

NEW JERSEY
COURT OF ERRORS AND APPEALS.

TOWNSHIP OF FRANKLIN, IN
THE COUNTY OF GLOUCESTER,

Plaintiff,

VS.

WILSON T. JONES,

Defendant.

ACTION AT LAW.
ON APPEAL FROM
ORDER STRIKING OUT
COMPLAINT.

BRIEF FOR PLAINTIFF.

INTRODUCTION.

State of Pleadings.

In January, 1913, the present appellant, the Franklin Township, brought an action at law in Gloucester County Circuit Court to recover from the defendant, Wilson T. Jones, certain Township moneys unlawfully retained by him. By way of answer, the defendant moved to strike out the complaint on the ground that it disclosed no cause of action. This motion, after argument before Cole, J., was granted and judgment entered against the plaintiff, with costs. From this judgment, plaintiff has prosecuted the present appeal.

Facts in the Case.

The allegations of the complaint, stated briefly, are that from February, 1893, to January 1, 1911, defendant held the office of Clerk of the Township of Franklin, a local municipal corporation of this State; that from 1902 to 1909, inclusive, a period of eight years, defendant received an annual salary of two hundred dollars, making the total amount received by him during said period the sum of sixteen hundred dollars; that Section 12 of the Township Act, as amended, (4 Comp. Stat. 5576), provides that the Township Clerk shall be allowed and paid three dollars per day, or such annual compensation as the Township Committee shall by ordinance determine, for the services rendered in the performance of the duties required of him by law; that the salary paid the defendant was fixed not by ordinance, but by resolution of the Township Committee, and that the payments thereunder were accordingly illegal because not authorized by law, and that the plaintiff is entitled to recover such illegal payments as money had and received by the defendant to its use.

The complaint further alleged that prior to the passage of said resolution, defendant obtained compensation for his services as Township Clerk by presenting from time to time to the Township Committee, bills or statements of amounts due him for services rendered; that said bills and statements were not itemized and verified by the oath of the defendant but called for the payment of a lump sum without exhibiting the nature and particulars of the services rendered or showing how such bills were made up; that Section 1 of the Act respecting the expenditure of public money by municipal corporations (3 Comp. Stat. 3665), renders it unlawful for the Township Committee of any Township in this State to pay out or disburse any moneys to any person unless the person claiming or receiv-

ing said moneys shall first present to the party or parties paying any such moneys a detailed bill of items or demand, specifying particularly how such bill is made up, and the dates and names of the persons to whom the amounts composing such bill or demand were severally paid, with the affidavit of the party claiming payment of such bill or demand that the same is correct; that under this section, the payments made to defendant upon bills unitemized and unverified were illegal and unauthorized; and that plaintiff is entitled to recover the amount so paid defendant as moneys had and received by the defendant for its use. Annexed to the complaint was an itemized statement of the various amounts so paid to the defendant.

The complaint thus presented two different demands for recovery. First, for those payments made contrary to law upon unitemized and unverified bills, and secondly, the payments made by way of salary where no right existed under the circumstances to pay a salary.

Questions Raised by Defendant's Motion.

The defendant attacked these demands separately. He insisted that with respect to the payments made by way of salary:

1. That such payments were voluntary and could not be recovered back.
2. That such payments having been made by virtue of a resolution duly passed by the Township Committee, their validity could not be impeached in a suit of this nature, but only in proceedings directed to a determination of the legality of the resolution itself.

And with respect to the payments made upon unitemized and unverified bills, the defendant contended:

1. That such payments were voluntary and could not be recovered back.

2. That it did not appear by way of direct allegation in the complaint that such payments were not legally due and owing to defendant from plaintiff.

3. That the complaint did not specify what bills of those specified in the bill of particulars annexed thereto were unitemized and unverified, and that defendant was, therefore, in ignorance as to what items the plaintiff charges him with as not having been presented in the manner required by law.

The principal questions of law raised by the defendant's motion to quash were *first, the objection of voluntary payment, and secondly, the objection of collateral attack*. It was on the latter ground that the trial Court felt compelled to render judgment in defendant's favor; on the other questions its decision supported the plaintiff.

ARGUMENT.

Foreword.

Before commencing our argument on the defendant's objections, we wish to call attention to the position in which the plaintiff's rights have been placed by prior adjudication of the matters contained in this case. Before this action at law was brought, a bill in equity was filed by the present plaintiff against the defendant for an accounting of the moneys received by him as clerk of the Township. To such bill, the defendant demurred, and from the order of the Court of Chancery overruling this

demurrer appealed to the Court of Errors and Appeals. That Court reversed the lower Court's ruling, saying, in a decision reported in 85 *Atl.* 347:

"It is evident from the statement on the face of the bill and its prayer for discovery that this is a pure collection suit by a creditor against his debtor for money had and received to the use of the former, for which an action at law will lie."

The Court of Errors held, by reference to a contemporaneous decision, that the plaintiff's remedy was either in direct attack by mandamus or in just such a suit as plaintiff has now brought.

But it is evident from the nature of the case that mandamus at this late hour would be barren of results and that the only real remedy remaining lies in the present action. That the payments of money for which recovery is sought were made in defiance of law cannot be denied and is not denied by the defendant in his motion to quash. Why then, should the plaintiff be put to the difficulty of another action in order to obtain the decision of the court that certain acts are illegal which a public law of the State expressly declares are illegal? The appellant has made a careful and thorough investigation of the authorities on this question and can say without hesitation that there is no decision either in this State or in any of the other States of the Union in which such a position was attempted as has been taken by the defendant in the case at bar.

I. Defendant's Objection of Voluntary Payment.

The defendant, in his motion to quash, raises the objection to the plaintiff's right of recovery that the payments made both as salary and in the form of *per diem*.

compensation were voluntary payments and by virtue of a familiar rule of law not recoverable by the payer.

The general rule is conceded to be that money voluntarily paid, with a full knowledge of all the facts, and without any fraud, duress or extortion, cannot be recovered back, although no obligation to make the payment existed. And this, in general, is also true with respect to payments voluntarily made under a mistake or in ignorance of the law. This general rule, however, like all others, has its exceptions; and no exception to the general rule now under consideration is more firmly established than that illegal payments made to public officers by mistake of law can be recovered back. (30 Cyc, 1315.)

A municipal corporation can act only by and through its agents. The exception to the rule is established because the corporation, representing as it does, the public, cannot be charged with responsibility for the unauthorized and illegal acts of its agents. The general rule is that the principal may recover his property or its value from a third person where it has been wrongfully transferred by his agent contrary to instructions or in excess of authority. Unauthorized payments of money made by an agent may as a rule be recovered by the principal as money had and received. (31 Cyc, 1605.)

An examination of the authorities will show that it is the established rule in all the state and federal courts that unauthorized and illegal payments made by the agents of a municipal corporation can be recovered back by the corporation in an action for money had and received, and that the defense of voluntary payment to such an action is not available. It is not necessary to cite the numerous decisions recognizing this doctrine because the question has been finally settled and determined by the Court of Errors and Appeals of this State, in the cases of *Demarest vs. Inhabitants of New Barbadoes*, 40 N. J.

L. 604; *City of Camden vs. Varney*, 63 N. J. L. 325; *Freeholders of Morris County vs. Freeman*, 44 N. J. L., 632; and *Troth vs. Freeholders of Camden*, 60 N. J. L., 193.

The case of *Demarest vs. The Inhabitants of New Barbadoes* was an action in assumpsit by the Township of New Barbadoes for the recovery of fees received by Demarest as Collector beyond the fees allowed by law. The cause was tried without a jury before Mr. Justice Dixon, and judgment was entered in favor of the Township for the amount of the overcharges. There was no fraud and no mistake in matters of fact alleged on either side. The exceptions argued in the Court of Errors related to two questions, ruled adversely to the defendant below. First, were the fees now sought to be recovered illegally charged by the collector, and, secondly, did the action of the Township Committee in auditing and approving the bills and settling with the collector preclude the Township from recovering them back? The Court of Errors, in holding that the fees sought to be recovered in the suit were illegally charged by the collector, said:

"The principle enunciated and applied in making them, that no public officer can be entitled to compensation for his public services save by express enactment, taken in connection with the clear and explicit words of the statute, admits of no conclusion other than that arrived at below, that the fees sought to be recovered were charged by the collector without authority of law."

And in dealing with the second question raised, the Court said:

"Having been paid with the approval of and on settlement with the Township Committee, can they be recovered in this suit? That they could not be recovered was contended for by the plain-

tiff in error on the ground that they were voluntary payments by the committee, with full knowledge of the facts, and without mistake or fraud; and also upon the further ground that the committee, in examining and passing upon the collector's accounts, were judges, and that their judicial action cannot be impeached in this suit. Neither of these contentions can prevail. The powers of the Township Committee are only those conferred by statute. In *Callahan vs. Morris*, 1 *Vroom*, 160, they are held to have no common law power to bind the township, and the importance is adverted to of protecting the people against their own servants by confining them within the strict limits of the powers conferred by law. By section twelve of the act respecting townships, (Rev. page 1195), it is enacted that they shall have authority and that it shall be their duty to examine, inspect and report to the annual or other town meetings the accounts and vouchers of the township officers, and superintend the expenditure of township moneys. Here is nothing indicating or suggesting for them the character of judges, whose function it is to hear parties and determine between them. They were correctly held in this case to be auditors to examine, inspect and report, the clerks or servants of the corporation, and not its judges to hear, try and determine without notice. The committee and the collector both derive their powers solely from the legislature, and each is presumed to know the limit of the powers possessed by the other. The committee are the agents of the township only so far as they act within the express provisions of the law. Payments made or sanctioned by them not authorized by legislative enactment are *ultra vires*,

outside of their agency, and cannot bind their principals, the people. Payments received by one knowing the agent to be unauthorized to make them, may be recovered by the principal as money wrongfully had and received. The doctrines of acquiescence and voluntary payment, insisted on here, have no place, because the payments were not by the plaintiff now seeking recovery, nor by its sanction or approval. The application of this necessary and salutary rule will not interfere with or disturb settlements made with Township Committees where unaffected by illegality or fraud. Acting in good faith and within their statutory powers, their settlements will furnish an adequate protection against future claims or litigation by the public."

In the case of *City of Camden vs. Varney*, above referred to, it was expressly held by the Court of Errors as follows:

"Money paid by a municipal corporation to one of its officers in excess of his lawful fees may be recovered by the corporation in an action against the officer for money had and received to its use, although the payments were made on the order of its governing body, with full knowledge of the facts and without fraud. The defense of voluntary payment is not available in such a case."

This was a suit by the City of Camden to recover alleged overpayments of fees made by its treasurer to its clerk. The defense was first, that the fees were paid upon a lawful exaction; and second, that their payment was voluntary through the order of the City Council, with full knowledge of the facts and without fraud on either side. The trial Judge directed a verdict in favor of the plaintiff.

After deciding that the fees sought to be recovered in the suit had been paid illegally and without statutory authority, the Court of Errors said:

"It was decided by the unanimous judgment of this court, in *Demarest vs. Inhabitants of New Barbadoes*, 11 *Vroom*, 604, that a Township Committee dealing with a collector of taxes are agents only so far as they act within express provisions of law, and that payments made or sanctioned by them not authorized by legislative enactment are *ultra vires*, outside of their agency, and cannot bind their principals—the people. It was further adjudged that unauthorized payments made by the committee to the collector might be recovered as money wrongfully had and received. The doctrine of acquiescence and voluntary payment, insisted on there as here, was held to have no place because the payments were not by the township nor with its sanction or approval. This decision controls in the present case for it is entirely parallel. The right to any fees resting entirely on statute, the knowledge of the clerk of the limit of the council's authority must be presumed."

The case of *Freeholders of Morris County vs. Freeman*, above referred to, was a suit brought on behalf of the county to recover money obtained by the defendant from the plaintiff for fees paid by him as Sheriff of Morris County to witnesses upon trial of an indictment against a person who was thereon convicted and sentenced to State Prison; and also moneys claimed by the defendant as Sheriff from the plaintiff for jail fees on the admission and discharge of prisoners in the County Jail. In affirming the judgment rendered in favor of the plaintiff, the Court of Errors reasserted the doctrine laid down by it in the prior case of *Demarest vs. Inhabitants of New*

Barbadoes, and held it to be the general principle that no public officer can be entitled to compensation for his public services save by express enactment.

The case of *Troth vs. Freeholders of Camden*, above referred to, was an action by Camden County to recover certain fees received by the defendant as Clerk of the County of Camden and for the payment of which it was contended on behalf of the county there was no authority under the statute. In affirming the judgment rendered in favor of the county in the court below, the Court of Errors held that the county was entitled to recover the unauthorized fees received by the defendant under the rule laid down in the case of *Demarest vs. Inhabitants of New Barbadoes*.

With respect to the present case, there can be no denial of the fact (and the defendant did not attempt such denial), that the payments received by the defendant were unauthorized. So far as the payments by way of fixed salary are concerned, it is submitted that in the absence of an ordinance of the Township Committee fixing the salary, there was no authority for such payments; and hence, they were made in violation of the rule that no public officer can be entitled to compensation for his public services save by express enactment. Accordingly, the action of the Township Committee in fixing the defendant's salary in any other way than that pointed out by law was illegal and unauthorized. With respect to the payments made to the defendant upon bills and statements presented by him without the same being itemized and verified as required by law, the same rule applies. The language of the statute in effect is that it shall be unlawful for the Township Committee of any township to pay out any of the township's money except upon the presentation, by the party claiming payment, of an itemized bill, showing how the claim is made up, and verified by his affidavit as to the correctness of the demand. (3

Comp. St., p. 3665, Sec. 727.) The Township Committee, therefore, had no authority to pay bills not presented in the manner and form required by law and, by the authority of the cases cited, payments so made, being unauthorized, can be recovered back.

It is further submitted that this very question under discussion has received the light of judicial interpretation. When this same case was before the Court of Errors and Appeals to which it had been carried by appeal from the Chancellor's decree in favor of the plaintiff as noted above, that tribunal, in overruling the lower Court, used language clearly applicable to the present discussion. They gave as their reasons for reversal those stated in the opinion filed in the case of *Franklin Township vs. Crane*, 85 *Atl.* 408, which was a suit in equity for an accounting filed by the plaintiff against another of its former officials. Thus, the Court said:

"The records kept by the township show precisely how much money came originally into its officer's hands and he does not cease to owe them to the municipality. He was its debtor to that extent and the remedies against him for their recovery are those which the courts of law afford."

And after pointing out that the plaintiff might pursue its remedy by mandamus to compel Crane to file an account showing just what moneys he had received and disbursed, the Court further said:

"If the mandamus proceeding should fall short of complete relief, the township has the additional and adequate remedy to recover from him what may be due it by an action at law against him for money had and received. We think the adequacy of these two remedies supplementing each other must be conceded and that further discussion on this head is uncalled for."

It is, therefore, submitted that in the present case there is virtually a pertinent adjudication by the Court of Errors that the present suit is properly brought and can be maintained.

II. Defendant's Objection of Collateral Attack.

Test to be Applied.

The doctrine of collateral attack has been given a broad and varied application. It has been applied with greatest frequency to assaults on decisions of external courts. And there the rule is that if the collateral attack goes to the primary jurisdiction of the judicial tribunal, it will be upheld, but that if it calls in question only irregularities or faults of procedure, the court will be open only to direct attack. (23 Cyc, 1055-1060.) The doctrine has found application as well to the acts, the decrees, revisions, findings, etc., of quasi-judicial tribunals, such as committees, boards and commissions, and has even been applied to governmental bodies possessed of no judicial discretion whatever and whose acts are purely ministerial. *Carron vs. Martin*, 26 N. J. L. 594. To such a class does the act of the Township Committee in voting the resolution of salary to the defendant belong. In this class of cases, where the act of a quasi-judicial or purely executive body is called in question, it will be found that the rule admitting collateral attack is, for purposes of public policy, more liberally applied, and that in many cases not only a lack of general jurisdiction over the subject matter but even irregularities apparent on their face will be held open to collateral attack by the courts. In such cases, the word "jurisdiction" is given a broader meaning than when used with reference to the authority of the courts, and is employed, as defined in the

Standard Dictionary, in the sense of "lawful power or right to exercise official authority of any kind."

This doctrine of collateral attack has found as great a variety of expression as it has application. "The distinction between jurisdiction in its comprehensive sense and the adequate authority to make a particular grant, which is loosely called the jurisdiction to make such grant," (Garrison, J., in *Attorney General vs. Sooy Oyster Co.*, *infra*), is honored by a great variety of different names and terms of expression, from the "strictly jurisdictional" and "quasi-jurisdictional" test of the United States Supreme Court to the many distinguishing epithets applied by lesser tribunals. Fortunately, we need not be concerned in this universal confusion of diction. In the recent case of *Attorney General vs. Sooy Oyster Co.*, 78 N. J. L. 394, Justice Garrison has drawn the well-recognized distinction and laid down the rule of collateral attack with brilliant conciseness. Referring to the two conceptions or sorts of jurisdiction, he says:

"Whatever of difficulty there is in making clear this distinction is merely increased, if, indeed, it is not actually created by the necessity of constantly repeating the definition of each sort of jurisdiction as mention is made of it. In the interest, therefore, both of clarity and of brevity, I shall, in this opinion, substitute for such cumbersome paraphrases the terms *generic* jurisdiction and *specific* jurisdiction, intending to indicate by the former the existence of those essential facts in the absence of which jurisdiction ought not originally to have been assumed, and by the latter, those subsidiary conditions in the presence of which or rather in the light of which the authority adequate to the lawful performance of some specific act is rendered questionable.

"Using these terms, we are able briefly to state

the rule: That the lack of generic jurisdiction is available in collateral proceedings but that the lack of specific jurisdiction is of avail only in some form of direct attack." (Page 396.)

This is the test which we are bound to apply to the case at bar, and in the light of which it must eventually be decided.

The decision in the Sooy Oyster Co. case resulted from an action in ejectment for the possession of certain ocean lands below high tide. The bill of exceptions showed that the land was covered by tidal waters which made out a *prima facie* case for the plaintiff, to meet which defendant introduced in evidence a grant from the State's Riparian Commissioners. The plaintiff then sought to show that this grant in reality covered natural oyster beds, which under an exception to the Commissioners' authority were exempt from their power to sell. The decision of the Court of Errors affirmed that of the lower Court, holding that the Commissioners exercised "generic" jurisdiction over all lands covered by tidal waters and that a lack of "specific" jurisdiction as effected by some exception to the general rule would have to be determined on direct attack. The Court held that as a corollary to the general rule above quoted:

"The existence of generic jurisdiction included the right to determine questions of fact on which the existence of a specific jurisdiction depends; which jurisdiction being judicial in character falls within the established rule respecting the conclusive effect to be given to the findings of special tribunals acting within the scope of their authorities." (Page 398.)

The facts in this case do not parallel those in the case at bar, but the principle of law involved is identical.

New Jersey Cases.

With this concise statement of the test in mind, a clearer understanding of the few New Jersey cases bearing on this question before the Court can be obtained.

The defendant contends that the resolution of the Township Committee fixing the defendant's salary cannot be collaterally attacked in a suit of this nature and that the payments by way of salary must, therefore, be deemed valid and legal until the resolution itself is adjudged illegal in proceedings directly instituted to test its legality. It is conceived that the defendant seeks to set up the proposition that before the present suit can lie, the plaintiff must review the resolution by writ of certiorari and obtain an adjudication that the resolution itself is illegal. In other words, the defendant raises the question, whether the proceedings of the Township Committee in fixing the defendant's salary by resolution can be collaterally attacked in the present suit and adjudged void by this Court as necessary to a finding that the payments by way of salary were unauthorized and can, therefore, be recovered back in this action.

This question first came before the Supreme Court in the case of *City of Camden vs. Mulford*, 26 N. J. L. 49, where the action was in assumpsit to recover from the defendant the expense of paving Pine Street in front of the defendant's premises. The paving had been done pursuant to an ordinance of the City Council. The power and authority of Council to enact such an ordinance under the City Charter was not questioned, but the City Charter provided that such an ordinance should only be enacted upon petition presented by a specified number of the owners of land along the street to be paved. It was conceded that the requisite number of land owners had not joined in the necessary petition, and this point was raised by the defendant in a special plea, to which the

plaintiff demurred. It was insisted by the defendant that, in the absence of a petition of the requisite number of land owners, the City Council had no jurisdiction over the subject matter of the ordinance; that its passage was an unauthorized exercise of power and that the ordinance was *ipso facto* void. The dicta of the Court with respect to this insistment were that if it were true in point of fact, the plea was clearly good; and that the ordinance would be a clear act of usurpation, and void. But the Court, in sustaining the demurrer, held that the City Council did have the power of directing by ordinance the streets to be paved; and that the absence of the requisite number of petitioners did not deprive the City Council of jurisdiction to enact the ordinance; and that its enactment without the necessary number of petitioners was merely the exercise of an undoubted power in an unauthorized manner or without the proper authority. The decision was that the Common Council having power to pass the ordinance but having passed it in an irregular and informal manner their proceeding could be reviewed and set aside on certiorari but could not be collaterally attacked; but that if the Council had been without power to enact the ordinance in question, it would be *ipso facto* void and subject to collateral attack.

Precisely the same question came before the Supreme Court again in the case of *Martin vs. Carron*, 26 N. J. L. 228, which was an action in ejectment to recover possession of a house and lot in the City of Newark. Under the City Charter, the Common Council had power to alter or widen any street upon the petition of a specified number of the owners of land along the street to be altered or widened. The necessary resolution was passed without the requisite number of land owners joining in the petition. The owner of the premises forming the *locus in quo* of the ejectment suit was assessed for his portion of the expense incurred by the city in altering the street, and

failing to pay the assessment, his land was sold to the plaintiff in ejectment for a term of thirty years by the City Treasurer. It was insisted by the defendant that the resolution of Council was null and void, having been passed without a petition of the requisite number of landowners; and was accordingly subject to collateral attack. This defense was overruled upon the authority of *Camden vs. Mulford*, and following the decision in that case, it was held that since the City Council had the power of altering streets, the ordinance was not void and could not be impeached collaterally, however irregular the proceedings might have been. From this opinion, Potts, J., dissented, holding that the petition of the requisite number of landowners was necessary to confer jurisdiction on the City Council, and that in the absence of such petition, Council had no power to pass the resolution, and that hence the proceedings were void and should be treated as a nullity, and that the sale conveyed no legal title to the purchaser.

The case went to the Court of Errors, in *Carron vs. Martin*, 26 N. J. L. 594, and was unanimously reversed. By this reversal, *Camden vs. Mulford* was in effect overruled. The question before the Court of Errors was: "Whether the resolution of City Council, although irregular and liable to be set aside upon a direct proceeding by way of certiorari, was so far available as to be good in a collateral proceeding like the present?" The Court answered this question by holding that the City Council, in the absence of a petition by the requisite number of landowners, was without power or authority to pass the resolution in question; and that the City Council was a tribunal having a limited and special power and could proceed only in the manner prescribed by law.

"Tribunals with special powers for adjudicating in particular cases, under the various names of commissioners, surveyors, appraisers, committees,

directors, overseers and the like, little or in no wise relating to the general administration of justice, whose modes of proceeding are prescribed in the statutes by which they are created, are of a different class and unless their proceedings on the face of them show a compliance with the directions required by the statute under which they act, it never could be known whether they acted within their jurisdiction or exceeded it." (Page 598.)

"In our judgment, public policy requires that the proceedings of our numerous municipal corporations should be kept strictly within the limits assigned to them by the statutes authorizing them, and if they appear not to come within those limits, they should not only be liable to reversal by certiorari but also be held void and insufficient to support a title professing to be founded on them." (Page 600.)

The Court thus not only held that the lack of the requisite number of petitioners was an insurmountable obstacle to the Council's exercise of jurisdiction but, in answer to the contention that the Council had authority generally over the subject matter and hence that the lack of sufficient votes was a mere irregularity, declared that, with relation to municipal bodies of limited and special powers, the rule favoring collateral attack should, for the good of the public, be more liberally applied than if the proceedings of a regular court were attacked, and that irregularities apparent on the face of the proceedings should be sufficient to vitiate them.

This decision goes a long way but it has been supported by all following adjudications of the same question in this State.

In *Dinsmore vs. Westcott*, 25 N. J. E. 470, the petitioner was the purchaser at a sheriff's sale of the prop-

erty in question and brought his writ of assistance against the defendant in possession. The defendant pleaded a deed made by a Collector of Taxes, and the question was raised whether this deed was valid in view of the fact that the warrant for the sale was issued to the Collector instead of a constable of the township, as required by law. The Court of Chancery, citing *Carron vs. Martin*, allowed the question of the Collector's authority to be disposed of collaterally and held that the warrant was issued without authority and the proceedings held under it were void.

That the Court of Errors, in *Carron vs. Martin*, went further than the Supreme Court in *Camden vs. Mulford*, upon this question, is pointed out by the Supreme Court in the case of *Brinley vs. City of Perth Amboy*, 29 N. J. L. 259.

Carron vs. Martin was followed by the Supreme Court in the case of *Phillips, et al., vs. The City of Hudson*, 31 N. J. L. 143, where the irregular proceedings of a municipal corporation were collaterally attacked, and it was held as follows:

"If the law authorizing the sale of land to pay for the improvement of the streets of a city requires the officers of the city to advertise a notice of the expiration of the time within which the owner may redeem, the neglect to do so will render the purchaser's title invalid and entitle him to recover back the purchase money in an action of *assumpsit*."

It is submitted that the decision of the Court of Errors in *Carron vs. Martin* is alone sufficient to control in favor of the plaintiff the question raised by the defendant under the present motion. That decision is beyond question authority for the proposition that the proceedings of a municipal corporation, whether defective by reason of irregularity or absolutely void because of lack of power

and jurisdiction over the subject matter are insufficient to found a title to property and can be attacked collaterally.

Testing the present case by the principles above enunciated, it is submitted that when the statute states in explicit terms that the Township Clerk shall receive a certain *per diem* compensation, "*or such annual compensation as the Township Committee shall, by ordinance, determine*" (4 Comp. St., p. 5576, Sec. 12), it says in effect that the Township Committee shall have no power to fix the Clerk's salary by resolution.

It cannot be and is not contended that a resolution is merely an irregular or insufficient ordinance, equivalent in principle thereto, but lacking only in form. It has been clearly settled in the following cases that the two methods of enactment are essentially different, and that a resolution can never take the place of an ordinance.

Paterson vs. Barnet, 46 N. J. L. 62;

Story vs. Bayonne, 35 N. J. L. 335;

State, Gleason vs. Bergen, 33 N. J. L. 72;

State, Shimer vs. Phillipsburg, 58 N. J. L. 506;

State, Hoboken Land & Improvement Co. vs. Hoboken, 35 N. J. L. 205.

The fixing of the salary by resolution, therefore, clearly contravened the express legislative enactment. That which the Township Committee attempted to do was clearly beyond its power and jurisdiction, for it has only a limited and special power and can proceed only in the manner prescribed by law. If, however, it be argued that the Township Committee has jurisdiction of the subject matter and merely exercised its power in an irregular manner, it is only necessary to urge the decision of the Court of Errors in *Carron vs. Martin*, that such irregularity is just as fatal as a total lack of jurisdiction, and that accordingly the resolution of the Township Committee fixing the defendant's salary can be collaterally attacked in the present suit.

In addition the appellant would like to call attention to an important distinction that exists between the case at bar and those just cited. Taking *Camden vs. Mulford*, for example, where the decision was against the plaintiff and required him to proceed by certiorari, it is evident here that there was no great injustice done by such decision. A verdict for the plaintiff upon writ of certiorari would have established his rights and precluded future attempts to recover from him the expense of paving the street. The same would have been true of the other cases cited had the courts required a direct attack; in each, certiorari would have determined the merits of the suit. In the case at bar, however, no such conclusive result would be obtained. The decision of the Court that this resolution was void would not of itself produce a recovery of the moneys unlawfully paid, and proceedings identical with the present would have to be recommenced. And what purpose exists for this postponement of justice?—The mere adjudication by a Court of that which a positive statute has already declared. One might as well contend that an indictment for the offense of burglary, which the Crimes Act names as a crime, should first be judicially declared to charge a crime before a trial could be had upon it. We submit that no reason exists in justice and law for such a postponement of a party's rights.

Other Authorities.

The following authorities from other jurisdictions support the New Jersey decisions just cited, and affirm the proposition for which the appellant is contending.

In *Willcox vs. Engebretsen*, 116 P. 750 (Cal.), it was held that:

“Since under the statute providing that no change of an established street grade may be or-

dered by City Council except on petition of a majority of the owners of the property affected by the proposed change, a petition for such change signed by the requisite number of petitioning property owners is a condition precedent to the making of an order for a change and the City Council has no power to order a change until a sufficient petition is filed. * * * * So that if the petition was not sufficient to afford jurisdiction, it was subject to collateral attack in an action involving the validity of the proceedings."

In *Keifer vs. City of Bridgeport*, 68 Conn. 401, 36 Atl. 801, where a city, in laying down a street, failed to follow the provisions of its charter, the defect was held to be jurisdictional and the proceedings void and subject to collateral attack.

In *Daly vs. Gubbins*, 35 Ind. App. 86, 73 N. E. 833, proceedings for a street improvement which were void because of failure to give the abutting property owners notice of the engineer's report of the final estimate of costs, as required by statute, were held subject to collateral attack in an action by the city to enforce the assessment.

In *Hart vs. Smith*, 159 Ind. 182, 58 L. R. A. 949, the assessment by a State Board of Tax Commissioners of property not subject to taxation under the laws of the State was held open to collateral attack.

Similar decisions in the same State were *Forsyth vs. Hammond*, 142 Ind. 505, 30 L. R. A. 576, and *Comer vs. Board of Commissioners of Morgan County*, 70 N. E. 179. In the latter case, the defendant, a County Clerk, retained out of county money received by him the sum of sixty-six dollars, which he charged to himself for the expense of making certificates of allowances for special judges during the term-time. Suit was brought to re-

cover this sum on the ground that it was not authorized by any statute. It was *held*:

"A county may recover from an officer amounts unlawfully allowed out of the county treasury which he accepted and converted to his own use.

"Where a County Clerk receives a salary he is not entitled to special compensation for any official services unless there is a statutory provision therefor.

"A County Clerk's claim for compensation in addition to his salary for making certificates of allowance to special judges, being official services, will be disallowed by the Appellate Court where he failed to point out any statute authorizing such compensation."

In the case of *Whitten vs. City of Haverhill*, 204 Mass. 95, 90 N. E. 409, the legality of proceedings by a city establishing a sewer over private lands was allowed to be collaterally attacked, for there was no valid layout of the sewer over the land.

In *Ellis vs. State Auditors*, 107 Mich. 528, 65 N. W. 577, payments of salary to an officer which were illegal because of the unconstitutionality of the act under which they were made, though paid under a mistake of fact, were allowed to be recovered back "since the act of the officer in making payments, being beyond the scope of his duty, the State is not bound thereby."

In *Morse vs. City of Omaha*, 67 Neb. 426, 93 N. W. 734, it was *held* that:

"Under statute declaring that a petition signed by the owners of a majority of the front footage is requisite to a valid levy of a special assessment against property specially benefited to pay for repaving, a petition which in fact contains the signatures of the owners of a majority of the taxable

front feet is a jurisdictional pre-requisite to valid action by the Council, so that the action of the Council based on a petition which purports to contain such a majority but does not do so may be collaterally attacked."

In *Brown vs. City of New York*, 3 Hun. 685, a failure to comply with statutory requirements in an essential respect in entering into contracts for city improvements was held to make an ultimate determination in proceedings thereunder a nullity, and that such want of jurisdiction could be inquired into collaterally.

In *Miller vs. Amsterdam*, 149 N. Y. 288, 43 N. E. 632, the syllabus is as follows:

"The laws, etc., provides that a city may order paving to be done by special assessment upon a petition signed by the owners of a majority of the lineal feet fronting that part of the street to be paved. *Held*, that the decision of the City Council declaring that a petition for such improvement was signed by a majority of such owners, whereas in fact it was not, was not a judicial but a ministerial act, which might be attacked collaterally."

In *Allen vs. Portland*, 35 Ore. 470, 58 P. 509, it was held that under the City Charter, which provided that no public improvements should be made until the owners of one-half the property to be affected should petition therefor, the Council, in determining the sufficiency of the petition exercised a quasi-judicial function and its determination was open to collateral attack; and its determination that it was signed by one-half of the owners of the property to be affected did not give jurisdiction in absence of the fact.

It is submitted that these cases support the contention of appellant that the privilege of collateral attack is more

liberally accorded where the acts of municipal bodies and not courts are assailed, and that irregularities alone are sufficient to justify such collateral attack.

Application of the Test Laid Down in *Attorney General vs. Sooy Oyster Co.*

However, if these cases should be regarded as insufficient in point of fact, or otherwise, to govern the case at bar, it is submitted that the test applied in *Attorney General vs. Sooy Oyster Co.* determines the question in favor of the appellant. The basic principle of that case has clearly been recognized in the cases above described but it has lacked in them the clear enunciation given it by Justice Garrison. His distinction between "generic" jurisdiction and "specific" jurisdiction has been approved and applied in two subsequent New Jersey cases, *Algair vs. Blew*, 82 N. J. L. 7, and *Sadler vs. Jappson*, 82 N. J. L. 20. The latter is an illustration of "specific" jurisdiction, but *Algair vs. Blew* gives a valuable example of what may constitute the lack of "generic" jurisdiction. There a writ of certiorari brought up the order of a Court of Common Pleas revoking a Prosecutor's license to keep an inn and tavern. The principal ground claimed by the Prosecutor for having the rule set aside was that the initial complaint did not confer jurisdiction upon the Pleas because the complainant by whose affidavit the matters contained in the complaint were verified had no personal knowledge of same. The Prosecutor claimed that when direct challenge of the Court's jurisdiction was made, that Court was bound to investigate the ground of the challenge and that jurisdiction could not be established by a mere formal presentation of the requisites of jurisdiction when the substance behind the form was attacked. The Court sustained this view, holding that the

Pleas had never lawfully acquired the jurisdiction to hear and determine the controversy. The Court said:

"Having thus concluded that the Pleas was without generic jurisdiction over the controversy, it is unnecessary to consider other reasons which deal with the lack of specific jurisdiction to make the order of revocation because of alleged errors committed in the course of the proceedings."

This case is an excellent illustration of lack of generic jurisdiction. It is analogous to the case at bar, holding that a formal compliance with the law that establishes jurisdiction is not sufficient when that form is challenged as false to fact. In the case at bar, not even the necessary form required to give jurisdiction was observed.

Let us apply this test to the facts in the case at bar. Does the complaint attack the generic jurisdiction or merely the specific jurisdiction of the Township Committee? What is the broadest power or jurisdiction considered in the most comprehensive sense that the defendant can claim for the Township Committee in the present case? Is it a general power to pay money out of the township funds as compensation to its officers or agents? No such general power, however, is inherent at common law in any Township Committee or in the governing body of any municipal corporation. If it exists at all, it exists only by statutory enactment and must be exercised in strict conformity with the statutory requirements. In New Jersey, no *general* statutory right exists in the governing body of a municipal corporation to appropriate moneys for the payment of salaries to officers or agents. A *limited* power to this effect alone is given, to be exercised only upon the performance of an express condition, to wit, the passing of a valid ordinance. In other words, there being no general inherent power to make compensation out of the township funds and only a limited statu-

tory power that arises but upon the performance of a specific act, it is clear that the generic jurisdiction of the Township Committee in this regard, such as it is, can only arise when that condition is performed. Until that time, it is simply non-existent. The generic jurisdiction to pay salaries in this case is, therefore, a very narrow one and by clear statutory enactment will come into being only after a proper ordinance has been duly passed. Only when that ordinance is passed does the generic jurisdiction arise. Thus, this attack which asserts that that ordinance was never passed is an attack upon the generic jurisdiction of the committee. If the ordinance had been duly passed and some subsequent requirement to the due payment of the salary provided for was charged as lacking, then it might well be argued that the specific jurisdiction to pay the salary was alone called in question. But we contend that in the plaintiff's complaint, the very source, the exact foundation of its jurisdiction to pay salaries to its officers is alone attacked, and that by virtue of the rule laid down in *Attorney General vs. Sooy Oyster Co.*, that attack being well-founded must be allowed to prevail in a collateral suit.

Opposing Cases.

Two cases which may be cited in opposition to the appellant's contentions remain to be considered.

In *VanSant vs. Atlantic City*, 68 N. J. L. 449, it was held as follows:

"1. A policeman in a city who claims to have been illegally removed from his office because no cause was alleged or complaint made or hearing given him cannot maintain an action for salary alleged to have accrued after such dismissal while such dismissal remains unreversed.

"2. Title to office cannot be tried collaterally in an action for salary."

It is well settled, however, that a city has generic jurisdiction to dismiss its agents and subordinate officers. Dismissal without right is a mere abuse of discretion. And an abuse of discretion, by the authority of the Sooy Oyster Co. case must be attacked directly and not collaterally.

In the decision of the lower Court, the learned trial Judge referred to the case of *Bourgeois vs. Freeholders of Atlantic County*, 82 N. J. L. 82, which he cited as authority to uphold his decision that collateral attack was not permissible in this case. It will be found, however, that the facts in that case are very far from being in point with those in the case at bar, and the only relevancy which it has to the present question is its discussion of various cases which distinguish between debts contracted without authority and those contracted with authority defectively exercised. But our whole argument, if it has amounted to anything, has shown that in the case at bar, the defendant's claim for salary was contracted without authority and not through authority defectively exercised.

III. Other Grounds of Objection Raised By Defendant.

Contention That Complaint Does Not Directly Allege That Payments Were Not Legally Due.

With respect to the defendant's contention that the complaint does not directly allege that the payments to the defendant were not legally due him and that the mon-

neys paid him were not due and owing him from the plaintiff, it seems sufficient to say that it is not necessary for the plaintiff, in its complaint, to make out the defendant's case, or to aver matter which is solely matter of defense and upon which the defendant must rely in his defense. This suit is under the new Practice Act, and must be dealt with in the spirit of that act, and ought not to be viewed from a narrow, technical standpoint. The complaint clearly and distinctly charges that there were made to the defendant certain payments which were unauthorized by law. If the defendant, through the illegal acts of plaintiff's agents, has received unauthorized payments of money belonging to the plaintiff, it follows that he has received money to which, on the face of the complaint, he has no title. This being so, the plaintiff has a right to recover such moneys in the present suit, which is, in its nature, an action for money had and received. If the defendant has any right or title to the moneys paid him, he must show that fact in his defense. How he should show it is not a question which concerns the plaintiff. The defendant may insist, in his defense, that the payments were authorized, or admitting them to be unauthorized, may allege that the payments were none the less in discharge of an honest debt due him from the plaintiff. That burden, however, is on the defendant. It is a fact which it may be necessary for him to urge in his defense but which obviously it is unnecessary for the plaintiff to allege in its complaint.

If, however, it should be held that the objection of the defendant to the complaint in this respect is well taken and that the complaint in this respect is defective, it is submitted that such defect is not sufficiently serious to warrant the striking out of the complaint but is curable by amendment, and that plaintiff would be entitled to amend his complaint under the provisions of the Practice Act (1912).

Contention That Complaint Should State What Bills Were Irregular.

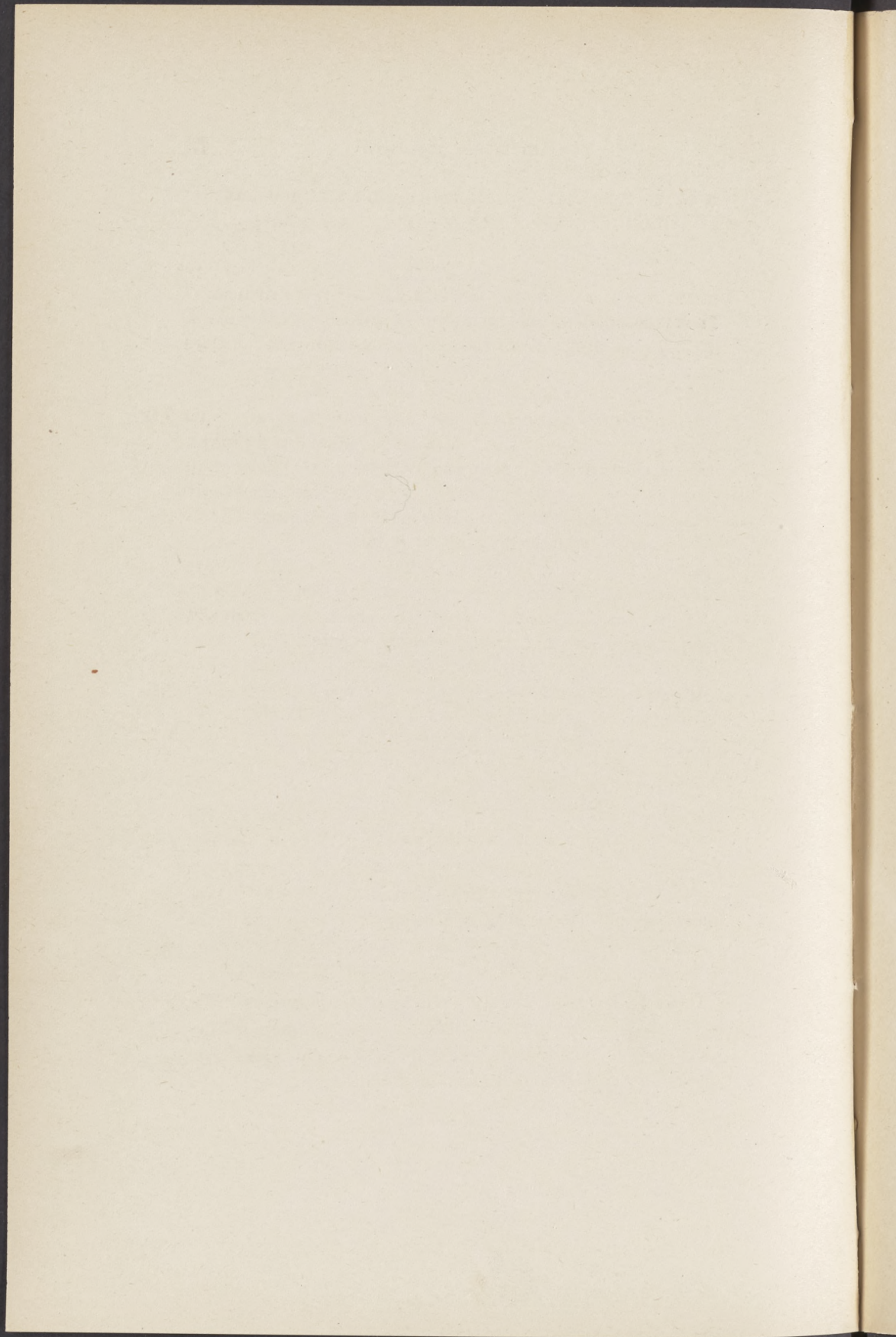
With respect to the defendant's contention that the complaint does not specify what bills of those mentioned in the schedule annexed thereto were not itemized and verified by affidavit as required by statute, and that the defendant is accordingly in utter ignorance as to the items which it is charged by the complaint were not presented in the manner required by law, attention is called to the fourth paragraph of the complaint, which recites that annexed thereto and thereby made a part thereof is an itemized statement of the moneys unlawfully and improperly paid to the defendant. Such an itemized statement is annexed to the complaint. The language of this paragraph is clear and can only be taken to mean that all the items specified in the schedule annexed to the complaint except the payments by way of salary, which are separately grouped, were paid in the manner charged in the complaint, that is, upon bills or statements which were not itemized and which were not verified by the defendant's affidavit. It is submitted that this is a complete answer to this particular objection.

CONCLUSION.

It is submitted that the foregoing arguments constitute a complete answer to the points of objection raised in the defendant's motion to quash, and that the decision of the Circuit Court upholding these objections should be reversed.

Respectfully submitted,

HARVEY F. CARR,
Attorney for Appellant.



GLOUCESTER COUNTY CIRCUIT COURT

THE TOWNSHIP OF FRANKLIN,
IN THE COUNTY OF GLOUCESTER

Plaintiff

vs

WILSON T. JONES,

Defendant.

Action at Law

NOTICE OF APPEAL

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Filed April 30, 1913.

To David O. Watkins, Attorney of Defendant:

TAKE NOTICE that the plaintiff appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals of the State of New Jersey, on the following grounds:

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1. Because the Court below erred in striking out the plaintiff's complaint upon the reasons specified in the defendant's notice of motion to strike out the complaint.

2. Because the motion to strike out the plaintiff's complaint ought to have been denied, for the reason that the payments by way of salary made by the plaintiff to the defendant were illegal and unauthorized, and can be recovered back by the plaintiff: and that the payments made by plaintiff to defendant without the presentation by defendant of a detailed bill of items or demand, specifying particularly how the bill paid was made up, with the

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affidavit of the defendant as to the correctness of the same, as required by statute, were illegal and unauthorized payments and can be recovered back.

Harvey F. Carr,

Attorney for Plaintiff.

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STATE OF NEW JERSEY }
 } SS
 GLOUCESTER COUNTY }

I, James Lafferty, Clerk of the Circuit Court of the County of Gloucester, do hereby certifu that the foregoing is a true and correct copy of the Notice of Appeal in above case as the same remains on file in my office.

20

(SEAL)

IN TESTIMONY WHEREOF,
 I have hereunto set my hand and
 affixed the seal of said Court at
 Woodbury, this Thirtieth day of
 April, A D., 1913.

James Lafferty,
 Clerk.

30

IN THE GLOUCESTER COUNTY CIRCUIT COURT

THE TOWNSHIP OF FRANKLIN,
IN THE COUNTY OF GLOUCESTER

Plaintiff

vs

WILSON T. JONES,

Defendant.

} Judgment Record.

10

Wilson T. Jones the defendant in this cause was summoned to answer unto the Township of Franklin, the Plaintiff therein, in an action at law upon the following complaint: 20

THE STATE OF NEW JERSEY

(SEAL)

to Wilson T. Jones

You are summoned to answer the annexed Complaint of the Township of Franklin, in the County of Gloucester, a municipal corporation of the State of New Jersey, in an action at law in the Gloucester County Circuit Court. And take notice that unless you file your answer to said Complaint with the Clerk of the said Gloucester County Circuit Court, at Woodbury, within twenty days after service upon you of this writ and the annexed Complaint, the 30

plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, Clarence L. Cole, Esquire, Judge of said Gloucester County Circuit Court, at Woodbury, this 16th day of January, 1913.

HARVEY F. CARR.

JAMES LAFFERTY,

Attorney.

Clerk.

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GLOUCESTER COUNTY CIRCUIT COURT

THE TOWNSHIP OF FRANKLIN,
IN THE COUNTY OF GLOUCESTER

Plaintiff

Action at Law

20

vs

WILSON T. JONES,

Defendant.

COMPLAINT

Plaintiff, a municipal corporation of the State of New Jersey, says that:

- 30 1. Some time during the month of February, 1893, defendant was duly elected to the office of Clerk of the Township of Franklin, in the County of Gloucester, and thereupon entered upon, assumed the duties of, and exercised the powers of said office, and that at each successive election thereafter, the said defendant was re-elected to said

office and continuously and without interruption held the same until January 1st, 1911, or thereabouts.

2. That by a resolution of the Township Committee of the Township of Franklin, in the County of Gloucester, passed March 21st, 1903, it was ordered that defendant receive and be paid an annual salary of \$200.00 per year for his services as Township Clerk, but that the statute in such case made and provided, provides that the annual compensation of the Township Clerk shall be determined by ordinance, duly passed by the Township Committee, and that accordingly the said Township Committee had no power or authority to fix by, resolution, or in any way other than by ordinance, the annual compensation to be paid to the said defendant as Clerk as aforesaid, and that accordingly, all payments of salary made to the said defendant under and by virtue of the aforesaid resolution, were illegally and improperly paid to said defendant, and that said defendant, under and by virtue of the aforesaid resolution, received from plaintiff the sum of \$200.00, as an annual salary for services rendered by him as Clerk as aforesaid for and during the respective years of 1902, 1903, 1904, 1905, 1906, 1907, 1908, and 1909, which said payments of salary aggregate and make up a total of \$1600.00 which said sum, because illegally and improperly paid to and received by said defendant, plaintiff is entitled to recover from defendant as money had and received by the defendant for its use.

3. That prior to the passage of the aforesaid resolution, said defendant obtained compensation for services by him rendered as Clerk as aforesaid, by presenting to the Township Committee, at divers times, bills or statements of amounts claimed by the said defendant to be due him for services rendered as aforesaid, the amounts of which said

- bills or statements were, from time to time, paid to the said defendant upon their presentation by him as aforesaid, but that said bills or statements were not itemized and verified by the oath of the said defendant, but merely called for the payment of a lump sum without exhibiting the nature and particulars of the services rendered, for showing how such bills or statements were made up; and that the statute in such case made and provided, provides that it shall not be lawful for the Township Committee of any Township in this State to pay or disburse out any of the moneys of the said Township to any person unless the person claiming or receiving said moneys shall first present to the party or parties paying any such moneys, a detailed bill of items or demand, specifying particularly how such bill or demand is made up and the dates and names of the persons to whom the amounts composing such bill or demand were severally paid, with the affidavit of the party claiming payment of said bill or demand that the same is correct, and that accordingly, the payment of the
- 10** bills and statements hereinbefore mentioned and referred to was unlawful and contrary to the provisions of the statute in such case made and provided; and that plaintiff is entitled to recover from the defendant the moneys so as aforesaid unlawfully and improperly paid to and received by defendant, as money had and received for its use.
- 20**

4. That annexed hereto and hereby made a part hereof is an itemized statement of the moneys so as aforesaid unlawfully and improperly paid to defendant.

- 30** Plaintiff demands as damages the amount so as aforesaid unlawfully paid to defendant, namely, \$3050.37, together with lawful interest on each item constituting said account from the date thereof.

Harvey F. Carr,
Attorney of Plaintiff.

PAYMENTS to WILSON T. JONES

1893	Attendance at 10 Committee meetings, at \$3.00	\$30.00	
Mar. 18	Fees for Township Clerk	10.75	
Apr. 21	Bill rendered	27.80	
1894			
Jan. 15	Accepted bill	107.00	10
Jan. 15	Writing deed	2.50	
		\$178.05	

1894	Attendance at 8 Committee meetings at \$3.00	\$24.00	
Mar. 17	Fees for Township Clerk	14.75	
Jun. 25	For services rendered	25.60	
1895			
Jan. 26	Accepted bill	101.00	20
		\$165.35	

1895	Attendance at 10 Committee meetings, at \$3.00	\$30.00	
Mar. 16	Accepted bill	20.75	
Jun. 24	Accepted bill	22.80	
Dec. 11	Services as Township Clerk	83.00	
		\$156.55	30

1896	Attendance at 8 Committee meetings at \$3.00	\$24.00	
Mar. 14	Accepted bill	20.75	
Jun. 29	Services as Township Clerk	19.40	
Jun. 29	Registering 10 dogs at 12 1-2c.	1.25	

	1897			
	Jan. 9	Services as Township Clerk	89.00	
				\$153.40
	1897	Attendance at 9 Committee meetings, at \$3.00	\$27.00	
	Nov. 13	Accepted bill	26.75	
	Aug. 21	Services as Township Clerk		
10		Bill Instructions	\$1.50	
		Tax Warrant	15.80	
				\$17.30
	Nov. 29	Services as Clerk	17.30	
	1898		81.50	
	Jan. 10	Bill rendered for services	1.50	
				\$154.05
20	1898	Attendance at 8 Committee meetings, at \$3.00	\$24.00	
	Mar. 26	Services as Clerk	26.75	
	Jun. 27	Services as Clerk	20.15	
	Aug. 22	Bill rendered	6.50	
	Oct. 6	Services as Clerk	40.50	
	1899			
	Jan. 9	Services as Township Clerk	32.50	
30				\$150.40
	1899	Attendance at 8 Committee meetings, at \$3.00	\$24.00	
	Mar. 18	Key to Ballot Box and Carfare to Woodbury	5.40	

SUMMONS AND COMPLAINT

9

Mar. 18	Bill rendered	26.75
Aug. 21	Services as Township Clerk	18.30
1900		
Jan. 25	Services as Township Clerk	80.00
		\$154.45

1900	Attendance at 9 Committee meetings, at \$3.00	\$27.00	10
Mar. 24	Bill rendered	28.25	
Apr. 21	Services as Township Clerk	16.40	
Nov. 22	Services as Township Clerk	47.50	
1901			
Jan. 14	Services as Township Clerk	39.25	
		\$158.40	

1901	Attendance at 10 Committee meetings, at \$3.00	\$30.00	20
Mar. 23	Bill rendered as Township Clerk	28.75	
Apr. 22	Services as Township Clerk	13.00	
Sep. 6	Services as Township Clerk	8.00	
Nov. 29	Services as Township Clerk	39.47	
1902			
Jan. 16	Services as Township Clerk	39.00	
		\$158.22	

1902			
Dec. 13	One Year's salary as Clerk	\$200.00	30
1903			
Dec. 5	Do	200.00	
1905			
Jan. 14	Do	200.00	
Dec. 28	Do	200.00	

1906		
Dec. 10	Do	200.00
1907		
Dec. 9	Do	200.00
1909		
Jan. 4	Do	200.00
Dec. 6	Do	200.00
1910		
Mar. 4	Taking acknowledgments	20.50
Total payments to Clerk,		<u>\$3050.37</u>

(Endorsed)

GLOUCESTER COUNTY CIRCUIT COURT

20	THE TOWNSHIP OF FRANKLIN, IN THE COUNTY OF GLOUCESTER	} Action at Law Summons and Complaint
	<i>Plaintiff</i>	
	<i>vs</i>	
	WILSON T. JONES,	} Defendant.

Filed Januaary 24th, 1913
James Lafferty, Clerk

30.

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.

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In case the within summons and complaint are served upon you by the leaving of a copy at your dwelling house or place of abode, then take notice that unless you appear and file an answer within twenty days after the date of the service thereof upon you, judgment will be entered against you.

Harvey F. Carr,

Attorney.

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Duly served January 19, 1913, on Wilson T. Jones by delivering to him a copy of the same personally in the Court House, in the City of Woodbury.

William C. Allen,

Fee \$2.65

Sheriff.

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STATE OF NEW JERSEY }
 } SS
 GLOUCESTER COUNTY }

William C. Allen, of full age, being duly sworn on his

oath says, that he is the Sheriff of the County of Gloucester and that on the seventeenth day of January, A. D. 1913 he served a true copy of the summons and Complaint attached hereto with the schedule thereto annexed, and the notice thereon endorsed, on the within named defendant Wilson T. Jones personally by delivering the same to him in the Court House in the City of Woodbury.

10 Sworn and subscribed to this seven-
teenth day of January, A. D., 1913, } WILLIAM C. ALLEN
before me }
Chester N. Steelman,
Deputy Surrogate.

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GLOUCESTER COUNTY CIRCUIT COURT

THE TOWNSHIP OF FRANKLIN, IN THE COUNTY OF GLOUCESTER	}	Action at Law AFFIDAVIT	10
<i>Plaintiff</i>			
<i>vs</i>			
WILSON T. JONES, <i>Defendant.</i>			

Filed January 24, 1913

STATE OF NEW JERSEY	} SS	20
GLOUCESTER COUNTY		

Wilson T. Jones, of full age, being duly sworn on his oath says, that he is the defendant in the above stated cause and he believes that he has a just and legal defense to the said action on the merits of the case.

Sworn and subscribed before me this 24th day of January, A. D. 1913.	} WILSON T. JONES	30
Samuel B. Burkett, Deputy Co. Clerk		

GLOUCESTER COUNTY CIRCUIT COURT

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THE TOWNSHIP OF FRANKLIN,
IN THE COUNTY OF GLOUCESTER
Plaintiff

vs
WILSON T. JONES,
Defendant.

Action at Law
NOTICE

Sir :

20 Take notice that I shall apply to his Honor, Clarence L. Cole, Judge of the Gloucester Circuit Court, at his Chambers in the Law Building, in the City of Atlantic City, on Monday, the fifteenth day of February next, at ten-thirty o'clock in the forenoon or as soon thereafter as counsel can be heard for an order to strike out the complaint, by you filed in the above stated cause, for the following reasons, viz :

FIRST, the said complaint charges that the sum of two hundred dollars per year was paid to the defendant as and for a salary as Township Clerk, during the years 1902 to 1910 inclusive, and that such payments were illegal and unauthorized because the salary of the said defendant as Clerk of said township was provided for by a resolution of the said township and was not provided for and authorized by an ordinance of said township. (a) The said payments on the part of the Township Committee were

voluntary and cannot be recovered back. (b) The said payments having been made by the Township Committee under and by virtue of said resolution and accepted by the defendant in good faith, the said payments cannot be attacked in this collateral proceedings, except by direct attack upon the legality of the said resolution.

SECOND, the said complaint charges that moneys were paid to the said defendant as Township Clerk on bills presented by said Clerk which were not itemized or sworn to in compliance with the statutes of this State. (a) The payments were voluntary payments and cannot be recovered back. (b) It does not appear from the statements of the said complaint that any or either of the payments made to the said defendant as Township Clerk were not legally due to the said defendant or that the money paid to him was not actually due and owing from the said township to the said defendant. (c) Because the said complaint does not specify what bills of those mentioned in the schedule annexed to the said complaint, were not itemized or did not contain the affidavit required by statute, and the defendant is therefore in utter ignorance as to what items it is charged, were not presented in the manner required by law. 10 20

To Harvey F .Carr, Esq.,

Attorney of Plaintiff.

David O. Watkins,

Attorney of Defendant 30

GLOUCESTER COUNTY CIRCUIT COURT

THE TOWNSHIP OF FRANKLIN,
&c.

vs

Action at Law
Motion to strike Complaint.
Conclusions.

10 WILSON T. JONES,

Filed February 26, 1913

For the Motion:

DAVID O. WATKINS AND A. H. SWACKHAMER.

Opposed:

WILSON & CARR.

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COLE, J.

The complaint sets up two classes of items: one money received pursuant to resolution when an ordinance was required; the other per diem compensation paid in the absence of itemized and verified bills as required by statute. There is an averment of services performed and no suggestion that the bills paid were otherwise illegal.

30 That the resolution could have been certiorated and set aside and the payment of the unverified bill stayed by the same process is unquestioned. But no direct attack has been made. The question then is, Can the Township legally recover the money paid for services actually performed merely because it neglected its duty in requiring strict

statutory procedure?

Counsel for complaint say the question is *resadjudicata* in the case between the same parties decided by the Court of Appeals. But I cannot so read the opinion. The single question in issue was one of jurisdiction in equity. That also was or could be decided *Bourgeois vs Freeholders*, 82 Law, 82, and cases cited point the distinction between debts contracted without authority and those contracted with authority defectively exercised; and also the distinction between a case where the municipality is defending 10 against a claim not properly proved and where the claim has been paid without exacting strict statutory proof. Upon principle and the authority of the cited case the complaint fails to show a cause of action and must be struck out.

Motion granted.

GLOUCESTER COUNTY CIRCUIT COURT

10	THE TOWNSHIP OF FRANKLIN, <i>Plaintiff</i>	Action at Law
	<i>vs</i>	
	WILSON T. JONES <i>Defendant</i>	Order striking out Complaint.

Filed March 5, 1913

20 The motion for an order to strike out the complaint heretofore filed in this cause coming on to be heard before his Honor, Clarence L. Cole, Judge of the said Circuit Court, and in the presence of Walter R. Carroll, for Harvey F. Carr, Attorney for plaintiff, and David O. Watkins and Austin H. Swackhamer, Attorneys for defendant, and the Court having inspected the pleadings and heard the arguments of Attorneys thereon and being of the opinion that said complaint fails to show a cause of action against said defendant.

30 It is, on the 27th day of February, 1913, ordered that the said complaint herein be stricken out.

C. L. Cole,

Judge, Gloucester County Circuit Court.

GLOUCESTER COUNTY CIRCUIT COURT

THE TOWNSHIP OF FRANKLIN
IN THE COUNTY OF GLOUCESTER

Plaintiff.

vs

WILSON T. JONES

Defendant.

Action at Law

JUDGMENT

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Filed March 24, 1913

The defendant having moved to strike out the complaint, on the ground that it disclosed no cause of action, upon which motion arguments for plaintiff and defendant by their respective counsel were duly heard, and the court being of opinion that the complaint disclosed no cause of action ordered that the same be struck out; whereupon a rule striking out the complaint was entered on the 27th day of February, 1913. 20

Whereupon, IT IS ADJUDGED that the complaint of the plaintiff be struck out and that the defendant recover from the plaintiff his costs, which are taxed at Twenty-six dollars, seventy-five cents.

Judgment entered this Twenty-fourth day of March, 1913. 30

David O. Watkins,

Atty, of Defendant

STATE OF NEW JERSEY }
 } SS
 GLOUCESTER COUNTY }

I, James Lafferty, Clerk of the Circuit Court of the County of Gloucester, hereby certify that the foregoing are true and correct copies of the Summons and Complaint, Affidavit of Merits, Conclusions Order striking out Complaint and Judgment, in the case of The Township of
10 Franklin vs Wilson T. Jones, as the same remains of record and on file in my office.

IN TESTIMONY WHEREOF, I have
 hereunto set my hand and affixed the seal
 (SEAL) of said County and Court at Woodbury,
 this Twenty-second day of April, A. D.
 1913.

James Lafferty,
 Clerk

New Jersey Court of Errors and Appeals.

Township of Franklin, in the County of Gloucester, Plaintiff-Appellant, vs. Wilson T. Jones, Defendant-Appellee.	} . Action at Law. ON APPEAL.	10
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BRIEF FOR RESPONDENT.

The Township of Franklin, in the County of Gloucester, brings this suit against the defendant, a former Clerk of the said Township, to recover salary paid him by the Township Committee, at the rate of two hundred dollars per year for the years nineteen hundred and two to nineteen hundred and nine, inclusive; and per diem compensation for services rendered by him from eighteen hundred and ninety-three to nineteen hundred and two. The complaint was struck out in the court below on motion of defendant because it disclosed no course of action. 20

It is contended by the plaintiff that the legal questions raised by the motion are res adjudicata in this court. The plaintiff had previously instituted a suit in the Court of Chancery for an accounting, setting up some matters in the bill of complaint presented in this suit. The bill was demurred to, which was overruled to in the Court of Chancery, but on appeal to this court, 30

the demurrer was sustained and in the course of an opinion by Judge Vredenburg, he made use of language which Counsel for plaintiff insists amounts to an adjudication by this court, that this suit is maintainable, and that this motion should be overruled, because the demurrer in the equity suit was sustained.

10 It can hardly be assumed that this court would or could pass upon the sufficiency or legality of pleadings in a case, which has never been before it. And by reference to the cases of *Township v. Crane* and *Township v. Jones*, mentioned in plaintiff's brief, it will readily be seen that no such deduction can be made from either of those decisions. What the court decided was, that the complainant in the Chancery suit was not entitled to equitable relief because it had a remedy at law; that the claim was a legal claim, rather than an equitable claim; but there was no intimation in the opinion that there was any merit in the plaintiff's claim, neither was there anything misleading in the opinion by the learned judge. It
20 dealt with the question of jurisdiction only and decided nothing except that the plaintiff was without relief in that court under the pleadings there filed.

If a decision in the Court of Chancery or on Appeal that a complainant is without relief in that court, because he has an adequate remedy at law, carries with it a guarantee that suit at law based upon the same cause of action is maintainable, the jurisdiction of the law court would be greatly impaired.

30 Much space in the Brief of Counsel for plaintiff, is devoted to the argument that voluntary payments, not authorized by law, when made by a municipal corporation to its officers, may be recovered, in an action at law; and the case of *Demaset v. Inhabitants of New Barbadoes*, 40 New Jersey Law 604, and a number of other cases

supporting the doctrine of that case have been cited. The law of these cases will not be disputed, but their application to the facts in this case is denied.

In the case of *Demarest v. Inhabitants*, supra, the Township Collector had retained, for his services as Collector, out of the moneys collected on his duplicate, fees in excess of those allowed by law, and the suit was by the Township to compel the Collector to disgorge what he had retained without legal warrant. It was not a case of the Township paying the Collector his fees fixed by law without verified bills, as the Statute required; but a suit to compel the restitution to the Township, the moneys which the Collector had unlawfully withheld. 10

It will therefore be seen that there is no parallel between the case now under consideration and the case cited by the plaintiff. By reference, however, to the last part of the opinion in that case is found support for the contention of the defendant. The court there says:

"Payments received by one knowing the agent to be unauthorized to make them, may be recovered by the principal as money wrongfully had and received. The doctrines of acquiescence and voluntary payments, insisted on here, have no place, because the payments were not by the plaintiff now seeking recovery, nor by its sanction or approval. The application of this necessary and salutary rule will not interfere with or disturb settlements made with township committees where unaffected by illegality or fraud. Acting in good faith and within their statutory powers, their settlements will furnish an adequate protection against future claims or litigation by the public." 20 30

There is no allegation in the plaintiff's pleading that the defendant was paid a single dollar that was not justly due him for the services he rendered. If the plaintiff should prevail, the result would be that the defendant,

without any fault on his part, will be deprived of compensation for his services as Township Clerk for the years eighteen hundred and ninety-three to nineteen hundred and ten, inclusive, a period of eighteen years.

The audits of the Clerk's account by the Township Committee, where there is no evidence of overcharge, should protect him from just such proceedings as these. And it is such settlements made by the Township Committee which the court had reference to in the language
10 above quoted. That this is the law, is not successfully challenged by the brief of plaintiff and the numerous cases cited, are not authorities against this contention.

It is difficult to understand how the plaintiff can, in good faith, demand from this defendant, who has rendered services to the Township during all these years, and from all that appears to the contrary, in the utmost good faith, having his accounts audited each year and presumably found correct, consistently and with any degree of fair dealing, insist that his wages be returned
20 and the public receive his services without compensation.

Coming to that portion of the defendant's brief which deals with the decision of the court and the grounds upon which the learned judge bases his decision. The plaintiff insists that the court erred in holding that the failure to itemize and verify the bills, and to order the defendant's salary by ordinance, rather than resolution, cannot be attacked in this collateral proceeding.

His argument is based upon the case of Carron v. Martin (26 N. J. L. 594), an old case which deals with legal principles well established in the jurisprudence of this State. In that case, the City of Newark levied an assessment in pursuance of a section of the City Charter authorizing the laying out, opening and widening streets, but providing that no street should be altered or widened
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except by application in writing of three fourths of all the owners of land lying on said street. The property of a landowner on said street was sold to raise an assessment for widening a street, and in an action by the purchaser against the owner to recover possession, the want of such written application by three fourths of the owners of all the land on said street, was set up in a special plea. It was contended on the part of the plaintiff that the want of jurisdiction could not be raised in a collateral proceeding, but the court held that the written application signed by the landowners was necessary to confer jurisdiction on the Council, and the defense prevailed. 10

A number of other cases in this state were cited on the brief of plaintiff, among them the recent case of State vs. Sooy Oyster Company, 78 N. J. L. 394, the facts of which Counsel admits are not similar to the case before the court, but he says that the principle of law involved is precisely the same.

It is submitted that the last mentioned case is rather an authority for defendant's contention, because the court there held that the Riparian Commission had jurisdiction to make the grant and whether or not the grant covered natural oyster beds could not be raised by collateral attack. 20

The case of Martin vs. Carron chiefly relied upon by plaintiff is clearly distinguishable from the case at bar for, while the Council had general jurisdiction over the streets and highways, it had not jurisdiction to widen any street in the city except upon written application signed by the property owners on the street as provided by the Charter. It could not acquire generic jurisdiction over the subject matter of the ordinance without the written application. And as such jurisdiction was wanting, the action of the Council in passing the ordinance 30

was subject to collateral attack. Its jurisdiction over the subject matter of the ordinance did not arise from the fact that it was the governing body of the city but because a legal application was presented which conferred such jurisdiction. The plaintiff's title to the land had nothing but the illegal ordinance to rest upon and of course such infirmity could be set up in the action for possession.

10 It may here be remarked that the statement in the brief of counsel for plaintiff that the decision in the case of *Mulford vs. Camden*, 26 N. J. L. 49, was in effect overruled by *Martin vs. Carron*, is unwarranted as an examination of the cases will show. In *Martin vs. Carron* the proceeding of the Council, widening a street, was practically an exercise of the power of eminent domain; whereas in *Mulford vs. Camden*, the municipal act was the mere paving of a street, the boundaries of which had been established, and the action was to recover in *assumpsit* the expense of such work.

20 In the case now under consideration, the Committee had full and complete jurisdiction over the subject matter of the act complained of. Making compensation to the Township officers is a familiar function of the Township Committee and is necessary to carry on the business of the municipality, and the statutory provision that the Clerk's salary shall be fixed by ordinance, was a mere regulation and the resolution was a substantial compliance with the law, because the amount to be paid was left to the discretion of the Committee and its action
30 could not be challenged by the public except for an abuse of such discretion. It may be, as was suggested by the learned trial judge, that if this harmless irregularity had been brought to the attention of the court immediately after the passage of the resolution, it might have been set aside and until an ordinance was substituted for the

resolution, the Clerk's compensation would have been left at three dollars per day; but there is nothing in the pleading to show that the per diem compensation would have been less than the salary paid, and therefore no claim that the Township has been damnified.

What has been said here regarding that part of the complaint which deals with the salary paid the defendant in pursuance of the resolution, is also applicable to the count charging payments to defendant without legal war-
rant prior to the passage of the resolution, fixing his sal- 10
ary. Indeed, it is impossible to discover any basis what-
ever for the claim. The statute relied upon provides
that it shall not be lawful for the disbursing officer of the
municipal corporation to pay a bill presented against the
corporation unless it is itemized and sworn to. The un-
lawful act complained of here, is the act of the Township
Committee in not exacting an itemized bill from the de-
fendant and proof of the correctness thereof. The evi- 20
dent object of the law was to safeguard the municipality
against fraudulent claims, but it surely cannot be said
that the failure of the disbursing officer to observe this
provision of the law would lay a foundation for an action
to recover moneys paid on a perfectly legal and honest
claim, where such requirement was not observed. The
statute provides no penalty for its violation; but if one
were imposed, it should fall upon the disbursing officer,
and not upon the innocent creditor who happened to deal
with the corporation. 30

It will be observed that the argument of Counsel for plaintiff treats this case precisely as if the defendant were seeking to recover under the ordinance or alleged defective proceedings the compensation earned by him as Clerk, and the cases cited deal with proceedings to en-

force claims based upon defective municipal action. There is a marked difference, as suggested by the lower Court, between a case where the municipal corporation is defending a suit based upon a claim not properly proved, and where the claim has been paid without requiring the strict statutory proof.

10 The case of *Bourgeois v. Freeholders*, 82 N. J. L. 82, cited in the opinion is in point. The case of *Cory v. Freeholders*, 44 N. J. L., 445, referred to in *Bourgeois v. Freeholders* was an action by the County to recover back moneys paid to Cory, who was one of the members of the Board, on the ground that such payments were unauthorized by law. In the course of the opinion, Chief Justice Beasley says:

20 "Because certain freeholders are authorized to order a bridge repaired when the cost does not exceed the sum of \$50, gives rise to no intendment that the right to order a similar work to be done was meant to be taken from the corporate body. The opposite view would often work inconvenience and injustice of which this case, in the aspect of it now under consideration, presents a conspicuous example, for if the defendant has done the work in question at fair prices, in the belief that it had been legally ordered, and has been paid for it, and such payment has the sanction of the board of freeholders, still, according to the construction acted on at the trial, he could not retain such moneys, and nothing short of an act of the legislature would enable him to do so. It would be much to be regretted if these public bodies were without the power of doing ordinary justice in these affairs, which must occur not infrequently."

30 The case of *Atlantic City v. VanSant*, 68 N. J. L., 449, is authority for defendant's contention in this case, notwithstanding the criticism of Counsel for plaintiff and his effort to differentiate the two cases. He says:

"It is well settled that a city has generic jurisdiction to dismiss its agents and subordinate officers. Dismissal without right is a mere abuse of discretion."

But it cannot be denied that the Township Committee has generic jurisdiction to compensate the Clerk for his services. That duty is cast upon them by law, and the fixing of the salary was an exercise of a discretion and the fact that that discretion was not exercised in the exact way pointed out by statute, will not render void the action of the Committee or lay a foundation for the Township to recover back the salary earned by the Clerk upon the faith of the legality of the action of the Committee in fixing the salary. 10

This suit is brought to recover moneys had and received by the defendant to the use of the plaintiff and the only allegation in the complaint, as a basis for such suit, is that the agents of the plaintiffs in compensating the defendant for his services, disregarded certain statutory regulations, although the record of these transactions was an open book, and the payments made to the defendant must have been published in the Township report each year during the eighteen years covered by the claim in suit. There is no fault attributed to the defendant nor any charge that he failed at all in the discharge of the duties for which he was paid. The result of the suit therefore if successful, would be to punish this defendant for the default and neglect of the township committee who were the agents of the plaintiff. 20

The learned judge in the court below, held that the complaint did not show a cause of action, and it is confidently submitted that the judgment ^{made} shall be affirmed. 30

DAVID O. WATKINS,
AUSTIN H. SWACKHAMER,
of Counsel with Respondent.

