

New Jersey Court of Errors and Appeals

J. VICTOR D'ALOIA,

Plaintiff-Appellant,

vs.

CITY OF SUMMIT,

Defendant-Respondent.

On Appeal
from
Supreme

10

Court

APPELLANT'S BRIEF.

Facts.

This is an action brought to recover fines paid, in summary proceedings for the violation of a municipal ordinance, the convictions having been set aside as being illegal. On the morning of July 9th, 1914, six persons were taken into custody, upon warrants issued upon complaints, charging each with violating a municipal ordinance of the City of Summit. They were immediately called upon to plead and each entered a plea of "not guilty"; without counsel they were summarily tried on that morning and found guilty; sentence was immediately imposed and the judgment of the court, in each case, was that each and every defendant pay a fine or go to jail for a certain number of days. After conviction and sentence, while in custody, to obtain his release from imprisonment, each paid whatever portion of his fine he was able to obtain through relatives and friends. After his release, and upon consulting counsel, on July 17th, 1914, each defendant procured an order reviewing his conviction; the Court of Common Pleas set aside the

convictions as being illegal; the order of the Court of Common Pleas of Union County was sustained by the Supreme Court in *City of Summit vs. Iarusso*, 87 N. J. Law, page 403. Subsequently this action was brought by the appellant as assignee to recover the sums paid on account of the fines, in the Summit police court, and judgment was rendered for the plaintiff; from the reversal of said judgment by the Supreme Court
 10 this appeal is taken.

POINT I.

The payments of the fines, which were the subject of the suit in the trial court, were not voluntary payments.

The District Court found that the payments were not voluntary payments, but were made under what is known in law as "Duress of the person" (Case, p. 4, l. 30).
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The rule is well settled that the Supreme Court will not review the decisions of the court below on questions of fact. It can only look to see if there was legal evidence before the court below upon which its judgment might be based. It will not reverse, though the evidence might lead it to a different conclusion.

N. Y. & N. J. Tel. Co. v. Connelly, 40
 Vroom, 182.

30 There was ample evidence to sustain the finding; indeed the respondent admitted that at the time of the payment of the fines the defendants (appellant's assignors) were under arrest, having been sentenced to pay a fine or serve time in jail (Case, p. 3, l. 10).

The trial Court correctly found as a fact that, at the time the payments were made, the persons making them did so under duress, to avoid imprisonment, and such finding of fact should not have
 40 been disturbed by the Supreme Court.

Duress of imprisonment arises where a person is actually imprisoned, 1, for an improper purpose without just cause, 2, for a just cause without lawful authority and 3, for a just cause and under proper authority but for an improper purpose, 4, where an imprisonment, originally lawful, has been abused. If under any of these various phases of this species of duress the person arrested execute a contract or pay money for his release, he may avoid the contract or may recover the money in assumpsit for money had and received. 10

Watkins v. Baird, 6 Mass., 506, 4 Am. Dec., 170.

Imprisonment is the restraint of one's liberty, whether in prison or elsewhere, for "every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of a common prison." 20

9 Cyc. 444.

Under the decision of the Supreme Court in the case of "*Tarusso v. City of Summit*" 87 N. J. L. 403, the proceedings and the convictions were declared illegal and therefore invalid ab initio, Justice Parker going as far as to hold in that case, on page 406, that the complaint in each case failed to set forth any violation of a valid ordinance and concludes that no support for the complaint can be found in the Charter act which was adopted by the respondent and by which it is governed. Therefore the fines were paid by the accused while imprisoned without just cause and without lawful authority. At the time of payment each man was confronted with the judgment of conviction "to pay the fine or go to jail." The Supreme Court in its decision states that two alternatives were open to each person, an appeal to the Court of Common Pleas upon giving a bond and a review of the conviction under the act of 1908. Let us consider the circumstances on the morning of July 30 40

9th, 1914. These men had been summarily arrested, tried, convicted and sentenced. Instead of being allowed to go to their respective homes and the judgment of the court enforced by execution against the chattels or body of each defendant as provided for in the Charter act governing said city and constituting its police court, (Comp. Stat. p. 1362) they were, without due process, restrained of their liberty and kept in custody. Their imprisonment was illegal and without lawful authority; no execution against their bodies had been issued; they had been sued by the City of Summit in debt and judgment had been rendered for the plaintiff. Whatever payment was made by any of them was solely for the purpose of being released and to avoid imprisonment.

The Supreme Court also lays stress upon the fact that it appears from the "record of conviction" that no protest was made. What, if any record, could be made of a protest so as to appear in the docket of the Summit police court? By what rule of law is a record of a protest required?

It is the rule that, unless required by statute, a protest is not essential. A payment made under protest does not become involuntary or under duress by reason of such protest. What governs is the coercion attending the payment. The defendants would not have paid any portion of their fines if they had not been kept in custody and actually imprisoned, after the judgment had been rendered. The only alternative present, at the time, was to go to jail for a certain number of days and this alternative was avoided by the payment.

What duress is has been plainly expressed in the decisions of the courts, and by the text authors. Sir William Blackstone divides it into two parts; first, duress of imprisonment, where a man actually loses his liberty; and second, *per minas*, of

which four instances are enumerated by Lord Coke; 1st, fear of loss of life; 2nd, of member; 3rd, of mayhem; 4th, of imprisonment. To constitute duress the imprisonment, threatened or inflicted, must be unlawful. It will not do if the threats are directed to the burning of houses or the destruction of goods, Co. Litt. 253, b. *Baron Parke* in *Atlee v. Backhouse*, 3 M. & W. 650 says:

“The law is clear, although there is some case in Viner’s Abridgment to the contrary; that in order to avoid a contract by reason of duress, it must be duress of a man’s person, not of his goods.”

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Turner v. Barker, (Supreme Court, June 1901) 66 N. J. L., 37 Vroom, 496, is not applicable because it merely involved a scow which had been libelled in admiralty for the amount of the wharfage. The owner of the scow, without contesting the claim, paid it to the proctor of the libellant and without contesting the claim in a direct proceeding brought a collateral action in the State courts and it was held that the money paid in the admiralty suit was paid voluntarily and not under duress. The course pursued by the plaintiff enabled him to release his boat without litigating the validity of the claim against it in the tribunal where the libellant had acquired a right to have the matter decided. To permit the matter to be afterward litigated in a forum of the plaintiff’s choosing is contrary to sound policy.

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These convictions were reviewed and set aside by the Union County Court of Common Pleas; upon certiorari, by the respondent, the convictions were passed upon by the Supreme Court (*Iarusso v. City of Summit*, supra). It cannot be said that no steps were taken to set them aside, but on the other hand with due diligence each defendant, immediately upon being released from custody, undertook to test the legality of his conviction. After said convictions were declared illegal and vacated and set aside, this action was brought.

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POINT II.

In the case at bar there was a choice of making the payment or going to jail and it is a clear case of duress in fact.

Harrington v. City of New York, 81 N. Y. Suppl., 667, 40 Misc. Rep., 165, came up on a demurrer to the complaint and holds that a law giving the Municipal Court of the City of New York jurisdiction over actions for breach of contract, express or implied, does not give that court jurisdiction of an action to recover a fine of the city imposed by a city magistrate who had no jurisdiction to impose the fine. Not only did the complaint fail to allege that the payment was made in ignorance of the invalidity of the judgment but the invalidity of the magistrate's decision did not depend upon any facts outside the record, but upon the statute limiting the magistrate's jurisdiction. Justice Clarke, speaking for the Supreme Court, Appellate Term, expressly admits that there are two classes of cases in which courts permit the recovery of money paid under an erroneous assessment or void judgment, although there was no duress in fact; but the case before him, where the plaintiff had paid a fine for speeding an automobile, was not within the rules permitting a recovery because there the plaintiff's mistake was one of law, not of fact. Nor is it denied that a plaintiff is permitted to recover money paid pursuant to an erroneous assessment or judgment from which appeal is taken and which is subsequently reversed. In these cases the money may have been paid under a mistake of law, but the payment is not considered voluntary, and is said to have been made under coercion of law. The judgment being void for want of jurisdiction, it was a nullity, and the plaintiff might have properly resisted it. As

there was no judgment requiring obedience, the payment was not made under coercion of law.

But what becomes of this reasoning, as applied to the case at bar, where the several persons were actually locked up in a cell all day and paid the money in suit in order to get out of jail?

In the cases quoted by Justice Black, imprisonment or fear of imprisonment, which constrained or influenced the payment, was not an element. It was not even shown by the statement of facts that the arrest had anything to do with the payment, or that the persons were constrained or influenced thereby to make it. It was not even shown that because of the duress by the arrest, the persons made the payment nor could any such thing be inferred. 10

The fact that orders to review the convictions were not obtained until July 17th, 1914, after a lapse of 8 days, is easily explained because during said month the Court having power to make such orders does not sit and is not readily accessible, it being vacation time. 20

It is the settled law of the state that where a party, without mistake of fact or fraud, duress or extortion, voluntarily pays money on a demand which is *not enforceable* against him, he cannot recover it back.

Camden v. Green, 54 N. J. L., 591.

And it has long been held that, in an action for money had and received, a recovery may be had for coercion which would not amount to the duress necessary to the avoidance of a contract. 30

Keener, Quasi-Cont., 426, note 2.

The action for money had and received, in its spirit and objects, has been correctly likened to a bill in equity, and it may in general be maintained whenever the evidence shows that the defendant has received or obtained possession of 40

money belonging to the plaintiff, which in equity and good conscience he ought to refund to him. It lies only for the money which *ex aequo et bono*, the defendant ought to refund, as for money paid by mistake, or upon a consideration which happens to fail, or for money obtained through imposition, express or implied, or extortion, or oppression, or an undue advantage taken of the plaintiff's situation. In short, the gist of this
10 kind of action is that the defendant, upon the circumstances of the case is obliged, by the ties of natural justice and equity, to refund the money.

This proposition is fully sustained by the English authorities.

Dew v. Parsons, 2 B. & Ald. 562;

Steele v. Williams, 8 Exch. 625;

Parker v. Railway, 7 M. & G. 253;

In this country the weight of authority seems
20 to be the same way.

Chase v. Dwinal, 7 Greenl. (Me.), 134;
 20 Am. Dec. 352;

Beckwith v. Frisbie, 32 Vt. 559;

Mobile etc. Ry. v. Steiner, 61 Ala. 559;

Chicago etc. R. R. v. Company, 79 Ill.
 121;

Louisville, etc. R. R. v. Wilson, 132 Ind.
 517, N. E. 311, 18 L. R. A. 105;

30 *Scottish, etc. Co. v. Herriott*, 109 Iowa,
 606, 80 N. W. 665, 77 Am. St. Rep.
 548;

Swift Co. v. United States, 11 U. S.
 22, 4 Sup. Ct. 244, 28 L. Ed. 341.

Restitution is a remedy well known to the common law. Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of a judgment against him which was subsequently
40 reversed.

Habeler v. Meyer, 132 N. Y. 363;

POINT III.**The return of the money paid as fines
is compulsory.**

Ch. 18, P. L. 1911, p. 30 provides that in any case where a defendant in any proceeding before a police magistrate, in any city of this State, has paid a fine on being found guilty of any offense and has appealed from said judgment and obtained a decision in his favor terminating the case of the said city against him, it shall be lawful for the body in control of the finances in said City wherein such trial was had, to return to the said person the amount of the fine so paid by him. 10

This act provides for the restoration of property of which any person may be illegally deprived and therefore affects public interests. The words "It shall be lawful" have been construed and interpreted as mandatory and compulsory. *Central Land Co. v. Bayonne*, 56 N. J. L. 297. 20

Conclusion.

It is therefore respectfully submitted that the fines paid by the appellant's assignors in the Police Court of the City of Summit were paid under duress and were not voluntary payments because (1) assignors were actually imprisoned and because (2) the imprisonment was unlawful. This being so, restitution of the fines was the only proper thing, and the decision of the Supreme Court reversing the decision of the District Court in favor of this appellant, should be itself reversed and that of the District Court should be affirmed. 30

Respectfully submitted.

ANTHONY R. FINELLI,
Counsel with Plaintiff-Appellant.

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POINT III

The return of the money paid as fines...

It is further provided that in any case where a defendant in any proceeding before a justice... shall be found guilty of any offense...

This act provides for the restoration of property of which any person may be illegally deprived and therefore affects public interests. The words "shall be found guilty" have been construed and interpreted as mandatory and compulsory.

Conclusion

It is therefore respectfully submitted that the fines paid by the applicant's assistants in the Police Court of the City of Toronto were paid under duress and were not voluntary payments because (1) assistants were actually apprehended and (2) the Department was unaware of this being so, therefore the decision of the Supreme Court regarding the decision of the District Court in favor of the applicant should be null and void and that of the District Court should be affirmed.

Very respectfully submitted,

W. J. ...

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<i>v.</i>	
CITY OF SUMMIT, <i>Defendant-Respondent.</i>	

Brief of Defendant-Respondent, City of Summit.

Statement of Facts.

A statement of facts on behalf of the defendant-respondent, City of Summit, is necessitated by the incorrect and improper statement of facts in appellant's brief. Many of the statements of facts set forth in appellant's brief, not only in the introduction, but also in the course of the argument, are incorrect and highly improper and objectionable because they are neither supported nor justified by the record on appeal.

This action was brought to recover from the City of Summit certain fines imposed upon several persons by the Police Justice of the City of Summit for the violation of a city ordinance (Case p. 2, l. 21). The right, if any, to recover these fines from the City of Summit was assigned to appellant after the payment of the fines (Case p. 2, l. 26). The statement in appellant's brief that each of these persons entered a plea of "Not Guilty" (p. 1, l. 27) on his trial before the police justice is ~~none~~^{unwarranted}, nor does such a fact appear anywhere in the State of Case. Moreover, the statement in appellant's brief (p. 1, l. 27) that these persons were without counsel

on the trial before the police justice is likewise unwarranted by anything which appears in the State of Case. Furthermore, the statement "after conviction and sentence while in custody, to obtain his release from imprisonment, each paid whatever portion of his fine he was able to obtain through relatives and friends" (p. 1, ll. 32, 36) is likewise not justified by anything in the record and is absolutely false. Another statement of fact in appellant's brief that is incorrect and improper for similar reasons is the statement on page 7, l. 3, "but what becomes of this reasoning as applied to the case at bar where the several persons were actually locked up in cell all day and paid the money in suit in order to get out of jail?" This statement is both unwarranted by anything in the record and unjustified by the facts of the case as they actually transpired. We may not pass unchallenged the effort of the appellant to create the impression that "third degree" methods were employed in the police court of the City of Summit. A due regard for plain truth demands the statement that while the persons charged with the violation of a city ordinance were technically in custody, they were never locked up in a cell, not to mention being locked up "all day." The unvarnished facts appear from the State of Case to be that these persons were under arrest for the violation of a city ordinance, having been sentenced to pay a fine or serve time in jail (p. 3, ll. 10, 12), and that at that time they paid the fines, amounting to \$290, *without any protest*.

Subsequent to the imposition and payment of the fines, the convictions in the Police Court of the City of Summit were, upon review, set aside by the Union County Court of Common Pleas, and on *certiorari* the Supreme Court affirmed the action of the Courts of Common Pleas.

This action was thus brought in the District Court of the City of Elizabeth by the appellant as assignee of some of the defendants in the Summit Police Court to the fines there paid. The District Court judge gave judgment for the appellant here, holding that the fines were paid under "duress of the person" (case, p. 4, l. 34). From this judgment the defendant City of Summit appealed to the Supreme Court, which reversed the judgment of the District Court (see opinion by Mr. Justice Black, on page 6 of the State of Case).

The appellant notes three grounds of appeal. (Case, p. 11), which will be dealt with *seriatim*.

Point I.

THE DECISION OF THE DISTRICT COURT THAT THE FINES WERE PAID UNDER DURESS IS A RULING OF LAW, NOT A FINDING OF FACT, AND THE SUPREME COURT SO TREATED IT CORRECTLY.

Appellant's first contention is that the decision of the District Court that the fines were paid "under duress of the person" is a finding of fact, and that such finding is final and conclusive (Case, p. 11, ll. 21-28, and Brief, p. 2, ll. 17-35). But it is very clear that the District Court's decision is not a finding of fact, but a ruling of law. The case in the District Court as stated by the judge of that court shows (1) That the fines were paid without protest (Case, p. 3, l. 16); (2) That the defendants in the Summit Police Court had a right of appeal under the charter of the City of Summit (Case, p. 3, ll. 18-35); (3) That they had an appeal under Chapter 228 of the Laws of 1908, p. 442 (Case, p. 3, ll. 35-39). As Mr. Justice Black said in the Supreme Court (Case, p. 6, ll. 30-35), "The appeal in this case presents a single point for discussion and de-

cision, viz.: whether the payment of fines which were the subject of the suit on the trial court were voluntary payments and made without duress of the person." The error of the trial court was an error of law, as what constituted a duress and what was a voluntary payment. The facts in the case were undisputed. In fact, the case was submitted to the trial court on admitted statements of fact (Case, p. 2, 3). The only question, there and here, is as to the application of the law to those facts.

Nor does appellant rely at length on this point, but merely touches it in passing (Brief, p. 2, ll. 20-35). The main question is that stated by the Supreme Court, which is our second and main point.

Point II.

A FINE, PAID WITHOUT PROTEST, WHERE THERE ARE OTHER COURSES OPEN TO THE DEFENDANT, IS NOT MADE UNDER DURESS, BUT IS A VOLUNTARY PAYMENT, AND MAY NOT BE RECOVERED.

Duress is defined as "personal restraint or fear of personal injury or imprisonment" (*Bouvier's Law Dictionary*, 3d Ed.); or as "unlawful constraint exercised upon a man whereby he is forced to do some act against his will" (*Black's Law Dictionary*); or "A condition which exists where one, by the unlawful act of another, is induced to make a contract or perform or undergo some act under circumstances which will deprive him of the exercise of free will, a condition of mind produced by the improper external pressure or influence that practically destroys the free agency of a party and causes him to do and act or make a contract not of his own volition; personal restraint or fear of personal injury or imprisonment; unlawful restraint, intimidation or compulsion of another to such an

extent or degree as to induce a person to do or perform some act which he is not legally bound to do, contrary to his will and inclination; an action of threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract; a restraint which overcomes the will of the person constrained and which may be the result of imprisonment or threats of immediate imprisonment; a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury." (14 *Cyc.*, 1123). See *Rolloson v. DeHart*, 134 Mo. App., 633, 114 S. W., 1122, 1123 where it is said: "as is said in *Francis v. Hurd*, 113 Mich., 250, 71 N. W., 582, there must be threats used in order to constitute duress." See also *Knigh v. Brown*, 137 Mich., 396; *Leather Co. v. Watke*, 116 N. W., 174, 175; *Smithwick v. Whitley*, 67 S. E., 913, 914.

The true nature of duress is brought out in the case of *Cantonwine v. Bosch Bros.*, 127 N. W., 657 (Ia., 1910). This was an action in equity to set aside an agreement transferring certain property to the defendants. The defendants, who were the keepers of a country store, in good faith, thought that plaintiff had robbed them of a certain amount, and the plaintiff, in compromise thereof, paid a certain amount to the defendants. The Court in its opinion said (p. 658):

"Starting, then, with the assumption that the claim of the defendants was in good faith
 * * * the one question remaining is whether they obtained the settlement by coercion.
 * * * His demeanor and conduct as revealed by himself was hardly that of a man who was being held up or compelled to relinquish the accumulation of years of work wholly against his will. *It may be conceded that he shows that he acted reluctantly; but that is not enough. It must appear that his*

will was overpowered by the threats or menaces of others."

In every case, then, duress appears to consist in forcing a person to act against his own will.

As the Supreme Court said (Case, p. 7, l. 33): "The legal idea of duress consists in forcing a person to act against his own will. It does not exist, when the person upon whom it is charged it has been exercised, has an *option* or *choice*, as to whether he will do the thing or perform the act, said to have been done under duress."

The clearest proof that the defendants in the Police Court did not act under duress is found in the fact that there were at least *three courses* open to them in addition to the one which they pursued:

1. They might have paid the fines under protest. This would have shown that the payments were involuntary. But there is no evidence in this case that the fines were paid under protest. In point of fact the docket entries of the Police Justice of the City of Summit show that no protest was made when the fines were paid on July 9th, 1914 (Case, p. 3, l. 17).

2. The City of Summit is governed by Chapter 52 of the Public Laws of 1899 (page 96). Section 78 establishing a Police Court provides: "That in all cases where the penalty shall exceed \$20, an appeal may be taken in the same manner as an appeal might be had from judgments in courts for the trial of small causes" (p. 135). The method of appeal is set forth in Section 80 of the act constituting courts for the trial of small causes (P. L. 1903, p. 276). Under the terms of these two acts the defendants in the Police Court, if they had desired to contest payment of the fines, might have taken their appeal and avoided the payment of the fines. But they evidently elected not to do this because no

such action was taken by them (case, p. 2, ll. 18-35).

3. The defendants in the Police Court also had the right to apply to the Court of Common Pleas for a review of the convictions under Chapter 228 of the Laws of 1908, page 442. This was the action which they ultimately did take, but not until after they had paid the fines in the manner hereinbefore set forth (Case, p. 3, ll. 35-40).

It is apparent, then, that at the time the fines were imposed by the Police Justice of the City of Summit, the defendants in that court were not under any duress or compulsion to pay the fines, because they had other remedies available to them. For example, the appeal under the act relating to courts for the trial of small causes would have stopped the execution of the judgment of conviction by the Police Court of the City of Summit. That the defendants in the Police Court paid the fines voluntarily is fairly indicated by the fact that although the fines were paid on the 9th of July, the proceedings were not questioned by them until the 17th of July. Appellant's explanation of this fact cannot be taken seriously (Brief, p. 7, ll. 18-23). And having paid the fines without resorting to other remedies, which were available to them, they must be taken to have paid them voluntarily. If the payments are made voluntarily there can be no question but that the defendants in the Police Court or their assignee, the plaintiff in this suit, is not entitled to recover.

The authorities in support of these propositions, which were adopted by the Supreme Court, are numerous and conclusive.

"It is not enough, however, for the plaintiff to show that prior to the time when he made the payment which he seeks to recover, he was acting under duress; it must appear that he

was acting under compulsion *at the time of making the payment* which he seeks to recover." (*Keener on Quasi-Contracts*, p. 439).

"A judgment debtor who, while under arrest under an execution, pays the amount thereof, while a remedy exists in his favor of *certiorari*, is precluded thereby from maintaining an action to recover it." *Walton v. Robb* 1 Ashm. 43 (Pa. 1831).

The case of *Bailey v. Incorporated Town of Paulina*, 69 Iowa 463, 29 N. W. 418, is very similar to the case at bar. It holds that where a defendant is convicted on a town ordinance which is void, and pays his fine without disputing its validity and without protest he cannot recover the amount of the fine in an action against the town. The opinion of the Court is brief and may be quoted with profit.

BECK, J.: 1. "The amount in controversy being less than \$100, the cause was sent here upon the certificate of the judge of the Circuit Court, stating the question for our decision in the following language: 'P., an incorporated town, passed an ordinance prohibiting the sale of all kinds of intoxicating liquors, including whiskey, which ordinance was void. S. was arrested for violating said ordinance by sale of whiskey, and when arraigned before the Mayor of said town pleaded not guilty to the charge, but did not plead to raise the question that the ordinance under which he was arrested was invalid. He was tried under the plea of not guilty, but was found guilty under the evidence, and fined in the sum of \$60, etc., which fine and costs S. paid without any protest. Can S. or his legal assignee recover said fine and costs so paid, back in an action against the town, the payment of the same having been made while he was under arrest?' * * *

"2. It is shown that the payment was made 'without protest' which, as we understand the language means that it was paid by plaintiff's assignee without objection or the denial of the justice of the claim, or assertion of his own rights. A payment so made is regarded as voluntary, and in the absence of fraud, deceit, duress or mistake of fact, the money cannot be recovered back. *Kraft v. Keokuk*, 14 Iowa 86; *Espy v. Fort Madison*, Id. 226.

"3. * * * It is insisted that he was under duress when he made the payment, by reason of the fact that he was under arrest. But it is not shown by the statement of facts certified to us that the arrest had anything to do with the payment, or that the defendant was constrained or influenced thereby to make it. It is not shown that because of the duress by the arrest, the defendant made the payment, nor can any such thing be inferred. We may readily presume that the defendant paid the fine and costs because he believed the judgment against him was valid, and this we are required to presume in the absence of any showing of objection, or that the payment was made under protest."

Harrington v. City of New York, 81 N. Y. Supp. 667, 40 Misc. Rep. 165 states the same rule. The plaintiff here had paid a fine for speeding an automobile, and after voluntarily paying the fine brings suit on the ground that the city magistrate acted beyond his jurisdiction and that his act was void. Referring to the decision in the case of *Bailey v. Town of Paulina*, the Court says:

"In the complaint before us it is nowhere alleged that the payment was made to avoid detention or imprisonment, or because of fear of imprisonment, which constrained or influ-

enced defendant to make such payment. There is not even an obligation of objection or protest. The complaint merely alleged that the fine was imposed and paid. The plaintiff has since learned that the magistrate had no authority, under the statute, to impose the fine. A fine cannot be recovered which is voluntarily paid under a mistake of law'' (p. 669).

The same rule is indicated in the case of *Houtz v. Board of Commissioners of County of Unita*, 11 Wyo. 152; 70 Pac. 840, (1902). The defendant in the suit below was charged with bringing sheep into the State without notifying the Board of Sheep Commissioners, as was required by law. Defendant below was summoned before a justice. The offence charged was outside the jurisdiction of the justice, except as an examining magistrate. He erroneously lead the party charged to believe that he had jurisdiction to impose a fine, but that an appeal might be taken. The accused entered a plea of guilty and paid the fine. The Court in the course of its opinion said:

“If the payments were induced, not because of the threatened imprisonment or actual constraint occasioned by the order of the justice, but preferably to close the matter and avoid further inconvenience and trouble without waiting on the District Court, and the justice and prosecuting attorney agreed to the expressed desires and the record was made up accordingly, and the party was allowed to depart upon payment of the smallest penalty that could be inflicted on the proper forum, the District Court would have been warranted in finding the payments to have been voluntarily made. * * * It seems to us immaterial that the parties may have misconceived the authority of the magistrate and believed that

an appeal was the method to be pursued in reaching the District Court. There was no misunderstanding of the facts upon which the complaint was based, nor of the charge preferred against them; and while the proceedings taken to settle the matter were irregular and unauthorized by law, we are inclined to the opinion that the situation did not afford ground for the recovery back of the money."

The general rule covering the objection has been expressed as follows:

"A fine illegally imposed may be recovered back where it was paid involuntarily or under duress. * * * The mere fact, however, that the judgment imposing a fine is void, as being in excess of the jurisdiction of the court, does not constitute a sufficient ground for recovering back money paid without objection or protest." 19 Cyc. 558.

If the payment of a fine or other money is voluntary there may be no recovery. *Carver v. United States*, 111 U. S. 609, at 612; *Houlhan v. Inhabitants of Kennebec County*, 81 Atl. 449 (Maine 1911).

The rule set forth in the preceding cases has also been established as law in this State. In the case of *Camden v. Green*, 54 N. J. L. 591, the Board of Excise Commissioners of the City of Camden demanded \$500 for a license, which the plaintiff in the court below paid. It seems that P. L. 1891, p. 221 had reduced the fee for liquor license in the City of Camden to \$300. The plaintiff in the court below thereupon brought suit against the City of Camden to recover the excess of \$200. The decision of the Supreme Court in refusing a recovery of the excess was unanimously affirmed by the Court of Errors and Appeals. "In such a transaction there is nothing to take the case out of gen-

eral principle, that where a party, without mistake of fact or fraud, duress or extortion, voluntarily pays money on demand which is not enforceable against him, he cannot recover it back" (p. 593, citing authorities).

"There is considerable authority for the proposition that where a municipality, in good faith, but under a misapprehension of the law, demands a greater sum than it is legally entitled to, for a license to carry on a particular business, a person who, within knowledge of the facts, pays the sum demanded, cannot recover back the excess" (p. 594, citing authorities).

"The impolicy of permitting a contestable demand, made on behalf of a municipality by their board and agents, acquiesced in and paid, without a final relinquishment of the right to contest the same, is pointed out by the Chief Justice in *Davenport v. City of Elizabeth*, 12 Vroom 362, and should bar suits under conditions like those in the present case."

In the case of *Mee v. Town of Montclair*, 86 Atl. 261, the plaintiff, a patrolman in the Town of Montclair, was fined for delinquency and was told to endorse his salary check to the Town in payment thereof. The Court of Errors and Appeals said:

"The evidence did not show that the fine was illegally imposed, nor does it appear that any coercion was used to compel the payment. The Chief of Police made no threats. We are expected to surmise that the payment was illegally exacted and paid under fear for the case is barren of evidence to support such a contention. The facts were thoroughly known to the respondent; he did not protest against the imposition of the fine or the payment thereof. We consider that the payment was a vol-

untary one. It is a well-settled and universally recognized general rule that money voluntarily paid under a claim of right and with knowledge of the facts on the part of the person making the payment or affected by it cannot be recovered back on the ground that the asserted claim was invalid or unenforceable. 22 Am. & Eng. Ency. Law. p. 509."

The same rule is enunciated in the case of *Shoemaker & Co. v. The Board of Health of Gloucester City*, 83 N. J. L. 425, which holds that the fact that a payment of a license fee to a city board of health was accompanied by a written protest against the right of the board to exact it, does not relieve the payment of the character having been voluntarily made. The case is based upon *Davenport v. City of Elizabeth*, hereinbefore referred to. The Court says:

"The *status* of the plaintiff here, therefore, resolves itself into *argumentum ab inconvenienti*, for it had the privilege and opportunity before paying the fee to remove the ordinance upon the claim of illegality to this Court, by writ of *certiorari*, which writ would operate as a *supersedeas*. It chose the alternative of paying the fee, and thus secure the privilege of operating under its license almost during the entire license period.

"The rule in this state is settled beyond possibility of reasonable controversy, that under such circumstances a payment is impressed by law with the character of having been voluntarily made. *Camden v. Green*, 25 Vroom 591; *Turner v. Barker*, 37 Id. 496; *Fuller v. Elizabeth*, 13 Id. 427."

It is therefore clear from these cases that the rule of our courts is that if the plaintiff had any alternative than to make the payment, the payment

must be regarded as having been voluntary, and therefore not recoverable.

The New Jersey cases thus far mentioned have been cases where a municipality is involved, and as to a municipality the rule is most strictly enforced. The same rule has been applied, however, in cases where an individual is concerned as a defendant. In the case of *Turner v. Barker*, 66 N. J. L. 496, the owner of a wharf at which a scow had been unloaded libeled the scow in admiralty for the amount of the wharfage. The owner of the scow, without contesting the claim, paid it to the proctor of the libelant and then brought the action in the State courts and recovered it from the libelant. In this action it was found that the plaintiff did not owe the wharfage, but it was not found that the defendant had as libelant, been guilty of fraud or extortion, or that he knew or ought to have had knowledge that the scow was not liable. It was held that the money paid in the admiralty suit was paid voluntarily and not under duress of goods, and that upon the facts proved it could not be recovered. The Court of Errors and Appeals said:

“The judgment of the Common Pleas must be reversed. The plaintiff did not make out a case of extortion. The payment by the plaintiff of the claim for wharfage with full knowledge of the facts was a *voluntary one even if he did not owe it.*

“The proposition maintained by the case annotated upon this subject in Smith’s *Leading Cases* is that money paid under regular legal process in a judicial proceeding, without contest, and with a full knowledge of the facts is, in the absence of fraud, not recoverable. 2 Sm. Lead. Cas. (8th Am. ed.) 436.

“There is nothing in the facts of the present case to take it out of this rule or to invoke

the rule with respect to the duress of goods. The essential factors of a duress of goods by the use of process were lacking. The libelant had not received pay for the scow's use of the wharf and had a legal right to test its liability in a competent tribunal of his own selection. Moreover, a complete answer to the claim of duress is contained in the finding of the trial court that the 'plaintiff was of ample pecuniary ability to give sufficient bond to enable him to procure the release of the said boat from the custody of the said United States marshal.' This fact destroys the force of the plaintiff's contention that the immediate delivery by him of his boat to complete a contract of sale compelled him to pay the claim against it. Under the circumstances, his payment of the claim was a matter of convenience merely."

In view of these authorities the conclusion of the Supreme Court seems well grounded (Case, p. 9, ll. 20-28).

"It, therefore, seems to be the rule deducible from the cases that if the defendants had the alternative of making the payments, the payments must be regarded as having been voluntary and, therefore, not recoverable. They were made without protest, and two forms of appeal were available to the defendants as alternatives to paying the fines."

Point III.

THE CLEAR IMPLICATIONS OF THE STATUTES, AS WELL AS THE DECISIONS OF THE COURT, JUSTIFY THE RETENTION OF THE FINES BY THE CITY OF SUMMIT.

Chapter 18 of the Laws of 1911 (p. 30) provides as follows: "In any case where a defendant in any proceeding before the recorder or other police magistrate in any city or other municipality of this State, has paid a fine on being found guilty of any offence and has appealed from said judgment and obtained a decision in his favor terminating the case of the city or municipality against him, it shall be lawful for the board of finance, or other body in control of the finances of the said city or municipality wherein such trial was had, to return to the said person the amount of the fine so paid by him."

The appellant contends (Brief, p. 9, ll. 15-20) that this statute affects the public interests, and that therefore the words "it shall be lawful" have a mandatory and compulsory meaning, under the decision in *Central Land Co. v. Bayonne*, 56 N. J. L. 297. It is impossible to perceive how this statute affects "public interest or concerns" within the meaning of that case. On the contrary, the answer to the argument appears in the very case cited, at p. 300, where the court by Van Syckel, J., says in reference to *Stiple v. Elizabeth*, 3 Dutcher, 407. "In the case last cited it was of no consequence to the public * * * and, therefore, the words 'it shall be lawful' were properly held not to be mandatory." It only remains to add, in answer to appellant's contention that if he had any right under this statute, he is not pursuing it by the proper remedy.

But far from aiding the appellant, this statute by its obvious implication shows that prior to the

passage of the act a municipality would have been doing a wrongful act in returning fines paid in cases similar to the one at bar. This statute by its terms make it lawful for a municipality to return such a fine if it so desires, but does not compel a municipality or its Board of Finance, to return such fines. In this case the City of Summit has declined to return the fines imposed on the defendant in the Police Court. As the Supreme Court said (Case, p. 9, ll. 29-31).

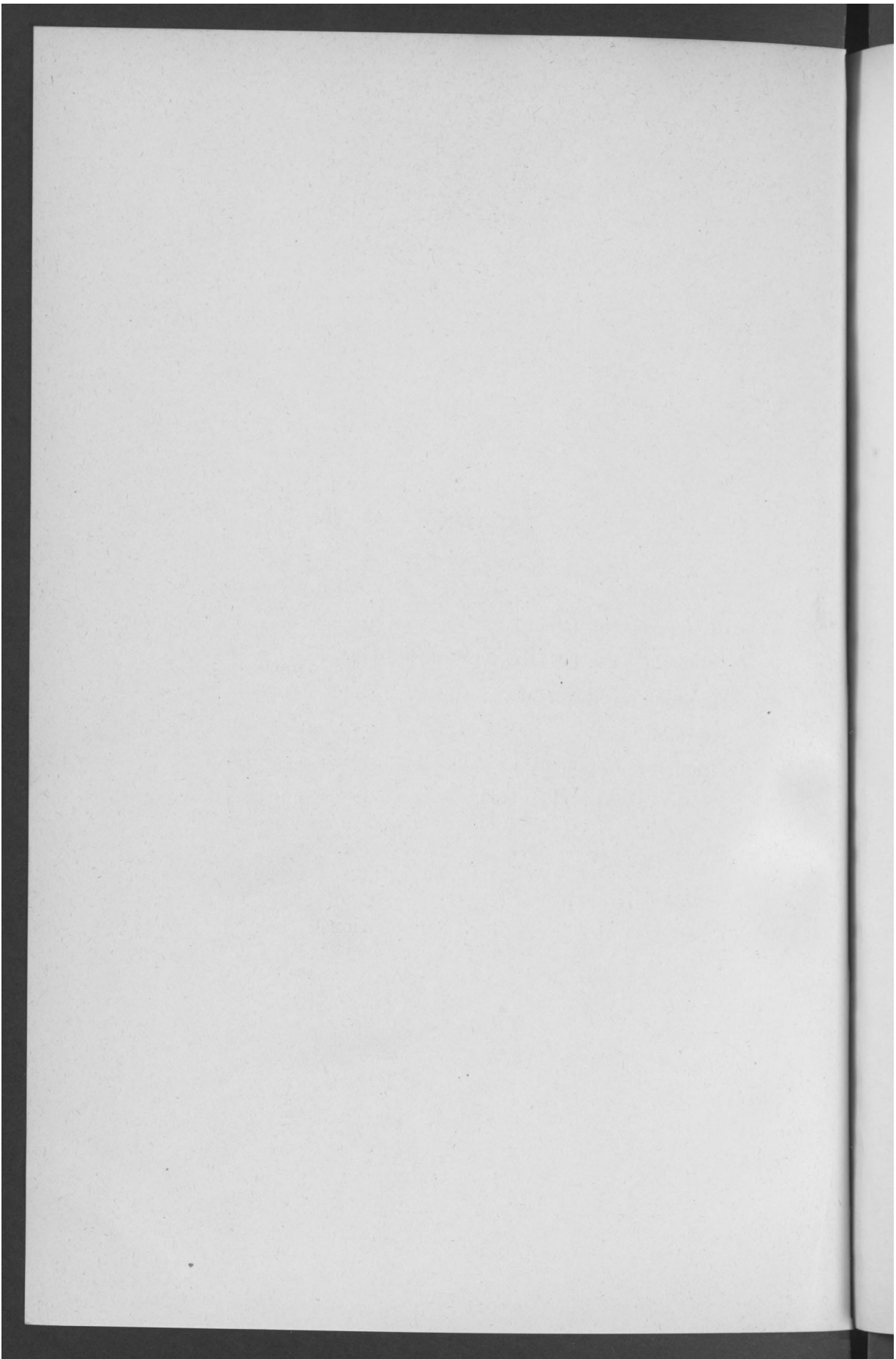
“By the Act of 1911, p. 30, it was lawful for the City of Summit to return these fines. This, however, is not a judicial question.”

Conclusion.

It is therefore respectfully submitted that the fines paid by the defendants in the Police Court of the City of Summit were not paid under duress, but were voluntary payments: (1) because no protest was made against the payment of the fines; (2) because two forms of appeal were available to the defendants as alternatives to paying the fines, and, nevertheless, the defendants chose to pay the fines. This being so, it is respectfully submitted that the plaintiff in this suit, as assignee of the defendants in the Police Court, should not be entitled to recover the fines under the decisions of the Supreme Court and the Court of Errors and Appeals, the well reasoned opinions of other jurisdictions and the statements of text-writers as well as under the statute law of this State; and that the decision of the Supreme Court in favor of the respondent City of Summit should be affirmed.

Respectfully submitted,

CORRA N. WILLIAMS,
*Attorney for and of Counsel with Defendant-
Respondent, City of Summit.*



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Transcript of Record.

**IN THE DISTRICT COURT OF THE CITY OF
ELIZABETH.**

STATE OF NEW JERSEY, }
County of Union. } ss. :

J. VICTOR D'ALOIA,

Plaintiff,

vs.

CITY OF SUMMIT,

Defendant

Action on
Contract.
Demand,
\$400.00.

10

Attorney of plaintiff, J. V. D'ALOIA.

Attorney of Defendant, C. N. WILLIAMS.

A Summons was issued in the above stated cause
Oct. 6, A. D. 1915, returnable Oct. 18, A. D. 1915,
at 10 o'clock A. M., and was returned by the Con-
stable as follows: I served the within Summons
Oct. 8, 1915, on the defendant by reading it to
Fred Kentz, Clerk of said City, and giving him a
copy.

20

J. G. MILLER,
Constable

Demand filed Oct. 6. Specification of defenses
filed Oct. 18, 1915.

30

Adjourned to Oct. 21, 1915, submitted on agreed
State of Facts.

On Nov. 11, 1915, Court gave judgment in favor
of the said plaintiff and against the said defend-
ant in the sum of Three hundred thirteen dollars
and fifty cents and costs. \$313.50.

Bond and notice of appeal filed Nov. 22, 1915.

Order extending time filed Dec. 4, 1915.

40

State of Case by District Court Judge.

(Filed December 20th, 1915.)

DISTRICT COURT OF THE CITY OF ELIZABETH.

10	<p style="text-align: center;">J. VICTOR D'ALOIA, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE CITY OF SUMMIT, <i>Defendant.</i></p>	}	Action on Contract.
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J. VICTOR D'ALOIA, Attorney pro se-Appellee.

CORRA N. WILLIAMS, Attorney for Defendant-Appellant.

The parties hereto having failed to agree upon a state of case, I, ABE J. DAVID, Judge of said District Court, do hereby settle the State of Case as follows:

This action was brought by the plaintiff as assignee to recover certain fines imposed upon certain persons defendants in actions in the Police Court of the City of Summit for the violation of a city ordinance.

Plaintiff offered in evidence assignments to himself from the various defendants in the Police Court of the City of Summit of all their right, title and interest to recover the fines paid by them in the Police Court. The defendant admitted that the assignments were in proper form but he objected to the plaintiff's right to recover the fines as assignee.

Counsel for the defendant admitted at the trial that the conviction of the defendants in the Police Court of the City of Summit was set aside by the Court of Common Pleas upon a review of said conviction on the twentieth day of August, 1914,

State of Case by District Court Judge.

and that thereafter the Supreme Court of the State of New Jersey affirmed the order of the said Union County Court of Common Pleas vacating and annulling the said summary conviction of the said defendants.

The attorney for the defendant also admitted that at the time of the payment of the fines the defendants were under arrest upon complaint for violation of a city ordinance, having been sentenced to pay a fine or serve time in jail. 10

It appears from the docket entries of the Police Justice of the City of Summit that the defendants paid on July ninth, 1914, fines amounting to \$290 and that at that time the defendants made no protest against the payment of fines.

It was admitted by the plaintiff that the Police Court of the City of Summit was established under an act of the Legislature of New Jersey, entitled, "An Act relating to and providing for the government of cities of this State having a population of less than twelve thousand inhabitants," approved March 21st, 1899. 20

It appears from an examination of said act last above mentioned that under Section 78 the said defendants had a right to appeal from the summary conviction of the Police Court of the City of Summit in the same manner as an appeal might be had from judgments in the Court for the trial of small causes, and that the method of taking an appeal in that court is pointed out in Section 80 of the "Act constituting courts for the trial of small causes," P. L. 1903, page 251. 30

The defendants also had the right to appeal to the said Court of Common Pleas under Chapter 228 of the Laws of 1908, page 442, which latter act was the one under which the appeal was taken.

The defenses interposed by the defendant were as follows: 40

State of Case by District Court Judge.

That the plaintiff was not entitled to recover the fines as assignee:

That the payments of the fines set forth in the said State of Demand were voluntary payments:

10 That if the payments of the fines were made under a mistake of law they cannot be recovered:

That the said payments were not made under duress:

That the State of Demand did not set forth a cause of action and that there was no statutory authority requiring the return of the said fines:

20 That judgment was rendered in favor of the plaintiff and against the defendant, for the sum of Three hundred and thirteen dollars and fifty cents, (\$313.50) besides costs, being the amount of the fines imposed against the assignors of the plaintiff, with interest to the date of judgment.

The Court found—

1—That the defendant in the Police Court, the assignors of the claims to the plaintiff, each had a chose in action, which were properly assignable, and assigned to the plaintiff.

30 2—That the payment of the fines by the defendants in the proceedings before the Police Court, the recovery of which is sought in the trial before the Court, were not voluntary payments, but were made under what is known in law as “Duress of the person,” and were therefore recoverable.

ABE J. DAVID,

Judge of District Court,
City of Elizabeth.

Reasons for Reversal.

(Filed January 3rd, 1916)

NEW JERSEY SUPREME COURT.

J. VICTOR D'ALOIA,

*Respondent,**vs.*

CITY OF SUMMIT,

*Appellant.*Reasons for
Reversal of
Judgment. 10

The appellant above named hereby specifies as the causes for reversal of the judgment of the District Court—

First—That the decision of the Judge of the District Court of the City of Elizabeth, that the claims of the defendants in the Police Court of the City of Summit for the return of fines paid by them were properly assignable to the plaintiff, was improper and without authority of law. 20

Second—That the decision of the said Judge of the said District Court, that the payment of the fines by the defendants in the proceedings before the Police Court, the recovery of which was sought in the trial in the District Court, were not voluntary payments and were made under duress of the person, was improper and without authority of law. 30

CORRA N. WILLIAMS,
Attorney for Appellant.

Filed January 3rd, 1916.

Opinion.

Filed May 12, 1916.

NEW JERSEY SUPREME COURT.

February Term, 1916.

J. VICTOR D'ALOIA,

Plaintiff-Respondent,

v.

CITY OF SUMMIT,

*Defendant-Appellant.*On Appeal
from Dis-
trict Court.

10

Submitted February 15, 1916. Decided May 12, 1916.

Fines paid upon conviction for the violation of a city ordinance, subsequently set aside by the
 20 appellate court, cannot be recovered back, when such fines were paid without protest, and two forms of appeal were available, to the defendants, as alternatives to paying the fines or serving time in jail.

Corra N. Williams, Esq., for Appellant. J. Victor D'Aloia, Esq., pro se.

Before Justices Garrison, Trenchard and Black.

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

30

The appeal in this case presents a single point for discussion and decision, viz.: whether the payments of fines which were the subject of the suit in the trial court were voluntary payments and made without duress of the person.

The action was brought by the plaintiff, as assignee, to recover fines from the City of Summit, imposed upon five defendants, by the Police Court of the City of Summit, for the violation of

40

Opinion.

a city ordinance. Subsequent to the imposition and payment of the fines, the conviction of the five defendants was, upon review, set aside by the Union County Court of Common Pleas. This judgment of the Court of Common pleas was affirmed by the Supreme Court. *City of Summit v. Iarusso*, 87 N. J. L., 403. At the time of the payment of the fines, the five defendants were under arrest upon complaint for the violation of a city ordinance, having been sentenced to pay a fine or serve time in jail. At the time the fines were paid, the defendants made no protest against their payment. 10

The Police Court of the City of Summit was established under the act of the legislature, approved March 21, 1899, p. 96. Under sec. 78 of said act, the defendants had a right to appeal, in the same manner, as an appeal might be had from judgments in the court for the trial of small causes, under sec. 80 of the act of 1903, p. 251. 20

The defendants also had a right to appeal to the Court of Common Pleas, under the act of 1908, p. 442, which later act was the one under which the appeal was taken and the convictions set aside. The District Court held that the fines were not voluntary payments, but were made under what is known in law as duress of the person, and gave judgment for the plaintiff, in the sum of \$313.50, being the amount of the fines. This, we think, was error. The judgment of the District Court should be reversed. 30

The legal idea of duress consists in forcing a person to act against his own will. It does not exist, when the person upon whom it is charged, it has been exercised, has an option or choice, as to whether he will do the thing or perform the act, said to have been done under duress. The defendants had at least three courses open to 40

Opinion.

them, in addition to the one which they pursued, viz.: first, to pay the fines under protest; second, they might have taken an appeal and avoided the payment of fines, under the act of 1899, p. 96, sec. 78, or P. L. 1903, p. 276, sec. 80, above cited; or third, to apply to the Court of Common Pleas under the act of 1908, p. 442. This was the action
 10 which they ultimately did take, but not until after they had paid the fines. The fines were paid July 9th, and the proceedings were not questioned until July 17th, 1914.

The rule seems to be quite clear, but in its correct application there is some confusion. There is no case in our reports directly in point.

In our Courts, Mr. Justice Dixon, speaking for the Court of Errors and Appeals, said, "that where a party, without mistake of fact, or fraud,
 20 duress or extortion, voluntarily pays money on a demand which is not enforceable against him, he cannot recover it back." *City of Camden v. Green*, 54 N. J. L., 593. In that case, the principle was applied to a refusal to issue a license, without payment of more than the legal fee. Held, it was not duress. So, the payment of a city assessment, under protest, cannot be recovered back. *Fuller v. City of Elizabeth*, 42 N. J. L., 427. This case was based upon *Davenport v. City of Elizabeth*, 41 ib. 362.
 30

So, the payment of a license fee, to a city board of health, accompanied by a written protest against the right of the board to exact it. *Shoemaker & Co. v. Board of Health*, 83 N. J. L., 425. Or a fine paid by a policeman for delinquency. *Mee v. Montclair*, 84 N. J. L., 400, reversing 54 ib. 274. So also, money paid under legal process, in a judicial proceeding. *Turner v. Barber*, 66 N. Y. L., 496.
 40

Opinion.

In other jurisdictions, it has been held that a fine illegally imposed, but voluntarily paid under mistake of law cannot be recovered back. *Houleshan v. Inhabitants of Kennebec County*, 108 Me., 397; 19 Cyc. 558.

The case of *Bailey v. The Town of Paullina*, 69 Iowa, 463, holds that where a defendant is convicted on a town ordinance, which is void, and pays the fine without disputing its validity and without protest, he cannot recover the amount of the fine, in an action against the town. This case is cited with approval in the case of *Harrington v. City of New York*, 81 N. Y. Supp., 667, 40 Misc., 165. 10

The same rule was followed in the case of *Houtz v. Board of Commissioners of Uinta County*, 11 Wyo., 152. 20

It therefore seems to be the rule deducible from the cases, that if the defendants had an alternative to making the payments, the payments must be regarded as having been voluntary and therefore not recoverable. They were made without protest, and two forms of appeal were available to the defendants, as alternatives to paying the fines.

By the act of 1911, p. 30, it was lawful for the City of Summit to return these fines. This, however, is not a judicial question. 30

The judgment of the District Court is reversed, with costs.

Rule for Judgment.

(Entered May 15, 1916.)

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">J. VICTOR D'ALOIA, <i>Plaintiff-Respondent,</i> <i>vs.</i> THE CITY OF SUMMIT, <i>Defendant-Appellant.</i></p>	}	<p>On Appeal from the District Court of City of Elizabeth.</p>
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This cause having been duly argued at the present term of this court by Corra N. Williams, of counsel for the Appellant, and J. Victor D'Aloia, Counsel pro se, and the Court having inspected the record and judgment of said District Court of the City of Elizabeth, and considered the causes assigned for error;

It is thereupon ORDERED that the judgment of the said District Court of the City of Elizabeth be in all things reversed, with costs to be taxed, and that said record be remitted to the court below to be proceeded with according to law.

On motion of

CORRA N. WILLIAMS,
Attorney of Appellant.

30

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Notice of Appeal.

(Filed June 1, 1916.)

NEW JERSEY SUPREME COURT.

J. VICTOR D'ALOIA,

*Plaintiff-Respondent,**vs.*

CITY OF SUMMIT,

*Defendant-Appellant.*On Appeal
from District
Court.Notice of Ap-
peal to Court **10**
of Errors
and Appeals.

To:—

Corra N. Williams, Attorney for Defendant-Appellant:

Take notice that the plaintiff appeals from the whole of the judgment in this cause on the following grounds: **20**

1. There being legal evidence to support the determination of the District Court, that the payment of the fines in the proceedings before the Police Court the recovery of which was sought was not a voluntary payment and was therefore recoverable, such finding was final between the parties.

2. That the decision of the Supreme Court holding that fines paid upon conviction for the violation of a city ordinance, subsequently set aside by the appellate court, cannot be recovered back, because paid without protest, and two forms of appeal were available to the defendants, as alternatives to paying the fines or serving time in jail, was improper and without authority of law. **30**

3. Chapter 18, Laws of 1911, entitled, "An act to authorize the return of money paid as fines in certain cases", is a statute which affects the public interest and the return of the fines is thereby made mandatory and compulsory. **40**

Yours respectfully,

ANTHONY R. FINELLI,

Attorney for Plaintiff-Appellant.

