INDEX.

Summons.

The State of New Jersey to Frederick H. Herring and John C. Storms:

You are summoned to answer the annexed complaint of Borough of Park Ridge, a Municipal Corporation, in an action at law, in the Supreme Court. And take notice, that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, 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:

WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 25th day of April, Nineteen Hundred and Twenty-two.

JOHN O. TOTTEN, JR.,
Attorney.

ENOCH L. JOHNSON,
(L.S.) Clerk.

Complaint.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

BOROUGH OF PARK RIDGE, A Municipal Corporation, Plaintiff, vs FREDERICK H. HERRING and JOHN C. STORMS, Defendants.	Action at Law.

Plaintiff, Borough of Park Ridge, a Municipal Corporation of the State of New Jersey, of the County of Bergen, in this State, says that:

FIRST COUNT.

1. At a general election held in the Borough of Park Ridge aforesaid, on the first Tuesday after the first Monday of November, in the year 1914, Defendant Frederick H. Herring, was elected Collector of Taxes thereof for the term of two years, beginning January 1st, 1915.

2. On or about January 1st, 1915, Defendant, Frederick H. Herring, took and subscribed the requisite oath of office to faithfully and impartially discharge the duties of said Collector of Taxes, and gave Plaintiff a bond dated December 23rd, 1914 in the sum of $5,000 with Defendant, John C. Storms and Hans J. Widness, as sureties, jointly and severally, conditioned that the Defendant Frederick H. Herring, should, during the continuance in said office, faithfully perform the duties of his said office as said Collector of Taxes, according to law, and should, at the

expiration of term of office, turn over to his successor all books and papers pertaining to said office, then the obligation to be void otherwise to be and remain in full force and virtue.

A copy of said bond is hereto annexed and made a part hereof, and marked Schedule A.

3. Defendant, Frederick H. Herring, failed to faithfully perform the duties of his office as said Collector of Taxes, for the year 1915, in that during said year he wrongfully took and converted to his own use, the sum of $1317.68 of Plaintiff's money, which he had collected and received as said Collector of Taxes.

4. Plaintiff paid defendant, Frederick H. Herring, the sum of $322 salary as said Collector of Taxes for the year 1915.

5. Plaintiff expended $818.49 in having audited and stated the books and accounts of Defendant, Frederick H. Herring, as said Collector of Taxes for the year 1915.

6. Defendants, Frederick H. Herring and John C. Storms on demand of Plaintiff, having refused and neglected to turn over or pay to Plaintiff the moneys mentioned in Paragraphs 3, 4 and 5 hereof.

Plaintiff demands $2536.17 with interest from December 1st, 1915.

JOHN O. TOTTEN, JR.,
Attorney for Plaintiff.

A True Copy,
ENOCH L. JOHNSON,
Clerk.

Complaint.

KNOW ALL MEN BY THESE PRESENTS, that we, Frederick H. Herring, John C. Storms and Hans J. Widness, all of the Borough of Park Ridge in the County of Bergen and State of New Jersey, are held and firmly bound unto the Borough of Park Ridge, a body corporate and politic of said State of New Jersey, in the sum of Five Thousand Dollars, lawful money of the United States of America, to be paid to the said Borough of Park Ridge or their assigns; for which payment well and truly to be made, we bind ourselves, and each of us for himself in the whole, our, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the Twenty-third day of December, in the year One Thousand Nine Hundred and Fourteen.

The condition of the above obligation is, that whereas, the above bounden Frederick H. Herring was, at an election held on the Third day of November in the year One Thousand Nine Hundred and Fourteen, duly elected Collector of Taxes for said Borough of Park Ridge, and is about to enter upon the execution of his office; now, therefore, if the said Frederick H. Herring shall during his continuance in said office faithfully perform the duties of his said office as Colector of Taxes of said Borough, according to and shall at the expiration of his term of office turn over to his successor all books and papers pertaining to said office, law, then this obligation shall be void; otherwise to be and remain in full force and virtue.

A.H.S. A.H.S.

Interlineation made after execution at request of the Mayor and Council of Borough of Park Ridge.—A.H.S.

Frederick H. Herring (L.S.)
John C. Storms (L.S.)
Hans J. Widness (L.S.)

Signed, sealed and delivered
in presence of
Alex. H. Sibbald.

[SEAL]

Approved Jany. 4, 1914.

Francis A. Seibert, Mayor.

50c Revenue Stamps Cancld.

Attest:

H. A. Snider, Borough Clerk.

I hereby deputize and appoint Geo. B. Hulit, of Pennington, N. J. a Special Deputy to serve the within writ.

Witness my hand and seal this 26th day of April, A. D. 1922.

Walter Firth, (L.S.)
Sheriff of Mercer County, by
Ira F. Smith,
Under Sheriff.

Served within Summons & Complaint April 26, A. D. 1922 upon Frederick H. Herring deft. personally at the New Jersey State Prison, Trenton, N. J., where deft. is confined.

John C. Storms, deft. not
in this County.

Water Firth,
Sheriff by
George B. Hulit,
Spec. Dep.

Complaint.

State of New Jersey,
Bergen County, ss.:

Joseph P. Winters, being duly sworn on his oath, says that he is the Special Deputy Sheriff named in the deputization endorsed and made a part hereof and that on the first day of May, 1922, instant, he served the said summons and complaint upon the defendant therein named John C. Storms, in person on public highway, Park Avenue, Park Ridge, N. J., by exhibiting the said summons and complaint to said defendant, and explaining to him the contents thereof, and by delivering to John C. Storms, a true copy of said summons and complaint.

Jos. P. Winters.

Sworn and Subscribed before me,
this 2nd day of May, A. D. 1922.

William V. A. Blauvelt,
Notary Public.

Complaint.

State of New Jersey,
Bergen County, ss.:

I, Joseph Kinzley, Jr., Sheriff of said County, do hereby deputize and appoint Joseph P. Winters, to be my Special Deputy, to execute and return the writ according to law.

Joseph Kinzley, Jr.,
Sheriff (L.S.)
Jack L. Fox,
Under Sheriff.

Witness my hand and seal this
twenty-ninth day of April, A. D. 1922.

Joseph Kinzley, Jr.,
Sheriff.

Jack L. Fox,
Under Sheriff.

Sheriff's Fees $4.70 Sheriff's Fees $3.62

Assessment of Damages For Judgment Against Defendant John C. Storms.

(Action at Law.,

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

This action is founded upon a certain bond given by the defendant Frederick H. Herring as principal, and the dfendant John C. Storms as surety to the plaintiff for the faithful and impartial discharge by Frederick H. Herring of the duties of Collector of Taxes of the Borough of Park Ridge, New Jersey, for the year 1915, a copy of which bond is as follows:

KNOW ALL MEN BY THESE PRESENTS, that we, Frederick H. Herring, John C. Storms and Hans J. Widness, all of the Borough of Park Ridge in the County of Bergen and State of New Jersey, are held and firmly bound unto the Borough of Park Ridge, a body corporate and politic of said State of New Jersey, in the sum of Five Thousand Dollars, lawful money of the United States of America, to be paid to the said Borough of Park Ridge or their assigns; for which payment well and truly to be made, we bind ourselves, and each of us for himself in the whole, our, and each of our heirs, executors and administrators, jointily and severally, firmly by these presents.

Sealed with our seals and dated the Twenty-third day of December, in the year One Thousand Nine Hundred and Fourteen.

The condition of the above obligation is, that whereas, the above bounden Frederick H. Herring was, at an election held on the Third day of November in the year One Thousand Nine Hun-

Assessment of Damages For Judgment Against Defendant John C. Storms.

dred and Fourteen, duly elected Collector of Taxes for said Borough of Park Ridge, and is about to enter upon the execution of his office; now, therefore, if the said Frederick H. Herring shall during his continuance in said office faithfully perform the duties of his said office as Collector of taxes of said Borough, according to and shall at the expiration of his term of office turn over to his successor all books and papers pertaining to said office, law, then this obligation shall be void; otherwise to be and remain in full force and virtue.

A. H. S. A. H.

Frederick H. Herring (L. S.)
John C. Storms (L. S.)
Hans J. Widness (L. S.)
Approved January 4, 1914.

Signed, sealed and delivered in presence of:
(Seal) Alex. H. Sibbald.

50 cents Revenue Stamps Cancld.

Francis A. Seibert,
Mayor.

Attest:
H. A. Snider,
Borough Clrk.

Interlineation made after execution at request of the Mayor and Council of Borough of Park Ridge. A. H. S.

Assessment of Damages For Judgment Against Defendant John C. Storms.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } SS.:

WILLIAM H. MCTIGUE, being duly sworn according to law, says:

1. I am a Registered Municipal Accountant of the State of New Jersey.

2. I was employed on or about April 1st, 1921, by the Borough of Park Ridge to examine the original books of account of Frederick H. Herring as Collector of Taxes of the Borough of Park Ridge for the years 1915 to 1921, inclusive, and report thereon. I find from my examination of the original books of account that the defendant Frederick H. Herring unlawfully took and converted to his own use the sum of $1,317.68.

3. That the said Frederick H. Herring returned and paid to the Borough of Park Ridge the sum of.....	$ 411.78	
The net amount unlawfully taken and retained by the defendant Frederick H. Herring for the year 1915 is.....		$ 905.90
Interest on $905.90 from December 1, 1915 to June 1, 1922, 6 years, 6 months, at 6% annually is		353.51
The cost of said audit for the year 1915, actually paid by the plaintiff is.....		818.49

Assessment of Damages For Judgment Against Defendant John C. Storms.

The salary paid by the plaintiff to the defendant for the year 1915 is		300.00

WILLIAM H. McTIGUE.

Subscribed and sworn to before me this 5th day of June, 1922. } ss.:

P. DEWITT JONES,
Attorney at Law of New Jersey.

COMPUTATION

Amount unlawfully taken by defendant Frederick H. Herring during the year 1915.	$1,317.68	
Amount returned by defendant Frederick H. Herring....	411.78	
Net amount unlawfully taken and retained by defendant Frederick H. Herring for 1915.		$ 905.90
Interest on $905.90 from December 1, 1915 to June 1, 1922, 6 years, 6 months, 6% annually is		353.51
Cost of audit for the year 1915, actually paid by plaintiff.		818.49
Salary paid by the plaintiff to the defendant for the year 1915.		300.00
		$2,377.90

Assessment of Damages For Judgment Against Defendant John C. Storms.

STATE OF NEW JERSEY, ss.:

I, ENOCH L. JOHNSON, Clerk of said court have examined the plaintiff's complaint and being satisfied that the above statement and calculations are correct, do hereby assess the damages of the plaintiff against the defendant John C. Storms in the above-stated cause, at the sum of $2,377.80 besides costs of suit to be taxed.

June 7, 1922.

A true copy,

ENOCH L. JOHNSON,
Clerk.

Judgment.

(Action at Law.)

NEW JERSEY SUPREME COURT.

1922, April 25, Summons and Complaint. Bergen; served May 1st.

The defendant having failed to appear and defend this action within the time allowed by law—Judgment by default is entered against him for the sum of two thousand three hundred seventy-seven dollars and ninety cents besides costs to be taxed.

Entered June 7, 1922.
On motion of John O. Totten, Jr., Attorney.

A true copy,

ENOCH L. JOHNSON,
Clerk.

Notice of Entry.

(Action at Law. By Default.)

NEW JERSEY SUPREME COURT.

John O. Totten, Jr., Attorney.

Judgment entered this seventh day of June, A. D. Nineteen hundred and twenty-two in favor of plaintiff and against the defendant for the sum of Two thousand three hundred seventy-seven dollars and ninety cents damages and Forty dollars and seventy cents costs.

$2,377.90
40.70

$2,418.60

WM. S. GUMMERE,
C. J.

A true copy,

ENOCH L. JOHNSON,
Clerk.

Affidavit of John C. Storms.

(Action at Law.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

STATE OF NEW JERSEY,
COUNTY OF BERGEN. } ss.:

JOHN C. STORMS, being duly sworn, according to law, on his oath, deposes and says: I am the defendant in the above entitled cause. I live at Park Ridge, and have resided there for 52 years. I signed the bond set forth in the complaint and thereby became surety for Frederick H. Herring, Collector of Taxes, for the Borough of Park Ridge, for the year of 1915. I also was one of the sureties on the bond of said tax collector, for the year 1916. My co-surety died, insolvent, several years ago.

When it was first discovered, about April, 1921, that there was a shortage in the accounts of the tax collector, for the years covered by said bonds, I discussed the matter informally with one member of the Borough Council, and I believed, after my conversation with him, that whatever amount of shortage, for the years covered by my bonds, was discovered by an accurate audit of the books, would be reported to me. I did not consider it necessary to engage a lawyer to represent me, but relied absolutely on the Borough Officials or their legal representatives to fix the amount of indebtedness and believed they would give me a fair opportunity to pay such an amount before beginning legal proceedings.

In the month of April, 1922, I was advised that the amount of my indebtedness as to the Borough had been fixed at about $2,500, and on May 1st, 1922, I was served with the summons

and complaint in this action, which complaint showed that the amount claimed to be due on that date was $2,536.17 with interest from December 1st, 1915. Believing this to be the true amount of my legal indebtedness to the Borough, I made several propositions for settlement and on July 10th, I sent to the Borough Clerk, my check for $400 with a letter offering to pay the balance of the amount due, which check is still in the hands of the Borough Authorities.

I am now informed that on June 7th, 1922, judgment was entered against me in this action for the sum of $2,377.90 together with costs amounting to $40.70. On August 1st, 1922, the Sheriff made a levy on certain real estate owned by me, for the amount of $2,418.60.

I am informed that the records in this suit show that the aforesaid sum of $2,377.90 is made up of the following items:

SCHEDULE "A"

Amount unlawfully taken by defendant Frederick H. Herring during the year 1915.	$1,317.68	
Amount returned by defendant Frederick H. Herring..	411.78	
Net amount unlawfully taken and retained by defendant Frederick H. Herring for 1915.		$ 905.90
Interest on $905.90 from December 1, 1915 to June 1, 1922, 6 years, 6 months, 6% annually is		353.51

Affidavit of John C. Storms.

Cost of audit for the year 1915, actually paid by plaintiff.	818.49
Salary paid by the plaintiff to the defendant for the year 1915.	300.00
Total	$2,377.90

I am further informed that the item of $818.49 and the item of $300, are not legal claims against me under the terms and conditions of the bonds aforesaid. If these items are not legal claims against me I doubt the accuracy of the other items, making up the said sum of $2,377.90, and believe that it is possible that an investigation of the entire matter will show that the other items of said account are in excess of the true amount of my liability, and believe that the complainant should be compelled to prove all the various items in open court.

I own several plots of land within the limits of the Borough of Park Ridge, which are ample security for any claim of the Borough against me, and I am willing and able to pay any lawful amount due from me to the Borough, but I verily believe that the amount of said judgment is greatly in excess of the true amount of my indebtedness.

J. C. STORMS.

Sworn and subscribed to before me this 11th day of August, 1922.

ALEX. H. SIBBALD,
(Seal) Notary Public, N. J.

A true copy,

ENOCH L. JOHNSON,
Clerk.

Rule to Show Cause.
(Action at Law.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

It appearing to the Court by the affidavits of the said defendant John C. Storms that a judgment in this cause was improvidently entered as to part of the amount claimed and that the said defendant has a just and legal defense to the said action on the merits of the case, and upon filing the said affidavit with the Clerk of this court.

It is on this 17th day of August, 1922, ordered that the said plaintiff, the Borough of Park Ridge show cause before this Court on the twelfth day of September, next, at ten o'clock in the forenoon, at the Court House in Hackensack why the judgment which has been entered in this cause should not be opened and the said defendant allowed to enter his appearance and defend the said action especially as respects the items of collectors salary and cost of audit of books.

IT IS FURTHER ORDERED that the Sheriff of Bergen County be and hereby is enjoined and restrained from making any sale under the execution heretofore issued in this cause until the further order of this Court but that any levy heretofore made may be retained and other property may be levied on but not sold or advertised.

AND IT IS FURTHER ORDERED that either party have leave to take affidavits to be used in the argument of this rule on four days notice.

On motion of Morrison, Lloyd & Morrison, Attorneys of Defendant.

Let the above rule be entered on the Minutes.

C. W. PARKER,
J. S. C.

Rule entered this day of , 1922.

A true copy,
ENOCH L. JOHNSON,
Clerk.

Rule on Defendant's Application to Open Judgment and for Leave to Plead.

(Action at Law.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

The Court having heard Morrison, Lloyd and Morrison, Attorneys for the Defendant and John O. Totten, Jr., Attorney for the Plaintiff, upon the defendant's rule to show cause why the judgment heretofore entered in this cause should not be opened and the defendant permitted to defend;

And the liability of the defendant in the sum of $905.90 with interest from the first day of December, 1915, being admitted and it appearing that the defendant may have a defense to the other items mentioned in the plaintiff's complaint on which the defendant on terms should have an opportunity to be heard further by the Court on a continuation of this Motion.

Rule on Defendant's Application to Open Judgment and for Leave to Plead.

It is on this 23rd day of September, 1922, ORDERED,

1. That the defendant pay to the plaintiff the said sum of $905.90 with interest from December 1, 1915, to the date of payment and also the plaintiff's costs in this action to the 17th day of August, 1922, being the date of the rule to show cause heretofore made in this matter, and also the plaintiff's costs on this motion, and that said payment be made within ten days from September 23d, 1922, and that upon said payment being made the plaintiff return to the defendant a certain check for $400 heretofore delivered by the defendant to the plaintiff as a payment on account in this matter. Upon failure of defendant to make payment as herein provided his rule on this motion shall be dismissed and the restraint therein contained shall be removed.

2. And it is further ORDERED that the question of the liability of the defendnant to the plaintiff on the items of salary and cost of audit be heard on oral argument and briefs before Honorable Charles W. Parker, Justice of the New Jersey Supreme Court at the Court House in Jersey City, on Saturday, the 14th day of October, 1922, at ten o'clock in the forenoon or as soon thereafter as the matter can be heard, provided, however, that the question may, if the Court deem it necessary, then he certified to the Supreme Court, the taking of this present rule shall be deemed a consent by the defendant to the determination of such additional liability by the said Justice or by the Court upon a case certified.

Rule on Defendant's Application to Open Judgment and for Leave to Plead.

3. And further ORDERED that the amount of the defendant's additional liability, if any, await the determination as to the existence of such liability as aforesaid, and if the defendant is liable that the amount then be fixed by stipulation between the parties, or in default thereof that the amount be then determined by such procedure as the Court may then direct by its further order to be made in this matter; and the taking of this order shall be taken as a consent by defendant to such further rule as the Justice may make in the matter.

4. And it is further ORDERED that the plaintiff's judgment, execution and levy shall stand and remain as a lien for the making of such sum as shall finally be found to be due and unpaid on account of the aforesaid judgment.

Let this rule be entered.

CHARLES W. PARKER,
J. S. C.

A true copy,

ENOCH L. JOHNSON,
Clerk.

Receipt for Payment Required by Rule Made September 23rd, 1922.

NEW JERSEY SUPREME COURT.

Received from Morrison, Lloyd and Morrison, attorneys for the defendant, the following payments in accordance with a rule made in this cause on September 23rd, 1922.

Amount of defalcation.....	$905.90	
Interest from Dec. 1, 1915 to Oct. 1, 1922.	371.42	
		$1,277.32
Costs as agreed between Counsel.		75.
		$1,352.32

JOHN O. TOTTEN, JR.,
Attorney for Plaintiff.

October 2, 1922.

A true copy,

ENOCH L. JOHNSON,
Clerk.

Rule for Final Judgment.

(Action at Law.)

NEW JERSEY SUPREME COURT.

This action was tried before Justice Charles W. Parker without a jury on October 28th, 1922. The Court having heard the parties, finds that the defendant John C. Storms at the time this suit was begun owed to the plaintiff the sum of $905.90 as surety for the defendant Frederick H. Herring, which sum has since been paid and fully satisfied; and finds the plaintiff cannot prevail against the defendant upon the allegations contained in the fourth and fifth paragraphs of the first count of the complaint in this action.

Whereupon on Motion of Defendant it is adjudged that the judgment heretofore entered herein be opened, set aside, and for nothing holden and that the plaintiff have judgment against the defendant for said sum of nine hundred and five dollars and ninety cents but without costs, and that plaintiff because of such payment do satisfy said payment of record or cause an acknowledgment of such payment to be entered on the record thereof.

Let this rule be entered.

C. W. Parker,

A true copy,

Enoch L. Johnson,
Clerk.

Dated November 26, 1922.

Final Judgment.
(Action at Law.)

NEW JERSEY SUPREME COURT.

John O. Totten, Jr., Attorney.

Judgment entered this thirteenth day of December, A. D. Nineteen hundred and twenty-two in favor of plaintiff and against the defendant for the sum of Nine hundred and five dollars and ninety cents damages without costs.

Damages $905.90.
No Costs.

WM. S. GUMMERE,
C. J.

I, ENOCH L. JOHNSON, Clerk of the Supreme Court of the State of New Jersey, By Virtue of a special Warrant of Attorney to me directed from the attorney of plaintiff within named hereby acknowledge that said plaintiff is satisfied of its judgment.

Dated December 13, 1922.

A true copy,

ENOCH L. JOHNSON,
Clerk.

Warrant.

To the Clerk of the Supreme Court of the State of New Jersey:

Whereas, the Borough of Park Ridge heretofore, to wit, in the term of June, 1922, obtained final judgment in the Supreme Court of the State of New Jersey against John C. Storms for $905.90 debt and costs as by the record thereof may appear; and whereas the Borough of Park Ridge has received satisfaction of the same; these are, therefore, to desire and authorize you to enter an acknowledgment of satisfaction upon the record of the said judgment; and for your so doing this shall be your sufficient warrant and discharge in that behalf.

In witness whereof, I have hereunto set my hand and affixed my seal the eighth day of December, 1922.

John O. Totten,
Borough Counsel for the
Borough of Park Ridge.

A true copy,

Enoch L. Johnson,
Clerk.

Warrant.

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } ss.:

BE IT REMEMBERED, that on this eighth day of December, 1922, before me a Notary Public of New Jersey personally appeared John O. Totten, Jr., whom I am satisfied is the person named in and who executed the within instrument, and I having first made known to him the contents thereof he acknowledged that he signed sealed and delivered the same as his voluntary act and deed.

MARY E. NELSON,
Notary Public of New Jersey.

A true copy,

ENOCH L. JOHNSON,
Clerk.

Notice of Appeal.

(Action at Law.)

NEW JERSEY SUPREME COURT.

To Messrs. Morrison, Lloyd & Morrison, Attorneys for John C. Storms, a Defendant-Respondent:

Take notice, that the plaintiff, Borough of Park Ridge, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from so much of the judgment entered in this cause on the 25th day of November, 1922, as adjudges that the judgment theretofore entered, be opened, set aside and for nothing holden, and orders that the plaintiff do satisfy such judgment of record, or cause an acknowledgment of such payment to be entered on the record thereof.

The following are the grounds of appeal, which will be urged by the plaintiff-appellant:

(1) That the judgment originally entered in the action against John C. Storms, was entered in the proper legal manner.

(2) The affidavits, read on the return of the rule to show cause, upon which the second judgment was entered and upon which the first judgment was opened, show neither surprise on the part of the defendant nor fraud on the part of the plaintiff, nor any meritorious defense to plaintiff's action.

(3) That the Justice of the Supreme Court, directing the entry of the rule for judgment final, dated November 25, 1922, erred in fixing the amount of the debt of the defendant Storms, to plaintiff, at the sum of Nine hundred and five

dollars and ninety cents ($905.90) instead of the sum of Two thousand, three hundred and seventy-seven dollars and sixty-nine cents ($2,377.69) as assessed by the Clerk.

(4) That the said Justice ~~Court~~, in assessing damages and entering said judgment, erred in not including in the debt and obligation of the defenant, John C. Storms, to the plaitiff, the sum of Three hundred dollars ($300) unlawfully paid by the defendant Herring, to himself, from moneys in his possession belonging to the plaintiff, under the guise and claim of salary, thereby increasing his defalcations by the amount of the said sum of Three hundred dollars ($300), for which his bondsman is properly chargeable, and in breach of the condition of the bond.

(5) That the said Justice of the Supreme Court, in assessing damages and entering said judgment, erred in not including in the debt and obligation of the defendant, John C. Storms to the plaintiff, the sum of Eight hundred and eighteen dollars and forty-nine cents ($818.49), cost of audit for the year 1915, made necessary by the unfaithful performance of the duties of the defendant, Herring, as Collector of Taxes for the plaintiff, the said costs having actually been paid by plaintiff.

JOHN O. TOTTEN, JR.,
Attorney for Plaintiff.

Service acknowledged January 23, 1923, by Morrison, Lloyd and Morrison, attorneys for defendant, John C. Storms.

Memorandum.

NEW JERSEY SUPREME COURT.

BOROUGH OF PARK RIDGE,

vs.

JOHN C. STORMS.

On motion to open default judgment &c. At Chambers.

For the Plaintiff, John O. Totten, Jr.

For the Defendant, William J. Morrison, Jr.

Memorandum by Parker, Judge.

For information of Counsel.

Defendant is surety on the bond of a defaulting borough collector. In this suit on the bond there was a default judgment which on a previous hearing I directed to be argued on terms that there be paid the amount of defalcation conceded to be correct. This seems to have been done. Plaintiff claimed in addition (as I recollect the matter) the return of salary paid the collector during the period of the defalcations, or something of that kind and also the costs of having an audit of his books by certified public accountants. The default judgment included these amounts and it was the questionable legality of the claims which led to an opening of the judgment, subject to further argument on the points, which has been had.

My conclusion is that the claim for return of salary paid is not warranted in law. The collector was a public officer, not serving under any contractual relation, and was entitled to his salary by law.

Memorandum.

Perhaps he did not fairly earn it but that case is not uncommon.

I think also that the claim for costs of an audit cannot be sustained. It does not seem to me to be anything that could be reasonably have been contemplated by the parties as damages proximately to be caused by a default. No statute that I know of makes it a liability of the collector himself, until some higher authority in this state declares that such an expense is recoverable as damages for a defalcation, I am not willing to recognize such a claim.

The results seems to be to leave plaintiff without any remaining claim, I will aid counsel in any proper way to place the record in condition to review if desired.

New Jersey Court of Errors and Appeals

BOROUGH OF PARK RIDGE, a Municipal Corporation,
Plaintiff-Appellant,

v.

JOHN C. STORMS,
Defendant-Respondent.

On appeal from Supreme Court.

SUPPLEMENT TO STATE OF THE CASE.

JOHN O. TOTTEN, JR.,
Attorney for Appellant.

RICHARD BOARDMAN,
Of Counsel.

MORRISON, LLOYD & MORRISON,
Attorneys for Respondent.

WILLIAM J. MORRISON, JR.,
Of Counsel.

A. J. DOAN & SON, Printers, Jersey City, N. J.

New Jersey Supreme Court

BOROUGH OF PARK RIDGE, A Municipal Corporation, Plaintiff, vs. FREDERICK HERRING and JOHN C. STORMS, Defendants.	Stipulation.

A rule to show cause was granted why the defendant John C. Storms should not be allowed to reopen the judgment obtained against him in the above entitled action which rule was returnable September 12th before Supreme Court Justice Parker and the hearing on the rule adjourned until September 23d. It is hereby stipulated and agreed by and between Morrisson Lloyd and Morrisson, Attorneys for the defendant John C. Storms and John O. Totten, Jr., Attorney for the Borough Park Ridge as follows:

1. That the defendant John C. Storms admits that there was no fraud in the entering of the default judgment.

2. The defendant John C. Storms admits that the amount of the judgment as taken was no surprise to him in that he was fully appraised of the cause of action and the claims and demands of the plaintiff.

3. Defendant stipulates and agrees that the only question to be raised on the return of the rule is whether the default judgment was entered in the proper legal manner.

(MORRISON, LLOYD AND MORRISON,
Attorney for Defendant John C. Storms.
(JOHN O. TOTTEN, JR.,
Attorney for the Borough of Park Ridge.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

BOROUGH OF PARK RIDGE, A Municipal Corporation, Plaintiff, vs. JOHN C. STORMS, Impld & C., Defendant.	Action at Law. Affidavit.

STATE OF NEW JERSEY, COUNTY OF BERGEN, } ss.:

JOHN C. STORMS, being duly sworn, according to law, on his oath, deposes and says: I am the defendant in the above entiled cause. I live at Park Ridge, and have resided there for 52 years. I signed the bond set forth in the complaint and thereby became surety for Frederick H. Herring, Collector of Taxes, for the Borough of Park Ridge, for the year of 1915. I also was one of the sureties on the bond of said tax collector, for the year 1916. My co-surety died, insolvent, several years ago.

When it was first discovered, about April, 1921, that there was a shortage in the accounts of the tax collector, for the years covered by said bonds, I discussed the matter informally with one member of the Borough Council, Dr. Samuel Alexander and I believed, after my conversation with him, that whatever amount of shortage, for the years covered by my bonds, was discovered by an accurate audit of the books, would be reported to me. I did not consider it necessary to en-

gage a lawyer to represent me, but relied absolutely on the Borough Officials or their legal representatives to fix the amount of indebtedness and believed they would, give me a fair opportunity to pay such an amount before beginning legal proceedings.

In the month of April, 1922, I was advised that the amount of my indebtedness to the Borough had been fixed at about $2500., and on May 1st, 1922, I was served with the summons and complaint in this action, which complaint showed that the amount claimed to be due on that date was $2536.17, with interest from December 1st, 1915. Believing this to be the true amount of my legal indebtedness to the Borough, I made several propositions for settlement and on July 10th, I sent to the Borough Clerk, my check for $400., with a letter offering to pay the balance of the amount due, which check is still in the hands of the Borough Authorities.

I am now informed that on June 7th, 1922, judgment was entered against me in this action for the sum of $2377.90 together with costs amounting to $40.70. On August 1st, 1922, the Sheriff made a levy on certain real estate owned by me, for the amount of $2418.60.

I am informed that the records in this suit show that the aforesaid sum of $2377.90 is made up of the following items:

SCHEDULE "A"

Amount unlawfully taken by defendant Frederick H. Herring during the year 1915	$1317.68
Amount returned by defendant Frederick H. Herring	411.78

Net amount unlawfully taken and retained by defendant Frederick H. Herring for 1915.....	905.90
Interest on $905.90 from December 1, 1915 to June 1, 1922, 6 years 6 months, 6% annually is.....	353.51
Cost of audit for the year 1915 actually paid by plaintiff.....	818.49
Salary paid by the plaintiff to the defendant for the year 1915.....	300.00
Total	$2377.90

I am further informed that the item of $818.49 and the item of $300. are not legal claims against me under the terms and conditions of the bonds aforesaid. If these items are not legal claims against me I doubt the accuracy of the other items, making up the said sum of $2377.90, and believe that it is possible that an investigation of the entire matter will show that the other items of said account are in excess of the true amount of my liability, and believe that the complainant should be compelled to prove all the various items in open court.

I own several plots of land within the limits of the Borough of Park Ridge, which are ample security for any claim of the Borough against me, and I am willing and able to pay any lawful amount due from me to the Borough, but I verily believe that the amount of said judgment is greatly in excess of the true amount of my indebtedness.

I am further informed and believe it to be true that on or about the 16th day of April, 1921,

Affidavit.

Sarah D. Herring and Frederick H. Herring, the latter being the Collector on whose bond I am surety, did convey to Walter G. Winne three tracts of real estate in the Borough of Park Ridge, which the said Walter G. Winne now holys in trust for the use and benefit of the Borough of Park Ridge as a creditor of the said Frederick H. Herring, to be converted into case, and the proceeds to be applied on account of the claim of the Borough of Park Ridge against said Frederick H. Herring; and that by a bill of sale made on the 22nd day of April, 1921 the said Frederick H. Herring and Sarah D. Herring, his wife, transferred to Walter G. Winne certain chattels upon the trusts aforesaid.

I am further informed, and believe it to be true, that at the present time all of the realty and chattels held by the said Trustee have not been reduced to cash but that a large part thereof has been sold and reduced to cash; and I am informed and believe that the proceeds of the same, amounting to over $4000. may be applicable to reduce the amount of the claim of the Borough Park Ridge against me in this suit.

I further allege that for the reasons above stated I have a just and legal defense to this action and therefore pray that the judgment may be set aside or opened and that I may be let in to plead, and I tender myself ready to give such security as the court may require.

I am also informed that the judgment in this case was entered for the sum of $2377.90 damages and $40.70 costs upon an assessment of damages before the Clerk of this court and was not entered for the sum of $5000. which is the pen-

alty in the bond which I signed, and that there has been no assessment of damages upon a writ of inquiry or before a jury as required by An Act Concerning Obligations, Compiled Statutes, Vol. 3, page 3779, Section 8.

J. C. STORMS.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 22ND DAY OF SEPTEMBER, 1922.

MARY E. NELSON,
Notary Public of New Jersey.

I hereby waive notice of the taking of the within deposition.

JOHN O. TOTTEN, JR.,
Attorney for Borough of Park Ridge.

New Jersey Court of Errors and Appeals

BOROUGH OF PARK RIDGE,
A Municipal Corporation,
Plaintiff-Appellant,

vs.

JOHN C. STORMS,
Defendant-Respondent.

BRIEF
FOR PLAINTIFF-APPELLANT.

I.

Statement of the Case.

The defendant John C. Storms became bound to the plaintiff-appellant, the Borough of Park Ridge, on or about January 1, 1915, in the sum of $5000. The condition of the bond after reciting the election of Frederick H. Herring, the principal, as Collector of Taxes of the Borough of Park Ridge, provided that if the said Herring should during his continuance in office faithfully perform the duties of his said office according to law and should at the expiration of his term of office turn over to his successor all books and papers pertaining to said office then said obligation to be void otherwise to remain in full force.

Herring during the period covered by the bond, unlawfully took from the moneys of the Borough and kept $905.90. He also paid himself salary for the year covered by the bond, $300. His dis-

honest conduct rendered necessary an audit by a Registered Municipal Accountant. The cost of this audit was $818.49.

This suit was brought to recover from the defendants Herring and Storms, the amount of these three items. It appears by the State of the Case that the summons is attested April 25th, 1922 (p. 1).

On April 26th, 1922, the defendant Herring was served personally at the New Jersey State's Prison where the said defendant Herring was then confined (p. 5).

On May 1, 1922, the Summons and Complaint were served upon the defendant, John C. Storms, personally (p. 6).

The Complaint alleges defalcations by defendant Herring amounting to $1317.68 and in a separate paragraph of the Complaint the payment of the unearned salary, $300, and in still another paragraph the payment of the expense of the audit, $818.49.

The complaint thereupon demanded judgment for the sum of these three items amounting in figures to $2566.17.

The defendant Storms, therefore when the complaint was served upon him was carefully and accurately advised of the gross amount of the claim made against him and the items of charge which he was called upon to pay.

On May 21, 1922, the time for Storms to answer, expired. After waiting two weeks plaintiff entered up judgment by default, the Clerk assessed the damages giving to the defendant credit for $411.68 which sum the audit disclosed Herring had returned to the Borough of Park Ridge (p. 10).

Storms waited more than two months longer before taking any action or asserting any defense to the action.

On August 17th, 1922, Storms applied for and obtained from Mr. Justice Parker an order to show cause why the judgment should not be opened and the defendant allowed to enter his appearance and defend the said action, especially as respects the items of Collector's salary and cost of audit of books.

On the 23d day of September, 1922, on the return of the Rule to Show Cause, Mr. Justice Parker made an Order,

> 1—That the defendant pay the plaintiff the sum of $905.90 with interest, being the amount of the defalcation.
>
> 2—That the argument of the question of the liability of the defendant to the plaintiff on the items of salary and cost of audit be heard on October 14th, 1922.
>
> 3—That the taking of the said rule should act as a consent by defendant to such further rule as the Justice might make in the matter.
>
> 4—The judgment, execution and levy to stand as security.

Defendant thereupon paid the sum of $905.90 with interest and costs.

On November 26th, 1922, Mr. Justice Parker made an Order for Judgment final whereby he found that the defendant Storms at the time this suit was begun owed to the Plaintiff the sum of $905.90 as surety for defendant Frederick H. Herring, which sum had since been paid and fully satisfied, and further found that the Plaintiff could not prevail against the defendant upon the allegations contained in the fourth and fifth paragraphs of the complaint. Whereupon, it was

adjudged that the judgment theretofore entered be set aside and that Plaintiff have judgment against defendant for the sum of $905.90 but without costs and that Plaintiff because of such payment satisfy said judgment of record, or cause an acknowledgment of such payment to be entered on the record.

A new judgment was thereupon entered and plaintiff complied with mandate of the Court causing an acknowledgment of payment of the said sum of $905.90 to be entered on the record.

Thereupon the plaintiff appealed to this Court from so much of the said judgment as adjudged that the first judgment should be set aside and alleged as error:

1—The regularity of the first judgment.

2—The failure of defendant to show either surprise on the part of the defendant or fraud on the part of the plaintiff or any meritorious defense to plaintiff's action.

3—Error by the Justice in assessing damages in $905.90 instead of $2377.69 as assessed by the Clerk.

4—Error by the Justice in not including in the debt of defendant the $300 of salary which defendant Herring paid to himself.

5—Error by the Justice in not including $818.49, the costs of the audit in the debt of defendant.

II.

Grounds of Appeal.

1—That the judgment originally entered in the action against John C. Storms, was entered in the proper legal manner.

2—The affidavits, read on the return of the rule to show cause, upon which the second judgment was entered and upon which the first judgment was opened, show neither surprise on the part of the defendant nor fraud on the part of the plaintiff, nor any meritorious defense to plaintiff's action.

3—That the Justice of the Supreme Court, directing the entry of the rule for judgment final, dated November 25, 1922, erred in fixing the amount of the debt of the defendant Storms, to plaintiff, at the sum of nine hundred and five dollars and ninety cents ($905.90) instead of the sum of two thousand, three hundred and seventy-seven dollars and sixty-nine cents ($2,377.69) as assessed by the Clerk.

4—That the said Justice in assessing damages and entering said judgment, erred in not including in the debt and obligation of the defendant, John C. Storms, to the plaintiff, the sum of Three hundred dollars ($300) unlawfully paid by the defendant Herring, to himself, from moneys in his possession belonging to the plaintiff, under the guise and claim of salary, thereby increasing his defalcations by the amount of the said sum of three hundred dollars ($300) for which his bondsman is properly chargeable, and in breach of the condition of the bond.

5—That the said Justice of the Supreme Court, in assessing damages and entering said judgment, erred in not including in the debt and obligation of the defendant, John C. Storms to the plaintiff, the sum of Eight Hundred and eighteen dollars and forty-nine cents ($818.49), cost of audit for the year 1915, made necessary by the unfaithful performance of the duties of the defendant, Herring, as Collector of Taxes for the Plaintiff, the said costs having actually been paid by plaintiff.

III.

Argument.

POINT 1.

The judgment originally entered in the action against John C. Storms, was entered in the proper legal manner.

Section 14 of the Practice Act of 1912 provides:

> "Judgment of non-suit or by default may be entered against plaintiff or defendant respectively for failure to plead according to the rules."

Section 136 of the Practice Act of 1903 still remains in full force and effect and is as follows, 3 C. S., page 4096:

> "If interlocutory judgment in an action on contract is entered by default, where the damages or sum recoverable are a mere matter of calculation or can readily be ascertained, the plaintiff may have his damages assessed by the Court, or if the Court is not actually

> in session, by a judge or the clerk, unless a rule shall be entered for a writ of inquiry or an order be made for assessment of damages in open court."

In the present case the amount claimed by plaintiff against defendant was set up in most precise manner, clearly and in a form comprehensible to a layman. The defendant Storms received the complaint, admitted the obligation, and deliberately neglected to file an answer. The only task set to Clerk to assess the damages was the computation of the interest and the deducting of a conceded credit.

The case of *Rogers* vs. *Brundred,* 16 N. J. L. 159, was upon a bond given under the act to abolish imprisonment for debt in certain cases. In that case as here, the declaration after reciting the condition of the bond set forth the exact amount due the plaintiffs, the Court held at page 160 as follows:

> "Let the damages be assessed by the Court. This is in the nature of a bail bond; the precise amount due the plaintiffs is apparent upon the record, and there is no uncertainty or discretion to be exercised in the matter, requiring the interference of a jury."

In *Peacock* vs. *Haney,* 37 N. J. L. page 179, the suit was upon a replevin bond where it was necessary to ascertain the value of the goods. There it was held the defendant was entitled to a jury but Mr. Justice Depue speaking for the Court said at page 180:

> "Where the amount of damages is a mere matter of computation which can be as well ascertained by the Court, or a master, or prothonotary, as by a jury, the assessment may be made without a writ of inquiry."

To permit a defendant to receive a complaint which clearly and with precision sets forth the cause of action against him and the nature and the items of the debt claimed, to default, and thereby to confess the debt, and permit judgment to go against him for want of an answer and later the damages to be assessed by the Clerk for want of an application for a writ of inquiry and execution to issue and be served then at his own convenience to have the default judgment opened, is to bring the process of the Court into disrepute. If defendants can simply default in cases such as this, and at their own sweet will come in and file their pleading and make their defense, the Statute permitting a judgment by default for failure of a party to file a pleading within a designated period might just as well be repealed and parties defendant be left to file their answers at their convenience. There is not the slightest pretense on the part of the defendant that he was either defrauded or surprised. Apparently it was only when the Sheriff came to levy on his goods and real estate that he thought it was necessary for him to concern himself with the processes of the Court.

In *Creamer* vs. *Dikeman,* 39 N. J. L. page 195, Mr. Justice Scudder said:

> "The cause of action is impliedly admitted by the default. The plaintiff below in this cause knew from the pleadings filed, the nature of the demand made against him, and if he were in any doubt, he could have demanded a bill of particulars. Having failed to do so, it was too late to call for proofs after the interlocutory judgment was entered against him."

Defendant Storms stipulated, "That the only question to be raised on the return of the rule

is whether the default judgment was entered in the proper legal manner." (Supplement to State of Case, page 1.) We respectfully submit, that that question must be answered in the affirmative.

POINT 2.

The affidavits, read on the return of the rule to show cause, upon which the second judgment was entered and upon which the first judgment was opened, show neither surprise on the part of the defendant nor fraud on the part of the plaintiff, nor any meritorious defense to plaintiff's action.

The only affidavit on file with the Supreme Court is the affidavit which is printed on pages 14, 15 and 16 in the State of the Case, the authenticity of which is vouched for by the certificate of the Clerk. We have been served with an objection to the State of the Case that some other affidavit of defendant respondent was presented to the Court and read on the return of the rule but no such affidavit has been furnished us by the Clerk upon a request for all the files in the case.

In a supplement to the State of the Case we have printed the affidavit referred to by Counsel, this *ex parte* affidavit was used and could be used only by consent, and that consent was predicated upon a stipulation entered into between the Attorneys of appellant and respondent which is also printed in the supplement to the State of the Case. (Pgs. 2 and 3.)

If one of these two papers is before the Court both are. The 26th section of the Practice Act of

1912 seems broad enough to permit the use of both. It is as follows:

> "AN appeal is a step in the cause, and is deemed to remove to the appellate court the entire record of the cause and all orders, proceedings and documents made, taken or filed therein, whether or not they are actually included in the transcript of the record sent to that court."

If only the record as returned is to be considered there was nothing before the Justice to support his action in making absolute the rule to show cause, but if recourse is to be had to the affidavit and stipulation it then appears that there was neither fraud nor surprise and that the only question before the Trial Justice was the legality of the manner in which the default judgment was entered. Upon this question we refer to the cases referred to and the argument made under point one.

POINT 3.

The Justice of the Supreme Court, directing the entry of the rule for final judgment, dated November 25, 1922, erred in fixing the amount of the debt of the defendant Storms, to plaintiff, at the sum of nine hundred and five dollars and ninety cents ($905.90) instead of the sum of two thousand, three hundred and seventy-seven dollars and sixty-nine cents ($2,377.69) as assessed by the Clerk.

The sum of nine hundred and five dollars and ninety cents ($905.90) covers the amount, exclusive of his salary wrongfully taken by Herring during the period for which the bond was given.

The item of salary, namely three hundred dollars ($300) which Herring paid himself, and the cost of the audit of the books of the said Collector Herring in the amount of eight hundred eighteen dollars and forty-nine cents ($818.49) is not made a part of this second judgment although each item is carefully set out in Paragraphs 4 and 5 of the Complaint. (See page 3, State of Case.) Furthermore, these amounts were assessed as damages by the Clerk and the original judgment as entered included these items, (See page 13 of State of Case.) The accuracy of these figures is not questioned.

By his default Storms had admitted his responsibility for these items clearly charged against him in the complaint.

Creamer v. *Dikeman,* 39 N. J. L. 195.

POINT 4.

The said Justice in assessing damages and entering said judgment, erred in not including in the debt and obligation of the defendant John C. Storms, to the plaintiff, the sum of three hundred dollars ($300) unlawfully paid by the defendant Herring, to himself, from moneys in his possession belonging to the plaintiff, under the guise and claim of salary, thereby increasing his defalcations by the amount of the said sum of three hundred dollars ($300), for which his bondsman is properly chargeable, and in breach of the condition of the bond.

The Court in his memorandum found that the Collector of Taxes was a public officer not serving under any contractual relations, and there-

fore was entitled to his salary. (Case, page 28.) Yet, section 9 of the Borough Act (Revision of 1898, C. S. Vol. 1, page 232), required that the Collector of Taxes shall annually give bond to the Borough for the faithful performance of his duty. The act is as follows:

> "The collector and such other officers as the Council may by Ordinance or resolution require shall, before they enter upon the duties of their office, give bond to the Borough in its corporate name in such sum and with such sureties as the council may require and approve, conditioned for the faithful performance of the duties of their office."

Certainly, such a bond constitutes a contract between the Collector and the Borough and it must follow, that in the event the said Collector shall not faithfully perform the contract that the penal sum of the bond is a fund to which the Borough may look to be made whole.

The statement of the Justice therefore, that, "The Collector was a public officer *not serving under any contractual relation,*" would seem to be too broad a statement of the law.

It is familiar law that an appointment to a public office is not a contract within the provision of the constitution which forbids the impairment of contracts by the state governments

Hoboken vs. *Gear,* 27 N. J. L. page 265.

The receiver of taxes of Newark (and no doubt of Park Ridge), is a public officer, not merely a private employee of the city and holds his office during the pleasure of the municipality.

Uffert vs. *Vogt,* 65 N. J. L. 377. s-c 65 N. J. L. 621.

And where salary attached to an office the right to it is not affected by the diminution of the duties of the office, the office itself remaining.

Bennett vs. *Orange,* 69 N. J. L. p. 176.

Similarly it has been held that the increase of the duties of a public officer does not of itself increase the amount of compensation to which he is entitled.

And yet again a *de facto* officer performing the duties of an office without fraud on his part and receiving the salary of the office can keep the salary he has received as against the claim of the person rightfully entitled to the office.

Stuhr vs. *Curran,* 44 N. J. L. p. 181.

But if fraud is imputable to the defendant in holding the office the rule would be different. Public policy would require that the fraud doer be not encouraged by deriving gain from his dereliction, 44 N. J. L. at page 191.

An unauthorized person gaining possession of a public office by force or fraud has no right of action against the public for the prescribed fee or salary.

Miehan vs. *Freeholders,* 46 N. J. L. p. 276.

While it is true that the obligation of the public to pay an officer his salary does not depend upon a contract to do so, nor generally upon principles growing out of contractual relationships, nevertheless, from this it does not follow, that one assuming a public office is under a lesser obligation than the conventional obligation of a servant to his master.

It would seem that the duty of a public officer or more definitely of a collector of taxes, is more

jealously guarded by the law than the contractual duty of a servant to his master. It would be too great a refinement of casuistry to say that a public servant owed a greater moral duty to the public to be honest than does a servant to his master. But to hold that the safe guards of the law are less in the former instance than they are in the latter is to fly in the face of the provisions of the Statute. The duty of personal honesty is an absolute one and not subject to any such refinement.

Before one may become a collector of taxes of a Borough he must submit his qualifications to the judgment of the voters. After election he must take and subscribe an official oath of office (Borough Act, 1 C. S., page 231, Section 8. See also P. L. 1920, page 413), and enter into a bond to the Borough for the faithful performance of the duties of his office (Borough Act, 1 C. S., page 232, Section 9). It would seem therefore that the Borough Collector is not only under the obligation of a public officer but these obligations are of a contractual nature as well.

The cases seem to indicate that a public officer touching matters of honesty and good faith is similarly bound to the public as a servant is to his master. In *Meehan* vs. *Board of Freeholders*, supra, it was held as we have seen, that one who fraudulently intruded into an office could not recover for services rendered in performing the office. On the other hand in *Erwin* vs. *Jersey City*, 60 N. J. L., page 141, it was held that Erwin who illegally but honestly and without fraud took possession of the office of city Attorney and performed its duties, was entitled to compensation.

Again upon the principal requiring of the public servant as of a private servant, good faith and

fair dealing, it was held in the case of *Love* vs. *Jersey City,* 40 N. J. L., 456 that if an officer continues in office after his salary has been reduced and from month to month accepts the warrant for the reduced salary he *assents* thereby to the reduction and is *estopped* from questioning the legality of the reduction. Assents and estoppels of this sort are certainly of a contractual nature.

Mr. Justice Dixon in his discussion of the case, said:

> "This principal was applied in *Stagg* vs. *Insurance Company,* 10 Wal., page 589, a public officer is not less strongly bound by his active consent."
>
> "If he continued in his office, his *acquiesence establishes his consent* to the terms fixed by the Board.'

The result would seem therefore that not only in common parlance but in point of law a public office-holder is a public servant and in words of Grover Cleveland, "A public office is a public trust." And that the salary is not payable where there is actual fraud or dishonesty.

Any other rule of law would be contrary to public policy and public morality.

Herring, as collector, paid his own salary, knowing of his own dishonesty. Certainly sums, so taken were wrongfully taken and should be recovered.

POINT 5.

The said Justice of the Supreme Court, in assessing damages and entering said judgment, erred in not including in the debt and obligation of the defendant, John C. Storms, to the plaintiff, the sum of eight hundred and eighteen dollars and forty-nine cents ($818.49), cost of audit for the year 1915, made necessary by the unfaithful performance of the duties of the defendant, Herring, as Collector of Taxes for the plaintiff, the said costs having actually been paid by plaintiff.

Speaking of the cost of audit the Trial Justice said:

> "I think also that the claim for costs of an audit cannot be sustained. It does not seem to me to be anything that could be reasonably have been contemplated by the parties as damages proximately to be caused by a default. No statute that I know of makes it a liability of the collector himself, until some higher authority in this State declares that such an expense is recoverable as damages for a defalcation, I am not willing to recognize such a claim."

Let us first consider what a reasonably intelligent man might have contemplated as proximate damages to be caused by a default, then what Storms as a matter of fact did contemplate as proximate damages for which he could reasonably be called upon to respond in case of default.

The practice in this State, is to give fidelity bonds in double the amount of the estimated value

of the estate entrusted to the trustee. This practice is so common that a reasonably intelligent man would be familiar with it. The reason for this practice is also well known and well understood by the reasonably intelligent. The one-half of the penalty is to cover the actual shortage, the other half is to cover interest, damages and costs of recovery.

The precise nature of the items recoverable by an injured party on such a bond for damages or expenses of recovery in ordinary course would not be known by a reasonably intelligent man who no doubt would be a reasonably ignorant man as well. But such an imaginary person upon being called upon to act as surety in the sum of $5000 where he knew that the amount in the hands of his principal was only $2500 and that the extra amount of $2500 was inserted to cover interest and costs of recovery would, we submit, anticipate that the cost of an audit in case of default by the principal would be properly chargeable against him, the surety. For it is common knowledge that where one charged with the safe keeping of trust funds begins to embezzle, he simultaneously, or shortly thereafter begins to falsify his books. It is also a matter of common knowledge that the very first step in any attempt to recover moneys that have been embezzled is to have an audit made of the books of the defaulter.

Any reasonably intelligent layman, we submit, would upon executing a bond in double the amount involved naturally contemplate a liability for the costs of an audit in case of default.

But in the present case, we have not the ideal, imaginary bond, given by an imaginary principal and imaginary surety, but we have an actual

bond given by actual men, a bond given by Frederick H. Herring and John C. Storms, neighbors in the little Borough of Park Ridge to the Borough of which they were both residents (Case, p. 4). The bond is not in the precise form prescribed by the Statute (Borough Act, section 9. 1 C. S., p. 233). It, however, was given without coercion or duress, is not prohibited by statute, nor contrary to public policy and is founded on a good and sufficient consideration and intended to serve a lawful purpose. Such a bond is good as a voluntary bond. See *Emanuel* vs. *McNeil,* 87 N. J. L. 499. *Koch* vs. *Costello,* 93 N. J. L. 367, at page 374.

Such bonds are uniformly construed according to the language of each bond itself.

Chief Justice Whelpley in the case of *Ordinary* vs. *Cooley,* 30 N. J. L. 179, at page 182, states the rule as follows:

> "The bond is to have just such a construction, and none other, as if the statute had prescribed no form, and the parties had invented their own security. This is precisely what they have done."

The construction depends upon the terms of the bond in suit and in this case if we are to apply the general rule cited by the learned Trial Justice we must inquire what damages were within the reasonably contemplation of Storms and the Borough of Park Ridge.

As to this, we are not left in doubt by the record itself. The Borough made prompt and immediate claim against Storms for the costs of the audit. It charged the costs of audit against him in its complaint in language that he could not fail to understand. "Plaintiff expended ($818.49) in having audited and stated the books

and accounts of the defendant Frederick H. Herring, as said collector of taxes for the year 1915" (Case, p. 3).

The Borough admittedly acted in good faith for it is stipulated that there was no fraud in the entering of the default judgment (Supplement to the case, p. 1). Such was the construction placed upon the bond by the Borough.

Storms himself, never doubted the propriety of this charge against him until after judgment was entered, execution issued, and levy made, then only he retained Counsel.

He says in his affidavit, the italics are ours:

> "When it was *first* discovered about April, 1921, that there was a shortage * * * I discussed the matter informally with one member of the Borough Council * * * and I believed, after my conversation with him, that whatever amount of shortage for the years covered by my bonds was discovered by an *accurate audit of the books, would be reported to me.*"
>
> "In the month of April, 1922, I was advised that the amount of my indebtedness to the Borough had been fixed at about $2500 and on May 1, 1922, I was served with the summons and complaint in this case, which complaint showed that the amount claimed to be due on that date was $2536.17 with interest from December 1, 1915. *Believing this to be the true amount of my indebtedness to the Borough, I made several propositions for settlement and on July 10, 1922, I sent to the Borough Clerk my check for $400 with a letter offering to pay the balance of the amount due,* which check is still in the hands of the Borough authorities" (Supplement to case, p. 3).

Out of his own mouth therefore he knew when the shortage was first discovered. He knew of the

audit being made, expected a report on the audit to be made to him, felt, no doubt, that it was being made in part in his interest, believed that only a proper charge against him would be made and on July 10th, 1922, more than two months after the summons and complaint were served, upon him, still believed that the charge for the cost of the audit was a just one. *His own construction of his own contract was that he was liable for the cost of this audit.*

We do not therefore have to consider whether this item reasonably could have been in the minds of the parties for we have plenary proof that as a matter of fact it was in the minds of both parties and that neither party ever questioned its propriety until the Sheriff came with the execution, and loop-holes of escape began to be sought by legal talent.

We have averted to the fact that the contract in suit is not technically the bond required by the statute. One of the points of departure, from form, is in the insertion of a provision that Herring will at the expiration of his term of office turn over to his successor all books and papers pertaining to said office. No doubt this referred to proper books and proper vouchers. The very fact that an audit was necessary as both parties to this suit seems to agree that it was, was due to Herring's neglect in this matter of turning over proper books and vouchers. As we have already pointed out this contract is to be construed according to its own peculiar terms. It is also to be construed in the light of its own peculiar surrounding circumstances. The rule averted to by the Trial Justice is not so much a rule for the construction of the contract as for the determining of damages. It harks back to the leading

case of *Hadley* vs. *Baxendale,* of which Sedgwick in his note to his work on "Damages," page 263, says:

> "So entirely is the later law founded on this case, that the great body of cases since decided involving the measure of damages for breach of contract, resolve themselves into a continuous commentary upon it."

In *Hadley* vs. *Baxendale,* after stating the rule referred to by the Trial Justice, the Court concludes:

> "The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

The language used by the Trial Justice seems to indicate that he too, was applying a rule for the guidance of a jury, not a strict rule of law to be applied by a Court. For, he says, as if weighing evidence in the light of surrounding circumstances, "*It does not seem to me* to be anything that could be reasonably have been contemplated by the parties as damages approximately to be caused by a default" (Case, p. 29). It did seem to the Borough Officials and to Storms himself that the cost of the audit were damages naturally flowing from the breach of the contract, and damages that might reasonably have been contemplated by the parties.

As a matter of fact the Trial Justice undertook to determine this question of damages, "On oral argument and briefs," and ordered that, "The taking of this present rule shall be deemed a consent by the *defendant* to the determination of such additional liability by the said Justice" (Case, p. 19). No such terms were imposed upon the plaintiff.

It was not in default. If a jury question was presented, defendant was precluded by the judgment upon default. He had failed to file an answer, had admitted the obligation, and failed to apply for a rule for a writ of inquiry.

A jury, had one been called, could have arrived at no other conclusion than did the Clerk in assessing the damages. We reaffirm our first reason, that the judgment as originally entered was a proper judgment under the circumstances of the case.

The judgment by the Court we submit should be reversed and the judgment originally entered should be affirmed.

Respectfully submitted,

JOHN O. TOTTEN, JR.,
Attorney for and of
Counsel with Appellant.

RICHARD BOARDMAN,
of Counsel.

New Jersey Court of Errors and Appeals

BOROUGH OF PARK RIDGE, a Municipal Corporation, Plaintiff-Appellant, vs. JOHN C. STORMS, Defendant-Respondent.	On Appeal from Supreme Court.

BRIEF OF DEFENDANT-RESPONDENT.

Statement.

Is a Borough Collector's surety, who has paid to the Borough the amount of a defalcation, obligated to reimburse the Borough for the Collector's salary and the expense of auditing his books?

Plaintiff-appellant sued for the amount of a defalcation by the Borough Collector (Complaint, Case, page 3, l. 10-17); for the Collector's salary for the year in which the defalcation occurred (Complaint, Case, page 3, l. 18-20); for the cost of auditing the Collector's books for that year (Complaint, Case, page 3, l. 21-24). The amount of the defalcation having been paid (Receipt, Case, page 21) the Supreme Court held that the Borough could not recover the salary and cost of audit (Case, page 22, l. 13-16). The Borough appeals (Case, pages 26-27).

I.

The surety is not liable for the collector's salary.

The appellant's argument seems to be that as the Collector did not perform his duties, he was not entitled to his salary. There is no allegation in the complaint that he did not perform the duties of his office except as to the defalcation. The amount of that defalcation has now been made good to the Borough so that it now stands in as good a position as though no defalcation had taken place. It has been held in many cases in our State that a public officer's right to compensation is not a contract (Hoboken vs. Gear, 27 N. J. L., 265, followed by many later cases), and that the compensation of a public officer belongs to him not by force of any contract, but because the law attaches it to the office and it is not affected by a diminution of the duties of the office, the office itself remaining. Bennett vs. Orange, 69 N. J. L., 176; affirmed in 69 N. J. L., 675.

Even sureties for contractors who perform a contract in the place of their principal, are entitled to the compensation fixed by the contract. St. Peter's Catholic Church vs. Van Note, 66 N. J. Eq., 78.

It is respectfully submitted that the surety has a just and legal defense to the appellant's demand for reimbursement for the collector's salary.

II.

The surety is not liable for the cost of the audit.

As to accounting and audits, the liability of the Collector and his surety is fixed by statute. The Collector's duties as to keeping accounts are set

forth in Sections 17 and 18 of the General Borough Act, P. L., 1897, page 285, at pages 292, 293; 1 C. S., 235. He is to "enter in suitable books to be kept for the purpose, the sums received by him each day for taxes"; to "keep a record and account of the finances of the Borough"; annually or oftener if required by the Council to "make and furnish a report thereof"; and "in addition to the annual report and statement above required to be made by him, when requested by the Council, render to said Council a true and full account of all moneys collected by him as such Collector."

For the Collector's faithful performance of these duties, the surety is bound. Although there is no express allegation to that effect in the complaint, what the plaintiff seems to claim is that these duties were not performed, and the plaintiff has been obliged to have an audit to state a "true and full account of all the moneys collected by him as such collector" and that the surety should pay $818.49 for the expense of this audit.

But Section 19 of the Borough Act expressly provides that for the Collector's failure to keep and render such accounts "he shall forfeit and pay to such Borough the sum of $100 to be recovered in an action upon contract in any court of competent jurisdiction." This, then, is the measure of damages if the Borough sought a remedy from the Collector. If it sought a remedy from his sureties, the Borough had by this Section an alternative remedy which was the right to remove the Collector from office, and to recover "the amount of money in his hands belonging to said Borough, or with which he is chargeable as Collector and Treasurer, by appropriate proceedings against said Collector or the sureties on his official bond." This is a clear statutory statement of the sureties' liability, and such liability is limited to the amount of money in the

Collector's hands belonging to the Borough, and money with which he is chargeable as Collector and Treasurer. So far as the Collector failed to perform the duties of his office in respect to paying over moneys with which he was chargeable as aforesaid, this surety has paid the moneys to the Borough. If the Borough had had the Collector's books audited at the end of the year in question, and had then discovered the shortage and had then received the amount thereof from the surety, the Borough could, under Section 19, have elected either to collect $100 from the Collector for failing to keep proper accounts or to remove the Collector and hold him and his sureties responsible for the moneys in his hands or for which he was chargeable. The Borough could not, at that time, have required the surety to pay the cost of the audit, and as there is no allegation that the delay in making the audit is in any way chargeable to the surety, there is no reason why the surety should now be held liable for the cost thereof.

It is respectfully submitted that the Surety has a just and legal defense to the appellant's demand for reimbursement for the cost of audit.

III.

The surety having a just and legal defense to the borough's action, the Supreme Court properly opened the default judgment.

Even where a default judgment is regularly entered, it may be set aside when defendant has a just and legal defense to the action.

"If a judgment by default is entered for want of a plea, the court or a judge on four

days' notice, upon proof that such judgment was improvidently or fraudulently entered, or that the defendant has a just and legal defense to the action, may order that such judgment be set aside or opened to let the defendant in to plead * * *"

1903 Practice Act, 3 C. S., page 4095, Section 135.

"The practice of this court has always been, where no trial was lost, to set aside a regular judgment in all cases where there is a real defense, on payment of costs. Even in cases where defendant may be chargeable with neglect.

"But omissions which arise from mistake and where there is an appearance of a just defense, have a stronger claim to the interposition of the court."

Denn vs. Evaul, 1 N. J. L., 201 at page 202.

It has been shown under Points I and II that the surety had a just and legal defense to the Borough's suit for salary and cost of audit. The Supreme Court was right, therefore, in opening the default judgment to permit the surety to assert these defenses.

IV.

The default judgment was not properly entered.

The surety having failed to file an answer within time, the Borough caused the Clerk of the Supreme Court to assess its damages. (Case, page 12, l. 1-12) and entered judgment. (Case, page 13, l. 1-25.)

This practice is permitted by statute in actions on contract:

> "If interlocutory judgment in an action on contract is entered by default, where the damages or sum recoverable are a mere matter of calculation, or can readily be ascertained, the plaintiff may have his damages assessed by the court, or if the court is not actually in session, by a judge or the clerk, unless a rule shall be entered for a writ of inquiry, or an order be made for assessment of damages in open court."
>
> 1903 Practice Act, 3 C. S., page 4096, Section 136.

But this is not the proper practice in an action upon a bond with a condition other than for the payment of money, for example, on the bond in this case which was conditioned for the faithful performance of the Collector's duties. In such cases the statute is:

> "That is every action upon any bond or for any penal sum for non-performance of covenants or agreements contained in any indenture, deed or writing or upon any bond, with condition other than for the payment of money, the plaintiff may assign as many breaches as he shall think fit; and the jury, upon the trial of such action, or on the execution of any writ of inquiry, in case of judgment on demurrer, or by confession or default, shall assess damages for such of the said breaches as have been broken; and on verdict therefor, the like judgment shall be entered as heretofore hath been usually entered in such action."
>
> Act Concerning Obligations, 3 C. S., page 3779, Section 8.

While the modern practice has wiped out the old technical names and forms of actions it has not and can not destroy the reasons for the differences to which such names and forms pertained. No extended argument is needed to make patent the difference between a suit on a simple contract and one on a penal bond, nor to demonstrate that these are still so different in nature that while the practice in the one may be regulated by the Practice Act the practice in the other is regulated by the Act Concerning Obligations. The Borough's failure to follow the practice required by the Act Concerning Obligations deprived the surety of a substantial right for he would, under that act, have had notice of the assessment of damages under a writ of inquiry, and might have been heard as to the proper amount thereof.

It is respectfully submitted that the Supreme Court was right in opening the default judgment as improvidently entered.

V.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

MORRISON, LLOYD & MORRISON,
Attorneys of Defendant-Respondent.

WILLIAM J. MORRISON, JR.,
of Counsel.