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*Complaint.*

**TRANSCRIPT OF PLEADINGS FOR TRIAL.**

**New Jersey Supreme Court**

UNION COUNTY.

JAMES J. NASH, SR., Executor  
of the Last Will and Testa-  
ment of Daniel Hallahan, de-  
ceased, JAMES J. NASH, JR.,  
and ROSE M. NASH,  
*Plaintiffs,*

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*vs.*

CITY OF PERTH AMBOY, a munici-  
pal corporation, and ADOLPH  
M. METZENDORF,  
*Defendants.*

20

Welanko & Strauss, attorneys for plaintiffs.

David T. Wilentz, attorney for defendant, City  
of Perth Amboy.

Wight, Wight & Golenbock, attorneys for de-  
fendant, Adolph M. Metzendorf.

Summons issued July 17, 1924.

30

Plaintiffs, residing in the City of Plainfield,  
County of Union and State of New Jersey, re-  
spectfully allege:

**FIRST CAUSE OF ACTION.**

**FIRST COUNT.**

1. That on or about October 12, 1905, one  
Daniel Hallahan died testate, seized in fee simple  
of the following premises:

40

*Complaint.*

10 FIRST TRACT: Being a plot or tract of land on the easterly side of Madison Avenue one hundred fifty feet north of Market Street and having a frontage on Madison Avenue of one hundred eighty-nine feet and a depth of one hundred feet, in the City of Perth Amboy, County of Middlesex and State of New Jersey.

SECOND TRACT: Situate in said City of Perth Amboy, and being a plot or tract of land on the northeast corner of Madison Avenue and Market Street and having a frontage of one hundred feet on Madison Avenue and a frontage of seventy-five feet on Market Street.

20 2. The first tract hereinabove described was designated as Lots Nos. 29 to 35 inclusive in Block 77 as shown on the Tax Assessment Map of said City of Perth Amboy, and the second tract hereinabove described is designated on said map as Lots Nos. 23 to 26 inclusive on said Block 77.

30 3. Said Daniel Hallahan by his will probated in the office of the Surrogate of Middlesex County on October 23, 1905, appointed said James J. Nash, Sr., as the executor thereof, but without power to sell the said real estate, and devised said premises above described to his wife, Ellen Hallahan, for her natural life, and upon her death to said James J. Nash, Jr., and Rose M. Nash in fee simple, share and share alike. Said James J. Nash, Sr., qualified on October 23, 1905, as said executor.

40 4. Said Ellen Hallahan predeceased her husband.

*Complaint.*

5. At the time of the death of said Daniel Hallahan the said Rose M. Nash was an infant, being seventeen years of age, and the said James J. Nash, Jr., was an infant of the age of sixteen years. In view of such circumstances the said James J. Nash, Sr., took charge of the management and control of said real estate as executor of the Last Will and Testament of said Daniel Hallahan, deceased, and on behalf of James J. Nash, Jr., and Rose M. Nash. 10

6. The two tracts aforesaid were assessed for taxes by said City of Perth Amboy, as follows:

For the year 1907.....	\$112.19
For the year 1908.....	\$ 97.50
For the year 1909.....	\$108.60
For the year 1910.....	\$115.70
For the year 1911.....	\$117.00
For the year 1912.....	\$136.86

aggegating in all the sum of \$687.85. 20

7. In the year 1907 the said City of Perth Amboy assessed the said first and second tracts in the sum of \$1,236.29 for the paving of said Madison avenue at the rate of \$112.39 for each of said lots.

8. In the year of 1908 said City of Perth Amboy assessed Lot 23, situate on the northeast corner of said Market street and Madison avenue, in the sum of \$339.37 for the paving of said Market street. 30

9. That in arriving and computing the assessments for taxes and for paving of said tract described secondly herein the said City of Perth Amboy included therein a lot of land twenty-five feet square immediately adjoining the said second tract on the easterly side thereof and in continuation of the most northerly line thereof. 40

*Complaint.*

The said plaintiffs were not the owners of said lot nor was said Daniel Hallahan the owner of said lot at the time of his death, and notwithstanding said facts the assessments for taxes and street improvements covering said lot were charged against said Daniel Hallahan, and the plaintiffs herein, as the owners thereof and included in the bills for taxes and street improvements hereinabove set forth.

10

10. In the year 1912 said plaintiffs sold a lot having a frontage of forty-two feet in said first tract and a depth of one hundred feet to the Benevolent and Protective Order of Elks No. 784, and thereafter all the taxes assessed against said lot of forty-two feet, if paid, were paid by said grantee, or their subsequent grantees.

20

11. Said City of Perth Amboy assessed the remainder of said first and second tracts for the years including the year 1913 to and including the year of 1915, as follows:

For the year 1913.....	\$89.60
For the year 1914.....	82.80
For the year 1915.....	91.98

aggregating the sum of \$264.38.

30

12. In the year 1912 said plaintiffs sold to one Mahler the most southerly forty-two feet of said first tract, and thereafter said grantee or his subsequent grantees paid the taxes thereon.

40

13. During the year 1915 said plaintiffs sold a part of said first tract having a frontage of twenty-one feet on Madison avenue and a depth of one hundred feet to said Benevolent and Protective Order of Elks No. 784, and in the year 1916 sold the remainder of said first tract, having a frontage of eighty-four feet and a depth of one hundred feet, to one Wester. Taxes as-

*Complaint.*

essed thereafter against said premises so sold were paid by said grantee or their grantees.

14. Said City of Perth Amboy assessed the second tract herein described for the years 1916 and 1917, as follows:

For the year 1916.....	\$105.00
For the year 1917.....	82.08

10

aggregating the sum of \$187.08.

15. During the year 1907 and thereafter said plaintiffs divided said two tracts as follows: Tract One into nine lots each having a frontage of twenty-one feet and a depth of one hundred feet, and Tract Two into five lots, each having a frontage of twenty feet and a depth of seventy-five feet.

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16. But during the year 1907 and each year thereafter until 1917 said plaintiffs demanded from said City of Perth Amboy that the taxes covering said two tracts of land be apportioned and that said fourteen lots as above sub-divided be individually assessed and that an allowance be made in said assessments for taxes and paving improvements for said lot of twenty-five feet square improperly included therein. Said City of Perth Amboy agreed to do so within a reasonable time and agreed with plaintiffs that they hold in abeyance the payment of the aforesaid sums due for taxes and assessments. Plaintiffs waited for said corrected tax bills and assessment bills, but for divers reasons unknown to said plaintiffs the City of Perth Amboy failed and wholly neglected to make the corrections agreed until the year 1912 and thereafter until the year 1918, except as to those lots aforesaid which were sold by said plaintiffs from the years 1912 to and including 1918.

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Complaint.

17. On the conveyance of the lots hereinbefore mentioned, adjustments of taxes and paving assessments on said specific lots so sold were made, and pursuant thereto plaintiffs paid to the City of Perth Amboy, on account of said taxes and paving assessments due and owing, the following:

10	July 17, 1912—\$667.26	
	In the year 1913.....	\$449.56
	In the year 1916.....	\$279.78
	In the year 1918.....	\$ 82.08

aggregating the sum of \$1,478.68.

18. A summary of the various assessments for taxes and paving aforesaid, and the amounts paid on account thereof, is as follows:

	Taxes from 1907 to 1912 inc.—\$687.85
20	Paving assessment—\$1,236.29
	Paving assessment—\$ 339.37
	Taxes from 1913 to 1915 inc.—\$264.38
	Taxes for 1916 and 1917—\$187.08

total \$2,714.97.

	Paid in 1912.....	\$667.26
	Paid in 1913.....	\$449.56
	Paid in 1916.....	\$279.78
	Paid in 1918.....	\$ 82.08

30 total \$1,478.68, leaving a balance of \$1,236.29, according to the said bills.

19. In the year 1908, when plaintiffs disputed the amount due for paving assessment, said City of Perth Amboy agreed to provide and give to plaintiffs a corrected bill, within a reasonable time thereafter, and in consideration therefor said plaintiffs paid the sum of \$260.00.

40 20. As the result of said payment of \$260.00 there remains due and owing from said plaintiffs

Complaint.

to said City of Perth Amboy according to said bills aforesaid the sum of \$977.29 on July 1, 1918.

21. On the occasion of each of the payments aforesaid said plaintiffs informed the said City of Perth Amboy that said payments were made under protest, and that said City of Perth Amboy agreed upon accepting such payments to examine the assessments for taxes and paving improvements aforesaid, and to make proper allowance to the said plaintiffs for the reasons aforesaid. 10

22. On or about July 1, 1918, the said City of Perth Amboy submitted to plaintiffs a statement for taxes and assessments due on the aforesaid lots from the years 1907 to July 1, 1918, showing the sum of \$1,467.40 due on account of principal and \$1,033.79 interest thereon, aggregating the sum of \$2,501.19. 20

23. At a meeting of the Board of Aldermen and Tax Commissioners of said City of Perth Amboy on or about July 1, 1918, said plaintiffs disputed the accuracy of said statement and claimed that there was only the sum of \$976.29 due and owing exclusive of interest thereon.

24. That thereupon in order to settle the dispute which had been pending for so many years between said City of Perth Amboy and said plaintiffs it was agreed by said City of Perth Amboy and said plaintiffs that said plaintiffs would pay only the principal due for taxes and assessments and that said City of Perth Amboy would waive all the interest due thereon, if the said plaintiffs deposited with said City of Perth Amboy the sum of \$1,467.40. It was further agreed by and between said City of Perth Amboy and said plaintiffs that said sum of \$1,467.40 30 40

*Complaint.*

would be retained in escrow by said City of Perth Amboy until said City of Perth Amboy determined whether the sum of \$976.29 was due as claimed by said plaintiffs, and in the event said sum was found to be due, then the excess over and above said sum would be returned to said plaintiffs.

10

25. Pursuant to said agreement made with said City of Perth Amboy said plaintiffs did deposit with said City of Perth Amboy on or about July 9, 1918, the sum of \$1,467.40.

26. That thereafter, on July 22, 1918, the then Collector of Revenue of said City of Perth Amboy returned to the said plaintiffs the sum of \$77.94, and informed plaintiffs that said sum was the amount in which plaintiffs had been over-

20

27. The said Collector of Revenue informed said plaintiffs that he was advised by the then attorney of the City of Perth Amboy that he was not permitted to make any corrections of improper taxes or assessments prior to the beginning of his term of office, and for that reason remitted to plaintiffs the sum of \$77.94 only, leaving the payment made by said plaintiffs to said City of Perth Amboy in the sum of \$1,389.46 on July 22, 1918.

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28. Said plaintiffs at said time demanded the sum of \$413.17, which was the excess paid over and above the sum of \$976.29.

29. Plaintiffs demanded said sum of \$413.17, but for the reason aforesaid said City of Perth

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*Complaint.*

Amboy refused to pay said sum and credited said sum of \$1,389.46 on account of said taxes and assessments and in full payment of all taxes and assessments owing from plaintiffs up to and including July 1, 1918.

30. Plaintiffs allege that this was done in violation of the agreement aforesaid and claim said sum of \$413.17, with interest from July 22, 1918, from said City of Perth Amboy.

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SECOND COUNT.

1. Plaintiffs repeat paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, of the First Count herein.

23. That on July 22, 1918, said plaintiffs paid to said City of Perth Amboy the sum of \$1,389.46 demanded by said City of Perth Amboy as the balance due for said taxes and assessments.

20

24. There was actually due on said date the sum of \$976.29.

25. Plaintiffs have overpaid to said City of Perth Amboy the sum of \$413.17.

26. Said plaintiffs have demanded said sum of \$413.17 from said City of Perth Amboy, who have refused to pay said amount to the said plaintiffs.

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27. Plaintiffs claim from said City of Perth Amboy the sum of \$413.17, with interest from July 22, 1918.

Wherefore plaintiffs claim as damages from said City of Perth Amboy on this First Cause of Action the sum of \$413.17, besides interest from July 22, 1918 and taxed costs of this suit.

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*Complaint.*

## SECOND CAUSE OF ACTION.

1. On or about January 5, 1920, said plaintiffs conveyed the second tract described in the first count of the first cause of action herein to the said defendant, Adolph M. Metzendorf.

10 2. On said date and before the delivery of the deed and the payment of the purchase price, the said defendant, Adolph M. Metzendorf, exhibited to the said plaintiffs a tax search made by the said City of Perth Amboy, showing \$1,267.20 due said city for taxes and paving assessments levied against said premises up to July 1, 1918.

20 3. Thereupon said plaintiffs produced and showed to said defendant, Adolph M. Metzendorf, receipted bills showing the payment of all taxes and assessments of any kind whatsoever levied against said premises up to July 1, 1918.

4. In order to avoid delay in the consummation of said transfer of title, because of the dispute relative to said taxes and assessments, it was agreed by and between said plaintiffs and said Adolph M. Metzendorf, as follows:

30 Plaintiffs delivered to said defendant, Adolph M. Metzendorf, the deed conveying said premises to him, in consideration of which said defendant paid all of the purchase price due to said plaintiffs thereon, except the sum of \$1,267.20; it was further agreed by and between said plaintiffs and said Metzendorf, that said Metzendorf hold said sum of \$1,267.20 in escrow until such time as would enable plaintiffs to have the City of Perth Amboy show all taxes and assessments  
40 levied against said premises to July 1, 1918,

*Complaint.*

paid and thereupon return said sum of \$1,267.20 to said plaintiffs. Plaintiffs informed said defendant Metzendorf that owing to the animosity that existed between them, and the then city attorney, they would be unable to dispose of the question so raised until the term of office of said city attorney expired on or about November, 1922. Said defendant Metzendorf agreed to this delay and to hold said sum in escrow until the matter was disposed of by said plaintiffs. 10

5. That during the year 1923, after the term of office of said city attorney had expired, said plaintiffs took up the question of said alleged unpaid taxes and assessments with the City of Perth Amboy, and were informed by said city that said sum of \$1,267.20 was paid to said city by the said Adolph M. Metzendorf on January 5, 1920. 20

6. Plaintiffs allege that this payment was made by said Metzendorf in violation of the terms of the agreement made between said defendant Metzendorf and said plaintiffs on January 5, 1920.

7. Plaintiffs demanded from said Adolph M. Metzendorf, the sum of \$1,267.20 and interest from January 5, 1920, but he has refused to pay said sum to said plaintiffs. 30

WHEREFORE, plaintiffs claim as damages from said defendant, Adolph M. Metzendorf, the sum of \$1,267.20 and interest from January 5, 1920, and taxed costs of this suit. 40

*Complaint.*

## THIRD CAUSE OF ACTION.

10 1. In July, 1918, said City of Perth Amboy received from said plaintiffs the sum of \$1,389.46 and alleged that they received said sum in full payment of all taxes and assessments whatsoever levied against and on the second tract described in the first count of the first cause of action herein.

20 2. On January 5, 1920, said defendant, City of Perth Amboy, received and accepted from one, Adolph M. Metzendorf, the sum of \$1,267.20, as and for taxes and paving assessments levied against the second tract described in the first count of the first cause of action herein, prior to July 1, 1918, and which they alleged were due and unpaid.

3. All said taxes and said assessments were paid by plaintiffs to said City of Perth Amboy on July 22, 1918.

30 4. No money was due from said plaintiffs to said City of Perth Amboy for taxes and assessments on said premises, levied and assessed prior to July 1, 1918.

5. Said City of Perth Amboy received and accepted said sum of \$1,267.20 improperly as said taxes and assessments were paid by plaintiffs in full, prior to January 5, 1920.

6. Said City of Perth Amboy holds said sum of \$1,267.20 for the use and benefit of said plaintiffs.

40 7. Plaintiffs have demanded of said defendant, City of Perth Amboy, said sum of \$1,267.20, and

*Complaint.*

said City of Perth Amboy has refused to pay said sum to plaintiffs.

WHEREFORE, plaintiffs claim as damages from said City of Perth Amboy the sum of \$1,267.20, interest thereon from January 5, 1920, and taxed costs of this suit.

10  
WELANKO & STRAUSS,  
Attorneys of Plaintiffs.

Filed October 18, 1924.

Upon application of plaintiff and upon consent of David T. Wilentz, attorney for City of Perth Amboy,

And it appearing that said suit has been discontinued as against said Adolph M. Metzendorf,

It is on this 21st day of September, 1925, on motion of Welanko & Strauss, attorneys of plaintiffs, and with the consent of said David T. Wilentz, attorney of defendant, City of Perth Amboy, ORDERED, that the complaint herein be amended as follows:

1. By adding paragraph 24A to the first count of the first cause of action, as follows:

“Thereupon said City of Perth Amboy passed a resolution waiving all the interest mentioned in paragraph 24, which had accrued on the unpaid taxes and assessments referred to in paragraph 24.”

2. By amending paragraph 25 of the first count of the first cause of action in said complaint so that it shall read:

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*Motion to Dismiss.*

"Pursuant to said agreement and said resolution of the said City of Perth Amboy, said plaintiffs did deposit with said City of Perth Amboy, on or about July 9, 1918, the sum of \$1,267.20."

3. By adding paragraph 2A to the third cause of action:

10 "Said sum of \$1,267.20 represented interest which had been waived by the City of Perth Amboy, under the agreement and resolution mentioned in paragraphs 24 and 24A of the first count of the first cause of action herein."

And it is further ORDERED, that the said City of Perth Amboy shall have fifteen days within which to answer after service of a copy of this order.

20 SAMUEL KALISCH,  
Justice of Supreme Court.

We hereby consent to the entry of the foregoing order.

DAVID T. WILENTZ,  
Attorney of the City of Perth Amboy.

Filed September 21, 1925.

30 To the above-named plaintiffs or Welanko & Strauss, their attorneys:

40 TAKE NOTICE, that at or before the trial of the issue to be joined in the above cause, I shall move to dismiss the first count and the second count of the first cause of action and the third cause of action contained in the complaint of the plaintiffs filed herein on the ground that the said first count and the second count of the first cause

*Answer of Defendant, City of Perth Amboy.*

of action and the third cause of action of said complaint are insufficient in point of law and do not set up a legal cause of action.

DAVID T. WILENTZ,  
Attorney of the Defendant.  
City of Perth Amboy.

10

The defendant, City of Perth Amboy, a corporation of the State of New Jersey, in answer to the complaint of the plaintiffs, says that.

FIRST CAUSE OF ACTION—ANSWER TO  
FIRST COUNT.

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1. 20

2. It denies paragraph 2.

3. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 3.

4. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4. 30

5. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5.

6. It admits paragraph 6.

7. It denies paragraph 7, except the allegation that assessments were laid for the paving of Madison avenue.

8. It admits paragraph 8.

9. It denies paragraph 9. 40

*Answer of Defendant, City of Perth Amboy.*

10. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 10.

11. It admits paragraph 11.

10 12. It has no knowledge or information sufficient to form a belief as to the allegation contained in paragraph 12.

13. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13.

14. It admits paragraph 14.

15. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 15.

20 16. It denies paragraph 16.

17. It denies the allegations contained in paragraph 17, except the statement that certain payments were made to the City of Perth Amboy on account of taxes and paving assessments due and owing by the plaintiffs.

18. It admits paragraph 18.

19. It denies paragraph 19.

30 20. It denies paragraph 20.

21. It denies paragraph 21.

22. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 22.

23. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 23.

24. It denies paragraph 24.

40 25. It denies paragraph 25.

*Answer of Defendant, City of Perth Amboy.*

26. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 26.

27. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 27.

28. It denies paragraph 28. 10

29. It denies paragraph 29.

30. It denies paragraph 30.

FIRST CAUSE OF ACTION—ANSWER TO SECOND COUNT.

1. The defendant herein repeats the answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the first count herein. 20

23. It denies paragraph 23.

24. It denies paragraph 24.

25. It denies paragraph 25.

26. It denies paragraph 26.

ANSWER TO THIRD CAUSE OF ACTION.

1. It admits that certain moneys were received from the plaintiffs on account of taxes and other municipal assessments due and owing by the plaintiffs to the defendant, but denies the remaining allegations contained in paragraph 1. 30

2. It admits the allegations contained in paragraph 2 that Adolph M. Metzendorf paid to the City of Perth Amboy certain moneys due and owing on account of taxes and paving assessments, but denies the remaining allegations contained therein. 40

*Answer of Defendant, Adolph M. Metzendorf.*

3. It denies paragraph 3.
4. It denies paragraph 4.
5. It denies paragraph 5.
6. It denies paragraph 6.
7. It denies paragraph 7.

10           FIRST SEPARATE DEFENSE.

The City of Perth Amboy is not indebted to the plaintiffs.

                  SECOND SEPARATE DEFENSE.

The plaintiffs did not appeal to the County Board of Taxation from any of the assessments referred to in the complaint within the time required by law.

20                               DAVID T. WILENTZ,  
                                  Attorney of the Defendant,  
                                  City of Perth Amboy.

Filed August 25, 1924.

30           Adolph M. Metzendorf, of the City of Perth Amboy, in the County of Middlesex and State of New Jersey, answering the complaint in the above-entitled action, says:

                  FIRST CAUSE OF ACTION.

40           1. Defendant has not any knowledge or information sufficient to form a belief as to the statements in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of the first count.

*Answer of Defendant, Adolph M. Metzendorf.*

2. Defendant has not any knowledge or information sufficient to form a belief as to the statements in paragraphs 1, 23, 24, 25, 26 and 27 of the second count.

                  SECOND CAUSE OF ACTION.

1. He admits paragraph 1 of the second cause of action. 10
2. He admits paragraph 2.
3. He denies paragraph 3.
4. He denies paragraph 4.
5. He denies paragraph 5, except he admits paying the sum of \$1,267.20 for taxes to the City of Perth Amboy.
6. He denies paragraph 6.
7. He denies paragraph 7, except he admits that the plaintiff, James J. Nash, Sr., made demand for \$1,267.20, and that he refused to pay the same. 20

                  THIRD CAUSE OF ACTION.

1. Defendant has not any knowledge or information sufficient to form a belief as to the statements in paragraph 1. 30
2. Defendant has not any knowledge or information sufficient to form a belief as to the statements in paragraph 2, except he admits that the said City of Perth Amboy received the sum of \$1,267.20 for taxes.
3. Defendant has not any knowledge or information sufficient to form a belief as to the statements in paragraphs 3, 4, 5, 6 and 7. 40

*Order Amending Complaint.*FIRST SEPARATE AND DISTINCT  
DEFENSE.

1. At the time of closing of title and delivery of deed by the plaintiffs to the said defendant, Adolph M. Metzendorf, all adjustments were made as to insurance, taxes and all other charges and the settlement thereby made as to all these matters, and the balance found to be due to the plaintiffs was then and there paid over to the said plaintiffs by the said defendant, Adolph M. Metzendorf.

WIGHT, WIGHT & GOLENBOCK,  
Attorneys of Defendant,  
Adolph M. Metzendorf.

Filed October 21, 1924.

The defendant, City of Perth Amboy, a municipal corporation of the State of New Jersey, in further answer to the complaint, and in answer to the amended complaint filed herein, says:

- (1) It denies paragraph 24A in the first count of the amended complaint.
- (2) It denies paragraph 25 of the amended complaint.
- (3) It denies paragraph 2A of the third cause of action of the complaint.

## THIRD SEPARATE DEFENSE.

To First, Second and Third Counts of Complaint.

This defendant further denies that the plaintiff has a good cause of action against the defendant, for the reason that the action was not com-

*Reply.*

menced and sued upon, within six years next after said cause of action accrued.

DAVID T. WILENTZ,  
Attorney of Defendant,  
City of Perth Amboy.

Filed September 23, 1925.

## REPLY TO FIRST SEPARATE DEFENSE.

1. Plaintiffs allege that the City of Perth Amboy is indebted to the plaintiffs as set forth in the complaint.

## REPLY TO SECOND SEPARATE DEFENSE.

1. Plaintiffs deny the allegations in the second separate defense.

WELANKO & STRAUSS,  
Attorneys of Plaintiffs.

Filed October 28, 1924.

Plaintiffs deny all the allegations in the first separate and distinct defense of defendant, Adolph M. Metzendorf.

WELANKO & STRAUSS,  
Attorneys of Plaintiffs.

Filed October 28, 1924.

*Certificate of Clerk.*

Plaintiff denies that said action was not commenced and sued upon, within six years next after said cause of action accrued.

WELANKO & STRAUSS,  
Attorneys of Plaintiffs.

10 Filed September 25, 1925.

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

20 (SEAL) IN TESTIMONY WHEREOF, I have set my hand and the seal of said Court at Trenton, this 3rd day of June, A. D. nineteen hundred and twenty-six.

EDWARD J. KELLEHER,  
Clerk.

30

40

*Postea.*

**POSTEA.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JAMES J. NASH, SR., executor of the Last Will and Testament of Daniel Hallahan, deceased, JAMES J. NASH, JR., and ROSE M. NASH,

*Plaintiffs,*

*vs.*

CITY OF PERTH AMBOY, a municipal corporation, and ADOLPH M. METZENDORF,

*Defendants.*

10

*Action at Law.*

*Postea.*

20

This case was tried before Judge Peter F. Daly with a jury, at the Union County Circuit, on October 28, 1926. The Court directed that a non-suit be entered against the said plaintiffs and in favor of the said defendant, City of Perth Amboy.

PETER F. DALY,  
Judge.

30

40

*Judgment.*

**JUDGMENT.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10 JAMES J. NASH, SR., executor of  
the Last Will and Testament  
of Daniel Hallahan, deceased,  
JAMES J. NASH, JR., and ROSE  
M. NASH,

*Plaintiffs,*

*vs.*

20 CITY OF PERTH AMBOY, a municipi-  
pal corporation, and ADOLPH  
M. METZENDORF,

*Defendants.*

*Action  
at Law.*

*Judgment of  
Non-Suit.*

This action came regularly on for trial on the  
28th day of October, 1926.

It was adjudged that a judgment of non-suit  
be entered against the said plaintiffs and in favor  
of said defendant, City of Perth Amboy.

30

40

*Testimony.*

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

October Term, 1926.

JAMES J. NASH, SR., Executor of  
the Last Will and Testament  
of Daniel Hallahan, deceased,  
JAMES J. NASH, JR., and ROSE  
M. NASH,

*vs.*

CITY OF PERTH AMBOY, a municipi-  
pal corporation, and ADOLPH  
M. METZENDORF.

10

Transcript of stenographer's notes of evidence  
in the above-entitled cause, taken before Hon.  
Peter F. Daly, Circuit Court Judge, and a jury,  
at the Union County Court House, in the City  
of Elizabeth, New Jersey, on the 28th day of  
October, A. D. 1926, at 12:25 P. M.

20

Appearances:

Messrs. Welanko & Strauss; Abraham Welan-  
ko, Esq. (Present), Daniel L. Strauss, Esq.  
(Present), attorneys for the plaintiffs.

30

Harry S. Medinets, Esq., attorney for the de-  
fendants.

A jury, being empaneled and found satisfac-  
tory, they were sworn.

Adjourned until 1:30 P. M.

40

*James J. Nash, direct.*

AFTERNOON SESSION, 1:30 P. M.

Mr. Welanko opens the case for the plaintiffs.

Mr. Medinets opens the case for the defendants.

10 JAMES J. NASH, one of the plaintiffs, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Welanko.*

Mr. Welanko: I wish to offer in evidence a certified copy of the Will of Daniel Hallahan.

(Certified copy of Will entered in evidence and marked Exhibit P. 1.)

20 Mr. Welanko: This is a certified copy of the letters testamentary issued to Mr. Nash.

(Certified copy of letters testamentary entered in evidence and marked Exhibit P. 2.)

Q Mr. Nash, you are the executor of the estate of Daniel Hallahan? A I am.

Q And Mr. Hallahan died seized of property in Perth Amboy located on Madison avenue? A He did.

30 Q Were you in the actual management of this property as such executor? A Yes, sir.

Q Did you have any dispute with the City of Perth Amboy over taxes and assessments? A I did.

Q Levied by them on this property? A Yes, sir.

Q When did that dispute arise? A Well, there was one dispute arose some time previous to 1907. That was where the—

40 Q Has that dispute anything to do with this particular suit? A No, it has not.

*James J. Nash, direct.*

Q Let us forget that. A All right.

Q I am referring to the dispute which is now in question. A The dispute was in 1907 that I received a communication from the tax office in Perth Amboy about back taxes. On receipt of that notice I went to Perth Amboy to the tax office and I met Mr. Walker there. 10

Q Who? A Mr. Walker. He was the tax collector. I showed him the notice and told him that was a bill that was in dispute and had never been cleaned up one way or the other.

Q When did this happen? A That was in the first part of—that was along the latter part of April or the first part of May.

Q What year? A 1918.

Q Was that the first time you raised any question about these taxes or assessments? A 20 No. I had repeatedly tried to get them to adjust the matter and get it out of the way.

Q As near as you can remember when was the first time or in what year did you first take up with the City of Perth Amboy the settlement of this dispute? A Why, in May, 1918. Oh, you mean when I first took it up with them?

Q Yes. A Why, I had been back and forth there with them. Mr. Schultz— 30

Q You have not answered my question yet. As nearly as you can remember in what year did you first take up with them this question of the dispute covering the taxes and assessments on your property? A I believe it was along in 1908.

Q Did you get any results from them? A Why, I got no results in this manner. I had handed the matter to Mr. Schultz, who was then the councilman, and asked him if he could not have the matter brought forward and have the 40

*James J. Nash, direct.*

matter adjusted in the proper way. He told me that he would.

Mr. Medinets: I object to any conversation between him and Mr. Schultz.

10 Mr. Welanko: Mr. Schultz was a member of the council at that time and an officer of the city. I think it is perfectly proper and binding on the city.

The Court: I will allow a wide latitude in this case. I am inclined to agree with Mr. Medinets, though, that there is nothing an alderman can do that would bind any debt of the city. Go on.

20 A Mr. Schultz told me he would take the matter up and see the other councilmen and see what he could do with it. It went along for some time and I went to Perth Amboy and I went and seen Mr. Schultz. I asked him how he was progressing in the matter, and he told me that he would get through with it. And I told him this way, I said, Mr. Schultz, I don't want no expense, or interests, or things pile up on this thing, and if you will speed it along I wish you would. So he informed me that he would take care of it. So he retired out of office. Then Mr. Dalton, Councilman Dalton, I gave the matter to him.

30 Q When was that? A That was in 1911. And I told Mr. Dalton that I had the matter up with Schultz and he went out of office and hadn't finished anything. Mr. Dalton stated to me that he would see what he could do. And about seven months after that I was down to Perth Amboy and I went to see him and asked him how he was getting along; and he told me that he was able to get an adjustment on a part of the pavement.

40

*James J. Nash, direct.*

That was on the corner of Madison avenue and Market street, and he got an allowance there of \$260.

Mr. Medinets: I have no objection to the offer of copies of the council minutes, but I do not believe it is proper evidence. It has no bearing on the issue before this Court and jury. 10

Mr. Welanko: Payment on these taxes—

The Court: If there is no objection I will admit it.

(Copy of council minutes entered in evidence and marked Exhibit P. 3.)

Q Go on. A Mr. Dalton informed me that he would go ahead and try and finish up the balance. So he was succeeded in office before he got any further adjustment in the claim. I then went to see City Attorney Charles Hommann, and I asked him if there was anything he could assist in getting this thing out of the way; I didn't want it hanging fire. He told me I would have to have the council—go to the council with him. I told him I had been with Councilman Schultz and Councilman Dalton, and how they were out of office, and I would like to have him assist me in the matter if he could do it. So he said no, you will have to go to the council. So I then went to Councilman Kelly and I stated the matter to Councilman Kelly, that I had the matter up to have straightened out, and he says, all right, I will take care of it. So it dragged along with him, and he retired out of office and nothing was done. Now, I related that same story to Councilman Clark, when I got this notice from the city about the back— 20 30 40

*James J. Nash, direct.*

Q When did you get this notice about which you are now speaking? A Why, it was along about the first part of April, 1918. When I went to Mr. Walker, the tax collector, he said Mr. Clark was the chairman of the tax board, and he would advise me to go and see Mr. Clark. So I went to Mr. Clark's home on State street and I found him there and I showed him the notice that I had got, and that was the bill was in dispute. Yes, he said, there is over \$100,000 worth of old claims that way, that I am in authority and power to go ahead and get them cleaned up out of the way.

Mr. Medinets: While the Court has been giving Mr. Nash a great deal of latitude, he is now bringing into the record some statements on the part of Mr. Clark, for example, which apparently are binding upon the city, and which I think are wholly improper as a matter of evidence. Anything Mr. Clark may tell him as to his impressions of tax matters in the city is certainly not binding upon the City of Perth Amboy.

The Court: I will allow a full story.

Q Mr. Nash, did Mr. Clark give you a statement at that time in 1918 which showed what the City of Perth Amboy claimed to be due for taxes in assessments and interests? A Yes, sir.

Q I show you this statement addressed to J. J. Nash, Trustee, and ask you whether that was the statement you received from Mr. Walker, tax collector? A Yes, sir.

Mr. Welanko: I wish to offer this in evidence.

(Statement entered in evidence and marked Exhibit P. 4.)

*James J. Nash, direct.*

Q Go on with your story. A So, in the latter part of May I went to Perth Amboy and I got off of the bus at the corner of State and Smith streets, and I met Mr. Clark there on the corner of State and Smith streets, Councilman Clark, and I asked him how he was doing in the matter of the adjustment. He asked me then if I had any suggestions I could make in order that he could bring it to the council; and I told him, I said, Mr. Clark, I will tell you this, that if I can get this matter all cleaned up out of the way, if the council waives the interest cost in the matter, that I will deposit the money with the city to pay the principal due. He said that that is fair and I will recommend to the council.

Q What happened after that? A The next I received notice from the council to be at a meeting to be held July 8, 1918, at 8 P. M., and I went to that meeting; I was present.

Q Where was this meeting to be held? A In the City Hall in the council chambers.

Q Continue. A Then they went into a session and they talked about agreeing to waive this interest from 1917 to July, 1918, and where I stood, or where I was, Mr. Krouse, he was the alderman-at-large, chairman of the council, he came over to me and he called Mr. Walker over to the other side there, and he said, Mr. Nash, you will have to deposit with the tax collector \$1,467, and he said, we are to pass a resolution waiving this interest from 1907 to and including July, 1918. So he went back over to the other councilmen and they went into session; they asked me if I would step aside.

Q Did you deposit the \$1,467? A Yes, I left it with Mr. Walker, as Mr. Krouse advised me to. I then stepped aside, it was in a hallway

*James J. Nash, direct.*

10 in a room, and there was other people in there, and I stayed there for, oh, a short while, and it looks as though the council adjourned, or they came out of the chambers anyhow, and there was—in that group there was Councilman Walters, Councilman Wilson, Councilman Reedy, Councilman Clark, Councilman Anderson, and Alderman-at-Large Mr. Krouse; and Krouse said to me, he said, well, he said, Mr. Nash, we have passed a resolution waiving the interest on your claim from 1907 up to 1918, including July; and I thanked him for it. Then Mr. Anderson, he said, well, Jim, I am damn glad you got it cleaned up. He said, the boys all voted for the resolution to clean it up and waive the interest from 1917 to 1918 in July. Then Mr. Krouse told me Mr. Walker would check over the books and fix—  
20 give me the bill.

Q Did you get any bill or receipt from Mr. Walker after that? A No. Then on July 9, which was the next day, in the afternoon, I went to Perth Amboy to the tax office and I met Mr. Walker there, the tax collector, and I asked him if he had checked over the matter, and he said yes. So, he handed me a bill with the interest and the principal; he called it—

30 Q Is this the bill he handed you on July 9? A No. There was interest on one side and the principal on the other.

Q This is a bill dated July 9, 1918? A No. That was the bill I got on July 22. That was a receipt, I think. Let me see.

Q Just read that over to refresh your memory. A Oh, that is right.

40 Mr. Welanko: I wish to offer this bill in evidence, or this receipt, rather.

*James J. Nash, direct.*

Mr. Medinets: I have no objection to it being offered for what it says on its face.

Mr. Welanko: That is about all it can be offered for. Gentlemen of the jury: This is a receipt addressed to J. J. Nash, Trustee, on a billhead of the City of Perth Amboy. It reads: "Received for taxes and assessments to July 1, 1918, for which receipt will be given later, \$1,389.46. Received payment, E. D. Walker, collector of revenue."  
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(Receipt entered in evidence and marked Exhibit P. 5.)

Q What happened after July 9, 1918, with respect to this question? A I told Mr. Walker then that there was four or five hundred dollars that from what I could check over with my payments that was less than what the amount in the principal. So he said, well, if you come down in a week or so I will have more time to go over it, and he says, I will check it over. So I went to Perth Amboy to the tax office on July 22, 1918, and I met Mr. Walker in the tax office, and I went in there and I sat down and he told me, he said, now, the city attorney, which is Leo Goldberger, would not permit him to go back on the tax beyond his time as tax collector in the office. He said there was other discrepancies there but he had no permission, because the city attorney would not let him go back. He gave me the receipt and the \$77.94 in cash.  
20

Q I show you another receipt dated July 22, of E. D. Walker, collector of revenue, and ask you if that is the receipt he gave you at that time? A Yes.  
30

Q That is the \$77.94 refunded? A Refunded.  
40

*James J. Nash, direct.*

Mr. Medinets: We admit that shows the payment on account of principal.

(Receipt entered in evidence and marked Exhibit P. 6.)

10 Mr. Welanko: This is receipt dated July 22, 1918, and shows a total of \$1,467.40 for principal, taxes and paving assessments covering this property in question; it does not set up any interest items. Also shows credit by payment \$77.94. Leaving balance \$1,389.46. Received payment, E. D. Walker, collector of revenue.

Q What did you do when Mr. Walker returned only the \$77.94 and told you why he could not make any further refund? A Mr. Walker told me, he says, of course, he said, everything is business.

Q What did you do? A Then I went and got a petition. Mr. Plechner, in New Brunswick, made me out the petition.

Q Is he a lawyer? A Yes, sir.

Q All right. A I presented it to the city council for them to go over the matter. The payments that I had that was made that showed the difference to what there is already. And I gave the petition to the clerk of the council.

30 Mr. Medinets: I object to the offer of this petition on the ground that it is a self-serving declaration, and is not binding upon the defendant.

Mr. Welanko: I served the defendant with a notice to produce the original, and this is a true copy; I will have Mr. Nash testify to that. I think it is evidential.

40 The Court: I do not know whether it is or not. I will admit it.

*James J. Nash, direct.*

Mr. Medinets: If you would like to have the original, I have no objection to letting you have it.

The Court: I will allow it. I do not say that it has any probative force, but I feel this is the character of case that should have a general explanation.

(Petition entered in evidence and marked Exhibit P. 7.)

(Petition read to the jury by Mr. Welanko.)

Mr. Welanko: There have been certain statements set forth in the complaint which have been admitted by the answer of the defendant, and I would like to read those figures to the jury. I am referring to paragraph 18 of the first count of the first cause of action.

Mr. Medinets: As to the ownership of the property?

Mr. Welanko: No, sir. Paragraph 18 of the first count of the first cause of action. It is a summary of the various assessments of taxes. Those have been admitted by the answer.

Mr. Medinets: If you say it is admitted, I will not contradict it. We have the books here if you want to check up on it.

Mr. Welanko: This recites paragraph 18, summary of the various assessments for taxes and paving assessments, and the amounts paid on account thereof, as follows:

*James J. Nash, direct.*

	Taxes from 1907 to 1912 inclusive	\$687.85
	Paving assessment .....	1,236.29
	Paving assessment .....	339.37
	Taxes from 1903 to 1915 inclusive	264.38
	Taxes for 1916 and 1917.....	187.08
	<hr/>	
10	Total .....	\$2,714.97
	Paid in 1912.....	\$663.26
	Paid in 1913.....	447.56
	Paid in 1916.....	279.78
	Paid in 1918.....	88.08
	<hr/>	
	Total .....	1,478.68
	<hr/>	
	Leaving balance of .....	\$1,236.29

20 Mr. Medinets: Do I understand you to admit those are payments on account of principal only?

Mr. Welanko: Those are payments made by Mr. Nash on account of the taxes and assessments levied against this property.

30 Q After this settlement, or whatever it was, that you had in July, 1918, after you presented this petition for the remission of the \$413, did you still own any property in Perth Amboy or did that estate own any property in Perth Amboy? A Yes, sir.

Q For how long did you own the remainder of that property? A Why, until 1920, I believe.

Q Did you sell that in 1920? A We did.

Q That was the last part of this piece of property that you owned? A That tract of land, yes.

40 Q And at the time this sale was consummated in 1920 did anything occur then relative to this

*James J. Nash, direct.*

question of taxes and interest and so on that had been going on since 1907? A Why, yes.

Q All right; tell us about it. A I went to Senator Brown's office, and Mr. Metzendorf was purchasing this corner tract, the corner piece, and Mr. Metzendorf's lawyer said that Goldberger told him there was a lien on there yet. 10

Mr. Medinets: I object to any testimony of conversation between Mr. Goldberger and Mr. Nash's counsel in the absence of the City of Perth Amboy.

Q Just confine your testimony to what happened at this closing relative to the question of these taxes. A Well, it came up there that there was some dispute about the interest.

Q Who raised that question? A Mr. Goldberger; he was a lawyer. 20

Q Not what you said. A He said—well, I said, in order to facilitate this bill, I said, the mortgage that you are taking back of thirty thousand dollars, will be sufficient security if anything whatever comes about. Well, they didn't want to agree to that.

Q What interest are you referring to? 30

Mr. Medinets: I move the last answer be stricken out as not being binding upon the City of Perth Amboy.

The Court: Of course, it is not.

Mr. Welanko: I do not remember what the answer is.

The Court: I will not strike it out, but Mr. Medinets is right about it. Let us have his story and I will pass on whether or not it binds the city. 40

*James J. Nash, direct.*

Q What interest are you referring to? A Why, he claimed, I don't know what went between Goldberger—Goldberger claimed there was a cloud on the—

*By the Court.*

10 Q A cloud on what title? A Cloud on the matter of the assessment, because Goldberger was the city attorney, and finally in conclusion I said, well, here, I will leave the money with you, out of the payments you are to give me in the purchase price, the purchase contract price, and if that satisfies you, why, all right, but you must hold it in escrow until I get—if there is anything there, until I have it thrashed out. So that was agreed to.

20 *By Mr. Welanko.*

Q Did they show you a tax search at that closing? A They did not.

Q They didn't show you? A No, sir.

Q Didn't they tell you how they arrived at this figure? A No. Only just that Goldberger had told Golenbock.

30 Q Did you know how much of this sum was retained as interest which had accrued prior to July, 1918? A There was some \$1,500 that was there because Nelson was the broker down there.

Q How much? A And he was in conversation with them, and he would relate to me if I was not down there. And they had the amount of money more than what would pay this here they claimed was due.

Q Did you pay your 1919 taxes? A Why, yes.

40 Q During the year 1919, or were those taxes paid at the time this deal was closed in 1920?

*James J. Nash, direct.*

A Well, I am not positive of one year, which the taxes would probably amount to some eighty dollars. I ain't positive on that.

Q Your taxes for the year 1918 were paid?

A Yes.

Q Prior to this closing? A Yes.

10 Q So that all that money that you left with Mr. Metzendorf, in escrow, for the security of interest, with the exception of this eighty or one hundred dollar item you speak of in the 1919 taxes? A Yes. And Mr. Brown sent my remittance back for the difference that was over it.

Q What happened after that, after you had settled up with Metzendorf? A Well, then there was a meeting of the council that I was asked to be at. It was about this petition.

20 Q Yes. A And the council was all glad to have settled the matter up, Goldberger saying that council had agreed—

Q When was this? A It was in the City Hall.

Q I mean when, what year? A Why, that was along after—along about I think the latter part of August of 1918.

30 Q Now, we are past that. We are down to 1920 when you sold this last piece of your property and left this—and agreed to have Metzendorf hold this sum of money until this was straightened up. What happened after that time? A Do you mean now as to the sale of the property?

Q No. As to any disposition of that money, or what you did in order to get back the money that you left with Mr. Metzendorf? A Why, I had to bring this suit.

40 Q Why? A Because the money was to be held by Mr. Metzendorf and it wasn't to be paid

*James J. Nash, direct.*

by him. That was only to secure him in case that I was obliged to pay any of this other which they claimed.

Q What happened to that money? A I don't know. They claimed they paid it to the city.

10 Q Did you go down to the City Hall to find out whether or not it was paid? A Yes. I would not be permitted to say Goldberger told me—I said, Goldberger, those books are public property and I want to check over them. And he wouldn't permit it. He said, if you want to see those books you will have to do it under a court order or court proceeding.

20 Q Did he tell you whether they had received this money from Metzendorf or not? A They did not. Never got a bill from 1918 to 1920, and they got nothing showing that there was anything whatever owing to them. Outside of two tax bills I think of eighty dollars and eighty-three dollars.

30 The Court: Let me understand this case, if you will, and see if I have it clearly, so that the jury may know the specific question that is involved. There were tax assessments due to the City of Perth Amboy from Mr. Nash, and according to the books there was interest charged up against the taxes and assessments; and he made application, as he claims, to be permitted to make a settlement on the basis of paying the principal of the taxes and assessments alone.

40 Mr. Welanko: Not only that, but that the tax collector was to go over the books and see whether there were any errors there and refund to him the amount of errors; and that he left a certain sum of money to cover

*James J. Nash, direct.*

the amount then owing, and there was a refund made of a certain sum of money, but Mr. Nash claims—

The Court: That after when he made the payment, as he claims, of fourteen hundred and odd dollars, the next night that he met the council and gave Walker a check for 10 fourteen hundred and odd dollars, that that was on the supposed amount of the principal, as distinguished from principal and taxes.

Mr. Welanko: Yes.

The Court: With an understanding that if a checking up of the books showed that the principal was different from that, or less than that, he was to get the refund, but that all he was to pay was the principal. Is that the claim? That subsequently it was found 20 that that amount was more than the principal by seventy odd dollars, and that that refund of seventy odd dollars was given to him, and that Walker gave him a receipt which eliminated all statement as to interest on the taxes or assessments. That the settlement on the basis of principal alone was the result of a resolution upon the part of the city governing body, the council of Perth Amboy. That subsequently in selling part 30 of his children's property, and of which estate he was the executor, and as executor he was taking care of the property as their father. That in disposing of that property, when it came time for the transfer to Metzendorf, the records shows that Goldberger told Mr. Harry Golenbock that according to the records there were still taxes due, which was represented by the interest— 40 which was really the amount of the princi-

*James J. Nash, direct.*

10 pal, showing, so far as the collector of taxes of the city was concerned, there was never any cancellation of those taxes on the books. That notwithstanding what might have been done, or whatever understanding Mr. Nash may have had, or no matter what receipts he may have gotten so far as the books of the city were concerned, he was simply credited with the face amount of the principal of the taxes and assessments, and the interest still remained, and in order to immediately effect the transfer of the title he agreed that Metzendorf should hold the amount that the city claimed was due, and to hold it, as he says, in escrow, or in trust; Metzendorf to hold that to secure him; and that

20 Metzendorf was to hold it until such time as Mr. Nash might bring this matter before the council, that he was having the matter adjusted or settled, and that instead of that, Metzendorf paid that amount to the city, that amount that he was supposed to hold in escrow, paid that to the city and cancelled the amount that appeared on the books of the city against that property for both taxes and interests, is that the claim?

30

Mr. Welanko: That is the substance of the case.

The Court: Now, the legal question is going to be, of course, who had authority to waive interest.

Mr. Welanko: There is nothing pleaded in the answer of the defendant that anyone did or did not have any authority.

40

*James J. Nash, direct.*

The Court: They were not dealing with their own money. They were dealing with the city money.

Mr. Welanko: We allege a resolution was passed by the council.

The Court: It may be in certain circumstances the governing body could legally do it. But there would have to be some other reason that the fact that it was interest, that they could cut off interest, because they have been charging interest to the thousands and thousands of property owners down there, and they could not say to one man, you do not have to pay interest, and make all the rest pay interest, you know that they cannot do that legally.

10

Mr. Welanko: I agree with your Honor.

20

The Court: There must have been some other reason, there must be a substantial reason, there must be a demand of an unfairness in the assessment for the street improvements, or the assessment for taxes, before any governing body has the first right to throw off one cent of what is on the books.

Mr. Welanko: That is what we allege was the case here, and that Mr. Nash did receive—

30

The Court: All right. Of course, there is no proof of why he disputed the payment of the interest. There is nothing in the evidence to show why he paid the interest.

Mr. Welanko: Mr. Nash has testified there was an assessment on this piece of property which he claims should not have been assessed.

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*James J. Nash, direct.*

10 The Court: I say it is conceivable that a governing body might find that even though a man has not resorted to the agencies that the statute specifically provides to get redress from an improper assessment, that if the improper assessment is so patent that it is not open to any dispute, it is conceivable possibly the governing body could, on its own motion, say we recognize this and it is without dispute an injustice was done and we are not going to force that man to any formal procedure or any litigation. There it is, that a man who runs may read and see that there was an injustice in such a situation as that the governing body may have the right to do it, and if it was once cleaned off the record, even though they did not have the full legal right, the tax body would not have to worry. There is no proof that this is such a case as that.

20 Mr. Welanko: I think there is enough in the case to show that there was this dispute.

30 Mr. Medinets: I would like to move at this time that Mr. Nash's testimony in reference to a resolution being passed by the board of aldermen be stricken from the record.

40 The Court: I will not do that, Mr. Medinets. You and I both want this whole thing explained. I am saying right now you are right, that that has no probative force. The record itself is proof of what the city council did. Unless you can show fraud on the part of some officials in suppressing a record. That is not alleged.

*James J. Nash, direct.*

Mr. Medinets: I do not want to create an improper impression upon the minds of the jury. The fact is that no such resolution was ever passed, and the record so shows.

The Court: If it reaches the jury, the jury will be told that nothing that is said as to what happened by the board of aldermen, or what the board of aldermen did, there is nothing can talk for the board of aldermen's action excepting the record itself. That is a public body, and its public record alone speaks. Unless there is allegation, of course, that somebody has suppressed the record. And that is not in this case at all.

20 Mr. Welanko: In order to get that straight on the record, I served the City of Perth Amboy with a notice to produce those minutes.

Mr. Medinets: The minutes are here.

30 Mr. Welanko: Mr. Medinets tells me the minutes are here and there is nothing in those minutes relative to this resolution. Naturally I believe that the testimony of Mr. Nash relative to that resolution is admissible as secondary evidence. That the mere fact that the resolution has not been reduced to writing is not conclusive evidence that the resolution was never passed. The clerk may have made an error, or the resolution may never have gotten to the clerk. We do not know. We are simply testifying to our knowledge as to the contents of this resolution, as given to Mr. Nash, by the councilman, immediately after that meeting.

40

*James J. Nash, cross.*

The Court: Mr. Nash does not testify there was a resolution passed.

Mr. Welanko: That is what he stated.

10 The Court: No. He simply says they went into a session and Mr. Krouse came to him and says, the boys are all with you, they all voted for this, and there was a resolution passed. He does not say he was present and heard the resolution read.

Mr. Welanko: No, because he stated they asked him to leave the room.

The Court: You cannot say that there should be in a record a resolution, unless you have proof to the effect that that resolution was actually introduced, voted upon and passed.

20 Mr. Welanko: His proof is by the statements of this councilman.

*Cross examination by Mr. Medinets.*

Q Mr. Nash, this meeting that you speak about, after which Mr. Krouse advised you concerning the resolution, that was a committee session of the board of aldermen, wasn't it?  
A Do you mean July 8th?

30 Q Well, I mean the meeting about which you spoke. Yes, July 8th. A I was sent word to attend to a meeting, to be present at a meeting in Perth Amboy on July 8, 1918, at 8 P. M. That they were taking up the claim for adjustment. And I was present there.

Q That was on Friday night, wasn't it, Mr. Nash? A I don't know what night, but it was July 8, 1918.

40 Q That was held in an anteroom of the city hall? A It was held in the chambers there.

*James J. Nash, cross.*

Q The regular meeting place of the board of aldermen? A Why, yes.

Q Are you sure about that? A That I don't know any other place they would meet there.

Q Why were you asked to get out of the room if this was an open meeting of the board of aldermen? A I don't know. Only on the request of the chairman of the council, Mr. Krouse. 10

Q Now, Mr. Nash, as a matter of fact, wasn't this just a committee session of the board of aldermen? A No.

Q And when they went into caucus, discussed the matter, you were asked to leave the room? A I didn't know whether they went into caucus or not. They went into meeting and I was in the meeting, too. 20

Q You have attended meetings of board of aldermen on many occasions, haven't you? A No, I have not.

Q Haven't you been more or less familiar with the operation of political affairs? A In Perth Amboy?

Q Yes. A I have not been down there in twenty-five years.

Q Mr. Nash, you have handled a great deal of real estate in your days, haven't you? A I don't know as I have. I haven't handled anything outside of what belongs to ourselves. 30

Q That involved a number of pieces of property in Perth Amboy? A Yes.

Q In the heart of the business section of Perth Amboy? A Yes.

Q Some of our best property? A Yes.

Q The estate left everything in your hands? A Yes. 40

*James J. Nash, cross.*

Q And when it came to closing of the Metzendorf deal you chose Senator Brown as your counsel? A Why, I went there and Brown was there at the time and I asked him to act for me.

Q Senator Brown represented you? A Yes, at that meeting.

10 Q And you instructed Senator Brown to prepare a deed to Mr. Metzendorf covering this property? A I did not. I don't know who prepared the deed.

Q Don't you know who prepared the deed? A There was a deed there that came up about the taxes inserted in it, and I said to facilitate the closing of that transaction I would sign that deed.

Q Now, when did you sign that deed, Mr. Nash? A Why, it was in 1920, I think.

20 Q Mr. Nash, where did you sign the deed? A In Mr. Brown's office.

Q And how many days before the title was actually passed did you sign the deed? Well, a number of days intervened? A Oh, I don't know what the number of days were.

Q Well, there were several days intervened between the time you signed the deed with your counsel and the actual passing of title? A Well, I can't just say how many days there was.

30 Q Before whom did you take the acknowledgment, do you recall? A That I can't. It was in Mr. Brown's office with Mr. Brown.

Q Did you read the deed, Mr. Nash? A I did not.

Q Did your counsel explain to you what was in the deed? A Why, he told me it was a deed to the property there and \$30,000 mortgage back on the property.

40 Q Is that all he told you? A That is about all.

*James J. Nash, cross.*

Q Do you mean to say that your counsel didn't read the deed to you and explain all the details of the deed? A Why, he did not that I can remember.

Q This property involved how much money? A \$35,000.

Q And you want the jury to believe that you signed a deed representing a \$35,000 piece of property without knowing everything that was in the deed? A Why, yes, I did. 10

Q Now, Mr. Nash, isn't it a fact that this deed was prepared by your attorney and you took it outside in order to have it signed up, and it was in your possession several days before it was signed up?

The Court: Mr. Medinets, aren't we taking up time? Here are the records and the records are open to counsel for the plaintiff. Let him show what the records show as to whether or not the debt due against this property for taxes and assessments were ever stricken off the record by proper resolution of the governing body. That is all there is to this case. 20

Mr. Medinets: Having in mind your Honor's suggestion I will just stop my examination with this question: 30

Q Mr. Nash, didn't you read that clause in the deed (indicating)? A I did not. This deed was handed to me by Mr. Brown to sign it, and he says, there is a dispute here with them that Goldberger had told Golenbock there was interest due down in the city, or on a claim, and I told him, to facilitate matters in the property I would sign the deed. But, that was 40

*Motion for a Non-suit.*

in my mind there between them and myself that that wasn't to be effective, the money that was left there was to be only paid in case they had to, and not to be paid on their own initiative.

Q There is not any question in your mind but that this is the deed that you and your children signed? A Yes, that is right.

The Court: Does the deed make any reference to this?

Mr. Medinets: Yes, it does.

The Court: What does it say with reference to this?

Mr. Medinets: "This conveyance is made subject to taxes and assessments for pavement and interest thereon in the sum of \$1,267.20, which the party of the second part assumes and agrees to pay."

Mr. Medinets: I ask this be marked for identification.

(Deed marked D. 1 for identification.)

Mr. Welanko: Plaintiff rests.

## MOTION FOR NON-SUIT.

Mr. Medinets: I move for a non-suit at this time on the ground that there is absolutely no evidence before this Court and jury to show any legal liability on the part of the defendant.

The Court: I will hear you.

(Argument by Mr. Welanko in opposing the motion.)

Mr. Welanko: There should be a direction of a verdict in favor of the plaintiff, because

*Motion for a Non-suit.*

that is practically admitted by the pleadings of the defendant.

(Further argument.)

(Citing case of *City of Burlington v. Dennison*, 42 Law 165.)

(*Bigelow v. City of Perth Amboy*, 25 Law 297.)

Mr. Medinets: As to the \$413, we have Mr. Nash's statement that he deposited with the city collector of taxes \$1,400 that he was to apply towards the unpaid principal of taxes and assessments, and in accordance with that instruction Mr. Walker applied that money towards the principal of taxes and assessments. Now, there is no contention in this case, nor is there any testimony to show that there was anything wrong or anything improper with the taxes or assessments on the books of the city collector of taxes. There is no charge as to any particular item which was wrong or improper. Mr. Nash merely makes a broad general statement that he had these continuous items about the taxes. I think that the city collector of taxes followed his instructions when he applied that money left in trust with him towards the records which were open.

The Court: That is not what is concerning me. He claims under paragraph 18 it is alleged that the amount of the taxes—what was the paragraph?

Mr. Welanko: That was paragraph 18 of the first count of the first cause of action, in which that summary is set up and admitted by the first defense of the City of Perth Amboy.

The Court: Where does the four hundred dollars come from?

*Motion for a Non-suit.*

Mr. Welanko: If you will read paragraph 18, there is an allegation there reciting that there is a balance of \$1,236.29, according to the tax bills. There must be deducted from that the sum of \$260, as alleged in paragraph 19, which has been admitted by the defense, in view  
 10 of their minutes of the council meeting of 1917. Deducting that \$260 from the first sum left a balance of \$976.29, and when the tax collector took thirteen hundred and seventy odd dollars to pay this \$976.27, there was this difference of four hundred and thirteen odd dollars.

Mr. Medinets: In the answer followed by the counsel for the city there is a broad general denial, under the first separate defense, that the City of Perth Amboy is not indebted to the plaintiffs. It also specially denies paragraph  
 20 19.

The fact is that there was no application in writing made by Mr. Nash, or anyone in his behalf, for a rebatement of the interest, which I think is required by the statute that counsel just referred to. The application for rebatement was made on a matter several months after this \$1,400 was left with the collector of taxes. I do not think it was within the rights of  
 30 the governing body of Perth Amboy, under the conditions that existed at that time, to waive the interest.

(Further argument)

(Citing page 1530 Compiled Statutes, Sec. 116.)

The Court: I will give you an opportunity to show, if you can, that these taxes or assessments were ever cancelled from the books.  
 40

*Motion for a Non-suit.*

Mr. Welanko: Mr. Medinets has told me there is no such copy of the resolution there, and admitting there is no such copy I still maintain that that is a question for the jury to determine whether such a resolution was passed, and whether it was carelessness, or some other reason on the part of the city council, and the officials  
 10 of the city that failed to reduce that resolution to writing. That is what I maintain.

The Court: In this case it is admitted that there appeared upon the books of the City of Perth Amboy, a certain amount as taxes, assessments and interest on the same. For some cause or another the owners of the property were not satisfied with the amount of taxes and assessments and interest due, according to the books of the City of Perth Amboy, and the  
 20 representative of the ownership of the property, according to his testimony, repeatedly interviewed different members of the Board of Aldermen of the City of Perth Amboy, for the purpose of securing the influence of some one or more of such aldermen to effect a compromise on the amount of taxes, assessments, and interest which appeared of record against the property. He asserts that these different aldermen promised to look into the matter, and also in  
 30 several instances assured him that they would bring it before the governing body. Now, of course, if everyone of the aldermen had promised him that they would reduce this amount, it would amount to nothing from a legal standpoint. The only time that the aldermen's action would count, so as to effectively control the city, would be by its formal vote, in formal regular session of the governing body. The representative of the ownership of this prop-  
 40

*Motion for a Non-suit.*

erty says that on one occasion, July 8, 1918, he was called by some one whom I have forgotten, to attend a session of the governing body, the Board of Aldermen of the City of Perth Amboy; and that the alderman at large, Mr. Krouse, told him that they had adjusted this matter, and that the amount they had fixed for taxes and assessments due would be the principal of taxes and assessments, eliminating the substantial charge of interest which appeared of record against this property. He said he was asked to leave the room, and, of course, the natural conclusion is that whatever room he was in was not the meeting room of a formal, open meeting of the council, a public body, which could only pass such a resolution as this in open, public session, even though they had the right to pass it and, therefore, the inevitable conclusion is one of two things: Either that they did in secret—which, of course, the Court does not believe for a minute—that which should have been done openly, and if it was done in secret, it would be ineffective; or that there was not any real meeting of the board of aldermen on that night, as a board of aldermen, but simply a kind of committee of the whole, or a meeting of one of the committees, or an informal conference of the members of the board of aldermen. So, we have not even from the witness in this case any assertion that there was ever a resolution formally passed by the Board of Aldermen of the City of Perth Amboy cancelling the interest on these taxes and assessments. It is indeed true that whatever a governing body like that might actually do, if you can prove that it did, even though the record does not show it, such proof takes the place of the record and is

*Motion for a Non-suit.*

just as effective. But that is not this case. There is nothing in this case that would justify a conclusion that there was ever a meeting of the board of aldermen at which such a resolution as this passed, and it is admitted that there is no such record in the minutes. The cases cited are altogether different; for instance, the purchase of a fire apparatus, the committee goes on and purchases a fire apparatus and then the man who sold the fire apparatus, they refuse to pay his bill, on the ground that there was not any authority to do it. That is different. We do not know what the testimony was in that case, but here was a committee went ahead, and no doubt the council was fully informed of it, and there was an inevitable deduction that the committee would not have gone ahead unless there had been a resolution. Then there are cases when the resolution does not fully show what they did, and yet you can prove what they did. For example, in this case, suppose there was such a resolution as this passed, and you could get witnesses to come along and show that such a resolution as that was actually passed, but that the clerk either innocently or deliberately omitted it, of course, if you proved that there was the fact of the resolution, then that would supply the record. But that is not this case at all. There is no evidence here that there was ever a resolution passed reducing the amount of indebtedness against this property that was shown upon the books. Suppose there had been—I am only supposing this—would the board of aldermen have had the right to make such a resolution as this? I have already suggested my views about that; and there is a statute to which I have been referred, which is practically the same, almost the same as other and much older statutes that pre-

*Motion for a Non-suit.*

ceded it; it says that "Where the lien for taxes or assessments so levied and assessed shall be for any reason questioned or impaired, or shall be in litigation, it shall be lawful for the common council, or the board or body having charge and control of the finances, upon the application and petition in writing, to make a revision." Now, it is not claimed that this resolution was passed after this petition in writing, which is a necessary preliminary to action by the board of aldermen under this section, that that resolution was passed after that petition. As a matter of fact, this petition came in long after July 8, 1918.

And then another thing must be remembered, that this statute says that if for any reason the taxes or assessments are questioned; that means something; it does not mean that you can go to the board of aldermen, and because they like you, or because you have a political pull, or for some other cause like that, or influence, that they can wipe off the interest on old taxes and assessments, when thousands of others have had to pay interest. That would not be a reason. Even under this statute the board of aldermen have no right to reduce the amount unless there is a reason. In this case there has not been shown that there was any reason. There has not been shown that any resolution followed a formal petition. And further than that, the next section provides that after that is done, when it is done under that statute, and done for a reason, where there is litigation, where it has been impaired, for some reason or other, but for a good reason, where, as I suggested before, and where they find that an actual mistake had been made, and a mistake so patent that the man who runs

*Motion for a Non-suit.*

could read it, then, instead of forcing him to a lot of technicalities, they would say, here, everybody honestly knows that tax is not due, or a tremendous mistake was made here, we will wipe it out right in the face of the world and everybody knows it. Of course, the board of aldermen, in such a case as that, can do it, if they do it formally and according to the statute. And after they do it, then they have to go and put their record up properly, under section 117, to the collector of taxes, to the man who has the right to cancel of record, and when he gets that record then under the force and effect of that resolution it is his duty to cancel that tax, upon the payment of the amount which they say that they will accept, because there has been a good reason for making it a different amount from what is on the record.

The plaintiffs in this case claim what? They claim they paid the City of Perth Amboy twelve hundred and odd dollars more than they owed. The records show they owed as much as they paid, and the burden of proving that they did not owe what the records show is upon them. The burden of proving, for example, that there was a resolution formally and legally passed by the board of aldermen in open meeting is upon them. And further than that, that that board of aldermen, if they did pass such a resolution, did it for a reason that was a legal reason and a good reason. To simply say they could wipe out interest is not a good reason.

I am constrained, in view of my understanding of the law, and the only evidence that has been presented to us, to grant the motion for a non-suit, and it is granted accordingly.

*Exhibit P. 1.*

Mr. Welanko: Does that cover the \$413 also?

The Court: It covers everything.

Mr. Welanko: I take an exception to your Honor's decision.

10

**Exhibit P. 1.**

In the name of God, Amen.

I, DANIEL HALLAHAN, of the City of Perth Amboy, in the County of Middlesex and State of New Jersey, being of sound and disposing mind, memory and understanding, do make publish and declare this to be my last Will and Testament, as follows:—

20

First:—I order and direct that all my just debts and funeral expenses be paid as soon as may be reasonable after my decease.

30

Second:—I give devise and bequeath all my estate both real and personal, in whatever it *my* consist or wherever situate, to my beloved wife, Ellen Hallahan, for and during the term of her natural life; and from and after her decease, I give devise and bequeath all my estate both real and personal to my two grand-children, Rose Nash and James Nash, Jr., to them their heirs and assigns absolutely and forever, share and share alike.

Lastly:—I hereby nominate constitute and appoint James J. Nash, Executor of this my last Will and Testament, and hereby expressly exempt him from giving bond or other security whatever for the faithful performance of his duties as such Executor.

40

In Witness Whereof I have hereunto set my hand and seal this Ninth day of June in the year

*Exhibit P. 1.*

of our Lord One Thousand and Nine Hundred and Two (A. D. 1902).

DANIEL HALLAHAN. (L. S.)

Signed, sealed, published and declared by the said Daniel Hallahan, as and for his last Will and Testament, in the presence of us (both being present at the same time) who, at his request, in his presence, and in the presence of each other, have hereto subscribed our names as witnesses.

Dora. E. Hallahan 147 Smith St. Perth Amboy N. J.

Jno Hallahan 147 Smith St Perth Amboy N. J.  
Thos H Hagerty Perth Amboy N J.

MIDDLESEX COUNTY SURROGATE'S COURT. 20

STATE OF NEW JERSEY, }  
COUNTY OF MIDDLESEX. } ss.

I, CHARLES FORMAN, Surrogate of the said County of Middlesex, do certify the annexed to be a true copy of the last Will and Testament of DANIEL HALLAHAN, late of the County of Middlesex, deceased, proved on the twenty-third day of October, A. D. one thousand nine hundred and five, as the same is taken from and compared with the original record thereof, now on file and of record in this office.

In Witness Whereof, I have hereto set my hand and seal of office this twenty-ninth day of October, A. D. one thousand nine hundred and twenty five (1925).

(SEAL) CHARLES FORMAN,  
Surrogate.

40

Exhibit P. 2.

Exhibit P. 2.

STATE OF NEW JERSEY, }  
MIDDLESEX COUNTY. } ss.

10 (L. S.) I, PETER FRANCIS DALY, Surrogate of the County of Middlesex, do certify the annexed to be a true copy of the Last Will and Testament of DANIEL HALLAHAN, late of the said County of Middlesex, deceased, and that JAMES J. NASH, of Perth Amboy, New Jersey, the Executor therein named, proved the same before me, and is duly authorized to take upon himself the administration of the estate of the said Testator, agreeably to the said Will.

20 WITNESS my hand and seal of office on the twenty-third day of October, in the year of our Lord one thousand nine hundred and five (1905)

PETER F. DALY, Surrogate.

STATE OF NEW JERSEY, }  
MIDDLESEX COUNTY. } ss.

30 I, CHARLES FORMAN, Surrogate of the said County of Middlesex, do hereby certify that I have compared the annexed copy of letters testamentary granted to James J. Nash, executor named in the last Will and Testament of Daniel Hallahan, late of Middlesex County, deceased, with the original record thereof, now remaining of record in this office and have found the same to be a correct transcript thereof, and of the whole of such original record.

And I do further certify that said Letters are in full force, unrevoked.

40

Exhibit P. 5.

Exhibit P. 5.

DELINQUENT TAX

Mr. J. J. Nash, Trustee

To CITY OF PERTH AMBOY, Dr.

For Taxes and Assessments on Block 77 Lots 23-24-25-26-29-30-31

Received all Taxes and assessments to July 1-1918.....1389.46

for which Receipt will be given later

Received Payment,

Ju 9 1918

E. B. WALKER, Collector of Revenue  
W. L. C.

Exhibit P. 6.

DELINQUENT TAX

Mr. Jas. J. Nash, Trustee

To CITY OF PERTH AMBOY, Dr.

For Taxes and Assessments on Block 77 Lots 23 to 26 & 29-31 on Madison Ave Pave Street, as follows:

Item	Amount	Interest	Costs	Totals
Madison Ave Pave. Lot	23.....112.39			1467.40
	24.....112.39	Cr of payments		77.94
	25.....112.39		on Old Ledger	1389.46
	26.....112.39			
	29.....112.39			
	30.....112.39			
	31.....112.39			
Market St. Bithuletic	23.....339.37			
Taxes	.....1909			108.60
Taxes	.....1910			115.70
Taxes	.....1911			117.00

Received Payment,

Jul 22 1918

E. B. WALKER, Collector of Revenue  
W. L. C.

WITNESS my hand and seal of office at New Brunswick in said County, this twenty-ninth day of October Anno Domini one thousand nine hundred and twenty-five (1925)

CHARLES FORMAN,

(SEAL)

Surrogate.

10

Exhibit P. 3.

COUNCIL MINUTES

PROCEEDINGS OF THE BOARD OF ALDERMEN OF THE CITY OF PERTH AMBOY, N. J.

April 3rd, 1911.

20

RESOLVED, That the assessment for paving Market street charged against Lot No. 23, Block 77, be reduced \$260.00, as the said lot is over assessed in accordance to benefits received, was introduced and on motion adopted by the following vote: Aye—Galvin, Larson, Dalton, Sandbeck, Voorhees. Nay—None.

30

40

Exhibit P. 4.

Exhibit P. 4.

DELINQUENT TAX

Mr. J. J. Nash, Trustee

To CITY OF PERTH AMBOY, Dr.  
For Taxes and Assessments on Block 77

Item	Amount	Interest	Costs	Totals
Madison Ave Pavm't July 1907	23.....112.39	86.54		
	24.....112.39	86.54		
	25.....112.39	86.54		
	26.....112.39	86.54		
	29.....112.39	86.54		
	30.....112.39	86.54		
	31.....112.39	86.54		
	23-26			
Market St. Pav't Jan 1908	29-31.....339.37	249.43		
Taxes .....	1909 29-31.....108.60	64.61		
	1910 29-31.....115.70	60.74		
	1911 29-31.....117.00	53.23		
Received Payment,				Amount paid.....2501.19

Collector of Revenue

Exhibit P. 7.

Exhibit P. 7.

To the Honorable Board of Alderman of the City of Perth Amboy, County of Middlesex and State of New Jersey:

Your petitioners respectfully show that in the years 1907, 1908, 1909, 1910, 1911 and 1912, your petitioners JAMES NASH, JR. and ROSE NASH, were the owners of certain lots of land and premises situate on the Northeast Corner of Market Street and Madison Avenue in the City of Perth Amboy, New Jersey; that said lots are known as lots numbers 23, 24, 25, 26, 29, 30, 31, 32, 33, 34 and 35 in Block 77 as shown on the assessment map of the City of Perth Amboy, N. J.; that in the years 1913, 1914 and 1915, your petitioners were the owners of lots 23, 24, 25, 26, 29, 30, 31 and 32 in Block 77 of said assessment map; that in the year 1916 and 1917, your petitioners were the owners of lots 23, 24, 25, 26 in Block 77 on said assessment map. That during the period of time from 1907 to 1917, inclusive, your petitioner JAMES J. NASH, was trustee for your petitioners the said James Nash, Jr. and Rose Nash.

Your petitioners further show that the taxes assessed against said lots during said periods of time were as follows:

Year	Lots	Amount
1907	23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35.....	\$ 112.19
1908	23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35.....	97.50
1909	23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35.....	108.60
1910	23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35.....	115.70
1911	23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35.....	117.00
1912	23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35.....	136.86
1913	23, 24, 25, 26, 29, 30, 31 and 32.....	89.60
1914	23, 24, 25, 26, 29, 30, 31 and 32.....	82.80
1915	23, 24, 25, 26, 29, 30, 31.....	91.98
1916	23, 24, 25, 26.....	105.00
1917	23, 24, 25 and 26.....	82.08
		<hr/> \$1,139.31

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Exhibit P. 7.

Your petitioners further show that in the year 1907 Madison avenue pavement was confirmed by the said Council and the assessments accordingly levied against said lots as follows:

	Lot	Block	Amount
	23	77	\$112.39
10	24	77	112.39
	25	77	112.39
	26	77	112.39
	29	77	112.39
	30-31-32-33-34-35	77	674.34
			<hr/>
			\$1236.29

20 That on January 6, 1908, Market street pavement was confirmed by the said council and assessments levied accordingly on lot 23, Block 77, amount \$339.37.

Your petitioners further show that the following payments were made to meet taxes and assessments hereinabove set forth.

	Year	Amount
	1910	\$ 260.00
	July 17, 1912	667.26
	1913	449.56
30	Nov. 25, 1916	279.78
	July 9, 1918	82.08
	July 22, 1918	1389.46
		<hr/>
	Total payments	\$3128.14

Exhibit P. 7.

Your petitioners further show as follows: Total payments made during said period of time ..... 3128.14  
 Total amount of taxes and assessments levied against said premises during said period of time..... 2714.97  
 Over payment.....\$ 413.07

10

Your petitioners therefore pray that your Honorable Body reimburse and return to your petitioners the said sum of Four hundred and thirteen dollars and seven cents (413.07), overpayment as aforesaid with lawful interest. and—  
Your petitioners will ever pray etc.

20

30

*Notice of Appeal.*

**NOTICE OF APPEAL.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10 JAMES J. NASH, SR., Executor of  
the Last Will and Testament  
of Daniel Hallahan, dec'd,  
JAMES J. NASH, JR., and ROSE  
M. NASH,

*Plaintiffs,*

*vs.*

CITY OF PERTH AMBOY, a municip-  
al corporation, and ADOLPH  
M. METZENDORF,

20 *Defendants.*

*Action at  
Law.*

*Notice of  
Appeal.*

To Harry S. Medinets, Attorney of Defendant,  
City of Perth Amboy.

TAKE NOTICE that the plaintiffs appeal from  
the judgment of non-suit entered herein against  
said plaintiffs and in favor of said defendant,  
City of Perth Amboy, in the above court to the  
Court of Errors and Appeals of the State of  
30 New Jersey.

WELANKO & STRAUSS,  
Attorneys of Plaintiffs.

Service of the within notice is hereby acknowl-  
edged ths 14th day of January, 1927.

HARRY S. MEDINETS,  
Attorney of Defendant,  
City of Perth Amboy.

40

*Grounds of Appeal.*

**GROUNDS OF APPEAL.**

**New Jersey Court of Errors and Appeals**

JAMES J. NASH, SR., Executor of  
the Last Will and Testament  
of Daniel Hallahan, dec'd,  
JAMES J. NASH, JR., and ROSE  
M. NASH,

*Plaintiffs-Appellants,*

*vs.*

CITY OF PERTH AMBOY, a municip-  
al corporation, and ADOLPH  
M. METZENDORF,

*Defendants-Respondents.*

10

*Grounds of  
Appeal.*

20

Appellants state the following grounds of ap-  
peal in this cause:

1. Because the Court erroneously refused to  
direct a verdict in favor of the plaintiffs-appel-  
lants and against the said City of Perth Amboy,  
defendant-respondent.

2. Because the Court erroneously granted the  
motion of defendant, City of Perth Amboy, for  
a non-suit upon the evidence given at the trial.

30

3. Because the Court should have granted the  
motion for a direction of verdict in favor of the  
plaintiffs on the first cause of action set forth in  
the complaint filed in said cause, as the answer  
filed in said cause by the City of Perth Amboy,  
and the resolution passed by the City of Perth  
Amboy which was offered in evidence, admitted  
that there was the sum of \$413.17 owing to said  
plaintiffs by said City of Perth Amboy.

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*Grounds of Appeal.*

4. Because the Court should have refused the motion of non-suit because there was sufficient evidence given at the trial to make a *prima facie* case for said plaintiffs.

WELANKO & STRAUSS,  
Attorneys of Plaintiffs-Appellants.

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Service of the within Grounds of Appeal is hereby acknowledged this 14th day of January, 1927.

HARRY S. MEDINETS,  
Attorney of Defendant-Respondent,  
City of Perth Amboy.

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**New Jersey Court of Errors and Appeals**

JAMES J. NASH, SR., executor of  
the Last Will and Testament  
of Daniel Hallahan, deceased,  
JAMES J. NASH, JR., and ROSE  
M. NASH,

*Plaintiffs-Appellants,*

*vs.*

CITY OF PERTH AMBOY, a mu-  
nicipal corporation, and  
ADOLPH M. METZENDORF,

*Defendants-Respondents.*

*Action  
at Law.  
On Appeal.*

**BRIEF FOR APPELLANTS.**

This is a suit to recover the sums of \$413.17 and \$1,267.20 from the City of Perth Amboy, a municipal corporation, the suit against the other defendant having been discontinued prior to the trial herein.

Plaintiffs-Appellants allege that they overpaid the sum of \$413.17 to the City of Perth Amboy for taxes and assessments levied on their property in the City of Perth Amboy between 1907 and July 1, 1918. They filed a petition with the City of Perth Amboy (State of Case, pp. 34 and 65) for a remission of said sum, the figures in the petition alleging \$413.07 due because of an arithmetical error. Plaintiffs-Appellants allege in their complaint the charges for taxes and assessments in question, and also the payments on account thereof (State of Case, p. 6). In paragraph 18 of the first count of the first cause of action of the complaint, a recapitulation of the foregoing figures is set forth. In paragraph 18

of the answer of the City of Perth Amboy to said first count of the first cause of action of the complaint, City of Perth Amboy expressly and unequivocally admits the sum of \$1,236.29 owing by said City of Perth Amboy. Thereafter Plaintiffs-Appellants allege in paragraph 19 a payment of \$260. The amended complaint shows this payment to have been, by way of credit, allowed by the City of Perth Amboy. This is denied in the answer of the City of Perth Amboy, but Plaintiffs-Appellants offered in evidence the resolution of the City of Perth Amboy allowing said credit of \$260 (State of Case, pp. 29 and 61). Thus far, a balance of \$976.29 was shown owing by Plaintiffs-Appellants to the City of Perth Amboy. Plaintiffs-Appellants proved by their own testimony, and the receipt for taxes and assessments given by the City of Perth Amboy, a payment of \$1,389.46 in July, 1918 (State of Case, pp. 31, 33 and 63). The difference between \$1,389.46 and \$976.29 amounts to \$413.17 as claimed by Plaintiffs-Appellants.

In the other phase of this litigation Plaintiffs-Appellants show a dispute with the City of Perth Amboy, over various assessments, since the year 1907 (State of Case, pp. 27, 28, 29). They show numerous efforts to dispose of this dispute with no positive result until 1918. In 1918, Plaintiffs-Appellants allege that the City of Perth Amboy, in order to settle finally the matter, entered into an informal arrangement with Plaintiffs-Appellants to have them deposit only the principal of the taxes and assessments claimed by City of Perth Amboy (State of Case, p. 31), after which the tax collector would examine his books to ascertain if any refund should be made to Plaintiffs-Appellants and furthermore that the City of Perth Amboy would pass a resolution waiving all

interest that had accrued on the principal during the years the matter was in dispute (State of Case, pp. 31 and 32). Plaintiffs-Appellants offered in evidence the written statements of the tax collector (Ex. P-4, P-5, P-6) showing the amount owing for taxes and assessments and interest thereon, the temporary receipt given until the tax collector examined his books, and the final receipt showing the payment of the principal with a refund of \$77.94. Plaintiffs-Appellants testified (State of Case, pp. 33 and 34) that they were entitled to a larger refund but the tax collector informed them that the City of Perth Amboy would not permit him to examine for the purposes of this refund, the tax books prior to the commencement of his term of office. Plaintiffs-Appellants further testified that the councilmen of the City of Perth Amboy informed them that a resolution waiving the interest had been passed by the council of which they were then the members. (State of Case, p. 32.) Service of a notice to produce the resolution was acknowledged by the City of Perth Amboy. The resolution was not produced (State of Case, p. 45). Oral testimony by Plaintiffs-Appellants was offered as aforesaid. City of Perth Amboy in their answer denied the passage of such a resolution. The interest amounted to \$1,033.74, the remaining \$233.64 representing a duplication of charges incurred prior to July 1, 1918, but made again between July 1, 1918 and 1920, when the payment of \$1,267.20 was made (State of Case, p. 40). City of Perth Amboy moved for a non-suit. Plaintiffs-Appellants moved for a direction of verdict in their favor as to the sum of \$413.17 and interest and a denial of the motion for non-suit. The motion for non-suit was granted. The motion for direction of verdict was denied.

## POINTS.

I. The motion to direct a verdict should have been granted because of the admissions in defendant's pleadings, the resolution waiving \$260 and the admissions by way of the tax receipts.

II. The motion to non-suit should have been denied because evidence of the passage of the resolution waiving interest and proof of \$413.17 due plaintiffs-appellants was sufficient to create a question of fact to be determined by the jury.

III. Defendant-respondent, City of Perth Amboy, failed to state its reasons for non-suit when making its motion, and said motion should have been denied for such failure.

## I.

The admissions in the answer referred to must be construed most strongly against the Defendants-Respondents and most favorably to Plaintiffs-Appellants. *State v. Mayor of Jersey City*, 111 Atl. 544. The City of Perth Amboy in their answer set up no affirmative defense claiming the levy of taxes or assessments which Plaintiffs-Appellants did not allege in their complaint. They did not deny the payments made because they specifically admitted them in paragraph 18 of their answer *ante*. They could not then offer proof to vary the allegations in their answer. The testimony of the resolution, of Plaintiffs-Appellants as to the payment of \$260, the tax receipts and petition for refund must stand uncontroverted because they were admitted. There could be no question in connection with this phase of the suit to go to the jury. The Court should have granted the motion for direction of verdict.

*Dickinson v. Erie Railroad Company*, 85 N. J. L. 586.

The Court further erroneously granted the motion to non-suit Plaintiffs-Appellants on this cause of action, because for the purpose of a motion of non-suit the truth of the evidence offered by Plaintiffs-Appellants and every inference of fact favorable to them that can be legitimately drawn therefrom, must be admitted. *Barry v. Borden Farm Products Company*, 125 Atl. 37; *Fox v. Great Atlantic & Pacific Tea Company*, 87 Atl. 339; *Weston Electrical Instrument Company v. Benecke*, 82 Atl. 878; *Andre v. Mertens*, 88 N. J. L. 626; *Jones v. Public Service Railway Company*, 86 N. J. L. 646; *Littman v. Slack*, 135 Atl. 776, and *Kerner v. Zerr*, 135 Atl. 866.

## II.

Plaintiffs-Appellants introduced evidence of the passage of a resolution waiving accrued interest. The Court erroneously thought that only the written resolution itself could be offered. In considering this question it should be observed that City of Perth Amboy did not allege affirmatively that the resolutions of said city are only evidential or valid when reduced to writing. They simply deny its passage.

In *Dillon on Municipal Corporations*, Sec. 557, we find.

“But a distinction has sometimes been drawn between evidence to contradict facts stated on the record and evidence to show facts omitted to be stated upon the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record, and make the record the only evidence”;

and further in Sec. 588:

“where the records of a municipal corporation have been so carelessly and imperfectly kept as not to show the adoption of a resolution or other acts of the City Council, and there is no written evidence in existence, parol testimony may be admitted *e. g.* to show that certain work was done by authority of the City, by proving the passage of a resolution of the council,” etc.

Evidently the City of Perth Amboy was guilty of such lapses in the past for in *Bigelow v. City of Perth Amboy*, 25 N. J. L. 297, we find a similar situation. The Chief Justice held in that case,

“Nor can the right of the creditor to recover depend upon the regularity with which the minutes of the City Council are kept, nor whether they are kept at all. It is expressly proved, by the City Clerk, that a resolution substantially the same as that shown to the clerk of the plaintiff was passed by the council. Whether the resolution furnished to the mayor was copied from the minutes, or furnished to him before the minutes were recorded, OR WHETHER THEY WERE RECORDED AT ALL (capital words mine) is a matter which can not prejudice the claim of the creditor.”

Followed in *Cook v. Manasquan*, 80 N. J. L. 206.

In the present case, several of the councilmen present at the meeting at which the resolution was passed and who had voted on it, informed one of the Plaintiffs-Appellants that such a resolution had been passed. The testimony of Plaintiffs-Appellants as to these statements went into evidence and the truth of these statements must be admitted for the purpose of a motion of non-suit. *Barry v. Borden Farm Products Company*, *ante*, and the other cases cited *ante*.

Furthermore such statements are admissible in evidence and binding on the City of Perth Amboy.

They were made by the councilmen present at the meeting, who voted on the resolution in question, who were the proper officials to pass such a resolution, and were declarations of public officers within the scope of their authority and therefore binding on the city. 22 *Corpus Juris* 392; *Vanderwater v. Town of Wappinger*, 74 N. Y. S. 699.

Plaintiffs-Appellants paid their money to the tax collector in good faith. Their rights should not be prejudiced by any omission to reduce the resolution to writing. *Hutchinson v. Pratt*, 11 Vt. 402; *Bank of United States v. Dandridge*, 12 Wheat (United States) 64.

In resume we can say nothing more effective than the statement made by Justice Trenchard in *Barry v. Borden Farm Products Company*, 125 Atl. 37, in an excellent opinion of this honorable Court.

“Motions for non-suit and for the direction of a verdict for the defendant, for the purpose of the motions, in effect admit the truth of the evidence, and of every inference of fact that can be legitimately drawn therefrom, which is favorable to the plaintiff, but deny its sufficiency in law; and where such evidence or inferences of fact will support a verdict for the plaintiff, such motions must be denied.”

That rule of law is well settled in this State as witness *Fox v. Atlantic & Pacific Tea Company*, 87 Atl. 339.

### III.

City of Perth Amboy made a motion for non-suit stating “there is absolutely no evidence before this Court and jury to show any legal liability on the part of the defendant” (State of

Case, p. 50). In this motion, the city failed to point out any absence of proof or any matter of law, disentitling the plaintiffs to go to the jury.

It was the duty of counsel to point out the questions of law or fact, or both, upon which he relies for a non-suit. *Koch v. Costello*, 108 Atl. 223, and *Ippolito v. Borough of Ridgely*, 109 Atl. 337.

We, therefore, respectfully urge and submit that the judgment should be reversed and the case be remanded for new trial except as to the sum of \$413.17 and as to that it is urged that judgment be entered in favor of Plaintiffs-Appellants and against the City of Perth Amboy in the sum of \$413.17 and interest from July 1, 1918.

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