit and contend that the charge of the Court did not in a proper and substantial manner cover the point raised by this request to charge on behalf of the defendant-appellant.

(L)

The twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second exceptions and grounds of appeal have to do with the trial Court's refusal to charge to the jury the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth requests to charge of the defendant-appellant.

What has been said with respect to the eleventh exception and ground of appeal applies likewise to

the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth requests to charge on behalf of the defendant-appellant.

REVIEW OF DECISIONS.

We respectfully submit that the status of the plaintiff-respondent is such that under the decisions of this State and evidence submitted to the trial Court and jury, he was not entitled to recover any sum of money from the defendant-appellant.

We contend that in order to justify a recovery it was incumbent upon the plaintiff-respondent to establish by a preponderance of the evidence that he was either a *de jure* or *de facto* employee of the municipality, and we maintain that the evidence and proof offered at the trial of this cause can in no sense of the word be construed to have established a right of recovery under either status.

In order to successfully establish a right to recover as a *de jure* employee of the municipality he must prove that the Mayor and municipal governing body by an official act designated and hired him to fill the position or perform the duties, and failing to offer such proof, it would then be incumbent upon the plaintiff-respondent to prove that he acted as an employee and performed the duties with the acquiescence and consent of the municipal governing body. We direct the Court's attention to the fact that in no portion of the plaintiff-respondent's case was any evidence offered of the hiring, and the plaintiff-respondent's own testimony (S. C., page

44) indicates that he had sufficient knowledge that his services were no longer required.

> "An officer *de jure* is one who is in all respects legally appointed and qualified to exercise the office; one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office and who has qualified himself to perform the duties according to the mode prescribed by law." Officers—46, *Corpus Juris*, 927.

While it is evident that the plaintiff-respondent in his own case does not contend to be a *de jure* officer, he would still have to carry the burden of proving that he was a *de jure* employee, and in so doing necessarily would have to offer evidence of an official hiring or designation by the municipal governing body, and this he failed to do. The evidence offered in the plaintiff-respondent's own case and that offered by the defendant-appellant negatived the fact that the plaintiff-respondent was a *de jure* employee.

We further contend that the plaintiff-respondent's case must rest entirely upon the theory that he was an employee and not an officer of the municipality. The plaintiff-respondent was not occupying any office or position prescribed and provided for by any statute of this State or ordinance of the municipality, but was only hired, according to his own case, as a clerk and employee in the office of the Borough Clerk and Clerk of the Water and Sewer Department of the municipality. No term of office, no duties, no salary or compensation, no tenure and no process

of removal were prescribed or provided for the employment that the plaintiff-respondent alleged to occupy.

> "The Courts * * * will refuse to regard as an officer a person who, while in the public service, does not occupy a position established as a result of the action, direct or indirect, of the Legislature, with a term, duties and tenure." 46 *C. J.*, 928. Also *State v. Broome,* 61 N. J. L. 115.

We respectfully submit that whether the plaintiff-respondent was in the public service as a *de jure* or *de facto* employee, that he was subject to removal at will and without cause.

> "An office terminable only at the will of the appointing power is one whose term is not fixed, etc., etc." *State v. Townsend,* 55 N. J. L. 380. *Fredericks v. Board of Health,* 82 N. J. L. 200; *Broadman v. Rade,* 2 N. J. Mis. Rep. 364.

We further direct the Court's attention to the fact that the plaintiff-respondent bases his right to the assumption of the employment in question by virtue of authority from a body, consisting of three qualified Councilmen of the municipality and one, Mary S. Chalfant, which he claims to have been the *de facto* municipal governing body.

We respectfully submit that this group cannot legally be considered as the *de facto* municipal governing body of the Borough of Pitman because of the decision of our Supreme Court in the cause of *Briggs v. Stanton, et als.,* 8 N. J. Mis. R. 363. For the purpose of argument if we assume that the body

consisting of three eligible Councilmen and Mary S. Chalfant did constitute a *de facto* governing body they would not have the power to create a *de jure* officer or employee. *Jersey City v. Erwin,* 59 N. J. 282.

The plaintiff-respondent having failed to establish that he was a *de jure* employee must then base his right of recovery upon his status as a *de facto* employee, and we respectfully contend that he failed to do this.

> "A person will be held to be a *de facto* officer when, and only when, he is in possession and is exercising the duties of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer for such a length of time and under such circumstances or reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election, etc., etc." 46 *C. J.*, 1053.

In order to establish a claim and the right to recovery for compensation as a *de facto* employee, the plaintiff-respondent would necessarily have to carry the same burden of proof.

> "A person is a *de facto* officer where the duties of the office are exercised without a known appointment or election but under such circumstances of reputation or acquiescence as was calculated to induce people without inquiry to submit to or invoke his action supposing him to be the officer he assumes to be." 22 R. C. L. 588.

In the case at bar the evidence offered on behalf of the defendant-appellant clearly substantiated the fact that the plaintiff-respondent was arbitrarily occupying the employment in question without the acquiescence and consent of the municipal governing body and in violation of its express instructions and authority. In order to successfully maintain this action for the recovery of compensation as a *de facto* employee, it would necessarily follow under the legal principles involved and the decisions of the Courts in this country that the plaintiff-respondent must establish the fact that he occupied the employment in good faith and with the acquiescence of the municipal governing body. This we contend has not been proven as the evidence offered indicates to the contrary. The testimony offered, and uncontroverted, clearly indicates that he was not rendering any service that was acquiesced in by the municipal governing body and the notice to the plaintiff-respondent that his services were no longer required vitiates his good faith in premises. The decisions of this State are clearly to the effect that in order to recover compensation from a municipality for services rendered that the claimant must necessarily prove that said services were rendered without dishonesty and fraud on his part. *Jersey City v. Erwin, supra.*

> "The mere assumption of the office, by performing one or even several acts appropriate to it without any recognition of the person as an officer by the appointing power may not be sufficient to consider him an officer *de facto*. There must be at least some colorable election or induction into the office *ab origine* and some action

> thereunder, or so long an exercise of the office and acquiescence therein of the public authorities, as to afford an individual citizen a strong presumption that the party was duly appointed." *Biencourt v. Parker,* 27 Texas 558.

We respectfully contend that the plaintiff-respondent failed to establish any right to recover compensation from the defendant-appellant for services rendered either as a *de jure* or a *de facto* employee, but on the contrary that he was a usurper and intruder in the employment in question and as such cannot maintain a successful action against the municipality.

A usurper of or intruder in an office is one who assumes rights arbitrarily, by force and contrary to and in violation of the wishes, instructions and directions of the body that has the authority to fill such office. 46 *C. J.,* 927 and 1054.

A usurper is not an officer or employee at all or for any purpose, and mere reputation and recognition by the public will not correct or remedy his title and employment *ab origine.* A mere usurper or intruder is not an officer *de facto* as he lacks the color of title and the public reputation and acquiescence essential to a *de facto* officer. Municipal Corporations, 28 *Cyc.,* 455.

> "Possession under color of right, it has been held, may well serve as a shield for defense but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and incidents of the office." 28 *Cyc.,* 455, *supra.*

See also 22 R. C. L., 600 at Sec. 322, as follows:

> "One getting possession of a public office forcibly and without authority cannot bring suit to recover the salary pertaining thereto."

In the case of *Blore v. Freeholders,* 64 N. J. L. 262, it was held:

> "one who by force retains possession of a public office after the expiration of his term and against the lawful demand of his legally appointed successor cannot recover salary or emoluments after such demand."

While in the case at bar there was no demand made by a legally qualified successor in the employment yet the demand by the body possessing the power to create the employment would necessarily be as binding upon the plaintiff-respondent as the demand of any successor. Also, *Gaskill v. Atlantic City,* 89 N. J. L. 269.

In this connection we respectfully submit and contend that the plaintiff-respondent has not proven and established by proper testimony that the status of his employment was such that he would come within the provisions of P. L. 1925, at page 670, etc., but on the contrary that he was a usurper and was occupying this employment in bad faith and contrary to the wish of the municipal governing body and concededly without the acquiescence of the public authorities.

We respectfully contend that it is not within the legal rights of the plaintiff-respondent to successfully contend that because he was engaged during the year 1929 to render services to the municipality

in the employment in question that he holds over during the year 1930 and until such time as a successor in the employment would qualify. In support of this contention we will not take the Court's time to go into a discussion of the matter in detail but simply state that the plaintiff-respondent was not occupying an "office" within the meaning of the provisions of the Borough Act or the Home Rule Act, nor by virtue of any provisions of any ordinance of the municipality but on the contrary that he was simply an employee at will.

The next question which is very vital in the case at bar, and this whether the plaintiff-respondent be considered as a *de jure* or *de facto* employee, is whether or not there was evidence of a lawful discharge and the termination of the employment. If, as we contend, the plaintiff-respondent was a usurper and intruder it would not be incumbent upon the defendant-appellant to offer evidence of any discharge.

Assuming that the status of the plaintiff-respondent was that of a *de facto* employee, and this we submit is his strongest claim, we direct the Court's attention to the undisputed proof of a discharge. In the plaintiff-respondent's own testimony (S. C., page 44) he acknowledged that he had been advised by the Executive Officer of the municipality that his services were no longer required. We also direct the Court's attention to the testimony of the Mayor (S. C., page 109), the corroborative testimony of Borough Clerk Doughty (S. C., page 134), the corroborative testimony of Councilman Briggs (S. C., page 143), and the official record of the municipal governing body constituting the minutes of a regular

councilmanic meeting held on January 13, 1930 (S. C., page 205), Exhibit D1 on behalf of defendant-appellant. We respectfully urge that the evidence of the defendant-appellant as to discharge, assuming the plaintiff-respondent to be a *de facto* employee, was so strong and uncontroverted that a verdict of no cause for action should have been directed by the Court.

The evidence of the defendant-appellant constituting the official minutes of the municipal governing body, transcribed and recorded by the duly qualified and recognized Borough Clerk and *prima facie* evidence of the business transacted at the meeting of January 13, 1930, were disputed by the plaintiff-respondent in that he offered in evidence, over the strenuous objection of counsel for the defendant-appellant, a memorandum and notes that were made by one, George P. Mayhew, who had arbitrarily contended to be the Borough Clerk of the municipality, although a successor had duly qualified on January 1, 1930, and this despite the fact that he (Mayhew) was not recognized by the municipal governing body. We submit that this evidence was improperly admitted, that it had absolutely no legal effect any more than a memorandum made by any citizen and that it could in no sense of the word be construed as binding upon the defendant-appellant.

> "Certificates of persons not officials, are not evidence of facts contained therein." *Anderson v. Barnes,* 1 N. J. L. 203.

See also *Fogg v. Ocean City Sewer Company,* 72 N. J. E. 7, as to refutation of an official record by other evidence.

We respectfully urge that the best evidence of what transpired at the Council meeting of January 13, 1930, was the official record and minutes transcribed and prepared by the lawfully qualified and recognized Borough Clerk and such evidence was offered and could not legally be controverted by an alleged record prepared by a third person. We submit that the plaintiff-respondent might have properly offered oral testimony of any persons who were in attendance at the meeting to contradict the record as kept by the Borough Clerk, but we direct the Court's attention to the fact that no witness for the plaintiff-respondent was called upon, in rebuttal, to dispute the record of what transpired at the meeting in question.

> "The record or document must be produced from or in the proper custody, and its identity, authenticity and genuineness must be established." Evidence—22 *C. J.*, 791.

We respectfully submit that the defendant-appellant complied with this well known rule of evidence in the offering of the record of the meeting in question.

> "Books or records of municipal corporations are admissible in evidence when produced from proper repository. It has been held, however, that there must be some declaration in or on, as part of, a book or pamphlet that its publication is by reason of some competent authority, to bring it within this rule." 22 *C. J.*, 794, *supra.*
>
> "A record is not admissible unless it is made by or under the direction of an officer, author-

ized either by express statute or by the nature of his duties to make it, especially where it relates to a matter of which the person making the record has no personal knowledge and even though a record is required to be kept, it is evidence only of such matters as are authorized to be recorded." 22 *C. J.*, 802, *supra.*

"In order that a document may be admissible in evidence it must appear that it is what it purports to be, it being necessary to establish its authenticity and genuineness either by evidence appearing on its face, as for instance by proper official verification, or by extrinsic evidence as by showing the custody from which it comes. It is very generally stated as a part of the rule that the entry must have been made by the party making it in the discharge of his duty or employment." 22 *C. J.*, 812, *supra.*

"When any judgment of any Court or any other judicial or official proceeding * * * has been reduced to the form of a document or series of documents, no evidence may be given of such evidence or proceeding * * * except the document itself, or secondary evidence of its contents in cases where secondary evidence is admissible." *Stephen on Evidence,* Art. 90, at page 425.

See also Arts. 18, 34, 71, 72 and 73. In the case at issue the evidence that was offered by the plaintiff-respondent, by the testimony of George P. Mayhew as recited from an alleged set of minutes of the municipality, was not proper secondary evidence and under no circumstances a legal refutation of the

evidence of discharge offered by the defendant-appellant, by the testimony of Borough Clerk Doughty, as contained in the official record constituting the minutes of the councilmanic meetings of the municipality.

The Court's attention is directed to the fact that much was said by counsel for the plaintiff-respondent concerning the adoption of the 1930 budget. We submit that the question of the preparation and adoption of this budget as well as any details in connection therewith or political differences that might have existed in the administration of the municipal government was entirely irrelevant, incompetent and immaterial in the case at bar. If, for the purpose of argument, such evidence of the preparation and adoption of this budget is considered relevant, we respectfully direct the Court's attention to the fact that the Mayor and municipal governing body were refused access and custody to the official records and documents of the municipality by George P. Mayhew, the self-alleged Borough Clerk and the plaintiff-respondent, both of whom were acting at the direction and under the instructions of a minority of the municipal governing body and counsel for the plaintiff-respondent in this case. Under these circumstances it is very apparent that no municipal governing body could intelligently and properly prepare a municipal budget.

We respectfully submit that there was error in the admission of certain testimony in this cause, both oral and documentary, and that the trial Court committed prejudicial error in refusing to grant a non-suit, refusing to direct a verdict for the defendant-appellant and failing to make the charges to

the jury as requested by the defendant-appellant and that in view and because of such legal errors that the verdict and judgment of the Supreme Court as rendered should be reversed.

Respectfully submitted,

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NEW JERSEY COURT OF ERRORS AND APPEALS.

BENJAMIN F. MOORE,
Plaintiff-Respondent,

v.

BOROUGH OF PITMAN,
Defendant-Appellant.

ON APPEAL FROM SUPREME COURT.

BRIEF FOR PLAINTIFF-RESPONDENT.

The vital question before the Court on this appeal is whether, upon the whole case the jury was justified in returning a verdict for the plaintiff. That services were performed by the plaintiff, a capable and experienced clerk, for the defendant in a satisfactory way is not disputed, and the only question seems to be whether the plaintiff should be compensated for twenty-five weeks work, at the rate of twenty-five dollars ($25.00) per week, the same rate of pay he had received from the defendant during the previous year. No question is involved con-

cerning an appointment to office as plaintiff merely held a position. The whole matter resolves itself into one jury question, as very clearly conveyed to the jury in the Court's charge, and admitted in the defendant-appellant's brief (page 7), and that is simply this: Was the plaintiff ever lawfully discharged, if not, assuredly he is entitled to collect his wages for the period he worked for the plaintiff, in and about its affairs.

In answer to the argument contained in the brief of defendant-appellant.

(A) The pleadings were framed and suit brought (second count of complaint; State of Case, pages 12 and 13), not only for compensation during the period plaintiff was actually employed and admittedly rendered services, but also for damages by reason of the acts of defendant in preventing the plaintiff in continuing his work, our contention being that the plaintiff was never legally discharged but that, through no fault on his part, he was prevented by defendant's own acts from further performance of the duties he had been engaged to perform, and which he was always ready, able, willing and anxious to perform, consequently it was entirely proper to show that the plaintiff endeavored to obtain other employment, after the defendant made further performance by the plaintiff impossible through its own acts, in changing locks and barring plaintiff (State of Case, page 28, lines 25 to 32).

It can well be said that it was the plaintiff's duty to exercise ordinary diligence to secure other employment and thus reduce the damages. Even if the plaintiff was not obliged to prove his inability to

procure other employment, it was entirely proper to make a *prima facia* showing in this respect. Aside from this, no damages were awarded plaintiff by the jury for wages beyond the time of his actual employment by defendant, and no injury was done defendant because the measure of damages was limited by the Court in its charge to the jury to the period the plaintiff, by the uncontradicted testimony, rendered services to the defendant, of the same nature and character previously performed and paid for by the defendant.

The ruling of the Court was entirely right and proper and in accord with the law and authorities hereafter cited.

Furthermore the defendant cannot now, for the first time, object to evidence on additional and different grounds than those advanced at the trial.

In the present case plaintiff testified (State of Case, page 32, lines 13 to 19):

> "Q. After you were barred out of the office, did you attempt to get another job?
>
> A. I did; I have been trying ever since.
>
> Q. Were you able to?
>
> A. I am able to, yes, and willing to; I want work."

Also (State of Case, page 33, line 26, etc.):

> "Q. Did you get another job?
>
> A. No, I did not.
>
> Q. Did you try to get another job?
>
> A. I did; I tried very hard. I put several applications in several places, and one of them, unfortunately, where I had apparently the best

opportunity was the Bankers' Trust, and when I saw the sign on the door, I knew I was finished there, naturally.

Q. That was recent; shortly after you were kept out of your office down there, did you immediately start in to look for other work?

A. Immediately, yes; I asked my friends to help me. It seems conditions was so you couldn't get a job nowhere."

In *Goebel v. Pomeroy Brothers Company,* 69 N. J. L 610, an action for breach of contract of employment, the Court in considering a verdict in favor of the plaintiff for the whole amount of compensation stated:

> "That would be proper if the proof would justify a finding that the plaintiff had made reasonable earnest efforts to secure other employment after the breach of his contract by the defendant."

In *Passino v. Brady Brass Co.,* 83 N. J. L. 419, it was held to be a question for the jury as to whether or not the plaintiff, after his discharge, made a bona fide effort to procure other employment for the purpose of reducing the damages.

In *Moore v. Central Foundry Co.,* 68 N. J. L. 14, our Chief Justice then said concerning proper instructions of jury:

> "That they should then take into consideration the fact that after his discharge his time became his own, and that it was his duty to

utilize that time in endeavoring to obtain employment elsewhere."

(B) Although there is no such question on page 65 of State of Case, there is such a one on page 67, which was objected to as surplusage. The whole of page 68 shows the colloquy which ensued between the Court and counsel, and the particular question discussed in paragraph "B" of brief of defendant-appellant was not, in fact, ever answered. It was reframed by direction of the Court (State of Case, page 69, line 1), and the new question answered without objection from defendant's counsel, consequently there is no ground for appeal concerning a question which was never answered by the witness.

(C) The State of Case does not disclose that objection was made by defendant to the first question referred to under paragraph "C" of defendant-appellant's brief. It was answered without objection and no objection can now be taken to the same in the absence of anything in the record showing that there was a motion to strike out the answer, or requesting instruction to the jury to disregard the same. *Prout, et al. v. Prout, et al.,* 82 N. J. L. 537.

Furthermore, the question, "By whom?" was, in fact, never answered, but after the objection was overruled and before the witness answered the question now objected to, another question was asked of the witness which was answered without objection, therefore, the question never having been answered, certainly no grounds of appeal exists.

In any event we are not now concerned with the question of appointments or reappointments read

into the record as the plaintiff did not hold an appointive office, merely a position, or as an employee. Furthermore the Court, in its charge to the jury, specifically states (State of Case, page 158, lines 19 to 27):

> "I think the question of reappointment has no place whatever, so far as his position is concerned, in this case. He was not an office-holder, with a term which expired, but was, under the facts as they have been presented in this case, an employee of the Borough and would, as I have already indicated to you, continue in that employment until he was legally discharged."

None of the appointments read into the record, or in the minutes, concerned an appointment of plaintiff to any office. In fact the plaintiff held no office, as the Court very clearly stated in its charge, but plaintiff merely held a position.

(D) While we contend that the evidence referred to was proper, yet if inadmissible at that stage it was harmless error as the plaintiff's case does not rest upon any proof of any appointment read into the record, or in the minutes offered. As above stated, plaintiff held no appointive office, and no substantial rights of the defendant were harmed even if the minutes objected to were not then properly admitted. The charge of the Court clearly limits the question for consideration of the jury within its proper sphere.

(E) A jury question was clearly raised by the uncontradicted proof that the plaintiff had been em-

ployed by the defendant, and it was clearly for the jury to decide whether that employment had terminated by legal discharge which could only be established after the defendant's case was placed before the jury, in fact, the brief of defendant-appellant concedes that the question was, "Whether or not there had been an employment and discharge of the plaintiff-respondent" (page 7).

Where the facts are numerous, complicated, and the subject of disagreement between the parties, the right of recovery of wages becomes a question for the jury's determination (18 *Ruling Case Law,* 531).

Questions of fact, or mixed questions of law and fact, are for the jury, under proper instructions by the Court. When the evidence is contradictory, the rule which requires that, upon a motion to dismiss the complaint, plaintiff is entitled to have the Court adopt a view most favorable to plaintiff, should lead to a denial of the motion and a submission of the case to the jury (39 *Corpus Juris,* 105).

The burden of proof was upon defendant to show discharge of plaintiff and motion for non-suit was properly refused.

(F) This question was answered before any objection was taken to it and while there was a motion to strike out, the defendant cannot now, in this court and for the first time, say that the question already answered was irrelevant, immaterial and not within any issues raised by the pleadings, as no such grounds were presented to the trial Court for striking out the evidence, in fact, no competent reason given for objecting to the testimony. The defendant cannot now raise objection to the admission of

testimony upon different grounds than those specifically argued in the trial Court.

(G) In the argument under this item, as well as under item "E," the defendant-appellant admits that there were questions of fact involved. The whole case was essentially a fact one. This being true, this Court will not review facts to determine the weight of the evidence. *Atlantic City v. Goldstein,* 67 N. J. L. 517.

Assignment of error for refusing to grant nonsuit or direct verdict for party sought to be held were without merit, where questions of fact were involved. *Alson-Garner v. Jennette,* 5 N. J. Misc. R. 957.

On appeal, in passing on a motion for the direction of a verdict, the Court cannot weigh the evidence. *Fagan v. Central Railroad of New Jersey,* 94 N. J. L. 454.

This Court will not consider on appeal an argument as to the weight of evidence which would be apropos on a rule to show cause. *Cervona v. Delaware, L. & W. R. Co.,* 95 N. J. L. 246.

In fact, it has been held that the Court of Errors and Appeals has no jurisdiction or power to review or determine the weight of the evidence on which a verdict of a jury is found. *Savino v. Goldberg,* 92 N. J. L. 617.

That verdict was against weight of evidence is not subject of appellate review in civil cases is so well established in this State as to require no citation of authorities, among them, however, being *Alson-Garner v. Jennette, supra.*

With relation to the remaining exceptions and

grounds raised in the brief of the defendant-appellant. Plaintiff was employed throughout the year 1929 and paid by defendant (State of Case, pages 27 and 28), and it seems perfectly clear that he was a bona fide employe of the Borough, performed the duties incident to his position satisfactorily and the burden rested upon defendant to show a discharge. It was a case of continuous employment, whether he held the position *de facto* or *de jure*. Considering the local situation which existed during the controversy in which the plaintiff was not involved, it would seem as though the Legislature's intent in passing Chapter 239 of the Laws of 1925 was to meet just such a situation as arose at Pitman.

1. Any person who has held or who may hereafter hold *de facto* any office or position in the public service of this State or of any county or municipality or other subdivision thereof, and who has performed or who may hereafter perform the duties of such office or position, shall be entitled to the emoluments and compensation appropriate to such office or position for the time in fact so held and may recover therefor in any court of competent jurisdiction, notwithstanding any refusal or failure of any other person or officer.

2. Any Act or part of Act inconsistent with this Act is hereby repealed.

3. This Act shall take effect immediately. Passes March 21st, 1925 (Chapter 239, Pamphlet Laws of 1925).

The major portion of the defendant-appellant's brief under caption, "Review of Decisions," is largely an argumentative discussion concerning *de jure* and *de facto* officers and appointees. I respectfully submit that no such question is now before the Court, and this case was not tried and determined upon the theory, fact, and proof that plaintiff was an officer or appointee, but that he was, on the other hand, an employee who had been engaged to work for the Borough of Pitman.

It will be observed that the various cases cited in defendant-appellant's brief relate to officers, offices and appointments, all matters in which this Court is not concerned in the present case, nor is there any question involved of obtaining an office by force, or retaining an office after the expiration of term, as a holdover, and until a successor is appointed, as there is no proof that the plaintiff was only engaged for some particular time, or during the year 1929. Neither was there proof of anyone being employed to take the plaintiff's place, and I feel very strongly that none of the decisions or law quoted in defendant-appellant's brief bear upon the facts involved in this case.

Under the conditions existing at the time the minutes were prepared it would be strange indeed if evidence could not be adduced to show that the so-called official records do not truly set forth what actually took place; in fact, a reading of the Mayor's statement of January 13th, 1930, particularly that portion of same on page 206 of State of Case, lines 18 to 23, negatives the accuracy and truth of the statement immediately following same upon which

rested the whole case of the defendant (State of case, page 207, lines 3 to 9). The jury very properly had the opportunity to compare the records and minutes made by Mr. Doughty with those made by Mr. Mayhew, as shown on pages 172, 173 and 174 of the State of Case, and the jury had the right to decide which set of papers were most trustworthy and believable. Having decided that the plaintiff was never legally discharged, the award of damages for wages during the period of the plaintiff's services to the defendant very naturally and properly followed.

As it was clearly established that the plaintiff was employed to work by the defendant-appellant, such employment would necessarily continue until terminated by voluntary act of the plaintiff or discharge by the defendant-appellant. Any effort to discharge, or statements by the Mayor to the plaintiff meant nothing, as very clearly presented in the charge of the Court (State of Case, page 158, line 16), as follows:

> "It is to be noted that no term was prescribed for his employment, so that he would continue to serve legally in the office until he was legally discharged. I think the question of reappointment has no place whatever, so far as his position is concerned, in this case. He was not an office holder, with a term which expired, but was, under the facts as they have been presented in this case, an employe of the Borough, and would, as I have already indicated to you, continue in that employment until he was legally discharged."

Consequently, the whole case resolved itself clearly into one of fact, and raised a question for determination by the jury whether the plaintiff had ever been discharged by action of the governing body. In endeavoring to prove that, the defendant-appellant offered in evidence certain minutes, which were contradicted by other minutes of the same meeting. The jury had the right to determine which account of the meeting of January 13 was true, and, having resolved that question in favor of the plaintiff, this Court will not now, upon appeal, attempt to reach a different conclusion, there being evidence to support the jury's finding.

The Supreme Court and the Court of Errors and Appeals have repeatedly held that judgments based upon verdicts will not be disturbed when there is any evidence to sustain them, even though the Court might not have reached the same conclusion upon the facts.

In *Alexander Dye Works v. Roufosse* (57 N. J. L., at p. 701, Court of Errors and Appeals, 1895), a case in which the Court was asked to reverse a judgment in favor of a servant who had suffered injuries in his master's employ, Justice Garrison said:

> "The fact to which the rules (relating to master and servant) were applied, were unusual and fairly susceptible to a construction that would lay the blame at the plaintiff's own door. The failure of the jury to take this view of the facts is the real ground to complaint. There being no legal error, the judgment is affirmed."

In *Faux v. Willet* (69 N. J. L., at p. 52) there was an application for a new trial. Although upon such applications the Court exercises a broader power of review upon the sufficiency of evidence, it was held by Chief Justice Gummere and Justices Van Sickel, Fort and Pitney that where the case left a theory upon which the defendant might be found liable, and the jury adopted that theory, the Court will not set aside the verdict, merely because the Justices themselves might have taken a different view of the case. Justice Fort said:

> "The charge of the Court certainly did give to the defendant every intendment and implication which the jury might gather from the facts, and stated to the jury that an acceptance of the view of the facts as expressed by the Court could lead to no other result but the finding for the defendant, but it likewise left a theory upon which the defendant might be found liable. That view the jury took. While we might not have found that way had we been the jury, still, we cannot say that the result is erroneous. The jury may be right in their view."

In *Upton v. Slater* (83 N. J. L., at pp. 374, 375, Supreme Court, 1912) Justice Trenchard said, in giving the opinion of the Court, confirming a judgment of the District Court on appeal:

> "It is true that there was other testimony from which a contrary conclusion might have been reached. But on appeal, where opposite

> conclusions might have been drawn from the testimony, that conclusion which is essential to support the judgment will be taken as found. Such a determination of a question of fact is final between the parties, when there is legal evidence to support it. Backes v. Movsovich (82 N. J. L. 44)."

In *Voorhis v. Terhune* (50 N. J. L., at p. 159) the Court of Errors and Appeals defined the limitations which the Appellate Court imposed upon itself with respect to questions of facts. Said Justice Knapp:

> "This is a writ of error, and its sole office is to present legal questions for decision. Under it the Court will not decide questions of fact and will look into the evidence only to discover whether it affords, on any permissible interpretation of it, a rational support for such finding. If it be found to be of this degree of strength, the determination of fact must be accepted as conclusive (Harrison v. Allen, 40 N. J. L. 556; Johnson v. Arnwine, 42 N. J. L. 451, and cases cited)."

There seems to be no authority for the suggestion that the minutes made by Mr. Doughty and produced at the hearing were the official minutes, but even if they were there is no reason why the minutes prepared by Mr. Mayhew should not have been produced when called for under subpoena, although they were not in court when the case was first called and only brought in by direction of the

Court (State of Case, page 79). The effort to suppress these minutes is significant in itself.

The authorities clearly hold that records of municipalities are merely *prima facie* evidence of the facts entered.

Although official records are admissible, they do not in general import absolute verity, but are treated as *prima facie* evidence of the facts entered and of the documents recorded (10 Ruling Case Law, page 1126).

A record or document kept or prepared by a person whose public duty it is to record truly the facts stated therein is, when relevant, admissible as *prima facie* evidence of such facts (22 *Corpus Juris,* page 801).

The defendant-appellant cannot now complain of error in the admission of the minutes offered by the plaintiff and at the same time admit in his brief that,

> "We submit that the plaintiff-respondent might have properly offered oral testimony of any persons who were in attendance at the meeting to contradict the record as kept by the Borough Clerk" (Brief, page 20).

It is also difficult to see, in view of the above statement in defendant-appellant's brief, how any harm was done defendant by the admission of the Mayhew minutes, notes, records, memorandums, or whatever else they may be called. Certainly they were the best evidence to contradict the records and evidence offered by defendant, more accurate and believable than oral testimony could possibly

have been, and although opposing counsel admits that the records in question could be contradicted, yet objects to a contradiction through presentation of the best evidence.

They were offered to the jury for what they contained in order that the jury could intelligently determine what transpired at the meeting of January 13th, 1930; whether any action was then taken which could be construed as a legal discharge of plaintiff, and if, as conceded in brief of defendant-appellant, the records offered by defendant at trial could be contradicted by other testimony, then it is submitted that is just what was done by the minutes made by Mr. Mayhew, whether same are considered official or otherwise. Certainly they were competent and relevant to prove what transpired at that meeting, and such evidence clearly established that no action was taken concerning the discharge of plaintiff. The minutes of Mr. Mayhew were properly admitted so the jury would know what transpired and were offered for that purpose, not necessarily as official records.

The case of *Fogg v. Ocean City Sewer Co.*, referred to in brief of defendant-appellant, concerned an ordinance which the Court held could not be varied by parol evidence. No such proposition is now before the Court.

Furthermore, it is clear that the defendant-appellant cannot object to the 1930 budget having been introduced when defendant-appellant accepted the benefits of same; in fact, that was the only budget adopted in 1930, and provided practically all the money to run the Borough in 1930 (State of

Case, page 123). In addition, no objection was taken to the offer and the budget was introduced in evidence without objection; therefore it is now too late to object to the budget, or for its admission in evidence to be passed upon by this Court.

It is respectfully submitted that the judgment should be affirmed.

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