

INDEX

	Page
Record of Proceedings	1
Summons	2
Complaint	3
Notice	6
Conclusion	8
Order	11
Answer	12
Reply	15
Postea	17
Rule for Judgment	18
Judgment	19
Notice and Grounds of Appeal	20
Clerk's Certificate	21
Testimony	22
Motion for Direction of Verdict	135

WITNESSES

Plaintiffs':

Beatrice Cooper,	
Direct	23
Richard West,	
Direct	37
Recalled:	
Direct	59
Recalled:	
Direct	81
Cross	84
Re-direct	89
Re-cross	93
Re-direct	96

	Page
George B. Joline,	
Direct	47
Recalled:	
Direct	79
Recalled:	
Direct	99
Cross	103
Evelyn Miller,	
Direct	62
Cross	65
Helen Manahan,	
Direct	67
Cross	70
Mabel VanBrunt,	
Direct	71
Cross	75
Recalled:	
Direct	97
 <i>Defendant's:</i>	
Sidney West,	
Direct	114
Cross	115
Re-direct	117
George VanBrunt,	
Direct	117
Cross	118
 <i>Rebuttal:</i>	
Richard West,	
Direct	127
Cross	131
George P. Joline,	
Direct	133

EXHIBITS

Plaintiffs':

	Offered Page	Printed Page
Exhibit P-1—Pages 190 and 191 of minute book	24	
Exhibit P-2—Page 212 of minute book	25	
Exhibit P-3—Page 213 of minute book	27	
Exhibit P-4—Page 219 of minute book	28	
Exhibit P-5—Page 229 of minute book	32	
Exhibit P-6—Page 226 of minute book	33	
Exhibit P-7—Record of proceedings in District Court, Monmouth Beach vs. West and Joline	35	145
Exhibit P-7—Check, dated Mar. 13, 1928	37	154
Exhibit P-8—Check, dated Oct. 25, 1928, for \$337.28 to order of Maurice Potter, signed George P. Joline	37	154

Defendant's:

Exhibit D-1—Lease, dated April 26, 1927	115	155
Exhibit D-2—Lease, dated May 1, 1928	118	159

New Jersey Court of Errors and Appeals

RECORD OF PROCEEDINGS.

10

I hereby depute and appoint William Ahern my Special Deputy to serve and execute the within writ.

Witness my hand this 7th day of December, A. D. 1928.

HARRY N. JOHNSON,
Sheriff.

RETURN

20

Duly and personally served a true copy of the within summons and complaint on William J. Meyers, President of the Board of Commissioners of the Borough of Monmouth Beach, a municipal corporation of the State of New Jersey, upon whom process may be served December 8, 1928, at his usual place of abode, Borden Street, Monmouth Beach, N. J.

HARRY N. JOHNSON, 20
Sheriff.

Per WILLIAM AHERN,
Special Deputy.

PERSONAL SERVICE

State of New Jersey,
County of Monmouth. ss:

William Ahern, of full age, being duly sworn, 40
according to law, on his oath says that on the 8th

Summons

day of December, 1928, he served a true copy of the within summons and complaint on the within named defendant, Borough of Monmouth Beach, on William J. Meyers, President of the Board of Commissioners of the Borough of Monmouth
 10 Beach, upon whom process may be served, personally by handing the same to him and informing him of the contents thereof.

WILLIAM AHERN.

Sworn and subscribed before me,
 this 8th day of December, 1928.

William R. O'Brien,
 20 Notary Public of N. J.
 My Commission expires Dec. 31, 1928.

SUMMONS.

THE STATE OF NEW JERSEY TO BOROUGH OF MON-
 MOUTH BEACH, a municipal copora-
 (L. S.) tion of the State of New Jersey.

30 YOU ARE SUMMONED to answer the
 annexed complaint of RICHARD WEST and GEORGE
 P. JOLINE, partners, in an action at law in the
 Supreme Court. And take notice, that unless you
 file your answer to said complaint with the Clerk
 of the Supreme Court, at Trenton, WITHIN
 TWENTY DAYS after service upon you of this writ
 and the annexed complaint, the plaintiffs may
 proceed in the suit and judgment may be entered
 40 against you.

Complaint

Witness, WILLIAM S. GUMMERE, Chief Justice
of the Supreme Court, at Trenton, this sixth day
of December, nineteen hundred and twenty-eight.

FRED L. BLOODGOOD,
Clerk. 10

APPLEGATE, STEVENS, FOSTER,
LEONARD & REUSSILLE,
Attorneys.

COMPLAINT.

(Filed December 17, 1928.)

20

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

RICHARD WEST and GEORGE P.
JOLINE, partners,
Plaintiffs,

vs.

BOROUGH OF MONMOUTH BEACH,
a Municipal Corporation of
the State of New Jersey,
Defendant.

Action at Law 30

The plaintiffs, Richard West and George P. Joline, partners residing in the Borough of Monmouth Beach, County of Monmouth and State of New Jersey, say that:

40

Complaint

FIRST COUNT

1. On or about March 13th, 1928, the plaintiffs rented from the Borough of Monmouth Beach, a municipal corporation of the State of New Jersey, certain premises situate in the said Borough of Monmouth Beach, and known as Monmouth Beach Bathing Pavilion and adjoining beach, for the summer season of 1928, at a rental of \$650.00.

2. Plaintiffs immediately thereafter took possession of said premises, and in June, 1928, proceeded to conduct thereon a beach bathing and general pavilion business.

3. In July, 1928, the defendant wrongfully and unlawfully interfered with plaintiffs' use and possession of the said premises, depriving them of the full use thereof, by authorizing and directing the public to use the same, or some portions of the same, free of charge; and by stationing officers for the purpose of carrying out such direction, against the wishes of the plaintiffs and notwithstanding their protests; and all to the end that plaintiffs, by reason of such unlawful action and interference on the part of the defendant, suffered great and divers damage in being unable to collect from the public, charges for the use of said pavilion and/or bathing beach and appurtenances.

4. Plaintiffs paid and the defendants received the aforementioned rent of \$650.00.

Plaintiffs demand as damages from the defendant the sum of \$6,000.00.

Complaint

SECOND COUNT

1. Plaintiffs repeat the allegations contained in paragraphs 1 and 2 of the first count.

2. In July, 1928, the defendant, in breach of its aforementioned contract for rental with plaintiffs, interfered with their use and possession of the said demised premises, depriving them of the full use thereof by authorizing and directing the public to use the same, or some portions of the same, free of charge; and by stationing officers for the purpose of carrying out such direction, against the wishes of the plaintiffs and notwithstanding their protests; and all to the end that the plaintiffs, by reason of said breach, suffered great and divers damage in being unable to collect, from the public, charges for the use of said pavilion and/or bathing beach and appurtenances.

3. Plaintiffs paid and the defendant received the aforementioned rent of \$650.00.

Plaintiffs demand as damages from the defendant the sum of \$6,000.00.

APPLEGATE, STEVENS, FOSTER,²⁰
LEONARD & REUSSILLE,
Attorneys of Plaintiffs.

Endorsed:

Received in Monmouth County Sheriff's Office
Dec. 7 At 9 o'clock A. M. 1928.

HARRY N. JOHNSON,
Sheriff.

Sheriff's Fees \$7.77.

NOTICE.

(Filed December 31, 1928.)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10

RICHARD WEST and GEORGE P.
JOLINE, partners,

Plaintiffs,

vs.

BOROUGH OF MONMOUTH BEACH,
a Municipal Corporation of
the State of New Jersey,

20

Defendant.

Action at Law

*To Applegate, Stevens, Foster, Leonard & Reus-
sille, Attorneys of the plaintiffs:*

30

PLEASE TAKE NOTICE that I shall appeal to the Honorable Frank T. Lloyd, Justice of the Supreme Court of New Jersey, at his chambers, in the Court House, in Freehold, on Tuesday, December 18, 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard for an order to strike out the complaint filed by you in the above stated cause, on the ground that said complaint does not disclose a cause of action in that:

40

1. There was no legal right in the Municipal Corporation of the Borough of Monmouth Beach to rent to the plaintiffs the premises described in the complaint, being a bathing pavilion and bathing beach.

Notice

2. If such renting by the Borough of Monmouth Beach to the plaintiffs was done upon authority of any act of the Legislature of the State of New Jersey such statute is not pleaded in the complaint and conformance with the terms of such act is not pleaded in the complaint aforesaid. 10

3. That the first count being founded in tort does not plead plaintiffs had legal possession of the premises of the Borough of Monmouth Beach or the right to legal possession of the lands of the Borough of Monmouth Beach, the same being public lands; and the second count being founded on contract fails to set forth any contract legally entered into by the Borough of Monmouth Beach with the plaintiffs. 20

MAURICE A. POTTER,
Attorney for Defendant.

Endorsed:

Service of within notice acknowledged this 13th day of December, 1928.

APPLEGATE, STEVENS, FOSTER, 30
LEONARD & REUSSILLE.

by L. C. L.

CONCLUSION.

(Filed December 31, 1928.)

NEW JERSEY SUPREME COURT**MONMOUTH COUNTY**

10

 RICHARD WEST and GEORGE P.
 JOLINE, partners,

Plaintiffs,

vs.

 BOROUGH OF MONMOUTH BEACH,
 a Municipal Corporation of
 the State of New Jersey,

20

 Defendant.

 Action at Law
 On motion to
 Strike
 Complaint.

This is a motion to strike the complaint filed in this suit on the ground that it does not set forth a legal cause of action against a municipal corporation. The gravamen of the complaint appears to be that the defendant municipal corporation interfered with plaintiffs' possession of a bathing pavilion and adjoining beach rented to

30 them by the corporation during the period covered by such rental, whereby they lost certain revenues and profits which they otherwise would have received, and as a consequence of such interference they suffered a financial loss to the amount alleged in the complaint.

There are two counts pleaded, the first of which charges an interference with plaintiffs' possession, and the second a breach of the contract of

40 letting in depriving plaintiffs of the full use of

Conclusion

the demised premises by like interference; in other words, both counts are made to rest on alleged acts of defendant in depriving plaintiffs of the full use of the premises leased, notwithstanding the payment and receipt of the stipulated rent. 10

It is argued that the complaint is defective in not stating whether the alleged possession of plaintiffs was in pursuance of a written lease legally entered into by the defendant municipal corporation with detailed regard for the provisions of the statute applicable to such municipal action, or whether in fact there was any such lease. It is urged that if plaintiffs were lawfully in possession of the premises, the complaint should state the method by which it was acquired in order that the defendant might be apprised in advance whether the alleged municipal action in renting the premises to plaintiffs was within the statutory powers of the defendant or *ultra vires*, and likewise whether the provisions of the statute applicable had been observed. It is further argued that the first count of the complaint alleges a tort for which a municipal corporation could not be liable, while the second sets up an alleged breach of contract based on the same conduct of which complaint is made. 20 30

While it may be that the complaint could have been couched in greater detail, it would seem to be sufficient to set forth a cause of action. The matters argued on the motion to strike really involve the evidence necessary to be produced at a trial in order to sustain the action, information as to which is doubtless in possession of defend- 40

Conclusion

ant, and if not, could be obtained by interrogatories or on a demand for a bill of particulars. The complaint alleges a renting of the premises to plaintiffs by defendant and possession taken thereunder at an agreed rental which was paid
10 and accepted, followed by an interference with such possession to the financial loss of the former. Whether such possession was lawful and the result of competent municipal action as required by a controlling statute, the provisions of which were duly observed, or whether the defendant is liable at all under the complaint filed are questions of fact to be raised and determined at a trial of the cause.

20 The motion to strike the complaint will be denied. A rule may be prepared and presented with the provision that the defendant may have fifteen days in which to file an answer.

RULIF V. LAWRENCE,
Circuit Court Judge Sitting as a
Supreme Court Commissioner.

ORDER.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

RICHARD WEST and GEORGE P.
JOLINE, partners,

Plaintiffs,

vs.

BOROUGH OF MONMOUTH BEACH,
a Municipal Corporation of
the State of New Jersey,

Defendant.

10

Action at Law

This cause coming on to be heard on the motion of the defendant to strike out plaintiffs' complaint on the ground that the same disclosed no cause of action; and the Court having heard the arguments for the respective parties, and their briefs, and being of the opinion that said complaint is sufficient in law;

20

It is Ordered that the defendant's motion to strike out said complaint be and the same is hereby denied.

30

It is further Ordered that the defendant have fifteen days from the date hereof in which to file answer.

RULIF V. LAWRENCE,
Circuit Judge, Sitting as
Supreme Court Commissioner.

Dated January 3, 1929.

Entered January 5, 1929.

40

On motion of

APPLEGATE, STEVENS, FOSTER,
LEONARD & REUSSILLE,
Attorneys for Plaintiffs.

ANSWER.

(Filed Jan. 28, 1929.)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10

RICHARD WEST and GEORGE P. JOLINE, partners, Plaintiffs,	}
vs. BOROUGH OF MONMOUTH BEACH, a Municipal Corporation of the State of New Jersey, Defendant.	

Action at Law

20

Defendant, Borough of Monmouth Beach, say that:

1. It denies each and every allegation of the complaint.

FIRST SEPARATE DEFENSE.

30

1. Defendant is a municipal corporation of the State of New Jersey.

2. No agreement or lease for the lands in the complaint described, was made by defendant to the plaintiffs.

3. Said lands were public lands, and possession thereof was never delivered to plaintiffs by the defendant.

40

Answer.

SECOND SEPARATE DEFENSE.

1. Defendant is a municipal corporation of the State of New Jersey.

2. No rental of the lands in the complaint described was made by defendant to the plaintiffs. 10

3. Said lands were public lands, and possession thereof was never delivered to plaintiffs by the defendant.

THIRD SEPARATE DEFENSE.

1. Any rental, of the lands in the complaint described to plaintiffs by the several officers of the defendant, if any, was *ultra vires*, and not in conformity to the statutes in such case made and provided. 20

FOURTH SEPARATE DEFENSE.

The lands and premises described in the complaint, comprised a bathing pavilion and adjoining beach, and were and had been in use by and a benefit to defendant and the inhabitants thereof for a number of years. Said premises were needed by said borough, as the same constituted the only public beach of said borough. 30

FIFTH SEPARATE DEFENSE.

No advertisement for bids for the rental of the premises in the complaint described was had by the defendant, and the letting thereof was not advertised in any newspaper circulating in the 40

Answer

said Borough of Monmouth Beach ten days prior to the receipt of defendant's offer, nor at any time during the year 1928.

SIXTH SEPARATE DEFENSE.

10

Plaintiffs illegally assumed possession of the lands in the complaint described. Plaintiffs paid to defendant the sum of Six hundred and fifty dollars for the use and occupation of said lands, after suit was instituted therefor, and in settlement of such suit.

MAURICE A. POTTER,
Attorney for Defendants.

20

We hereby consent to the filing of the answer herein as within time.

APPLEGATE, STEVENS, FOSTER,
LEONARD & REUSSILLE,
by LESTER C. LEONARD.

REPLY.

(Filed Jan. 4, 1930.)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10

RICHARD WEST and GEORGE P.
JOLINE,

Plaintiffs,

vs.

BOROUGH OF MONMOUTH BEACH,
a Municipal Corporation of
the State of New Jersey,

Defendant.

Action at Law

20

The plaintiffs, Richard West and George P. Joline, by way of reply to defendant's answer, say:

AS TO FIRST SEPARATE DEFENSE.

1. They admit the allegations contained in paragraph 1, and deny the allegations contained in paragraphs 2 and 3.

30

AS TO SECOND SEPARATE DEFENSE.

1. They admit the allegations contained in paragraph 1, and deny the allegations contained in paragraphs 2 and 3.

AS TO THIRD SEPARATE DEFENSE.

1. They deny each and every allegation therein contained.

40

Reply

AS TO FOURTH SEPARATE DEFENSE.

1. They deny each and every allegation therein contained, except that they admit that the lands and premises described in the complaint had been used by defendant.
- 10

AS TO FIFTH SEPARATE DEFENSE.

1. At the time of trial, they reserve the right to strike out the allegations contained therein upon the ground that such allegations do not constitute a legal defense.
2. Of the allegations contained therein they have no knowledge and leave defendant to its proof.
- 20

AS TO SIXTH SEPARATE DEFENSE.

1. They deny each and every allegation therein contained except that they admit they paid the defendant the sum of Six Hundred and Fifty Dollars (\$650.00), which sum the defendant accepted in two installments of Three Hundred and Twenty-five Dollars (\$325.00).
- 30

APPLEGATE, STEVENS, FOSTER,
LEONARD & REUSSILLE,
Attorneys for Plaintiffs.

POSTEA.

(Filed Jan. 4, 1930.)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10

RICHARD WEST and GEORGE P.
JOLINE,

Plaintiffs,

vs.

BOROUGH OF MONMOUTH BEACH,
a Municipal Corporation of
the State of New Jersey,

Defendant.

Judgt. for
Deft.

Costs \$51.50.

20

This action was tried before Judge Rulif V. Lawrence with a jury at the Monmouth Circuit on November 19th and 20th, 1929.

By direction of the Court the jury returned a verdict in favor of defendant and against the plaintiffs of no cause of action.

RULIF V. LAWRENCE,

30

Judge.

40

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT

10	BOROUGH OF MONMOUTH BEACH, a Municipal Corporation of the State of New Jersey, Defendant, ads. RICHARD WEST and GEORGE P. JOLINE, Plaintiffs.	}	Action at Law. In Postea.
----	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	----------------------------------

20 Costs \$51.50

It is ordered that judgment be and hereby is entered in favor of defendant and against the plaintiffs with costs to be taxed nisi.

d January 4, 1930.

On motion of

POTTER & FISHER,

Attys.

JUDGMENT.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

RICHARD WEST and GEORGE P. JOLINE, Plaintiffs, vs. BOROUGH OF MONMOUTH BEACH, a Municipal Corporation of the State of New Jersey, Defendant.	}	On Postea. Judgment for Defendant. Potter & Fisher, Attorneys.	10
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	-----------------------------------------------------------------------------------	----

Costs \$51.50. 20

Judgment entered this fourth day of January, A. D. nineteen hundred and thirty in favor of defendant and against the plaintiffs for the sum of fifty-one dollars and fifty cents costs.

WM. S. GUMMERE,
C. J.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10	RICHARD WEST and GEORGE P. JOLINE, Plaintiffs, vs. BOROUGH OF MONMOUTH BEACH, a Municipal Corporation of the State of New Jersey, Defendant.	}	Action at Law
----	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	---------------

20

To Maurice A. Potter, Esq.,
Attorney of Defendant.

SIR:

PLEASE TAKE NOTICE that the plaintiffs in the above entitled cause appeal to the Court of Errors and Appeals of the State of New Jersey, from the judgment entered in said cause on the following grounds, to wit:

30

(1) Because the Trial Court erred in denying plaintiffs' motion for a direction of verdict in their favor.

(2) Because the Trial Court erred in directing a verdict in favor of the defendant and against the plaintiffs.

40

APPLEGATE, STEVENS, FOSTER,
 LEONARD & REUSSILLE,
 Attorneys of Plaintiffs.

CLERK'S CERTIFICATE.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office.

10

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-sixth day of February, A. D. nineteen hundred and thirty.

(Seal)

FRED L. BLOODGOOD,
Clerk.

20

New Jersey State Library

TESTIMONY.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10	RICHARD WEST and GEORGE P. JOLINE, partners, &c, Plaintiffs, vs. BOROUGH OF MONMOUTH BEACH, a municipal corporation, &c, Defendant.	}	Action at Law
----	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	---------------

20

Freehold, N. J., November 19, 1929.

Before HON. R. V. LAWRENCE, JUDGE, and a jury.

Appearances:

For Plaintiffs: Applegate, Stevens, Foster, Leonard and Reussille, by Lester C. Leonard, Esq.

30

For Defendant: Maurice A. Potter, Esq.

Mr. Leonard: If the Court please, counsel for the defendant has been duly called upon to produce the letter that Richard West and George P. Joline sent to the Borough of Monmouth Beach in March, 1928, with which letter was enclosed a certified check for \$325.

40

The Court: Have you that letter?

Beatrice Cooper—Direct

Mr. Potter: No, Judge, we have made a search for the past ten days, I was going to say, for that letter. We were not served with the notice until this morning, but we had other purposes of our own in producing the letter, and the search that we have made has been of no avail. We cannot find it. 10

The Court: Do you admit that they received a letter?

Mr. Potter: Oh, yes; we received it. It is admitted that it was received with the check.

The Court: Did you use the check?

Mr. Potter: Yes, they have the check, Judge.

The Court: Secondary evidence will be admissible when the time comes. 20

BEATRICE COOPER, sworn for plaintiffs.

Direct-examination by Mr. Leonard:

Q. Madam, you are clerk of the Borough of Monmouth Beach, are you not? A. Yes, I am.

Q. And have you produced today in Court the minute book of the proceedings of that Borough covering the year 1928? A. I have.

Q. Where is that book now? A. I have it right here. 30

Q. Will you turn to page 190 and 191, please?
A. I have it.

Q. I ask you if you discover in any one of those pages any resolution pertaining to Mr. West and Mr. Joline, the plaintiffs in this action? A. A letter from Richard West—

Q. Don't read it. Do you find such a letter?
A. Yes, I have it here. 40

Discussion

Mr. Leonard: There is no objection to that portion of page 190 and part of 191 just described by this witness being offered in evidence, is there?

10 Mr. Potter: How far are you going? How far on the page are you going?

Mr. Leonard: Well, everything on the two pages having to do with this controversy.

Mr. Potter: All right, sir.

The Court: No objection. They may be marked.

Mr. Potter: I understand pages 190 and 191 are marked Exhibit P-1?

20 Mr. Leonard: Those parts of pages 190 and 191 having to do directly or indirectly with this controversy are offered.

(Pages marked Exhibit P-1.)

Mr. Leonard: May I spread this upon the record at this time?

The Court: You may.

30 Mr. Leonard: (Reads) "A letter from Richard West and George P. Joline submitting a bid of \$650 for the rental of the Monmouth Beach bathing pavilion and adjoining beach for the current season, and enclosing a check (certified) for one-half of said amount, was read. Councilman Smith moved regularly seconded by Roe that said bid be accepted. Motion carried on the following roll-call vote:

Yeas: Councilmen Cooper, Meyers, Roe, Smith.

40 Nays: Councilman Maney.

Beatrice Cooper—Direct

The mayor declared the motion carried.

Councilman Roe moved regularly seconded by Smith that the solicitor be authorized to draw up a contract covering the rental of the Monmouth Beach bathing pavilion. Carried." 10

Q. Now, Madam, would you turn to the next place in that minute book, the resolution having to do with the bathing controversy, the subject of this suit? A. A resolution, did you say?

Q. Yes, or anything appearing in the minutes. A. The next I have is discussion.

Q. On what page? A. On page 212.

Mr. Leonard: May that page be offered 20
in evidence, Mr. Potter? I assume that you have copies of all these.

Mr. Potter: Yes, sir.

(Page 212 marked Exhibit P-2.)

Mr. Leonard: May that be read, if the Court please? I think we neglected to add that the extract of the minutes appearing on page 190 and 191 was from the minutes dated March 13, 1928. And the portion of the minutes from which I am now about 20
to read, marked Exhibit P-2, at page 212—

The Court: Is under date—

Mr. Leonard: Is under date of July 10, 1928:

(Reads) "A discussion was next held to determine who had the right to the free use of the beach at the bathing pavilion. Councilman Cooper moved regularly seconded by Smith that all residents and tax- 40

Beatrice Cooper—Direct

10 payers of the Borough of Monmouth Beach shall have the right to use the—” I see something written here in pencil; I don’t know whether that is part of the minutes or not. Anyway I am going to read the typewritten part, what the Borough has inserted in the minutes.

Mr. Potter: That is corrected, should be changed. I have the old clerk here to testify to the change if you want it.

20 Mr. Leonard: (Continues) “shall have the right to use—” the written in pencil part; the other being written on the typewriter—“use the Borough bathing beach, showers and parking space at the small bathing pavilion free of charge. Carried.”

“Councilman Cooper moved regularly seconded by Roe that the lessees of the bathing pavilion be reimbursed for the cost of installing bathing ropes and poles at the bathing pavilion. Motion carried on the following roll-call vote:

30 Yeas: Councilmen Cooper, Graham, Meyers, Roe.

Nays: Councilman Smith.

Absent: Councilman Maney.

The mayor declared the motion carried.”

Q. Now, Madam, have you any other light to shed by way of resolutions on this subject? Look at page 213. Something there? A. Yes.

40 Mr. Leonard: The portion of the minutes appearing on that page and dated July 31, 1928, can be admitted, Mr. Potter?

Discussion

Mr. Potter: Beginning "Mr. Joline addressed the mayor and council"?

Mr. Leonard: Yes, that is the one. I offer it.

The Court: No objection. It may be marked. 10

(Page 213 marked Exhibit P-3.)

Mr. Leonard: I guess that runs over to 214. May I read that?

The Court: Yes.

Mr. Leonard: (Reads) "Mr. Joline addressed the mayor and council stating that subsequent to the adoption of a resolution at the last regular meeting allowing all taxpayers and residents of the Borough of Monmouth Beach free use of the beach adjoining the bathing pavilion, he was experiencing considerable difficulty obtaining revenue from anyone for the use of the beach for this reason he respectfully requested that the resolution be rescinded. Following a discussion a recess was declared at 9:25 on motion of Councilman Graham regularly seconded by Meyers for the purpose of reaching an understanding regarding the execution of a lease and the payment of the balance of the rental amounting to \$325. 20 20

Meeting again called to order by Mayor VanBrunt at 9:50 P. M.

Councilmen Cooper, Graham, Maney, Meyers, Roe, Smith, present.

Discussion

10 Councilman Maney reported on the outcome of the adjourned meeting, stating that it was the consensus of opinion of the councilmen that the lease and resolution in connection with the rental of the bathing pavilion should and would stand as offered."

Now by consent we can offer the portion of the minutes appearing on page 219 and under date of August 14, 1928, can we not, Mr. Potter?

Mr. Potter: Yes, sir.

(Page 219 marked Exhibit P-4.)

20 Mr. Leonard: I am reading now a resolution dated August 14, 1928:

30 (Reads) "Several complaints were made to the Borough council that bathers were being chased off the Borough beach by the tenants of the bathing pavilion and they requested the Borough council to take steps to prevent this condition. Following a discussion Councilman Cooper moved regularly seconded by Smith that the tenants be requested to sign the lease in its present form and pay the balance of the rental amounting to \$325 tonight or that the Borough council take steps to have the tenants dispossessed. (Then the roll-call.)

The mayor declared the motion carried.

40 Councilman Maney moved regularly seconded by Smith that a police officer be placed at the bathing pavilion until the matter was settled."

That motion was carried and the names of the councilmen appear.

Discussion

“A request was made that a boat and lifeguard be placed at the bathing pavilion. Said request was ordered referred to the beach and public building committee for consideration.” That portion being read at the request of Mr. Potter. 10

The Court: Mr. Leonard, do you know the beach?

Mr. Leonard: I?

The Court: Yes. I wish you would describe just what it is, for my benefit, at least. I assume there is a boardwalk there; is that it?

Mr. Leonard: No, it is the main Ocean Avenue in the Borough of Monmouth Beach, immediately adjoining the beach property; and in this particular locality in Monmouth Beach a bathing pavilion has been erected. 20

The Court: Owned by the Borough?

Mr. Leonard: Owned by the Borough; and you can immediately pass from the main highway, Ocean Avenue, so-called, right onto the bathing pavilion and thence onto the beach. 30

Mr. Potter: Or you go immediately off onto the beach, Judge, either one.

The Court: Without going through the pavilion?

Mr. Potter: Oh, yes.

The Court: Then I assume that there is a pavilion there and that there are bath-houses connected with that pavilion? 40

Mr. Leonard: Yes.

Discussion

The Court: How many bath-houses?

Mr. Leonard: There are fifty-eight bath-houses.

10 The Court: Then of course in front of the building, the pavilion and the bath-houses, is the beach?

Mr. Leonard: Is the beach; and then the ropes, life-lines, and the like extending in the water, and then they have various stands and chairs.

The Court: And the bathing portion is immediately in front of the pavilion?

20 Mr. Leonard: Of the pavilion; and as Mr. Potter says, of course, if one cares to enter upon the beach by some remote locality and walk down in the undertow or on the beach and then get in front of the pavilion, they can do that.

Mr. Potter: I didn't say that at all.

The Court: Don't argue it. I just want to get it.

30 Mr. Potter: He is leaving an erroneous impression. The pavilion does not commence to occupy the entire frontage of this land.

The Court: It is like any beach, I suppose, these resorts. Then your complaint, at least you claim that you leased the building with the bathhouses.

Mr. Leonard: And the bathing beach, for \$650.

40 The Court: Do you say it covered all of the bathing beach belonging to the Borough?

Discussion

Mr. Leonard: Well, I say that it covered the full extent of what it did cover. Of course it does not appear in the resolution, but it is my understanding that it covered the bathing beach immediately lying to the east of the bathing pavilion, where the ropes were. 10

The Court: And where were the showers that you speak about?

Mr. Leonard: In the pavilion.

The Court: All right. Proceed.

Mr. Potter: We evidently got into a discussion which is unfair to this defendant, and I think one thing should be made clear. You asked what was under lease in this matter. Of course that is part of our defense. 20

The Court: I so understand.

Mr. Potter: Anything that Mr. Leonard said is not to be taken as evidence.

The Court: I was just wondering what the physical structure of the beach was there; I was assuming there was a pavilion and bath-houses there, as you ordinarily and customarily find at a summer resort. Proceed, Mr. Leonard. 30

Mr. Leonard: By consent we may offer that portion of the minutes contained on page 229 and dated August 17, 1928, may we not?

Mr. Potter: Yes, sir.

Mr. Leonard: If the Court please, I neglected to read the paragraph from the 40

Discussion

minutes of August 14. This is the paragraph:

10 "There being no further business the meeting adjourned to meet on Friday evening, August 17, 1928, at 8 P. M., for the purpose of settling the bathing pavilion question, on motion of Councilman Smith regularly seconded by Roe. Carried."

The Court: Let me have that again, won't you, please?

(Paragraph reread by Mr. Leonard.)

Mr. Leonard: I offer in evidence that portion of page 220.

(Page 220 marked Exhibit P-5.)

20 Mr. Potter: What page is that?

Mr. Leonard: Page 219 and 220; the portion I am reading from appearing on page 220; this being the minutes of August 17, 1928.

30 "The bathing pavilion was next brought up for discussion and the solicitor advised that it was impossible to lease property from a municipality without procuring a lease and that those in possession of property without such lease were not tenants but trespassers. He said that the usual procedure was to compel said occupants to establish their rights to possession and if they failed to do this then the premises would be considered public property."

Mr. Potter: Are we to accept this as the law of the case?

40 The Court: I will make the law of the case, gentlemen.

Discussion

Mr. Leonard: (Reads) "Councilman Smith moved regularly seconded by Cooper that the clerk be instructed to write to Richard West and George Joline and ask them to establish their rights to possession of the bathing pavilion or same will be considered public property and thrown open to the public. Carried." 10

Mr. Leonard: Mr. Potter, in order to save time may I request whether you have a copy of the letter referred to in those minutes, in that we do not seem ever to have received the original?

Mr. Potter: No, we haven't it here.

Mr. Leonard: Do you know if it is in existence? 20

Mr. Potter: I do not. I have the old clerk.

Mr. Leonard: By consent we can offer the portion of the minutes for September 11, 1928, page 226, can we not?

Mr. Potter: Yes.

(Page 226 marked Exhibit P-6.)

Mr. Leonard: This is the meeting of September 11, 1928: 30

"Councilman Maney moved regularly seconded by Graham that the clerk be instructed to demand the balance of the rent for the small bathing—" and then someone has written in pencil the word "pavilion."

On the same page: "Councilman Maney moved regularly seconded by Graham that in the event the balance of the rent for the 40

Discussion

small bathing pavilion is not forthcoming the solicitor be authorized to start proceedings to collect same. Carried."

10 I call your Honor's attention particularly to the confinement of the remark to the small bathing pavilion.

I think that is all, Madam. You may cross-examine.

Mr. Potter: No questions.

20 Mr. Leonard: I now offer in evidence a certified copy of the record and proceedings in the action contemplated in the resolution, said action having been instituted in the District Court in behalf of the Borough of Monmouth Beach against Richard West and George Joline for the rent.

Mr. Potter: I do not see where it is a part of this issue.

The Court: Well, I understand the purpose of it; to show that you were assuming the lease had been made and that there was occupation under it and therefore you were entitled to the rent reserved.

30 Mr. Potter: On the contrary he is now offering to offer in evidence a paper that absolutely denies.

Mr. Leonard: I assume the paper will speak for itself.

The Court: What is it, a certified copy of the District Court record?

Mr. Leonard: Yes, state of demand.

40 Mr. Potter: The state of demand was not on record at all.

Mr. Leonard: It will speak for itself.

Discussion

The Court: It will speak for itself. I will determine that. In other words, you are going to claim it was merely for use and occupation and did not relate to any lease at all, upon your theory that the plaintiffs went into possession without any lawful right. 10

Mr. Leonard: Of course under the statute your Honor will recall in McKenna v. Reid, that an action for use and occupation will lie only when the relationship of landlord and tenant exists.

(Paper marked Exhibit P-7.)

The Court: Did the Borough recover?

Mr. Leonard: Well, we advised that they pay the rent. 20

The Court: And the Borough accepted the money?

Mr. Leonard: Yes, we have it right here, that check.

Now, may we add this state of demand, this suit being started October 17, 1928, resulting, as I said, in the payment of \$325, brought by the Borough of Monmouth Beach against Richard West and George Joline in the District Court of the Second District of the County of Monmouth, on contract, state of demand. 20

Mr. Potter: I would like to enter an objection if I can. As I understand it, this suit is based upon a letting. The paper he is about to read now sets up an entirely different cause of action. If you overrule it I will ask an objection. 40

Discussion

The Court: If that is so why do you object? Go ahead. I will allow him to read it.

(Objection noted for defendant as ground of appeal.)

19 Mr. Leonard: (Reads) "Plaintiff corporation demands of the defendants \$500 for that they used and occupied all those certain pavilions and bath-houses and the land and beach appurtenant thereto, situate on the east side of Ocean Avenue and extending to the Atlantic Ocean and adjoining Valentine Street in said Borough of Monmouth Beach, from the 1st day of June, 20 1928, to the 30th of September, 1928; and defendants took therefrom to their own use the rents, issues and profits, etc."

The Court: Do they say there an agreed rental? They don't, do they?

Mr. Potter: No, sir.

Mr. Leonard: The reasonable rental value of said land.

The Court: Six hundred and odd dollars?

30 Mr. Leonard: \$650. Your Honor will recall the use and occupation statute will lie where there be a sum certain or their reasonable value.

The Court: I heard you the first time, Mr. Leonard. Go on. I think the interesting question has not yet arisen. Proceed.

Mr. Leonard: I think we can by consent offer in evidence the certified check paid to the Borough.

40

(Check submitted to Mr. Potter.)

Mr. Potter: Yes.

Richard West—Direct

The Court: It may be marked.

(Check marked Exhibit P-7.)

The Court: What is the date of the check?

Mr. Leonard: March 13, 1928.

The Court: Oh, that was the first one?

Mr. Leonard: That was the first one they 10
took.

The Court: The second one was October,
wasn't it?

Mr. Leonard: The second one was Oc-
tober, yes. Here is the second one, I be-
lieve, to your order as attorney.

The Court: That is admitted. It may be
marked. Payable to his credit?

Mr. Leonard: Payable to Mr. Potter, en- 20
dorsed by him to the credit of Monmouth
Beach.

RICHARD WEST, sworn for plaintiff.

Direct-examination by Mr. Leonard:

Q. Mr. West, where do you live? A. Mon- 30
mouth Beach.

Q. How long have you lived there? A. Fifty-
three years.

Q. And you are one of the plaintiffs in this ac-
tion? A. I am.

Q. A partner of Mr. Joline, the other plaintiff?
A. Partner of Mr. Joline; yes, sir.

Q. Now, in 1928, March, you and your partner
gave to the Borough of Monmouth Beach a cer- 40

Richard West—Direct

tain check being marked in this case as Exhibit P-7, did you not? A. Yes, sir.

Q. And with that check went a letter? A. Yes, sir.

10 Q. Have you a copy of that letter? A. I have not.

Q. Did you ever prepare a copy of it? A. I did not.

Q. When did you go into possession of the bathing pavilion and beach, if you went into possession at all, after you gave that check? A. About the 1st of June.

Q. When did you receive the key, if you received that? A. About the 1st of June.

20 Q. From whom?

Mr. Potter: Objected to.

The Court: I am going to allow the factual situation to be developed here and then I will pass upon the law.

(Objection noted for defendant as ground of appeal.)

30 Q. From whom did you receive the key? A. Mr. J. George Goodall, assistant to the mayor.

Q. And did the keys you received from him fit the building? A. Yes, sir.

Q. Did you find any equipment in the building? A. Yes, sir.

By the Court:

40 Q. Will you describe the building and the grounds generally, Mr. West? A. The borough grounds are situated on Ocean Avenue Street and Valentine Street, I should judge about 110

Richard West—Direct

feet. The pavilion sits in the neighborhood of fifty or sixty feet, probably a little more, from Ocean Avenue, in the center of the ground belonging to the borough. The building occupies two-thirds of the property on the beach front.

Q. Of the 110 feet? A. No, I think the borough property is over 200 feet, but the building sits in the center and occupies perhaps two-thirds of it. The south side is graveled, beach graveled, and it has piling across the front of it running the full length of the borough lot. Those piles set close together. There may be one or two sets in the full length that may not get through to the surf to bathe. This property consists of property on Valentine Street, which, if I am not mistaken, is 110 feet. That property belonged to a gentleman by the name of Koch, and on entering the beach, or to get into the surf in front of the pavilion, by not going through the pavilion, you had to cross the Koch property.

Q. Describe the building itself, the pavilion.
A. The building itself was a one-story building consisting of a main entrance in the center and the bath-houses north and south of the center on each end; first a boardwalk or place for the public, and there is a porch in the front, a large porch on the east side, where the public usually sits.

Q. Sun parlor? A. Yes, chairs on the porch, rocking chairs.

Q. Where are those showers they speak of?
A. One shower is on the east porch.

Q. On the porch? A. On the porch; the other one was on the side porch, on the north side near the center.

Richard West—Direct

Q. How far from the bath-houses are the showers? A. Well, it was just a step from the shower into the bath-house.

Q. Fifty-eight bath-houses? A. Fifty-eight bath-houses that could be used.

19

By Mr. Leonard:

Q. And what was there to the west of the Koch property or to the south of the Koch property?

A. There was a road under Valentine Street, runs from the bulkhead east of Ocean Avenue.

By Mr. Potter:

Q. Do you mean to the south or the north? A. To the north.

20

By Mr. Leonard:

Q. Were there any bulkheads in that property to prevent anyone from gaining access to the beach? A. There is a bulkhead on the north side of the Koch property next to Valentine Street.

By the Court:

Q. How wide is the beach, I mean the borough property? A. The borough property, I don't know exactly, but I think that on the north end, where people usually sit on the beach, there was between thirty and forty feet of the borough beach.

30

Q. How long was the borough beach? A. That was the extent north of the pavilion where people could sit and stand.

Q. The whole 110 feet on the Ocean Avenue side? A. On the ocean side, yes.

40

Richard West—Direct

By Mr. Leonard:

Q. What was your object and the object of your partner in leasing these premises? A. Well, to rent the rooms and the beach out to bathers to bathe, make a nominal charge to everyone that came on. 10

By the Court:

Q. And your understanding of your lease is that no one could come on the beach to bathe excepting those who had paid an admission fee? A. That is right.

Q. Supposing any citizen of the borough—citizen or otherwise—dressed at home: would it be your idea that he would have to pay to get to the beach? A. Yes. 20

Q. In other words, you got under your lease or you claim, at least, the exclusive privilege to control the use of the beach and the pavilions and bath-houses for pay? A. That is the idea.

Q. No one had a right to go there, even though they were not bathers, without paying admission to the pavilion? A. Yes, sir.

Q. That is your claim. Go on. 30

By Mr. Leonard:

Q. Did you make a charge if anyone attempted to go upon the beach if they were not in a bathing suit? A. No, we never attempted to.

Q. Well, you answered his Honor as a general question, which we assume included that. A. I mean by my answer that it was our privilege, the property being in our possession.

Q. What was your custom with reference to charges when you went there in June? A. Our 40

Richard West—Direct

custom was to rent houses by the season or charge fifty cents for a person renting a house for a bath, or fifty cents for a suit.

Q. Now, suppose they used your pavilion and chairs and beach in front of it in a bathing suit;
10 would there be any charge then? A. Yes.

Q. How much? A. Fifty cents.

By the Court:

Q. In other words, the general public in the borough could not go on the pavilion or the beach front without paying admission to you?

Mr. Leonard: And bathe.

Q. Is that right? A. Yes, and bath.
20

Q. And bath? A. Yes, sir.

By Mr. Leonard:

Q. Could they go upon the beach without paying if they did not bathe? A. Yes.

By the Court:

Q. Oh, I see; it was the bathing privilege. A. Yes.

Q. You would be absolute? A. Yes.

Q. No one could go on the beach and bathe—
30 A. No, sir.

Q. Without paying you admission? A. No, sir.

By Mr. Leonard:

Q. Do you know whether or not there was any custom prevailing in that general vicinity, including Sea Bright as well, as to the use of bathing pavilions similar to yours.

Discussion

Mr. Potter: I object unless he qualifies this man.

The Court: Well, of course that is not a question, what they did in other places, not at all.

Mr. Potter: The question was did he know if there was a custom. 10

The Court: In some other locality.

Mr. Potter: I ask that he be instructed to answer only yes or no.

The Court: I won't let him answer at all. (Question repeated.)

Mr. Potter: Objected to.

The Court: Objection sustained.

(Objection noted for plaintiffs as ground of appeal.) 20

Mr. Leonard: Now, if the Court please, in that we propose to pursue that line somewhat, and in the light of the fact that your Honor has mentioned the understanding of these plaintiffs, would it not be pertinent—

The Court: Perhaps I misunderstood. I did not want his understanding, I wanted what his lease was. At least the plaintiffs claim a lease. Now, what did it cover? What was the thing that was leased? That is the point. And he told me that it was the exclusive bathing privilege on the beach as against anyone excepting those who had paid the admission. 20

Mr. Leonard: Now, suppose, if that were inferred from the mere letting of the beach, by reason of the fact, let us assume, that 40

Richard West—Direct

10 it was a custom. I say let us only assume that it was a custom of all bathing pavilion owners and all beaches, let us assume, to do the very thing. It would therefore not be unusual for a man to whom had been

let or rented the bathing beach to set the charge as other owners of pavilions did.
The Court: I have ruled on the question.
Mr. Leonard: I have an exception.

(Objection noted for plaintiffs as ground of appeal.)

20 Q. And how long did you pursue that plan, Mr. West, of charging fifty cents for those who used the bath-houses and the beach and water, as well as those who in a bathing suit used the beach and water? A. Through the season of 1928.

Q. And when did it begin? A. I think the pavilion was opened either the 15th or 17th of June.

Q. And that plan was inaugurated then? A. Yes.

30 Q. Do you know if that were the usual and customary plan of charging for the use of such privileges as you have described prevailing in that and the vicinities immediately adjacent on the Atlantic coast?

Mr. Potter: Objected to.

The Court: The Court has already ruled. Objection sustained. It is the same question, in a little different form, is all.

40 (Objection noted for plaintiffs as ground of appeal.)

Richard West—Direct

Q. Did you note any change after July 10, 1928, in conditions, in business? A. A great change.

Q. What was the change? A. For the worse.

Q. Well, what was it? A. People refused to pay.

Q. Did you demand payment? A. I did. 10

Q. Where would they have to pass—

By the Court:

Q. What did you demand payment for, Mr. West? A. Bathing; people coming on in their suits and bathing there.

Q. They didn't use your bath-houses, did they? A. No.

Q. Came in in their bathing suits and went out? 20
A. Went out.

Q. You demanded payment and they refused to make it? A. Yes, sir.

The Court: Go on.

By Mr. Leonard:

Q. Did those people use your beaches? A. They did.

Q. Did they use your chairs? A. Yes, sir.

By the Court: 30

Q. Was there any other public bathing beach in Monmouth Beach? A. No, sir.

By Mr. Leonard:

Q. Did you have chairs in the porches? A. I did.

Q. Did any of these people use those? A. They did.

Q. How many chairs did you have? A. Well, I can't give you the exact number, but some- 40

Richard West—Direct

wheres in the neighborhood of seventy-five, I think.

By the Court:

Q. Who owned the chairs? A. The borough.

10 Q. The borough? A. Yes.

By Mr. Leonard:

Q. They were part of the equipment you rented, weren't they? A. Yes.

By the Court:

Q. Part of the equipment?

By Mr. Leonard:

20 Q. Now, who in your employ would make the demand for payment? A. Myself or Mrs. Van-Brunt.

Q. Is she here today? A. She is.

Q. Was the demand which you made after July 10th any different from the demand that you had made before and had been complied with? A. None whatever.

Q. How long after July 10th did you notice this change of condition? A. Immediately after July 10th.

30 Q. Did those people ever tell you why they refused? A. They said the borough had declared it a free beach.

Q. Did you keep account of the people who went on the beach with bathing suits and used the privileges there without paying for them? A. We kept an account from August 19th, I think, until September 16th.

40 Q. Have you that calculation with you? A. I have.

George B. Joline—Direct

Q. Now, beginning August 19th, how many went in on that day?

Mr. Potter: May I ask some question here as to what he is reading from?

Mr. Leonard: I might say, Mr. Potter, 10 here is the original.

By the Court:

Q. Who kept that? A. Mr. Joline.

Q. Mr. Joline, your partner? A. Yes, sir. That was a slip of paper they tacked on the wall and kept an account on.

Q. The paper which Mr. Leonard now has, what might be called the original? A. Yes.

Q. Was tacked on the wall, and Mr. Joline, you 20 say, made the figures? A. Mr. Joline made the figures.

Mr. Potter: I object to this man testifying to it. He is right here.

Mr. Leonard: Step down a moment.
(Witness withdrawn.)

GEORGE B. JOLINE, sworn for plaintiffs. 30

Direct-examination by Mr. Leonard:

Q. Mr. Joline, you are a partner of Mr. West, are you not? A. Yes.

Q. You have lived in Monmouth Beach for how long? A. About three and a half years, or four.

Q. Formerly you were connected with the famous old Barnegat light, weren't you? A. I came from Barnegat light at that time to run a bath- 40 ing pavilion.

George B. Joline—Direct

Q. Now I show you a paper containing some figures. Do you recognize that paper? A. Yes.

Q. As what? A. As the slip I had hanging up on the side—

10 By the Court:

Q. Of the pavilion? A. The pavilion, in the candy department, the soda department.

By Mr. Leonard:

Q. What would you enter on that? A. The number of people that went in bathing from our beaches, the one that we rented from the next door—our beach was rented from the borough.

20 Mr. Potter: That is what I thought, Judge.

By the Court:

Q. There was an addition there? A. Yes.

Mr. Potter: We have nothing to do with the beach next door.

Q. Can you segregate them, or separate them, Mr. Joline?

By Mr. Leonard:

30 Q. Did you keep a list of the people who passed through your pavilion and used your facilities?

The Court: That is, the borough's pavilion.

Q. The borough pavilion, that which you leased from the borough, or claim you leased. A. We claim we leased from the borough; the people went down on the beach.

40 Q. Through your pavilion? A. Through the property, the borough property.

George B. Joline—Direct

Q. Now when did you make these figures? A. I began on the 19th of August.

Q. And did you make them each day? A. Each day.

Q. Are those figures there the accurate figures of the persons who used the beach without paying for it? A. Yes. 10

By the Court:

Q. Wait a moment. Did you demand payment of each of these persons? A. We did, most every one of them. Mrs. VanBrunt was the first in the—

Q. Leave that to her. Was it your desire that they went to some other beach? A. Well, it belonged to us. 20

Q. That you leased from someone else? A. Yes, they used that same beach all the time, the borough had; they used it again this summer.

Mr. Potter: At that time it was absolutely privately owned.

Mr. Leonard: May we have it marked for identification?

The Court: It may be marked for identification. 30

(Paper marked Exhibit A for identification.)

Mr. Potter: May I have an opportunity to cross-examine Mr. Joline before this is used?

The Court: If you want to, yes, I will allow you to do it now.

George B. Joline—Cross

CROSS-EXAMINATION by Mr. Potter:

Q. Do I understand you say that this list that you have made up here comprises everyone that was on the two beaches? A. That comprises people that went into the water that brought bath-
10 ing suits.

Q. On both beaches? A. There is no reference to the other beach on the inside.

Q. But those are only people that went into the water on the borough side? A. All of them went into the water if they pleased.

Q. Everybody that is tabulated on this slip of paper was on the borough property; is that correct? A. Yes, sir; on the borough property.

20 Q. Where was this, inside the pavilion? Where was this paper kept, inside the pavilion? A. Inside the pavilion.

The Court: Near the candy stand, he says.

A. Inside the candy stand.

By the Court:

Q. Inside the candy stand? A. Yes, on the
30 wall.

By Mr. Potter:

Q. Who marked it up? A. I did the marking, every one of them.

Q. Every morning? A. No, sir; every evening, after the report came in from the slip that I had.

Q. Where are the slips? A. I haven't got any slips.

Q. What are these, just simply one figure, say
40 25, 30, or 35? This paper is just one figure you

George B. Joline—Cross

put down each day? A. One figure, the number of people that had been on that beach with bathing suits and using the privilege of that beach without paying for their privilege.

Q. Yes, I heard you say that before. Where are the slips? A. Sometimes I just put it down 10
on a slip of paper, as the young lady, or whoever was keeping account of the free bathers that was going on that beach, and that were not inhabitants of Monmouth Beach.

Q. Who were the people who were putting down these notations on these slips? A. I put them down as they come in and give me the report.

The Court: He is telling you that the 20
young lady kept the tabulation each day.

Q. Who was the young lady? A. The young lady that is here.

Q. Did she make the slip? A. No, sir; she would tell me the number of people. Her orders was not to count no one twice.

Q. And she would tell you and you would write it down on the slip? A. Yes, sir.

Q. Then you would post it on this? A. Yes, 20
sir; every day I posted it up, every day on that card that was hung up there.

Q. Didn't you include anybody in these calculations who were residents of Monmouth Beach? A. No, sir.

Q. Didn't you charge for those? A. The specific orders was not to charge for any resident of Monmouth Beach, what we called a resident, people that lived there the year round.

George B. Joline—Direct

By the Court:

Q. So that tabulation is merely for outside guests? A. Yes.

Q. Summer people, transient people? A. Yes, and their guests.

10 Q. Transient people and their guests?

Mr. Leonard: Yes.

FURTHER DIRECT EXAMINATION by Mr. Leonard:

Q. For how long did you continue this method of polling? A. Only to the 16th day of September.

20 Q. And is that paper you have in your hand the original paper that hung near the candy shelf? A. Yes.

Q. And during the summer of 1928? A. Yes, sir.

Q. And that is all in your handwriting? A. Yes, sir; even them little charges on top for candy.

Mr. Leonard: It is offered in evidence. I withdraw it.

30 The Court: No, you haven't proven it yet.

Mr. Leonard: I don't think I will offer it even to refresh his recollection.

Q. Can you tell us, Mr. Joline, without the use of that paper, how many of those people went in and used your beach without paying—

40 The Court: You didn't get it. He says he wasn't there taking a tabulation, that the young lady took the tabulation. She

George B. Joline—Direct

is the one that can speak. He merely has the total at the end of the day.

Mr. Leonard: Just like a bookkeeper—

The Court: He is the ledger keeper.

Mr. Leonard: You mean to say like a book of original entry? 10

The Court: No, it is not an original entry.

Mr. Leonard: If your Honor is suggesting that we call a little girl here and ask her how many people went on the beach without paying on the 21st of August, I can anticipate her answer. I don't know.

The Court: It is hearsay.

Mr. Leonard: It is something to refresh his recollection. 20

The Court: No, it is merely hearsay.

By Mr. Leonard:

Q. Mr. Joline, can you tell without refreshing your recollection the number of people who went upon that bathing pavilion and beach which you rented without paying fifty cents demanded by you or your employees? A. According to this list—

Mr. Potter: Objected to. 30

Q. Yes or no?

The Court: I have decided I will agree with Mr. Potter that anything that we get in over your voice may be stricken.

By the Court:

Q. Now the question, Mr. Joline, was whether or not you could give that information without refreshing your recollection by means of some 40

George B. Joline—Direct

memoranda that you might have. Yes or no? A. Yes.

Q. You can tell us without refreshing your recollection? A. Yes, at the present time.

Q. All right. Tell us.

10

Mr. Potter: May I ask a question or two?

The Court: I will allow you to cross-examine. The next question will bring out what you want.

A. About twenty-eight hundred in that time, twenty-nine days.

Q. How do you know that? A. I counted it up.

Q. Oh, you counted it up? A. I did.

20 Q. On what? A. I took the figures from this paper and counted it up.

Q. And that paper was made up by you as a result of information given to you by your girl employee? A. Two girls.

Q. At the close of the day? A. Two girls.

Q. Two girls? A. Two girls; yes, sir.

Q. And you made the memoranda from what they said? A. Yes.

Q. You didn't keep the slips that they made?

30 A. No, sir.

Q. That is the only way you can tell? A. That is the only way I can tell.

The Court: Now until you establish that memorandum as a refresher, properly establish it, I will strike out his statement of twenty-eight or twenty-nine hundred people from August—what date?

The Witness: 19th.

40

George B. Joline—Direct

The Court: August 19th to September 16th. Strike out his answer there as to twenty-eight hundred people, on the ground that it is obviously relying upon a paper that has not been established and could not be used to refresh his recollection, based 10 purely upon hearsay, at the close of the day.

Mr. Leonard: I understood your Honor's ruling—

The Court: Now if he knows.

By the Court:

Q. Do you know, independent of that paper or record, how many went in there, without looking at that paper, without referring to it, do you 20 yourself know? A. I know there was hundreds come in there on that beach, but I asked those people to keep account for me each day.

Q. We don't know what they told you. You say you were not around there all day. A. I was there all day.

Q. What were your duties? A. Taking care of the bathing pavilion.

The Court: Well now, so far as he can 30 state independent of the paper in question, how many, on an average each day, went in there; I will allow him to state it.

Q. Can you tell that? A. That was the reason I kept that paper each day.

Q. You don't follow me at all. Independent of that paper, are you able to say on an average how many went in there without paying and took advantage of the bathing privileges? A. Yes, 40

George B. Joline—Direct

that is the way I claim there was over a hundred a day.

Q. Well, that is your statement, a hundred a day? A. Yes.

10 Q. From the—what date in August? A. 19th of August.

Q. To the 16th of September? A. Yes, sir; on an average.

The Court: All right. That is his statement.

By Mr. Leonard:

Q. And at fifty cents that would be \$50 a day, would it not? A. Yes, sir.

20 Q. Now were there any who went in without paying prior to August 19th? A. Yes, sir.

Q. And for how long prior to August 19th did they attempt to go on free of charge? A. Right from the beginning.

Q. In July? A. In June.

By the Court:

Q. From the beginning? A. Right in the beginning of June.

30 Q. Well, this difficulty with the borough didn't occur until when?

Mr. Leonard: July 10th, I think.

A. July 10th is when they came in, but the controversy—

Q. The controversy as to the public going in? A. Yes.

By Mr. Leonard:

40 Q. How many would you say in this estimate, based upon your observation, were there a day

George B. Joline—Direct

who went in without paying during July? More or less than went there in August? A. About the same.

Q. One hundred a day? A. Yes, sir; that is, in good weather.

By the Court:

10

Q. What sort of a month was July? A. A very good month.

By Mr. Leonard:

Q. Now can you tell us, Mr. Joline, what money was made or lost by you and your partner in that venture at the end of the season? A. Estimated about \$384.

Mr. Potter: Objected to.

20

The Court: As a preliminary piece of examination I will allow it. We will see whether it is brought in properly and connected with another issue in the case.

By the Court:

Q. What is your answer? A. It is a general loss.

(Question repeated.)

Q. Your answer to that is yes or no. Can you tell? A. Yes, according to the figures, the actual figures from the business we done, was about \$384.

30

Mr. Potter: I ask that that be stricken out. Your Honor's advice to him was to answer yes or no.

Q. What is that answer, \$384? A. \$384, not counting what we lost from their bathing.

40

George B. Joline—Direct

By Mr. Leonard:

Q. You lost \$384, as I understand it?

By the Court:

10 Q. How do you know that? A. Why, the record of our expenses and for the moneys that we took in during the season.

By Mr. Leonard:

Q. The difference between the two? A. The difference between the two.

Q. Well, have you any figures with you showing those calculations? A. Yes, sir.

Q. Produce those, please.

20 Mr. Potter: I object to the entire line of this testimony and ask that it be stricken out. There are any number of a thousand elements that might have entered into that profit and loss.

Mr. Leonard: I will not pursue it.

30 The Court: He is not pursuing it at the present moment. Of course, all the witness has said is, they know how much their income was and how much their expense was. They say that their expense was \$384 more than their income. That is how that comes in. That is what I assume he means, isn't it?

Mr. Leonard: Yes. That is all, Mr. Joline.

Mr. Potter: Are you going to call Mr. Joline again or shall I examine him now?

Mr. Leonard: I will call him for the purpose of your cross-examination.

40 The Court: I will allow him to be called again.

Richard West—Direct

Mr. Leonard: Now, if the Court please, for what it is worth I offer the original paper containing the calculations of Mr. Joline, made every day, partly from rough memoranda supplied by his employees, partly by what they told him as a result of his instructions to observe how many went on the beach without paying, it being made from day to day and being kept near the candy counter. 10

The Court: Have you any objection to it?

Mr. Potter: Yes.

The Court: I won't allow you to have it marked until you establish it. The only way to establish it is to call those young women and let them say whether at the end of each day Mr. Joline entered the figures on the paper. You have got to call them to establish it. At least, you are obliged to get that paper in. That is a mere result of what somebody else has done. 20

Mr. Leonard: I have those here. I will do that. 30

RICHARD WEST, recalled for plaintiff.

Direct-examination by Mr. Leonard:

Q. Mr. West, were you there every day? A. No, sir.

Q. How often were you there? A. Well, I was in every day. I wasn't there all day long. I was 40

Richard West—Direct

there from half-past four until closing time each day except Saturdays and Sundays. Saturdays I was there from noon till the closing time, Sundays all day.

Q. I show you a paper marked Exhibit A for
10 identification and ask you if you have ever seen that before? A. I have.

Q. Where? A. In the candy booth in the pavilion.

Q. When? A. Through the season of 1928.

Q. Do you recognize the handwriting? A. I do.

Q. Now, where was it kept? A. It was tacked on the east wall of the candy booth.

Q. What was done with it, do you know? Do
20 you know why it was there? A. Well, it was there originally to keep the accounts of all the children buying candy and it was used to keep the number of people that bathed free from August 19th to September 16th.

Q. Have you, Mr. West, made any independent estimate— A. I have.

Q. Of the number of people? A. I have.

Q. Who used the beach and pavilion with bathing suits without paying the demanded sum of
30 fifty cents? A. I have.

Q. And what is your estimate as to the number per day?

Mr. Potter: I object, if the Court please. I don't think he has proved himself competent to give an estimate.

By the Court:

Q. Are you able to answer that question, Mr.
40 West?

Richard West—Direct

Q. How? A. By the time that I was being there, seeing the number of people that were on the beach.

Q. In other words, you can give an estimate from the number that you yourself saw? A. Yes.

Q. Without referring to any memorandum now? A. Yes, on certain days. 10

Q. You can't do that unless you establish your memoranda, unless you made it yourself or it was adopted by you. You may testify as to the days, certain days, you said? A. Yes, sir.

Q. What were they?

By Mr. Leonard:

Q. In your judgment, what was the average during that period? A. About a hundred a day, on the average, that didn't pay. 20

Mr. Potter: I ask that that be stricken out. He has testified here he was not there except after four o'clock in the afternoon and after Saturday noon.

The Court: Did he say that?

Mr. Potter: Yes. How can he say?

The Court: Oh, he can't, obviously, if that be so. 30

Mr. Potter: That is his testimony.

The Court: I don't see why you don't call these girls. They will clean it up as quickly as may be.

Mr. Leonard: They will be here.

The Court: You haven't them here now?

Mr. Leonard: Rather than have any further controversy, I will put them on the stand and withdraw Mr. West. 40

The Court: Don't you think that would be the quicker way to do it?

Evelyn Miller—Direct

EVELYN MILLER, sworn for plaintiffs.

Direct-examination by Mr. Leonard:

Q. Miss Miller, where do you live? A. Monmouth Beach.

10 Q. Do you know Mr. Joline and Mr. West? A. Yes.

Q. You worked for them during the summer season of 1928 at the bathing pavilion in Monmouth Beach, did you not? A. I did.

Q. It was your duty to be upon the beach in a bathing suit and look after the little children and preserve order?

20 Mr. Potter: Let her tell.

Q. On the beach during that period, was it not? A. It was.

By the Court:

Q. What were your duties?

Mr. Leonard: Well, I thought we could save time.

By Mr. Leonard:

30 Q. I show you a paper and ask you what that is—marked Exhibit A for identification—and ask you if you recognize that.

By the Court:

Q. What is that paper? A. It is a paper that Mr. Joline put the totals down each day.

By Mr. Leonard:

Q. Where was it kept? A. Kept in the candy room.

40 Q. Did you ever assist in putting down the totals? A. I didn't write anything on it.

Evelyn Miller—Direct

Q. Did you ever assist him in compiling the number that was written? A. I told him, yes.

Q. When would you do that? A. At the end of the day.

Q. What would you do to determine the number that you would give him? A. I knew the people that lived there all the year round and I knew the people that were strangers. 10

Q. Didn't you include the people who lived there all the year round? A. No.

Q. And after you would give him the number at the end of the day, what would he do? A. He wrote it down on this paper.

Q. Did you see him do that? A. Yes, sir.

By the Court: 20

Q. And how did you keep your record, have a slip of paper? A. No, kept it in my head.

Q. In your head? In other words, Mr. Joline would come around and say, "Well, how many were here today?" and you would say 20, 25, 50? A. Yes.

Q. Is that the way he made the record? A. At the end of the day.

Q. At the end of the day? A. Yes. 30

Q. Were you able to keep that in your head all day? A. Yes, because there wasn't such a terrible lot of people there.

Q. How many on an average would you count? A. Oh, about forty.

By Mr. Leonard:

Q. You say you saw Mr. Joline write the figures down that you gave him? A. Yes. 40

Evelyn Miller—Direct

Q. Have you ever seen that paper since the time that it was placed in the candy store and the time that you testified? A. No.

Q. Well, look at it now, please.

10 The Court: Starting with August—
Mr. Leonard: 19th.

The Court: Is it August 19th?

Mr. Leonard: Yes.

Mr. Potter: If this is looking at it for the purpose of refreshing her recollection, I object.

Mr. Leonard: For the purpose of identifying the paper.

20 The Court: It may be identified.

By the Court:

Q. Now, you may look at it as to August 19th. Do you say that on August 19th—how many do you say were there, Miss Miller? A. Well, I didn't always count those people.

Q. You didn't? A. No, not always? Mrs. VanBrunt did sometimes.

Q. Mrs. VanBrunt did sometimes? A. Yes.

By Mr. Leonard:

30 Q. And the days that you did you would give Mr. Joline your figures and you would see him write them down? A. Yes.

Q. Do you know the little Hart boy? A. Yes.

Q. Did anything happen to him during that season?

Mr. Potter: I object, if your Honor please.

40 The Court: I don't know yet. I can't tell.

Evelyn Miller—Cross

Mr. Leonard: I shouldn't ask it if it were not admissible.

The Court: That may or may not be so, generally speaking.

By the Court:

Q. Do you know the little Hart boy? A. Yes. 10

Q. Anything happen to him? A. Yes.

Q. What was it happened to him? A. He was nearly drowned.

By Mr. Leonard:

Q. Who saved him? A. I did.

The Court: Now, what is the significance of that?

Mr. Leonard: I will connect it with it and show that the little Hart boy was one from whom they demanded fifty cents and who went there in a bathing suit and refused to pay and then called on some of these people to get them out of trouble, that is all. 20

CROSS-EXAMINATION by Mr. Potter:

Q. How many hours a day did you work? A. From nine in the morning to six at night. 30

Q. From nine to six? A. Yes.

Q. Have you any recollection of the condition of the weather between August 19th and September 16th? A. There was a storm during the latter part.

Q. There was a storm during the latter part of what? A. August.

Q. How many days? A. Nearly the whole week. 40

Evelyn Miller—Cross

Q. Almost the entire last week of August? A. Yes.

Q. And in the conduct of this bathing pavilion as you observed it, would there be more people there on some days than on others? A. Yes.

10 Q. Did anyone bathe during this storm? A. They were not supposed to, but they went in at their own risk.

Q. How many? A. Well, twenty-five.

Q. Altogether? A. What do you mean, altogether?

Q. I mean twenty-five people altogether that would venture to go in in the storm? A. Yes.

Q. Including residents of Monmouth Beach? 20 A. Yes.

Q. And others? A. Yes.

Q. Including some people who rented houses in the pavilion? A. Yes.

Q. So that all together, for that whole week, it didn't average over twenty-five a day; is that right? A. Yes.

Q. Now, let's take a normal week. Do as many people bathe on Monday as on Saturday? A. No.

30 Q. Do as many people bathe on Tuesday as on Sunday? A. No.

By the Court:

Q. What is the big day in the week? A. Saturdays and Sundays.

Q. They bathe Saturdays and Sundays? A. Yes.

Helen Manahan—Direct

HELEN MANAHAN, sworn for plaintiff.

Direct-examination by Mr. Leonard:

Q. Miss Manahan, you worked for Mr. Joline and Mr. West at Monmouth Beach in 1928, did you not? A. I did. 10

Q. You and Miss Miller worked together on the beach, didn't you? A. Yes, we did.

Q. Did you at any time during that period make calculations as to the number of people who went upon the beach without paying fifty cents? A. I did.

Q. Whom did you assist? A. Mr. Joline.

Q. Now, Miss Manahan, I show you a paper marked Exhibit A for identification and ask you if you ever saw that paper before. A. I have. 20

Q. Where did you see it during the summer of 1928, if you saw it during then? A. It was on the east wall of the candy booth.

Q. What was it there for? A. It was to keep the account of the people that used the pavilion and the beach without paying for bathing privilege.

Q. Did it include any local residents? A. No.

Q. In whose handwriting is it, do you know? A. It is in Mr. Joline's. 30

Q. Did you ever see him make any of the notations? A. I did.

Q. Did you ever report any figures to him? A. I did.

Q. What did he do after you reported the figures to him? A. Well, Evelyn and I usually had a separate beach day; she would be on one day and I would be on the next; and at different times a day I would report to Mr. Joline and he 40

Helen Manahan—Direct

would put it down on a slip of paper and at the end of the day he would add it up and he would put it on this slip of paper.

By the Court:

10 Q. You made no record of your own, did you?

A. No.

Q. Just carried it in your head, just as Miss Miller said? A. I did at different times of the day. I didn't go regularly.

Q. Not steadily? A. No, sir.

By Mr. Leonard:

Q. What would you do, make rounds for the purpose of checking it and counting? A. Well, 20 in the morning I would report in the morning, and in the afternoon I reported in the afternoon.

By the Court:

Q. Were those people asked to pay? A. Yes, sir.

Q. Who asked them? A. Well, Mr. Joline would ask them during the week and Saturday afternoon if Mr. West was there he would ask them, or on Sunday it would be either Mr. West 30 or Mrs. VanBrunt or Mr. Joline.

Q. What would they say? A. Well, they just would ask them if they had paid their privilege for the beach, but they asked them in a nice way.

Q. I don't mean that. That is not a part, of course. I want to know what was said to them.

A. They just asked them for the money.

Q. If they paid? A. Yes.

Q. And what would the particular individual 40 say? A. "The borough says it is a free beach."

Helen Manahan—Direct

Q. In other words, these nonresidents when they went there were asked if they had paid and they would reply that "the borough says it is a free beach"? A. Yes.

Q. Were any signs out on the building giving the schedule of admission fees? A. No, I don't think there was. 10

Q. Anywhere on the buildings at all, indicating that it was private bathing ground, any notices of that sort, were there? A. I don't think so, no.

Q. Or giving notice to the public that they must pay to enter the pavilion and the bathing ground? A. Inside there was a sign.

Q. Where? A. It was in the hall. 20

Q. Leading to what, the bathing-houses? A. There was a corridor went down through the center of the pavilion, it was right there.

Q. And what was that? A. It had "Admission 50 cents to bathers."

The Court: Go on.

By Mr. Leonard:

Q. Would the bathers who passed through the pavilion and down on the beach in their bathing suits have to pass that card? A. Yes. 30

Q. Were there any lifeboats on the beach? A. Two.

By the Court:

Q. Who owned them, if you know? A. They belonged to Mr. Joline and we had the privilege of the other one from a man that lived there through the summer. 40

Mr. Leonard: That is all.

The Court: Cross-examine.

Helen Manahan—Cross

CROSS-EXAMINATION by Mr. Potter:

Q. Where were these bathers? A. What bathers?

Q. That you say you told Mr. Joline about? A. Well, they were on the borough beach and they
10 were on the pavilion.

Q. The borough beach and the pavilion? A. Yes.

Q. Never on the other beach? A. Well, naturally they could pass from the borough beach right over to the other beach.

Q. You counted them only where they went on the borough beach? A. Well, yes.

Q. Didn't count them on the other beach? A.
20 What was I to do if they passed from the borough beach to the other?

Q. Don't argue with me. A. I did.

The Court: Don't argue with a lawyer.
Just answer as briefly as possible.

Q. Did you count any on the other beach? A. No.

Q. Did you ever tell Mr. Joline at the end of the day how many were there for the whole day?
30 A. No.

Q. Did you ever figure out how many were there for a whole day? A. I never did, no.

Q. You say they were all transients? A. By transients I mean not residents of Monmouth Beach.

By the Court:

Q. Not residents of the borough? A. Yes.

Q. How do you know? A. Well, in the winter
40 there aren't many people there and you can usually tell the home people.

Mrs. Mabel VanBrunt—Direct

Q. What about the summer residents there?

A. They were requested to pay.

Q. And you counted those among the nonpaying bathers of the property? A. Yes.

By Mr. Potter:

Q. There are about as many summer residents as there are permanent residents of Monmouth Beach; isn't that true? A. Yes.

10

Mr. Potter: That is all.

Mr. Leonard: That is all.

MRS. MABEL VAN BRUNT, sworn for plaintiffs. 20

Direct-examination by Mr. Leonard:

Q. Mrs. VanBrunt, you live where? A. Monmouth Beach.

Q. How long have you lived there? A. All my life.

Q. Were you ever employed by Mr. Joline and Mr. West? A. I was.

Q. In what year? A. 1928.

30

Q. At the bathing pavilion and beach in the Borough of Monmouth Beach? A. Yes.

Q. And what were your duties? A. I attended in the office, gave out the towels, suits, assigned the bathhouses.

Q. Was there any pay window or cage where the sums were collected? A. Yes, there was an office there.

40

Mrs. Mabel VanBrunt—Direct

Q. Was there any charge made for the bathing beach privilege? A. Sometimes; sometimes there wasn't.

Q. Did you make a demand and make a charge for the bathing privilege? A. I did.

19

By the Court:

Q. Wherever the bath-houses were used, Mrs. VanBrunt, I assume they were paid for? A. Yes, by the season.

Q. And this controversy really relates to those who went on the beach? A. Yes.

Q. In bathing suits? A. And used the pavilion and chairs.

20

Q. Or used the pavilion and chairs? A. Yes.

Q. Whether or not in their bathing suits, either sat there and used chairs, not in bathing suits, or who were with them and went out? A. Yes.

Mr. Leonard: I think we can agree on this: there was no attempt at any time made to charge for those who were not in bathing suits. People in every day clothes could use the bathing beach and pavilion free of charge.

30

The Court: My difficulty is that I got the impression that Mrs. VanBrunt was including those who sat in the chairs on the pavilion.

Mr. Potter: That is correct.

By the Court:

Q. Were you? A. Well, only those that paid the cost, of course. They wouldn't always be in bathing suits.

40

Mrs. Mabel VanBrunt—Direct

Q. Your statement was, and your employers, Joline and West, were to charge everyone who went and sat in the chairs. A. No, I didn't mean that that way.

Q. It was only those in bathing suits? A. That is all. 10

The Court: All right. Go on.

By Mr. Leonard:

Q. And how would you make the demand for the privilege of going there with bathing suits and showers, chairs, pavilion and beach? A. I would ask them in a polite way if they would pay the fifty cents. And they would just refuse, laugh at us and say, "It is a free beach and you daresn't put us off." 20

Q. Was there a sign there? A. A what?

By the Court:

Q. A sort of a sign indicating that admission fees were charged. A. Not to my knowledge.

Q. You never saw any such sign? A. I didn't see any.

By Mr. Leonard:

Q. When did you go there? A. The latter part of July. 30

Q. You were not there before? A. No.

Q. Do you know the Hart family? A. I do not. I know of them but I don't know them personally.

Q. I show you Exhibit A for identification, Mrs. VanBrunt, and ask you if you recognize it. A. Yes, I think I do.

Q. As what? A. An account kept of those, the free bathers. 40

Mrs. Mabel VanBrunt—Direct

Q. Where was the account kept? A. Well, I kept my own account and then gave it to Mr. Joline at the end of the day.

By the Court:

10 Q. How did you keep your account, Mrs. VanBrunt? A. Mark it down on a piece of paper and hand it over to him at night, give him the figures.

Q. How often did you do that? A. Every day.

Q. During what period? A. From the time I was there to the time we closed.

Q. Until when? A. Until August, I think they closed.

Q. On the 16th of September? A. Yes.

20 Q. And you kept an account every day? A. Yes.

By Mr. Leonard:

Q. In whose handwriting is that paper, do you know? A. It is Mr. Joline's. I don't think anyone else wrote on it but him.

Q. Did you ever see him write upon it? A. Yes, I have watched him put the numbers down that I gave him.

30 By the Court:

Q. How many on an average, do you recall, did you count per day, Mrs. VanBrunt? A. August 19th there were 269 free bathers. That was on a Sunday.

Q. And on other days, say from Monday to Friday, what would they average? A. They would average a hundred, sometimes seventy-five.

40 Q. One hundred to seventy-five? A. Yes, they would vary.

Mrs. Mabel VanBrunt—Cross

Q. And Saturdays and Sundays were the biggest days? A. Yes.

Q. And they averaged two hundred and something? A. Yes, 263, 269, different.

By Mr. Leonard:

Q. How about the two or three days of the storm, do you recall that period? A. Well, there would be a few go in at their own risk, that you couldn't do anything with them. 10

Q. Do you recall what date the storm occurred? A. Not exactly, no; in August, but I don't know just when.

Q. Who suggested keeping a tally, do you know? A. I did. I just wanted to have an idea. 20

Mr. Leonard: Cross-examine.

The Court: Cross-examine, Mr. Potter.

CROSS-EXAMINATION by Mr. Potter:

Q. Mrs. VanBrunt, your duties were entirely inside the building? A. Not exactly, but I was in and out.

Q. And how much out? A. I was out a great deal to see the bathers that came that should pay and didn't pay. 30

Q. On the beach? A. On the beach and pavilion also.

By the Court:

Q. Did you ever attempt to exclude anybody from the pavilion because they didn't pay, Mrs. VanBrunt? A. I did not.

Q. Did Mr. West or Mr. Joline to your knowledge ever exclude anybody? A. No, not to my knowledge. 40

Mrs. Mabel VanBrunt—Cross

By Mr. Potter:

Q. When did you start this system of keeping check? A. I think August 19th.

Q. And how long did you keep up the check?

A. Every day for the balance of the season.

10 Q. Did you participate in it every day? A. I certainly did.

Q. You checked them yourself? A. Yes.

By the Court:

Q. Well, did you check while the two girls were doing it, too? A. No, no.

By Mr. Potter:

20 Q. You have heard them testify that they checked between the two of them every day? A. Yes; well—

Q. Did you check also every day? A. I checked every day, yes.

Q. Well, now how do you know whether you got the same ones that they got? A. I know that I didn't.

By the Court:

Q. Why?

30 By Mr. Potter:

Q. How? A. Well, because I know it.

By the Court:

Q. Why? How do you know it? A. Well, I know.

Q. How do you know it? A. I don't know whether they checked while I was checking or not.

40 The Court: Her answer is "I don't know whether they checked when I checked."
Well, anything more?

Mrs. Mabel VanBrunt—Cross

A. I know the Sunday that I checked the 269 they wasn't checking, because they were very busy.

By Mr. Potter:

Q. Weren't you? A. I think I was. 10

Q. And weren't they in a better position to check than you were? A. I don't remember whether they were or not.

Q. Wasn't Miss Miller's job on the beach? A. I think so.

Q. And wasn't yours inside of the building? A. Not all the time, no.

Q. But your primary duties were inside the building? A. At times. 20

Q. Now, is it necessary to go through that building to get to the beach? A. Sometimes, yes.

By the Court:

Q. When? A. They had to come on the grounds to get to it, and all those people went right through the grounds.

By Mr. Potter:

Q. You misunderstood my question. Is it necessary to go through the building to get on the beach? A. Not all the time, no. 20

Q. Not all the time? Any reason that you can't walk down there now and walk onto that beach without going through that pavilion?

Mr. Leonard: I object to what the conditions are now.

Q. Or at any time during the summer of 1928?

A. I think there was a rope around the lot, if I 40

Mrs. Mabel VanBrunt—Cross

am not mistaken, and they took it down and tore it down.

Q. All right; leave the rope out of consideration. I mean so far as the physical properties are concerned there was nothing to prevent you
 10 from walking onto that beach without going through the building? A. Well, you can cross any of the properties there and get to the beach.

Q. You could cross the borough property and get to the beach, couldn't you, without going through the building? A. Yes, but you had to go on the borough street.

Q. But I say you didn't have to go through the building to reach the beach, did you? A.
 20 They went on the borough property.

Q. All right; we will agree upon that; but you didn't have to go through the building, did you? A. Not necessarily, no.

Q. As a matter of fact practically all of these free bathers that you speak of went onto the beach without going through the building? A. No, they didn't, not on the beach.

Q. I say most of them. A. No, most of them
 30 went through the pavilion.

Q. They did? A. Yes.

Q. What was the occasion for that? A. Simply to defy you and say it was a public beach, that is the reason, and try and put them off, they would say.

Q. I assume these bathers were summer residents of the borough, were they, Mrs. VanBrunt? A. Transient people and some residents of the
 40 borough.

George P. Joline—Direct

Q. Summer people? A. Summer visitors, I have seen them.

Q. How could you tell who were summer residents and who were not? A. I have lived there all my life.

Q. Well, summer people. A. Well, I know 10 them.

Q. You know all the summer people? A. Mostly all of them.

Q. Don't they change at Monmouth Beach? A. Not so much.

The Court: Well, go on.

Mr. Potter: That is all.

Mr. Leonard: That is all, Madam.

Mr. Leonard: If the Court please, I 20 offer that paper in evidence now, as the tabulation is identified.

The Court: I won't allow you to offer it in evidence. I will allow you to recall Mr. Joline and let him refresh his memory—he kept it—merely to use it for that purpose, that is all. Of course, the integrity of the testimony would be a matter for the jury.

30

GEORGE P. JOLINE, recalled for plaintiffs.

Direct-examination by Mr. Leonard:

Q. Using Exhibit A for identification, if you desire, Mr. Joline, can you tell us the number of people who went upon the bathing pavilion or beach you rented after demand and refusal to 40

George P. Joline—Direct

pay the fifty cents, who were not legal residents of the borough? A. Have I reckoned up this slip—

Q. Looking at the slip if you desire and starting with August 19th, give us the numbers. A. 10 August 19th was Sunday, was 269 people went on that beach that were non-residents, in bathing suits, according to the figures given in by—

Q. All right; pass on to August 20th and go right down.

By Mr. Potter:

Q. I would be very much interested to know the last thing said. By whom? A. By the women. 20

By Mr. Leonard:

Q. Pass on to the next. A. 20th, 72; 21st, 84; 22nd, nobody, because that was the time of the storm; 23rd, nobody, storm; 24th, 42; 25th, 96; 26th, 104; 27th, 112; 28th, 143; 29th, 221; 30th, 167; 31st, 136; 1st of September, 90; 2nd of September, 263.

By the Court:

Q. That was Labor Day? A. No, sir; Sunday 30 before Labor Day. Labor Day there was only 67.

Q. On Labor Day? A. On Labor Day.

Q. How do you account for that? A. Well, there it is.

Q. All right. Go on. A. September 4th, 43; 5th, 98; 6th, 112; 7th, 4.

Q. What happened then? A. Storm. 8th, 107; 9th, 212; 10th, 14; 11th, 90; 12th, 52; 13th, 104; 40 14th, 78; 15th, 9; 16th, 34.

Richard West—Direct

Q. Those large days indicate Saturdays or Sundays? A. Yes, Sundays.

Mr. Leonard: Will you step down and I will recall Mr. West and continue.

Mr. Potter: I would like to ask him— 10

Mr. Leonard: I will bring him back so we can get on with our proof.

RICHARD WEST, recalled for plaintiff.

Direct-examination by Mr. Leonard:

Q. I show you Exhibit A for identification, from which Mr. Joline was reading, and ask you 20 if while he was reading you checked up the figures. A. I did.

Q. And from those figures, at the fifty cent rate, did you make any calculation? A. I did.

Q. What calculation did you make? A. I made a calculation that in that time there was 2,823—

Mr. Potter: I object, if he is going to state a figure. What proof is there from the fact that those people were on the beach 30 that they would be paying customers?

The Court: I am going to allow him to say, however, that they did charge fifty cents a head, and I am going to allow the jury to determine the rest of it if the case goes to the jury. Just a matter of mathematics, Mr. West.

Q. Two thousand people, did you figure? A. 40
2,823.

Richard West—Direct

Q. And what does that amount to at fifty cents a head? A. \$1,412.50. That is 2,823 people.

By the Court:

Q. That is what you claim you lost? A. That
10 is from August 19th to September 16th.

Q. And then you claim you lost 300 a day at least?

Mr. Leonard: No, there is no claim for that. We claim from July 10th to August 18th, at which time no specific memorandum was made, but the average was 100 persons a day.

By Mr. Leonard:

20 Q. What is your figure for that period, from July 10th to August 18th? A. Well, in August we calculated that our loss per day was \$48.81. 216 in July would make—

Mr. Potter: I ask a general exception.

The Court: I am allowing it to come in for the purpose of considering the law applicable to the situation. I will tell the jury what the issues are, of course.

30 A. Twenty-one days in July, \$1,025.01.

By the Court:

Q. What do you claim you lost during the season, the total?

By Mr. Leonard:

Q. What is the total of those two figures? A. About \$3,306.

40 By the Court:

Q. \$3,306? A. Yes.

Richard West—Direct

Q. That is what you claim? A. Yes.

By Mr. Leonard:

Q. Were there any signs in that vicinity of your pavilion or beach relating to the payment of any fees? A. None of the payment of any fees but there was a large sign on the front, next to the front hedge, next to Ocean Avenue, claiming "Bathing pavilion. For terms inquire." 10

By the Court:

Q. Inquire where? A. In the office.

Q. In the office? A. In the office.

By Mr. Leonard:

Q. Did you know the Hart family? A. Yes, 20
sir.

Q. Did they have a son? A. Yes, sir.

Q. I mean the Hart family whose son was rescued by the young lady who was on the stand a minute ago. A. Yes.

Q. The Hart family you refer to? A. Yes.

Q. Do you know if that family paid? A. They did not.

Q. Do you know if a demand was made? A. I made a demand personally. 30

Q. And what was the reply? A. They refused, said it was a free beach.

Q. And was that before or after one of your employes rescued their son? A. I think it was before their son was rescued.

Q. You had boats on the beach? A. Yes, sir.

Q. Was the beach at any time cleaned? A. Always cleaned.

Q. By whom? A. By us. 40

Richard West—Cross

The Court: Anything more?

Mr. Leonard: I think that is all.

The Court: Cross-examine, Mr. Potter.

CROSS-EXAMINATION by Mr. Potter:

19 Q. You were paid for the ropes, were you not?

A. Yes.

Q. By the borough? A. By the borough.

Q. You say you received the keys from Mr. Goodall? A. I did.

Q. When? A. About the first of June.

20 Q. How did you come to do that? A. I was in the office talking with Mr. Goodall and he told me that the borough had rented us the pavilion and that he might as well turn the keys over, so he gave them to me.

Q. What was Mr. Goodall's position? A. Assistant to the borough mayor and collector.

By the Court:

Q. Why didn't you sign a lease? A. A lease wasn't offered to me to sign until in July and then the terms didn't suit and I refused.

30 Q. The terms didn't suit? A. No, sir; at that time.

By Mr. Potter:

Q. You were formerly a councilman of Monmouth Beach, were you not? A. I was.

Q. You were familiar with the bathing beach in question, were you not? A. I am.

By the Court:

40 Q. Excuse me a moment. How did you know the beach was to let? A. Well, I had heard it

Richard West—Cross

talked around. The borough collector had told me he heard that he was going to put in a bid and he spoke to me about it and he says, "Now is the time to send in your bid," so I sent it in.

Q. Did you ascertain at the terms under which the letting was to be? A. Not at that time; no, 10
sir; there was no terms mentioned.

Q. Did you ever at any time ascertain the terms? A. I did later on.

Q. When did you ascertain that? A. I think it was about three weeks after the bid was given, so I was talking to the collector and he told me the terms then, or showed me a copy of the old lease.

Q. Which he said was to be used? A. Yes. 20

Q. That is, the same form? A. Yes.

Q. Were you aware that there was on the borough minutes at the time the award was made to you that the borough solicitor was directed to draw a lease? A. Yes, sir.

Q. You knew that was there? A. I knew it.

Q. Why didn't you wait for that lease? A. I did wait until July.

Q. And was it ever submitted? A. It was never submitted until after that time. 30

Q. Then when it was submitted you refused to sign it? A. I did.

Q. Because the terms didn't suit? A. Yes.

Q. Why did you continue in possession then?

A. Well, we had paid our rent and they had accepted it.

Q. That was the \$300 part payment? A. Part payment; yes, sir. 40

Richard West—Cross

Q. So upon that theory you kept possession; is that right? A. Yes, sir.

The Court: All right. Go on.

By Mr. Potter:

10 Q. You said approximately three weeks after the bid had been sent in to the borough that you knew of the existence of a prior lease? A. Yes, sir.

Q. That would be about the first of July? A. Somewheres about.

Q. Was that the lease? (Paper shown witness.)

20 By the Court:

Q. How was this lease—well, answer the question; is that the lease that you refer to? A. That is the form of the lease.

By Mr. Potter:

Q. Well, that is the lease? That is the lease of the previous years' tenants? A. Yes, sir.

The Court: His answer is yes.

30 Q. And you were shown this lease by whom?

A. Mr. Goodall.

Q. Subsequent to that? A. Yes, sir.

Mr. Potter: If there is no objection may I have that lease marked?

The Court: Mark it for identification.

Mr. Leonard: He can have it offered in evidence if he wants to. I have no objection.

40 Mr. Potter: Mark it for identification.

(Paper marked Exhibit B for identification.)

Richard West—Cross

Q. You didn't discuss this lease for the previous year with any member of the council of the Borough of Monmouth Beach, did you? A. No, sir.

Q. The first person that you discussed the new lease with, I take it, was myself; is that right? 10

A. Yes, sir; you were the first one.

Q. And were you not informed at that time—

Mr. Leonard: What time is this?

Q. When did you first take the matter up with me? A. It seems to me I called you on the telephone in June sometime and asked you about the lease and you said you didn't know anything about it, that you had not been instructed at that time to draw a lease; and then the next time it came up I think I met you in the borough hall somewhere around the first part of July and I believe you took it up with the mayor at that time. 20

Q. Isn't it a matter of fact you were several times at my office? A. I was once or twice.

Q. Only once? A. Once, yes, in regard to the lease.

Q. And didn't I inform you at that time that the borough would require that you accept—that the lease should contain a provision providing for all residents of the borough of Monmouth Beach to have access to and from the beach? A. I think not. I don't remember of it. 20

Q. Well, that was the condition in the old lease, wasn't it? A. That was the condition in the old lease, but the resident part was understood to be the home people, I believe, that had lived there 40

Richard West—Cross

all their lives and were there the year around. That was the understanding.

Q. And didn't I inform you that that had been the previous contention—

10 Mr. Leonard: One moment. I don't want to embarrass Mr. Potter at all, but he as well realizes the form in which he now employs in his examination calls for his going upon the stand in the event it is denied.

The Court: Not necessarily. That doesn't follow at all.

Mr. Potter: I will not go on the stand.

20 Mr. Leonard: I object to the form of the question upon the ground that it assumes that which is not in evidence; and moreover I object to it unless it be assured that the affirmative fact now hypothecated in evidence is spread upon the record sometime during this trial.

The Court: What is the question?

30 Q. Mr. West, weren't you informed that the borough would require a free privilege to the residents and taxpayers? A. No, sir.

Q. To go upon that beach? A. No, sir.

Q. Now, I show you another agreement and ask you if that was the lease that was eventually submitted to you? A. That is the lease that was submitted in July.

By the Court:

40 Q. And which you declined to sign? A. And which I declined to sign.

Richard West—Re-direct

Mr. Potter: I ask that it be marked for identification.

The Court: It may be marked.

(Paper marked Exhibit C for identification.)

Mr. Potter: That is all.

10

RE-DIRECT-EXAMINATION by Mr. Leonard:

Q. Mr. West, had you previously tried to obtain a lease from the borough before you requested Mr. Potter? A. I had asked the mayor several times about it.

Q. What was your conversation with him? A. I asked him what about the lease; and he said it was up to Mr. Potter to draw a lease.

20

Q. Who told you to go in possession? A. The mayor's assistant, Mr. Goodall.

By the Court:

Q. Just what relation—what did that mean? You say the mayor's assistant? A. That is what he was hired for. He had charge of the keys.

Q. Business manager of the borough? A. Yes, sort of a business manager.

30

Mr. Potter: I ask that his—

The Court: Well, if he knows.

Q. What was Goodall's position, if you know?
A. Sort of a business manager, I understood.

Mr. Potter: If the Court please, that is conclusion, pure and simple. I object to it.

The Court: Yes, I think you may strike it out.

40

Richard West—Re-direct

Q. What did you ever see Goodall doing around the borough there? A. Attending to the general business of the borough.

Q. Doing what? A. Well, keeping the books.

10 Q. What else? A. Taking care of the road work, buying supplies, checking the bills and having them ready for the borough council.

Q. Where did you meet him? A. Right at his office, borough hall.

Q. At the borough hall? A. Yes.

Q. What was the conversation? A. He merely stated that his conversation in regards to the pavilion was that the borough had granted me the pavilion through their resolution and I might as
20 well take the keys; it was time to get things ready and open up.

Q. When was that? A. That was along about the first of June, I think, when he gave me the keys.

Q. Of course at that time no lease had been signed? A. No, sir.

Q. And no lease was ever signed? A. No, sir.

Q. When you were not getting a lease, why didn't you give up possession? A. Well, I
30 thought it belonged to me, as long as they had granted it and was taking my money.

Q. When did you pay them \$360 or whatever it may have been? A. \$325 was paid in March.

Q. In March? A. Yes, in March.

Q. How soon after that meeting in which you say you were awarded the lease? A. How soon after that?

Q. Yes. A. This last lease that Mr. Potter pre-
40 sented was presented in July.

Richard West—Re-direct

Q. No, the payment of \$325. A. That was paid—the last payment?

Q. With your bid? A. With my bid, yes.

Q. You sent that in with the bid? A. Yes, I sent that in with the bid and it was accepted.

Q. Why did you send it in with the bid? Was 10
there any advertisement for bids? A. No, sir.

Q. How did you know the borough wanted bids?
A. I heard that they wanted bids and I sent it in.

Q. And you included your check for half of the rent? A. For half the rent, yes.

Q. Did the borough use that check? A. They did.

By Mr. Leonard:

20

Q. Was anything said by any of the officials as to when you were to open the pavilion? A. Not to my knowledge.

Q. When did you open it? A. I think it was June 17th.

Q. And how long after that before you went into possession? A. Yes, once before that I demanded a lease, I think, from the mayor.

Q. And what did the mayor say? A. He said 30
it was up to Mr. Potter at that time.

Q. And then did you call Mr. Potter? A. I did.

Q. What did he say? A. Well, the first time I called Mr. Potter he said that a copy of the lease or the terms had not been submitted to him.

Q. And how long was that after you submitted your bid and paid your money? A. That was some time after that, I don't remember the exact 40
date.

Richard West—Re-direct

Q. In June? A. I think it was. I think it was right after we took possession.

Q. Did you call Mr. Potter again? A. I went to his office, I think, the second time.

10 Q. What happened then? A. I just can't recall the exact conversation.

Q. When did the conference take place? A. Mr. Potter's office?

Q. When did the conversation take place? A. Well, that I can't give you, the date; sometime in June, I think.

Q. When was that second lease submitted to you for the first time? A. In July; the second lease?

20 Q. The second lease, yes. A. It was in July, I think, when this resolution was passed, the resolution referring to the taxpayers and residents.

Q. How did you receive it? A. Receive it?

Q. Yes. A. I didn't receive it.

Q. No? A. Oh, how did they receive—Mr. Goodall, I think, presented me with that part of the lease, or the copy of that lease for me to sign.

Q. You say you refused to sign the lease? A. Yes.

30 Q. After you had been in possession a month or so? A. Yes.

Q. Did they ever make a demand upon you after you had refused to sign the lease for the balance of the rent, part of which you had paid away in March? A. Yes.

40 Q. When was that? A. I will have to refer to the borough minutes for the date. I don't remember the date.

Richard West—Re-cross

Q. Refer to what? A. The borough minutes. You will see a resolution there or motion.

Q. That is set forth in the resolution? A. Yes.

By the Court:

Q. The balance of the rent, did you say? A. 10
Yes.

Mr. Leonard: The balance of the rent.

The Court: When was that payment made, in March?

Mr. Leonard: In August.

The Witness: No, August.

The Court: Toward the end of the season, as I understand it?

Mr. Leonard: Yes, sir. Cross-examine. 20

RE-CROSS-EXAMINATION by Mr. Potter:

Q. Mr. West, isn't this a true statement of the whole fight that went on between yourself and the borough—

Mr. Leonard: I object, if the Court please, to its being characterized as a fight. We choose to characterize it as an honorable insistence for the recognition of our legal rights. 30

The Court: I will allow you to state your characterization and then of course your adversary claims the right to make his own characterization. We must have an equality of rights here. I will let you both cut loose.

Mr. Leonard: I press my objection to the use of the word "fight." 40

Richard West—Re-cross

The Court: Take out the characterization. He doesn't like to fight.

Q. Wasn't there a difficulty then, Mr. West?

The Court: That is better.

10 Q. The borough decides to protect the residents, including what we call the summer residents or taxpayers who were there all the year around, and give them free access to the beach?

Mr. Leonard: I object. It calls for a characterization and asks this witness to describe the municipal mental attitude, if such a thing exists in this borough.

20 The Court: Objection overruled. You may have an exception. He may answer.

(Objection noted for plaintiffs as ground of appeal.)

By the Court:

Q. Wasn't there difficulty between you and the borough over the— A. Not necessarily, no.

Q. Granting a privilege to the residents, as indicated in the paragraph that Mr. Potter has just
30 read from the tentative lease? A. No, I think not.

Q. Why did you turn down the lease when it was submitted to you? A. Because it allowed people to come in and bathe that should have paid.

Q. Who should have paid? A. The people that come there for the summer practically all should have paid, if the property was rented and the rent
40 paid.

Richard West—Re-cross

Q. That is the way you— A. That is the way I considered it.

Q. That is the reason you would not sign the lease for that beach? A. Yes.

Q. And that is what you objected to? A. Yes.

By Mr. Potter:

10

Q. You read the old lease, didn't you? A. Yes.

Q. And it said, among other things, that all residents—

Mr. Leonard: One moment. You offer it in evidence if you want to read from it.

Mr. Potter: It is marked for identification.

20

Mr. Leonard: I submit he should offer it in evidence.

The Court: I am going to allow it. When you mark a paper for identification you may examine on it. That is my understanding of the rule.

Q. You knew three weeks after you had sent your bid to the borough that the previous lease contained this statement: "All residents of the Borough of Monmouth Beach shall have access to and from the public beach"? Now, that is true, isn't it? 30

By the Court:

Q. Did you know that? A. I did know it.

Q. You did? A. I know as he reads it there, and the understanding as you take it is entirely different from the understanding that the borough took it. The idea of that same paper at 40

Richard West—Re-direct

that time was the borough, the local residents were to bathe there and the local residents were not molested.

By Mr. Potter:

10 Q. Now, that was your way of interpreting that clause, wasn't it? A. Yes.

Q. That that applied only to the permanent residents? A. Yes.

Q. And it developed during the course of the next month or two that the borough understood that that should include more than the permanent residents? A. Yes.

20 Q. In other words, it should include the summer residents, and you would not agree to that? A. No, I wouldn't.

Q. For that reason the two sides couldn't get together? A. That is the idea.

Q. Now, that is the whole controversy, isn't it? A. Yes.

Q. Is that right? A. That is right.

RE-DIRECT-EXAMINATION by Mr. Leonard:

30 Q. What did Sidney West do about these people who were not regular residents of the borough?

Mr. Potter: I object. What Mr. West did the year previous has nothing to do with it.

Mr. Leonard: I insist upon my right to state the question upon the record.

40 The Court: I am going to allow him to finish his question. I am going to allow you to finish your questions, too, in spite of

Mrs. Mabel VanBrunt—Direct

his objections. Go on. Finish your question, Mr. Leonard.

(Question repeated as follows: What did Sidney West do about these people who were not regular residents of the borough?)

Q. Under the lease?

10

The Court: Under his lease.

Q. Under his lease—

Mr. Potter: Objected to.

The Court: Objection overruled. He may answer.

By the Court:

Q. Do you know what Sidney West did? A. He told me he tried to collect.

20

Mr. Potter: Objected to.

A. I only know what he told me.

Mr. Potter: Anything he said—

The Court: No, that is clearly hearsay.

MRS. MABEL VAN BRUNT, recalled for plaintiffs.

30

Direct-examination by Mr. Leonard:

Q. Did you know Sidney West? A. I know him, yes.

Q. Do you recall when he had the beach and bathing pavilion that Mr. Joline and Mr. West later had? A. Yes.

40

Mrs. Mabel VanBrunt—Direct

Q. Do you know when Sidney West had that if he charged for the bathing privilege? A. Yes.

Mr. Potter: I object, if the Court please, to this line of questions.

10 The Court: I don't see that it makes any real difference. I am going to allow it, anyway. You may have an exception.

(Objection noted for defendant as ground of appeal.)

Mr. Potter: This is conduct of that bathing business a year prior to the term in question.

20 The Court: That is exactly what I understood. I am going to allow it.

Mr. Potter: I beg an exception.

The Court: You may have it. I have something in mind on the subject.

(Objection noted for defendant as ground of appeal.)

By the Court:

Q. Do you know how Sidney West restricted the use of the bathing privileges under his lease?

30 A. Well, I was never there personally, no.

Q. Do you know what occurred there? Do you know if any charge was made?

Mr. Potter: I object. She has said she wasn't there.

The Court: She has said she wasn't there.

Mr. Potter: She doesn't know.

40 Q. You were never there under the Sidney West lease, were you? A. Oh, no.

George P. Joline—Direct

By Mr. Leonard:

Q. Do you know if any charge were made for the bathing privilege while Mr. West was in possession of the beach and bathing pavilion in question? Yes or no.

10

Mr. Potter: The same objection.

The Court: Unless you were there.

Q. Yes or no. A. I couldn't say yes because I don't know. But if he didn't charge, how would he get his money?

Mr. Potter: I ask that it be stricken out.

The Court: She says she was not there and she doesn't know.

20

GEORGE P. JOLINE, recalled for plaintiffs.

Direct-examination by Mr. Leonard:

Q. Do you know Sidney West? A. Yes, sir.

Q. Did you know him while he occupied the beach and bathing pavilion that you and Mr. West rented? A. I knew him at that time, yes.

Q. Do you know if he made any charge for the bathing privilege during that period? A. I was never there but once, so I couldn't say.

30

The Court: He doesn't know.

Q. Well, was any charge made to you, or don't you bathe? A. I didn't go there to bathe.

Q. Did you have any conversation with the mayor? A. Mr. West and I had conversation with him one day when he was in there, about the lease.

40

George P. Joline—Direct

Q. When was that? A. Somewhere along the first part of July.

Q. What conversation was that? A. He asked him about the lease and I said—

10 Mr. Potter: I object to the conversation itself.

Q. Who did?

By the Court:

Q. Was he present at the time? A. The mayor; yes, sir.

20 Mr. Leonard: He is just relating a conversation between Mr. West and the mayor. Strike that off the record about Mr. Joline going there once.

Mr. Potter: When was this conversation?

Mr. Leonard: Around the first part of July, he said.

By Mr. Leonard:

Q. Relate the conversation, please, with the mayor. A. Mr. West asked him about the lease.

30 By the Court:

Q. Were you present? A. Yes.

Q. Heard the conversation? A. Yes.

Q. Go on. A. He says what difference does it make whether he had the lease or not; he has possession; what does he want of the lease?

Q. Who said that? A. The mayor.

By Mr. Leonard:

Q. What was his name? A. George VanBrunt.

40 Q. Did you thereafter make any demand for the lease? A. I never made any demand only that

George P. Joline—Direct

the borough council at the time of the meeting, called a meeting and both went in executive session with them.

Q. Was anything said to you about the lease when you made that demand and they in response retired into secret executive session? A. I went in with them. I told them that if they give me a lease the same as given to Sidney B. West that I would sign that lease and give them their money right there and then; if they didn't accept my check I would go out and get the cash in the morning for it. I went to Mr. West and got his lease that he had the year before and I had it in my possession, so I turned it right over to the lawyers at Red Bank. 10
20

Q. Did you hear any more from them, from the borough council? A. Yes. They didn't seem to be in very good humor that night when we wound up in executive session and they wouldn't accept the proposition that I made with them, that they wanted us to sign the lease which they had drawn at that time, and I told them that under the advice of counsel we wouldn't sign no such lease. 30

By the Court: 30

Q. You split on the terms then, didn't you?
A. Yes.

Q. You didn't get together on the terms of the lease? A. No, sir.

Q. Neither you nor Mr. West nor the borough?
A. And the borough.

Q. That was the whole difficulty about the lease, wasn't it? A. Yes. 40

George P. Joline—Direct

By Mr. Leonard:

Q. Did they demand at that time that you give up possession? A. They made—

Q. Any written communication? A. They—the communication, I think I have it home, a letter
10 that was sent by special delivery and I received it.

Q. When? A. Along in August.

By the Court:

Q. What did it do, ask you to get out? A. To put up or get out.

Mr. Potter: I think we ought to have the letter.

20 The Court: Of course, it would speak for itself.

Q. Have you got it at home? A. Yes, I will bring it in the morning.

Mr. Leonard: I assume they had a copy and will put it in in their case.

The Court: Have you a copy?

Mr. Potter: No, I haven't got it.

By Mr. Leonard:

30 Q. You remarked, "put up or get out"?

The Court: He said that was the effect of the notice.

A. That night in executive session, Mr. Smith said he would close it up in an hour, take the whole three police in there and close up the building and lock it up. I told him to go ahead; to lock the building up with three policemen. That
40 was the entire force.

George P. Joline—Cross

Mr. Potter: I don't know of anything said about policemen in the entire case except what he read.

A. Mr. Smith said in that room, in executive session, and you were in there.

10

Mr. Potter: I object to anything Mr. Smith said.

The Court: Never mind. They didn't take the police there.

A. They started out to do it, but they brought him back, changed their mind.

Mr. Leonard: I think that is all.

CROSS-EXAMINATION by Mr. Potter:

20

Q. Mr. Joline, wasn't the whole trouble between you two parties, the borough on the one hand and yourself on the other, the interpretation of the question of what constituted a resident?

Mr. Leonard: Objected to. It calls for a conclusion.

The Court: Not necessarily.

Mr. Leonard: Secondly, it is not evidential.

30

The Court: Put it in the other form: what was the reason you wouldn't sign the lease.

Mr. Leonard: Objected to as immaterial and irrelevant to these issues in this case.

The Court: Objection overruled. He may answer. It is perfectly obvious what happened here. There was an undertaking to agree upon the lease and the minds of

40

George P. Joline—Cross

the parties did not come together, that is all. Now ask him. Have you the right of occupation under an agreement for lease? I am going to submit that legal question to you in a moment and let you prove it. Anything more?

10

Mr. Potter: I think you asked him—I haven't heard the answer—what was the reason he didn't sign it.

The Court: I will allow him to answer it. I think he has put it on record.

By the Court:

Q. As a matter of fact, what were the terms over which you disagreed with the borough? A.

20

The terms that we disagreed was the resolution that they offered, the resolution that all taxpayers and residents are free guests, should have free access to that beach, and I objected to it.

Q. That is the reason you wouldn't sign the lease? A. Yes, I felt that night and I objected to it. The reason why was this: If we had rented the beach and I didn't propose to stay there on that pavilion and pay a thousand dollars for somebody else's pleasure, and that if they wouldn't

30

allow me to get the money for the people's pleasures that were merely residents and their guests and their friends that come on that beach, that I would try to get it from the borough, because the mayor had made the statement before that they would run that beach free if it cost \$10,000. I says, "Well, if you would spend \$10,000 to run that beach, then you pay me for running it for you, and if I can't get compensation for running that beach well from the borough or from the summer people, we will have to pocket the loss ourselves."

40

George P. Joline—Cross

By Mr. Potter:

Q. Did you ever see this lease that was tendered to Mr. West?

The Court: By the way, what was the term covered by this? 10

Mr. Potter: The proposed lease, to all residents and taxpayers?

The Court: No, the term; from what time to what time?

Mr. Potter: I think from the first of May or the first of June, to the first of October.

The Court: From the first of June to the first of October? 20

By the Court:

Q. The question is whether that form of lease was submitted to you. A. I couldn't say. The old lease, the Sidney B. West lease, said that any taxpayer or resident may rent a bathing house in that pavilion.

Q. Well, there was a lease submitted to you? A. There was a lease submitted but I turned it over to the lawyer.

Q. And you never signed that lease? A. No, 30
sir.

Q. Because it had terms that you didn't agree with? A. I told them if they would get me a lease the same as was given the year before, I would accept it and pay the balance of the rent immediately.

The Court: That is all.

Mr. Leonard: The plaintiffs rest. 40

Discussion

10 The Court: Now, Mr. Leonard, I am going to allow you, of the Court's own motion, to show me any authority which holds that an agreement for a lease entitles the proposed tenant thereunder to a right to go into possession of the premises contemplated by the proposed lease. The minutes of the borough council here indicate that there was some sort of a motion made at the March meeting to the effect that the beach in question or the borough property in question be leased to the plaintiffs; that it was contemplated at that time that a written lease should be prepared, as indicated by the direction and instruction given to the borough attorney, either at that meeting or at or about that time, to prepare a lease. The plaintiffs themselves admit that there was a written lease in contemplation and the terms could not be agreed upon and therefore they never signed it. Some person in the borough by the name of Goodall one day gave Mr. West the keys. Well, that didn't bind the borough at all; it was not a delivery of possession, as a matter of law. You see, a municipal corporation is so protected by the law against its servants and agents that it requires the greatest formality before a municipality may be bound. And therefore if these agents or employes do that which is illegal it cannot bind the borough. That is perfectly obvious.

40 Now here, as a matter of law, it seems to me, it was contemplated that a lease should

Discussion

be signed, and therefore that principle involving the rights or so-called rights or tentative rights in a situation where there was an agreement to lease and the lease itself was never formally agreed upon by the parties and signed. 10

Now tell me tomorrow morning whether you find any law or any interpretation of law under which the present action, bear in mind, can be sustained by the plaintiffs upon the theory that a term of a proposed lease, namely, that the plaintiffs should have the right to charge for everybody except possibly permanent residents or winter residents, having occasion to use the bathing privilege and the beach. Now you are suing upon the theory that that was agreed upon. 20

Mr. Leonard: No, sir; there is what we are not, sir.

The Court: What are you suing on?

Mr. Leonard: We are suing upon the theory—

The Court: Where is the complaint in this case? 30

Mr. Leonard: The first paper, sir.

The Court: Now bear in mind that the borough acts only through its minutes, through its borough council as indicated by its minutes—with some exceptions we recognize, of course. You charge in count 1 (reads from complaint).

Now that is the first count. Then the second count is (reads). 40

Discussion

10 You don't call it a lease. You say contract for rental. That is the precise point I make. Can there be a contract of rental which permits the proposed tenant to go into possession and then claim that because the proposed landlord had violated some contemplated understanding you can bring suit on it? (Continues reading.)

20 How can you get possession unless there was a lease, either verbal or written—lawful possession, I mean? I am submitting that to you and if you will show me an authority in the morning I will take it up and I will examine it myself tonight, so that we will know exactly what the legal phases of this case are.

30 Mr. Leonard: I should like to have my duty to the Court defined; if we are instructed to produce authority upon the assumption that in this case there was no lease and there was no tenancy, but that there was an agreement to lease, and being a mere agreement to lease and no lease, whether a right of action will accrue to the plaintiffs?

The Court: That is it.

40 Mr. Leonard: That proposition, sir, is not our case. I will try to look up authority upon it if your Honor instructs me so to do, but that is not our theory of the case. We have a very definite, well-defined theory and we respectfully urge, if permitted to elaborate upon it, that we have

Discussion

made out a prima facie case in this record. Our theory is a very simple one.

The Court: What is it?

Mr. Leonard: It is merely this: That there is now evidence on record, namely, the state of demand in the District Court action, the resolution of March, 1928, wherein these people, the plaintiffs, bid \$650 for possession of—as the resolution states—a bathing pavilion and bathing beach; that that bid was accepted; that by reason of the acceptance of that bid they were entitled to the possession of that pavilion and of that bathing beach. 10

The Court: Exclusively? 20

Mr. Leonard: From June until September, whenever they were directed to take possession, or indeed, from the time their bid was accepted.

The Court: Do you feel that you are entitled to exclusive possession of the bathing privileges?

Mr. Leonard: We are entitled to possession of the property subject to a demise. I am coming to that with respect to the exclusive feature in a moment. That by virtue of our having paid \$325 for possession of certain property, about which there can be no dispute as to the physical confines, and they having accepted the \$325— 30

The Court: That made a bargain?

Mr. Leonard: For the possession or what was given or contemplated to be given for that money. That after the plaintiffs undertook to go into possession of the bath- 40

Discussion

ing pavilion and the bathing beach the borough said, "You can have possession of part of the demised premises because we say the relationship of landlord and tenant then existed." whether a tenancy by sufferance, whether a tenancy at will, whether a tenancy from year to year or whatever kind of tenancy your Honor chooses to call it, it was a relationship of landlord and tenant.

The borough thereafter said, "We do not propose to give you possession of the beach." The only possession contemplated by the relationship of landlord and tenant, once a demise is made, is exclusive possession. "We do not propose to give you that; we propose to give you something else." And it is because they failed to do that which they were bound to do—

The Court: Excuse me. Have you copies of the minutes there? I would like to have them.

Mr. Leonard: What was the form of bid of West and Joline? That becomes rather important, it seems. And, moreover, how can they account for what appears in the state of demand, wherein they allege that the relationship of landlord and tenant existed between these two parties? If the relationship of landlord and tenant existed there must be a subject of that relationship, and if there were a subject of relationship it must be the premises described in the lease of March, 1928, and if it were

Discussion

those premises, as we state here, we have made out a prima facie case here to show that we were deprived at least of part of it; and if we were deprived of part of it, under the law of this state we are entitled to an action. I will produce authorities to support that view, and abundant authority. 10

The Court: Mr. Potter, the plaintiffs having rested, you may put on the record a motion for non-suit. I understand you rested. Now proceed with your motion.

Mr. Potter: In view of the fact that it is conceded that they made an offer of \$650 for the rental of the property, which offer was, according to the resolution, accepted—and that is what we have; that is all we have—there was coupled with it, at least, a direction that there should be a lease drawn, which was well within the knowledge of the contracting parties. In fact, Mr. West testified that about three weeks thereafter he was confronted with the previous lease, and from that time on these various negotiations took place relative to the lease. 20

The Court: There was never a meeting of the minds. 30

Mr. Potter: A contract could not be spelled out of the bid as submitted, from a so-called acceptance of the resolution, because it is not definite in any singular particular, either as to space, as to time, as to the character of the admission—

The Court: Or term. 40

Discussion

Mr. Potter: Term; and the evidence is undisputed here that there was a previous condition existing heretofore where they always provided that the residents should have free access to the beach. None of these things were definite. So I submit respectfully that there never was a contract, as you have suggested, because there was never a meeting of the minds. And in addition to that the borough can only, being a municipality, operate in solemn form, as some of the cases say. Now, under the various Acts of the Legislature it is my opinion that this beach and park property falls distinctly within that classification. And you will note from the various cases that it is impossible for a municipality to lease such without going through the proper channels. Those terms are mandatory and have been held so over and over again. And they were not complied with. So that even though a contract might be spelled out of this alleged bid—

The Court: You mean the statute regarding competitive bidding?

Mr. Potter: Yes, there was no competitive bidding. There was no advertisement.

The Court: No advertisement.

Mr. Potter: None at all. They admit that. That is in the evidence in the case. Even though you spell out a contract, even though Mr. Leonard goes so far as to sustain this theory which he presented to your Honor, that there was a contract, I say

Hearing of November 19, 1929

that the contract, if such were made, is *ultra vires*; and the Court has distinctly held over and over again that such cannot be enforced against a municipality itself; and further than that, that they cannot recover upon an implied contract upon their failure to prove a legal contract. 10

The Court: I will examine the legal phases of this case.

Adjourned till November 19, 1929, at 10 A. M.

Freehold, N. J., November 19, 1929. 20

The Court: Anything more to be said in this case, gentlemen?

Mr. Leonard: It is our understanding, if the Court please, that we were directed to make an examination of the authorities, which we did.

The Court: What have you to say then?

Mr. Leonard: As to the main point of Mr. Potter, as to *ultra vires*, I think that can be very quickly answered. There is a distinction between where a power is delegated by the Legislature to a municipality and where there is no such power. By two statutes in this state the power to rent is delegated to a municipality. A long line of cases holds that once that power is delegated, whether or not it is invoked in strict accordance with the procedure out- 20 40

Sidney West—Direct

lined in the statute is of no consequence. The Tobish case was one involving the same principle. There they did not advertise a contract. The Court said, having the right to contract—and by analogy in this case, having a right to lease—whether they did it in strict accordance with the statute is of no consequence. And I think the reason in that case is particularly applicable here.

10

(Cites authorities.)

The Court: I am going to deny the motion without prejudice to your making a motion for a direction. You put in this lease and I will rule upon it.

20

Mr. Potter: I take exception to your denial of the motion.

The Court: You may have it.

DEFENDANT'S TESTIMONY.

SIDNEY WEST, sworn for defendant.

30

Direct-examination by Mr. Potter:

Q. Mr. West, I show you a lease and ask you if that is your signature. A. Yes, sir; it is.

Mr. Potter: Any objection to its being offered?

40

The Court: I think you had better develop the history of the transaction. Is Mr. West a member of council, or mayor, or what?

Sidney West—Cross

Mr. Potter: No; Mr. West is the lessee of the previous year. This is the lease of the previous year.

Mr. Leonard: I object on the ground that it is immaterial. What relation the borough may have had with this man cannot bind our clients. 10

The Court: I am going to allow it to be marked. I am going to allow the present situation to be developed. You may have an exception. It may or may not be material. At the present moment I can see that it is.

(Objection noted for plaintiffs as ground of appeal.) 20

(Paper marked Exhibit B-1.)

CROSS-EXAMINATION by Mr. Leonard:

Q. How long did you occupy the bathing pavilion on the beach?

Mr. Potter: Objected to as not cross-examination.

The Court: I will allow it.

Mr. Potter: May I say this, Mr. Leonard? I only wanted to have Mr. West prove this. If subsequently we have to go into the question of damages I will recall Mr. West. 30

Mr. Leonard: I want to ask Mr. West one more question.

Sidney West—Cross

Q. Did you, while you were there, make any charge for any bathers to use the beach and the pavilion you rented?

Mr. Potter: Objected to.

10 A. I did.

The Court: He has answered it.

Q. Whom did you charge while you were there?

A. Whom did I charge?

Q. Yes. A. I charged everybody that came there that didn't have a bath house.

Q. And what did you charge them? A. I charged them fifty cents.

20 Mr. Potter: May my objection stand to all this?

The Court: Yes.

A. I charged them fifty cents if they got a bath house, and if they didn't have a bath house I charged them twenty-five cents if they had their suits.

Q. What did you charge if they used the beach?

30 The Court: Without bathing.

A. Why, I didn't charge anything.

Q. But if they did use your beach in a bathing suit and didn't have a bath house you charged them how much? A. I charged them twenty-five cents.

Q. And you occupied these same premises the year before Mr. West and Mr. Joline went there?

A. Yes.

40 Q. You rented them from the borough? A. Yes.

Sidney West—Re-direct
George VanBrunt—Direct

RE-DIRECT-EXAMINATION by Mr. Potter:

Q. Mr. West, you have continued in this business at other locations? A. I have.

Q. And where have you operated the last two years? A. At Long Branch. 10

Q. Have you in mind or have you your books here so that you could tell us what your total receipts were for the year 1927?

Mr. Leonard: Objected to as not proper re-direct.

The Court: He is going afield.

Mr. Potter: I will make him my witness again. 20

The Court: It may remain.

Mr. Potter: If there is any question I will put him on for all purposes.

The Court: No, I won't allow further examination. All I want is to have this lease properly in, to bring out the situation here, what was contemplated by the council.

30

GEORGE VAN BRUNT, sworn for defendant.

Direct-examination by Mr. Potter:

Q. Mr. VanBrunt, you were mayor of Monmouth Beach in 1928? A. Yes.

Q. I show you a paper that was drawn up as a lease and ask you if that is your signature. A. Yes, sir. 40

George VanBrunt—Cross

Q. And do you know whether that has been offered to Mr. West? A. Not by me but by the assistant to the council and mayor. It was left in his office and he called Mr. West up or Mr. West happened to drop in and the following day Mr.
 10 Goodall told me that he refused to sign it, that there were conditions in the lease that he didn't approve of.

Mr. Potter: We offer it, if the Court please.

The Court: Well, Mr. West really admitted that; he admitted that it was presented to him and he refused it. It may
 20 be marked as a full exhibit.
 (Paper marked Exhibit D-2.)

CROSS-EXAMINATION by Mr. Leonard:

Q. Well, Mayor, when was it presented? A. I don't just remember the date.

Q. Do you remember what month? A. No, I don't.

Q. Do you know when they went in possession? A. I couldn't say the day or week.

30 Q. Do you know, Mayor, if they went into possession at all?

Mr. Potter: Objected to; it is not cross-examination.

Mr. Leonard: An officer of the municipality.

The Court: I will allow it. They went into possession.

40 A. They went into possession but I don't know when.

George VanBrunt—Cross

The Court: That is his answer. They admit they went into possession.

Q. You received a request from Mr. West for a lease, didn't you? A. Yes, sir.

Q. That was sometime in May and June, wasn't it? 10

By the Court:

Q. And that request, Mr. Van Brunt, was after the award or the acceptance of the bid in March, wasn't it? A. Oh, yes, sir; quite a few weeks.

Q. And then West, you say, asked you for a lease? A. Yes, he asked me when the lease was going to be ready and I told him just as soon as the council authorized me to go before the solicitor to have one prepared. 20

By Mr. Leonard:

Q. Well, when did the council authorize you, the mayor, to go before the solicitor and get one prepared? A. It is in the minutes.

Q. It is? Show it. A. There was a minute and the clerk—

Q. Show us, please.

By the Court: 20

Q. Look at March 13th, motion of Councilman Roe. Look at 190. Is that the resolution you refer to? A. "Councilman Roe moved regularly seconded by Smith that the solicitor be authorized to draw up contract covering the rental of the bathing pavilion. Carried."

By Mr. Leonard:

Q. Did you take it upon yourself to see that that was done? A. I believe that— 40

George VanBrunt—Cross

Q. Not what you believe. A. Well, naturally—
 Q. Not naturally; what you did, Mayor.

The Court: Let him answer.

Mr. Leonard: I am not at all interested
 10 in the natural operation of this borough.

A. If I didn't authorize the solicitor who
 would?

Q. I don't know. You tell me.

The Court: Don't debate it.

A. Well, I did authorize the solicitor to draw
 up the lease.

Q. You personally? A. I believe I did.

20 Q. How long after this resolution in March,
 when you accepted their \$325, did you go to the
 solicitor and tell him to prepare that lease? A.
 I don't remember.

Q. Well, would you say it was a week after?

A. I would say it was fully a month after.

Q. A month? A. I believe that.

Q. That would bring it around in April. When
 would you say this lease your counsel just marked
 in evidence was, in fact, presented to these people?
 30 A. When was it presented them?

Q. Yes.

The Court: If you know.

A. I don't know.

Q. Who had charge of it? A. The solicitor.

Q. After you gave instructions to him sometime
 in April, you think it was, you don't know what
 occurred after that? A. If I recall correctly one
 40 evening the Board of Council met as a whole in

George VanBrunt—Cross

the solicitor's office and the lease was discussed at that time, if I remember correctly.

Q. Were you in doubt as to what the lease should contain?

Mr. Potter: I object. It doesn't make any difference whether he was in doubt or not. 10

The Court: Let him answer.

A. There wasn't any doubt in my mind.

Q. Well, why all this delay, from March, until as Mr. West said, July, in getting this little paper drawn? A. People don't go in swimming in March, not in our town.

Mr. Leonard: Repeat my question, please. 20

(Question repeated.)

The Court: You can answer; you say the season was not open, therefore it was not necessary to have a lease?

A. There was plenty of time.

Q. Well, you knew they went in possession in June or the latter part of May? A. I seen them in possession, I couldn't just say when. 20

Q. You knew they had a key? A. I did.

Q. You knew they considered it the borough beach? A. Seen them up there, absolutely. They admit they were there.

Q. Well, you expected them to be there the entire season, didn't you? A. If they signed the lease, yes.

Q. Whether they did or not you expected the season to run from May till October, didn't you? 40

George VanBrunt—Cross

That was the summer season there? A. June to October.

By the Court:

Q. The question is whether they signed the
 10 lease or not, you expected them to be there?
 What do you say to that? That is the question.
 A. I don't know.

Mr. Potter: Judge, his expectation—

The Court: His answer is he doesn't know. Anything more, Mr. Leonard?

By Mr. Leonard:

Q. You are acquainted with the contents of this
 20 lease it took so long to prepare, aren't you? A.
 I am not familiar with it at the present time.

Q. Well, I will refresh your recollection. You say the term mentioned in that lease is from May 1st. Now, would you explain why that term ran from May 1st of 1928, if you say that their term did not begin until the time they received that lease and accepted it?

The Court: No, he didn't say that; he
 30 didn't say anything of the kind. He said the season of 1928. That is exactly what the resolution says.

Q. Do you know if any attempt, Mayor, was made to charge these people for their having occupied the premises in May, June and July?

Mr. Potter: If your Honor please, I object. It is not cross-examination. Besides, Mr. Leonard has got it in a good
 40 deal better form anyway.

George VanBrunt—Cross

The Court: He says he doesn't know.
Anything more?

Q. Do you remember seeing this lease of Mr. West, marked Exhibit D-1? A. Yes, sir.

Q. You showed that to Mr. West or Mr. Joline, 10
didn't you? A. I don't remember.

Q. You don't remember very much about this whole circumstance, Mayor, do you? A. Not a whole lot of it, to tell you the truth.

Q. How old are you? A. Thirty-three.

Q. How long have you been mayor? A. One term.

By the Court:

Q. By the way, Mr. Van Brunt, how long has 20
the borough of Monmouth Beach, to your knowledge, been leasing the bathing privileges there?
A. I couldn't tell you any days or dates or years. West merely had it in 1927. Previous to that I think the borough ran it themselves, if my memory serves me correctly.

Q. It was never leased then, to your knowledge, until 1927? A. Oh, yes; when it was first built it was leased to Mr. Heitzman. No, I think I am 20
wrong. I think Mr. Heitzman ran it in conjunction with the borough. I am not positive of that.

Q. Some man manager of the bathing pavilion?
A. I think so. I am not positive. It has been quite a while ago.

By Mr. Leonard:

Q. Mayor, you recall when Heitzman occupied the premises don't you? A. Yes.

George VanBrunt—Cross

Q. They charged for people going upon the beach in bathing suits, didn't they? A. I couldn't tell you.

Q. You know that West occupied the premises in 1927? A. Sidney B. West; yes, sir.

10 Q. You knew that he charged for people using the beach in bathing suits, didn't you? A. I don't know for a fact, only what people come and told me.

Q. You were there all during the summer of 1927? A. Yes, sir.

Q. Were you in any way connected with the borough? A. Probably mayor.

20 Q. Mayor, will you say that you don't know as a fact that during the summer season of 1927, when Sidney B. West occupied the bathing pavilion and bathing beach, that you don't know whether he charged people for bathing suits? A. Yes, hearsay, people come up and tell me.

By the Court:

Q. Then you don't know? A. No.

By Mr. Leonard:

30 Q. You don't believe all the hearsay you hear, do you? A. No, sir.

The Court: All right; you don't anyway.

Q. Will you deny that he did? A. How can I?

Q. Well, would you? A. Well, I don't know.

The Court: He says he doesn't know.

Mr. Leonard: That goes to his credibility.

I am going to demonstrate that he does, if I am allowed any latitude.

40

George VanBrunt—Cross

Mr. Potter: Mr. Leonard is making this man his own witness and is going to discredit him. I am objecting all along that he is not cross-examining him; he is making him his own witness.

The Court: Well, anything more, Mr. Leonard? 10

Mr. Leonard: Just one question.

Q. Try and think hard about this Sidney B. West lease. Did you ever have that in your possession before the bid of West and Joline was submitted? A. Before?

Q. Yes. A. I don't believe I did.

Q. Did you ever have it in your possession afterward? A. It was in the files of the borough hall. 20

Q. Did you ever have it in your possession afterwards? A. That I don't remember.

Q. Do you remember showing it to Mr. Joline and Mr. West? A. I absolutely did not.

Q. You did not? A. No, sir. As a matter of fact, I didn't know Mr. West was going to put in a bid until it was there.

Q. I am talking about in March. You said you didn't before. I said in March didn't you show the lease to them in March? A. Absolutely not. 30

Q. Didn't make any reference to the Sidney B. West lease to them in March, did you? A. I don't remember.

Q. Mayor, wasn't the reason why so much time was taken in getting this paper out, from March, when the resolution was passed, away down to July, when it was submitted, caused by you and your colleagues, councilmen and other represen- 40

George VanBrunt—Cross

tatives of the borough, being in doubt as to whether or not you could depart from the custom followed by West and Heitzman and the other predecessors, and insist that Joline and West allow the people to go on free of charge, although the other predecessors had not? Wasn't that the reason why the time was consumed, or one of the reasons why?

10

Mr. Potter: Well, which? One of the reasons?

The Court: Never mind. Let the witness struggle with that.

A. But there are about a million questions there. I don't know how to answer that.

20

The Court: That is his answer.

A. I don't know how to answer your question.

Q. What part of it don't you know how to answer, Mr. Mayor? What part of that question is too complicated for you to understand? A. About, you say the reason was—

By the Court:

30 Q. That you and your colleagues in council were in doubt as to whether you had to follow the same practice that West did in excluding the public from the bathing privileges without pay. That is what he is asking. A. No, not on my account. In fact, I left it right up to the council as a whole to decide what we were going to do.

By Mr. Leonard:

40 Q. Well, that was what consumed some time; they didn't know what to do; they were discuss-

Richard West—Direct

ing it, weren't they? A. That I don't remember. There was plenty of time. I suppose they were quite busy.

Q. You do? A. With their own private business.

Q. Well, what was the subject matter of these discussions that took place between March, when these people paid their money, and July, when you gave them this lease? You were there. What was the subject matter? A. That I don't remember.

Q. Don't remember that? That is all.

Mr. Leonard: I am prepared to go on and develop the defense in this matter. 20

The Court: I will allow you to rest and make a motion for a direction.

Mr. Potter: Then I ask for a verdict in this matter.

Mr. Leonard: One moment. If the counsel—for the defendant rests we insist upon our right to rebuttal.

The Court: All right. Go ahead and I will control your rebuttal. 30

PLAINTIFF'S TESTIMONY IN REBUTTAL

RICHARD WEST, recalled for plaintiff.

Direct-examination by Mr. Leonard:

Q. Mr. West, did you ever talk to the mayor of this borough? A. I did. 40

Richard West—Direct

Q. After your \$325 was accepted by the borough? A. I did.

Q. What did you talk to him about?

10 Mr. Potter: I object, if the Court please. Conversations with the mayor are not binding upon the borough.

The Court: Well, it may have some tendency. Has the mayor been examined at all?

Mr. Potter: He was the last man on the stand.

The Court: Is he still mayor?

Mr. Potter: No, not now.

20 The Court: Oh, during that period? It may be in the nature of a contradiction. I will allow it.

Q. Answer, please.

By the Court:

Q. What was the talk with the mayor? A. In regard to the lease.

By Mr. Leonard:

30 Q. And what was the conversation and when did it take place? A. The first conversation was at the time that Mr. Goodall showed me the lease of Sidney B. West and wanted to know if the terms of that lease would be acceptable.

Q. I show you Exhibit D-1 and ask you if that is the lease he showed you. A. That is the lease.

By the Court:

40 Q. What did you say? A. I said the terms of that lease would be acceptable.

Richard West—Direct

By Mr. Leonard:

Q. And when did that conversation take place?

A. Either in April or May.

Q. And where were you when you had it? A. In the borough hall, in the collector's office.

10

By the Court:

Q. So that you understood, Mr. West, that a lease was to be prepared and signed, did you?

A. I understood that a lease similar to the one given Sidney B. West was to be prepared immediately.

Q. And signed by you? A. Signed by me and my partner.

Q. Mr. Joline? A. Yes, sir.

20

Q. No lease was ever sent? A. No, that lease was not presented to us.

Q. But afterwards a lease was presented? A. Yes, in July.

Q. And you refused to sign it? A. I refused to sign it.

By Mr. Leonard:

Q. Did the mayor ever tell you why there was a delay in presenting the lease to you? A. No, he just merely kept putting it off.

20

Q. Who did? A. The mayor.

Q. Did you ask him for the lease? A. I did. I asked him for the lease on the bathing pavilion in Mr. Joline's presence.

Q. When was that? A. I think that was the latter part of June.

Q. Why did you go into possession? A. He was at the office at the time Mr. Goodall gave me the keys, knew I went into possession.

40

Richard West—Direct

By the Court:

Q. You understood that because Goodall gave you the keys that you had a right to go and take possession? A. Yes, that is what I understood.

10 Q. With the idea that a lease was to be later signed? A. Yes.

Q. A lease agreeable to you and the borough? A. Yes, sir.

Q. What was to be the term? A. The term was specified in the—

Q. No, I mean the period, from when to when? A. From June 1st to October 1st.

Q. That was your understanding? A. That was my understanding.

20 Q. You went in possession in May? A. No, I went in possession about the 15th of June.

Q. You went into possession about the 15th of June when Goodall gave you the keys? A. When he gave me the keys.

By Mr. Leonard:

Q. Prior to the submission to you or Mr. Joline of that lease in July did the borough or any one in its behalf make a protest? A. No, sir.

30 Q. As to your being there? A. There was no protest made until in July. That protest is on the borough minutes.

By the Court:

Q. That protest involved the right of the public to go there? A. Yes, sir.

Q. Without pay, of course? A. Yes, sir.

The Court: Anything more?

40 Mr. Leonard: That is all.

The Court: Any cross-examination?

Richard West—Cross

CROSS-EXAMINATION by Mr. Potter:

Q. Mr. West, the lease that was eventually submitted only differed in one particular from the lease of Mr. West, did it not?

Mr. Leonard: Objected to. The two 10
leases will speak for themselves.

The Court: Well, since I haven't had an opportunity to examine it I will allow Mr. West to answer for me.

(Objection noted for plaintiff as ground of appeal.)

A. That I can't answer unless I see it.

Q. The second lease, the lease of Sidney West, 20
the lease that was presented to you in July, contained this clause: "All residents and taxpayers of the Borough of Monmouth Beach shall have access to and from the public beach;" and Mr. West, "All residents of the Borough of Monmouth Beach shall have access to and from the public beach." In other words, there is only the difference of "tax payers"?

Mr. Leonard: I object. This witness 30
can't characterize it. It is on the lease and the leases speak for themselves.

(The Court examines the lease.)

The Court: Evidently the words "tax payers of the Borough of Monmouth Beach," or at least the expression "tax payers of the Borough of Monmouth Beach shall have access to the public beach" was incorporated in the proposed lease which 40
was not in the West lease; the expression

Richard West—Cross

there being "all residents of the Borough of Monmouth Beach shall have access to and from the beach."

By the Court:

10 Q. Now, you objected to this change here? A. I did.

Q. And refused to sign the lease; is that right?

A. Yes, sir.

By Mr. Potter:

Q. Mr. West, when the original lease of Sidney West was shown to you it merely stated that all residents of the Borough of Monmouth Beach were to have free access to the beach; it was then
20 explained to you, was it not, that that meant also the summer residents? A. No, sir; it was not.

Q. Weren't you informed that early in the proceedings, that the council insisted that the summer residents should have access to the beach?

A. I don't know.

The Court: I meant to ask you, Mr. Potter, as to the solicitor or borough solicitor of Monmouth Beach, is there any statute
30 which specifically allows a borough, either in the Borough Act and its supplements and amendments or in the Municipalities Act, to lease the bathing privileges to the exclusion of the public unless they pay?

Mr. Potter: No, sir; there is not. The Borough Act is silent on it.

The Court: My attention has not been called to any such provision at all.

40

George B. Joline—Direct

Mr. Potter: May I get the two acts, so your Honor may have the opportunity of perusing them?

The Court: Well, I have been perusing. Now go ahead and get at what you want. If you have such a statute I will be glad to see it. 10

(Further argument.)

The Court: Are you through?

Mr. Leonard: I want to confirm Mr. West by Mr. Joline.

The Court: Complete the record. Go on.

20

GEORGE P. JOLINE, recalled for plaintiff.

Direct-examination by Mr. Leonard:

Q. Did you ever see this Sidney B. West lease marked in evidence? A. Yes, sir; I went to Mr. West's and asked him for his lease.

Q. And did you see it in his possession? A. In Mr. West's possession?

Q. Yes. A. Yes, sir; he took it out of his pocket and gave it to me. 30

Q. Did you ever see the other copy that was in possession of the borough? A. I did not. Mr. West saw that. Mr. VanBrunt showed that to him.

Q. You were not there? A. Not when they were talking I wasn't with them. I understood Mr. West—

Q. You saw them talk but you were not there the date of the lease? A. The only time I saw 40

Discussion

them talk was about the 1st of July in the bathing pavilion, when Mr. West asked him about giving him that lease, and he said, why did we need any lease. We had possession, go ahead.

Q. Who said that? A. Mr. VanBrunt.

10

(No cross-examination.)

Mr. Leonard: Now, if the Court please, so that our pleadings may properly invoke the questions about which we have all been talking, and so that a clear question of law may be presented, which I understand your Honor takes the view that this case will assume, may I amend my complaint so as practically to embody a count for a breach of

20 an agreement to lease?

The Court: In view of the fact that the case is predicated and the real issues here as developed by the testimony present an issue as to any authority at all on the part of the municipality to lease in the manner in which it was attempted the bathing privileges, I decline to allow the amendment for the reason that I am about to hold that nothing has been shown here that the municipality proceeded legally with reference to leasing or letting the bathing privileges under the statute; therefore your request for an amendment is denied. Therefore no action would go against a municipality for the breach of an agreement to lease in circumstances such as those developed, I say, in this case.

30

Mr. Leonard: May I move at this time, prior to their motion, they having rested, as I understand it, after our rebuttal—

40

Mr. Potter: Yes.

Motion for Direction of Verdict

Mr. Leonard: We move for the direction of a verdict in favor of the two plaintiffs and against the municipality.

The Court: And you may put on the record a motion for a direction, Mr. Potter.

Mr. Potter: I will ask that a verdict shall be 10
 directed against the plaintiff and in favor of the defendant as of no cause of action; because in the complaint in this matter, by the first paragraph, first count, plaintiffs allege that they rented from the Borough of Monmouth Beach certain premises situated therein, which first paragraph is repeated in the second count and made the basis of the second count. The proofs in the matter, if any, would disclose an alleged 20
 agreement to make a lease. There are no proofs that the Borough of Monmouth Beach at any time entered into a contract of lease or that the Borough of Monmouth Beach made any rental or letting to the plaintiffs.

Furthermore, we ask for the direction of a verdict upon the ground that the Borough of Monmouth Beach, being a municipality, has only the certain limited powers granted to such a municipal corporation, and the premises in question be- 30
 ing public lands of the Borough of Monmouth Beach, situated on the beach front, used for public bathing purposes, being park lands or beach front properties of the Borough of Monmouth Beach, could not be leased by the municipality except and in the event that they were no longer needed for public use, and only upon due advertisement and award to the lowest bidder. These terms in the act in effect are mandatory and can- 40

Motion for Direction of Verdict

not be waived by the municipality. Any contract to lease or any attempted lease would therefore be an *ultra vires* act of the council of the municipality. Being an *ultra vires* act and void in its initiation, it is impossible for the plaintiffs, under the cases of this state, to allege an implied contract or to recover on a *quantum meruit*. It is also impossible, under the cases in this state, that the plaintiffs could plead an estoppel against the municipality in the premises.

For these several reasons we respectfully ask that a verdict of no cause of action on both cases shall be directed against the plaintiffs.

The Court: This suit is brought by the plaintiffs on the allegation that the defendant municipality, in March, 1928, rented to them the bathing privileges, including the exclusive right to use and occupy as a tenant, under a rental, the pavilion and bath houses, plus the beach front in the borough. It appears, and it is not denied, that the bathing pavilion and the beach belong to the borough, and the Court may assume, as it must, that the property was purchased with the votes of the citizens, the borough taxpayers, in other words, used and equipped and designed and intended for public use in the circumstances that any public property would so be purchased.

As I see this case, the plaintiffs have failed to prove any contractual relation of the nature alleged in the complaint, namely, that of landlord and tenant. There are a number of reasons why that relation could not have been created in the manner in which it was attempted as indicated by the minutes of the municipal body. Those minutes tend to indicate that without any formal

Motion for Direction of Verdict

advertising or calling for bids the plaintiffs submitted at a regular meeting of the borough council a bid for the bathing privilege in question, fixing the price; and it appears that the council accepted by a mere motion, the bid, but that it was contemplated that a written lease should be executed is perfectly clear, because at the same meeting it appears that one of the councilmen moved that the solicitor be authorized to draw up a contract covering the rental of the bathing pavilion. Therefore the simple situation is presented, so far as that is concerned, that one of the parties, namely, the landlord in this case, or the so-called landlord, clearly intended that the terms of the letting should be incorporated in a written instrument called a lease, and that notwithstanding the failure of the parties to agree upon the terms, the plaintiffs here went into possession of the property. 10 20

Now since it was contemplated that a lease was to be executed the plaintiffs clearly had no right to take possession of public property. Nevertheless they did; and while it might be said that under the statute, assuming now for the moment that a private relation might be said to exist here, an oral lease may be given for any term less than three years, under the Statute of Frauds, nevertheless such principle does not apply here, because it is clearly indicated at the inception of this so-called relation that there should be a written lease embodying the terms agreed upon by the parties. 30

Now, it is immediately evident that the minds of the parties never met; therefore I hold that it 40

Motion for Direction of Verdict

is not shown here that the relation of landlord and tenant was created at all. It is suggested that the borough accepted a part payment on account of the rental, which was admitted here. But that is immaterial. And it further appears that

10 after the season was over and some sort of controversy had been carried on, either as to the right of the public to go in, especially the residents and taxpayers of the borough, that subsequently council demanded of the plaintiffs the balance of the so-called rental upon a theory that since the plaintiffs had used and occupied the property they should pay for it. Well, now, that does not compromise the borough at all, because

20 the council could not do that. Suppose they did sue, as they did, in the District Court to recover the balance of the rental that was contemplated under the lease to be subsequently drawn after the award or acceptance of the bid. The question now is whether the borough should not return that money to the plaintiffs as being improperly received. However that may be, it is perfectly clear that the minds of the parties never met on

30 the terms of the letting, and therefore the plaintiff had no right to take possession of the property as they did.

But there is an insuperable obstacle to this suit, as I see it, under the statute. A municipality can only act by virtue of power from the legislature, and it is bound within those powers. Now, I have been examining the statute here, and it is said that there is one specifically related to the

40 leasing by a municipality of bathing privileges on such a beach as this. I have not been able to

Motion for Direction of Verdict

locate that act. The only act I know of of that nature is under the Walsh Act, such as in the case of the City of Asbury Park. But whether it is under the municipalities act or some act which would relate to the borough I am unable to say. However, the statutes that we do find clearly fail to sustain the letting that was attempted in this case. For example, it is held in the case of *Schimmer v. Phillipsburg* that a lease is a conveyance of real estate, and the power to convey is vested in the inhabitants of the municipality in their corporate name. Now, we find, for example, in the Acts of 1927, a supplement to the municipalities act, that no land or right or interest therein shall be sold by any municipality except at public sale to the highest bidder, after public advertisement given in a newspaper circulating in the municipality at least once a week for two weeks prior to said sale; the provisos, of which there are a number, having no relation excepting to indicate—the statute itself indicating a general policy.

Then again I find a section to which my attention has been called:

“The governing body of every municipality may lease, rent or hire, any part of any public park, or place of public resort, owned by it and not presently needed for the purpose for which it was acquired, or any building, or portion thereof thereon not so needed, for any period not exceeding two years. The governing body may let out to any person or persons, corporation or corporations, any privileges in any public park

10

20

30

40

Motion for Direction of Verdict

or place of public resort, upon such terms and conditions as it may prescribe; and upon the violation of the terms upon which any lease or privilege is granted, the same shall become void, and said governing body shall have power to so
 10 declare and may re-enter any place so leased and prevent the exercise of any privilege so forfeited; any such letting shall be to the highest responsible bidder therefor. The letting thereof shall be advertised in some newspaper circulating in the municipality, at least ten days prior to the receipt of bids."

There again you see the policy of the legislature as indicated by the statutes I have read with
 20 reference to sales; so that although it may be said that this was not a sale of land; nevertheless the policy is the same.

Then again in the municipalities act it says—you find a number of provisos—"Every municipality may sell or dispose of any lands or buildings or any right of interest therein not needed for public use." That idea runs through all these statutes. "Any lands owned by a municipality and which cease to be suitable or convenient
 30 for the use for which they were acquired, may be devoted to any other municipal use, but no land may be transferred from the control of any municipal board or body without the consent thereof."

Here there was a contemplated lease to be prepared and executed; and plaintiffs, notwithstanding that no such lease was ever entered into, went
 40 into possession, and therefore the land was at-

Motion for Direction of Verdict

tempted to be occupied really without the consent of the proper municipal body.

“Every municipality may lease for fixed and limited terms to any person or persons any land or building of the municipality not presently 10 needed for public use.

“No land or any right or interest therein shall be sold by any municipality except a public sale and to the highest bidder, after public advertisement given in a newspaper circulating in the municipality, at least once a week for two weeks prior to such sale.”

Then again in the municipalities act is the provision known as Section 13, which I really have 20 just referred to, but the significant and important features of which involve the right to lease “any place of public resort owned by it and not presently needed for the purpose for which it was acquired;” and with the other provision that “the letting thereof shall be advertised in some newspaper circulating in the municipality at least ten days prior to the receipt of bids.” Now, the procedure here was clearly irregular. I feel obliged 30 to hold that the municipality should have advertised publicly, within the provisions of one or more sections of the statutes to which I have referred, for bids, to the end that the highest responsible bidder might be secured. That is the purpose of the statute. And I hold that these provisions with regard to public advertising are mandatory, where a privilege is attempted to be 40 disposed of such as that in this case.

Motion for Direction of Verdict

Moreover there appears to have been some litigation in the Court of Chancery, in which that Court seems to have indicated that the rights of the taxpayers of the Borough of Monmouth Beach were entitled to protection. The result is that

10 this borough could not lease those privileges, which were public rights, unless some statute specifically gives them power to do so. Now, my attention has not been called to any statute which would enable this borough to dispose of a public privilege such as this in the manner which is indicated in the minutes in this case. For example, a mere motion to accept somebody's bid without advertising or without it appearing that

20 they were leasing that which was not immediately needed for public use. Obviously in a place like Monmouth Beach, on the ocean front, a boardwalk and a pavilion are intended for public use. That is the reason they were put there. One of the objects and motives in spending taxpayers' money for making the borough attractive is having a privilege and convenience of that sort. Now, it is intended that council should not dis-

30 pose of that public privilege without the observance of the provisions of the statute. A mere motion would not do it. It does not appear how these plaintiffs came to submit their bid. I assume what happened was that the year before Mr. West, or the years preceding somebody else, had been given leases, probably illegally, and they had gone into possession, and these plaintiffs may have known that that had been done theretofore and for that reason submitted their bid. But the

40 action of the mayor and council was clearly with-

Motion for Direction of Verdict

out lawful authority, and in the circumstances it was wholly unavailing to give these plaintiffs any legal right in the bathing pavilion and the beach there. I think it is a grave question, moreover, whether there ever was any intent on the part of the legislature to give an exclusive privilege to lessees or concessionaires as against the right of the public, especially the taxpayers of the municipality, to use such a public property as that. However, it seems to have been done here in previous years; but whether there was any legal authority or warrant for that, my attention has not been called to it all; but I am not aware that there is any legal authority. It was public property the public had a right to use, and until the legislature passes some act or delegates some authority specifically covering a case such as this, clearly the governing body had no such authority at all.

Therefore I hold that there could be no contractual relation whatever arise between these plaintiffs and the Borough of Monmouth Beach in the circumstances developed by the proofs in this case, therefore they were in possession of the property without legal authority or warrant, and the fact that the mayor subsequently attempted to allow the public to have access there did not violate any legal rights the plaintiffs had; they had not acquired any.

The motion therefore for a direction in favor of the defendant borough will be allowed. The motion for direction in favor of the plaintiffs will be denied. You may have an exception.

Motion for Direction of Verdict

(Objection noted for plaintiffs as ground of appeal.)

10 Mr. Leonard: If your Honor please, in making my motion for an amendment, I recall your Honor observing that your idea was to predicate the direction of a verdict upon your last ground, namely, the absence of delegated power.

The Court: Yes.

Mr. Leonard: Now, is the direction of a verdict predicated upon that ground alone?

20 The Court: Oh, no, it is predicated upon the general proposition of law that this borough did not proceed legally to dispose of the privilege that is alleged here, not advertising; and moreover, the only statute to which my attention has been called is that they had no power to lease excepting that portion of the public property not immediately needed for public use.

Mr. Leonard: In other words, it would not raise the subject matter of my proposed amendment, as your Honor indicated, going to that question?

30 The Court: No, I deny that amendment for the same reason: that if you allege an agreement to lease you have not shown any lawful authority on the part of the mayor and council, by what they actually did, to enter into a lawful agreement at all.

Mr. Leonard: In other words, the single question raised is whether the municipality had a right to contract.

40 The Court: No, that is not the single question at all. Even if they had authority to lease these privileges, they did not proceed legally, that is what I say.

Motion for Direction of Verdict

Mr. Leonard: By reason of not advertising?

The Court: By reason of not advertising, and moreover, there has not been shown to me any statute relating to Monmouth Beach, the leasing of the bathing privilege and the exclusive right to use the pavilion and bath-houses as against the public; particularly, I mean by that, the taxpayers of the public, under a lease. My attention has not been called, and moreover in the statute to which my attention has been called, which I have not been able to locate, even there I am told that there is a provision that there must be an advertising for bids by the municipality, to the end that the highest responsible bidder may be obtained.

10

20

That disposes of this case. You may take this verdict. The jury are directed to return a verdict in favor of the defendant borough.

PLAINTIFF'S EXHIBIT P-7.

DISTRICT COURT

OF THE

SECOND JUDICIAL DISTRICT OF THE COUNTY OF
MONMOUTH

10

 BOROUGH OF MONMOUTH BEACH,
 a Municipal Corporation of
 the State of New Jersey,

Plaintiff,

vs.

20 RICHARD WEST and GEORGE JO-
LINE,

Defendants.

 On Contract.
 State of
 Demand.

30 Plaintiff corporation demands of the defend-
 ants the sum of Five hundred dollars, for that
 defendants used and occupied all those certain pa-
 vilions and bath houses, and the land and beach
 appurtenant thereto, situated on the east side of
 Ocean Avenue and extending to the Atlantic
 Ocean, and adjoining Valentine Street in said
 Borough of Monmouth Beach, from the first day
 of June, 1928, to the thirtieth of September, 1928,
 and defendants took therefrom to their own use,
 the rents issues and profits of the bathing beach,
 bath houses, and pavilions.

40 The said lands, beaches, pavilions, bath houses
 and equipment contained therein and thereon are
 the property of the Borough of Monmouth Beach.
 The reasonable rental value of said lands, beaches,

Plaintiff's Exhibit P-7

pavilions, bath houses and equipment contained therein and thereon from June 1, 1928, to September 30, 1928, was Six Hundred and Fifty dollars.

The said defendants paid to the Borough of Monmouth Beach the sum of Three Hundred Twenty five dollars but have refused and failed to pay the further sum of Three Hundred Twenty-five dollars, after demand was made upon them for the same. 10

Plaintiff demands the sum of Three Hundred Twenty-five Dollars together with interest from June 1, 1928 and costs of suit.

MAURICE A. POTTER, 20
Attorney for Plaintiff.

To the Defendants:

Take notice that the plaintiff demands that the defendants shall file a written specification of defenses intended to be made in said action, on or before the time specified for appearance in the process issued in said cause. 30

MAURICE A. POTTER,
Plaintiff's Attorney.

Plaintiff's Exhibit P-7

Endorsed on back:

DISTRICT COURT

of the

10 Second Judicial District of the County of
Monmouth

BOROUGH OF MONMOUTH BEACH,
a municipal corporation of
the State of New Jersey,

Plaintiff,

vs.

20 RICHARD WEST and GEORGE JO-
LINE,
Defendants.

ON CONTRACT

STATE OF DEMAND.

30 Maurice A. Potter, Atty.,
652 Broadway,
Long Branch, N. J.

Plaintiff's Exhibit P-7

DISTRICT COURT SUMMONS

THE STATE OF NEW JERSEY, to any Constable of
 the County or the Sergeant at Arms of
 the District Court of the Second Judi-
 cial District of the County of Monmouth. 10

SUMMON

RICHARD WEST and GEORGE JOLINE,

to appear before the District Court of the Sec-
 ond Judicial District of the County of Monmouth
 to be held at the City Hall, No. 344 Broadway,
 in the City of Long Branch, in the County afore- 20
 said, on the twenty sixth day of October nineteen
 hundred and twenty-eight, at ten o'clock in the
 forenoon, to answer unto Borough of Monmouth
 Beach, a municipal corporation of the State of
 New Jersey in an action upon contract wherein
 the plaintiff demands from the defendant Five
 hundred dollars.

Hereof fail not.

Witness, LEO J. WARWICK, Esquire, Judge of 20
 said Court, at Long Branch, in the
 County aforesaid, the 17th day of Oc-
 tober in the year nineteen hundred
 and twenty-eight.

JAMES HOROWITZ,
 Clerk.

Plaintiff's Exhibit P-7

Endorsed on back:

DISTRICT COURT
of the
10 Second Judicial District of the County of
Monmouth

SUMMONS UPON CONTRACT

BOROUGH OF MONMOUTH BEACH,
a municipal corporation of
the State of New Jersey,

20 Plaintiff,

vs.

RICHARD WEST and GEORGE JO-
LINE,
Defendant.

Address

Demand \$500.00
Court Costs .. 4.00
30 Mileage48

Returnable Oct. 26th, 1928, at ten o'clock A. M.

MAURICE A. POTTER,
Plaintiff's Attorney.

I served the within Summons Oct 18 1928 on
the defendant George Joline by reading it to him
and giving him a copy.

40 SAMUEL BARRON
Constable
Sergeant-at-Arms

Plaintiff's Exhibit P-7

The said Defendant Richard West not being found, I served the within Summons Oct 18 1928, by leaving a copy thereof at his place of abode with a member of his family above the age of 14 years, informing her of its contents.

10

SAMUEL BARRON
Constable
Sergeant-at-Arms

I James Horowitz, Clerk of the District Court of the Second Judicial District of the County of Monmouth, certify this to be an exact copy of the summons, constable's return of service and state of demand filed in the matter of Borough of Monmouth Beach vs. Richard West and George Joline. 20

October 25, 1929.

JAMES HOROWITZ,
Clerk.

Plaintiff's Exhibit P-7

A2938
 State of New Jersey
 County of Monmouth

IN THE

10 DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
 of the County of Monmouth

BOROUGH OF MONMOUTH BEACH, a municipal corporation of the State of New Jersey, Plaintiff, vs. 20 RICHARD WEST and GEORGE JO- LINE, Defendant.	}	In an action upon Contract Demand, \$500.00 Att'y of P't'ff Maurice A. Potter. Att'y for Def't
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	---------------------------------------------------------------------------------------------------------------------

A summons was issued in the above-stated cause, 17th day of October A. D. 1928, returnable on the 26th day of October A. D. 1928, at 10 o'clock A. M., and was returned by the Constable as follows:

30 I served the within Summons Oct 18 1928, on the Defendant George Joline by reading it to him and giving him a copy

SAMUEL BARRON

Constable,
 Sergeant-at-Arms, D. C.

The said Defendant Richard West not being
 found, I served the within Summons Oct 18 1928,
 40 by leaving a copy thereof at his place of abode

Plaintiff's Exhibit P-7

with a member of his family above the age of 14 years, informing her of its contents.

SAMUEL BARRON

Constable,
Sergeant-at-Arms, D. C. 10

10/17/28 Plaintiff filed State of Demand.

October 26, 1928 adjourned to November 2, 1928.

November 2, 1928 This Cause was Settled.

I, James Horowitz Clerk of the District Court of the Second Judicial District of the County of Monmouth, certify the above to be a true and correct transcript of the entries in the above entitled cause. Docket #28. 20

October 25, 1929.

JAMES HOROWITZ,

Clerk (Seal)

NEW JERSEY TRUST COMPANY 55-226

OF LONG BRANCH

30

No. 3058

Treasurer's Check

Long Branch, N. J. March 13, 1928

Pay to the

Order of Borough of Monmouth Beach \$325.00
Three hundred twenty-five and 00cts Dollars

40

GUSTAVE JOERG

Asst, Treas.

a/c 10031 George P. Joline

*Plaintiff's Exhibit P-8**Stamped on face:*

C. N. B. Mar 28 1928 2

Endorsed:

10 Pay to the order of the Citizens National Bank
Long Branch, N. J. Borough of Monmouth Beach
J. Geo. Goodall, Treasurer (Protest Waived)

Pay to the order of Any Bank, Banker or Trust
Co. All Prior Endorsements Guaranteed. The
Citizens National Bank 55-225 Long Branch,
N. J. 55-225 B. K. Reid, Cashier

20

PLAINTIFF'S EXHIBIT P-8.

Long Branch, N. J. Oct 25 1928 No....

NEW JERSEY TRUST COMPANY 55-226

OF LONG BRANCH

Pay to the

Order of Maurice Potter, Atty. \$337.28

30 Three Hundred and Thirty-Seven 28/100 Dollars

GEORGE P. JOLINE

Collectible at par through
the Federal Reserve Bank
of New York.
Safety Deposit Vaults

Endorsed:

40 For deposit credit account Maurice A. Potter
Atty

Defendant's Exhibit D-1

Pay to the Order of Any Bank, Banker or
Trust Co. (All Prior Endorsements Guaranteed)
Oct 27 1928 Long Branch Banking Co. 55-223
Long Branch, N. J. 55-223 Wm. Hendrickson,
Jr., Cashier

10

DEFENDANT'S EXHIBIT D-1.**THIS AGREEMENT**

Made the 26th day of April in the year of our
Lord, One Thousand Nine Hundred and twenty-
seven.

BETWEEN Borough of Monmouth Beach, a mu-
nicipality of the State of New Jersey, party of
the first part,

20

AND Sidney B. West, of the Borough of Mon-
mouth Beach, in the County of Monmouth and
State of New Jersey, party of the second part.

WITNESSETH, that the said party of the first
part, has hereby let, and rented to the said party
of the second part, and the said party of the
second part, has hereby hired and taken from the
said party of the first part,

20

ALL that certain premises known as the Mon-
mouth Beach Bathing Pavilion, situate on the east
side of Ocean Avenue, south of Valentine Street,
for the term extending from May 1st to October
1st, 1927, to commence on the first day of May
A. D., 1927, at the term rent of Six Hundred Dol-
lars payable Two Hundred dollars (\$200.) on July
1st, 1927, Two Hundred Dollars (\$200.) on Au-

40

Defendant's Exhibit D-1

gust 1st, 1927, Two Hundred dollars (\$200.) on September 1st, 1927.

10 AND it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

20 AND the said party of the second part covenants to pay to the said party of the first part, the said rent as herein specified, to wit: Six Hundred Dollars (\$600.) payable as follows, Two Hundred dollars (\$200.) on July 1st, 1927, Two Hundred dollars (\$200.) on August 1st, 1927; Two Hundred Dollars (\$200.) on September 1st, 1927.

AND at the expiration of the said term, or the termination of this lease, the said party of the second part will quit and surrender the premises hereby demised, in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

30 AND the said party of the first part covenant, that the said party of the second part, on paying the said term rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

The party of the second part is to put up sufficient bathing ropes for the accommodation and safety of the patrons and to keep a life guard
40 on the beach during bathing hours. And the Boro to furnish a boat properly equipped with oars for the protection of the bathers.

Defendant's Exhibit D-1

It is further covenanted and agreed that the tenant shall keep the said bathing pavilion open for business from June 22nd until September 22nd, 1927.

All residents of the Borough of Monmouth Beach shall have access to and from the public beach. (The renting of the bathing houses shall be extended to the residents of the Borough of Monmouth Beach in order to comply with the order of the Court of Chancery in the injunction suit against the Borough of Monmouth Beach.) 10

It is covenanted and agreed that the tenant shall furnish all the necessary equipment, such as towels, etc., to properly run the bathing pavilion. 20

It is hereby further covenanted and agreed that the said party of the first part shall keep the building, inside and outside, in good, first class condition, and shall make all necessary repairs thereto.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals the day and year first above written. 30

BOROUGH OF MONMOUTH BEACH, N. J.
George Y. VanBrunt,
Mayor.

SIDNEY B. WEST
Acknowledged and accepted by the
Beach & Public Buildings Committee
S. H. COOPER, JR.

Signed, Sealed and Delivered
in the Presence of 40
J. GEO. GOODALL
Attest
Wm. F. Bradley
(Seal)

DEFENDANT'S EXHIBIT D-2.

THIS AGREEMENT

MADE the first day of May, in the year of our Lord, One Thousand Nine Hundred and twenty-eight,

BETWEEN Borough of Monmouth Beach, a municipality of the State of New Jersey, party of the First Part. 10

AND George P. Joline and Richard West, of the Borough of Monmouth Beach, in the County of Monmouth and State of New Jersey, party of the Second part.

WITNESSETH, That the said party of the First Part, has hereby let, and rented to the said party of the Second Part, and the said party of the Second Part, has hereby hired and taken from the said party of the First Part 20

ALL that certain premises known as the Monmouth Beach Bathing Pavilion, situate on the east side of Ocean Avenue, south of Valentine Street, and the beach appurtenant thereto, for the term extending from May 1st to October 1st, 1928 to commence on the first day of May, A. D., 1928, at the yearly rent of Six hundred and fifty dollars payable Three hundred and twenty five (\$325.00) Dollars on May 1st, 1928 and Three hundred and twenty five (\$325.00) on August 1st, 1928. 30

AND it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the First Part to re-enter the said premises, and to remove all persons therefrom. 40

Defendant's Exhibit D-2

AND the said party of the Second Part covenants to pay to the said party of the First Part, the said rent as herein specified, to wit: Six hundred and fifty dollars (\$650.00) payable as follows, Three hundred and twenty-five (\$325.00) dollars, on May 1st, 1928 and Three hundred and twenty five dollars (\$325.00) on August 1st, 1928.

And at the expiration of the said term, or the termination of this lease, the said party of the Second Part will quit and surrender the premises hereby demised, in as good a state and condition as reasonable use thereof will permit, damage by the elements excepted.

It is further covenanted and agreed that the tenant shall keep the said bathing pavilion open for business from June 22nd, until October 1st, 1928.

All residents and tax payers of the Borough of Monmouth Beach shall have access to and from the public beach. (The renting of the bathing houses shall be extended to the residents of the Borough of Monmouth Beach in order to comply with the order of the Court of Chancery in the injunction suit against the Borough of Monmouth Beach.)

It is covenanted and agreed that the tenant shall furnish all the necessary equipment, such as towels, etc., to properly run the bathing pavilion.

It is hereby further covenanted and agreed that the said party of the first part shall keep the building, inside and outside, in good, first class condition, and shall make all necessary repairs thereto.

Defendant's Exhibit D-2

The party of the second part for the accommodation and safety of the patrons is to keep at all times and during bathing hours, life guard on the beach and boat properly equipped with oars for the protection of the bathers.

And the said party of the First Part covenant, that the said party of the Second Part, on paying the said term rent, and performing the covenants, aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid. 10

In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written. 20

BOROUGH OF MONMOUTH BEACH,
By George Y. Van Brunt,
Mayor.

Signed, Sealed and Delivered
in the Presence of

“Attest”

Clerk.

30

_____(L. S.)

_____(L. S.)

Endorsed on back:

LEASE.

BOROUGH OF MONMOUTH BEACH,
a municipality of the State of
New Jersey,

40

to

GEORGE P. JOLINE, *et al.*

Dated May 1st, 1928.

Warrant of Arrest

The body of the said party in the within-
captioned and name of the person is to keep at all
times and during business hours the road on
the north and west property adjacent with care
for the protection of the highway.

19

And the said party of the first part covenants
that the said party of the second part on pay-
ing the said term will and performing the above-
mentioned covenants shall and may lawfully and
quietly have, hold and enjoy the said premises
quietly for the term aforesaid.

20

In witness whereof, the said parties before
have hereunto set their hands and seals the day
and year first above written.

BOROUGH OF ROYALTON

By George A. Van Hout

Mayor
Royal Town and District
in the presence of
the following witnesses
I Attest: _____

30

_____ Clerk

(A. S.) _____
(A. B.) _____

40

Attest on this _____ day of _____

LEASE

Between or Messrs. _____
a municipality of the State of

New Jersey, of the one part,
and _____ of the other part.

Witness my hand and seal

Dated May 1st 1923

New Jersey Court of Errors and Appeals.

RICHARD WEST and GEORGE P.
JOLINE,
Plaintiffs-Appellants,

vs.

BOROUGH OF MONMOUTH BEACH, a
Municipal Corporation of the State
of New Jersey,
Defendant-Respondent.

Action at Law
On Appeal.

BRIEF OF APPELLANTS.

Preliminary Statement.

This is an appeal from a directed verdict in favor of the Borough of Monmouth Beach in an action brought against it by Richard West and George P. Joline for damages arising from the Borough's failure to deliver possession of certain premises and for interfering with the possession of that part which was delivered.

Introduction.

In March, 1928, the Borough of Monmouth Beach, by formal resolution, accepted plaintiffs' bid of \$650 "for the rental of the Monmouth Beach bathing pavilion and adjoining beach for

the current season" (p. 24). The bid was accompanied by a check for \$325 which the Borough cashed and accepted as one half of the rent. The keys for the pavilion were delivered to the plaintiffs about the first of June and they at once undertook the renovation of the structure and appurtenances for the approaching season.

Part of the pavilion consisted of bath-houses and these the plaintiffs proceeded to let. A charge of twenty-five cents was made to persons in bathing suits using the pavilion, showers and the beach. If a bath-house were desired, an additional charge of twenty-five cents was made (p. 116). The plaintiffs provided life-guards and a life-boat for the protection of the bathers. Throughout the month of June and the first part of July the plaintiffs carried on their business unmolested, making and collecting a charge for the bathers.

On July 10, 1928, the Borough passed a resolution reciting that the public had a right to and could, "use the Borough bathing beach, showers and parking space" at the plaintiffs' pavilion *free of charge* (p. 26). At the same meeting another resolution was passed providing that the plaintiffs should be reimbursed for the cost of installing bathing ropes and poles (p. 26). Immediately conditions changed. The public passed in and out of the pavilion in bathing suits using the chairs and showers as well as the beach, and when the charge was demanded the reply invariably was that the Borough had declared the accommodations free to the public. The resolution

attempting to make them free was evidently well advertised, for the season was disastrous to the plaintiffs who estimated their loss to be \$3,306. This was based on the tally of those bathers who had used the pavilion and other privileges without paying the charge demanded.

Not only did the Borough pass a resolution reciting that the privileges were free to the public, but in August at the height of the summer season, directed in another resolution that an officer be placed at the pavilion whose duty it was to see that no charge was made (p. 28).

The plaintiffs frequently protested to the Borough officials against the treatment that they were receiving but to no avail. At a Borough meeting on July 31, 1928, Joline addressed the mayor and council and vividly described these difficulties caused by the resolution making the beach free to everyone. He requested that the resolution be rescinded (p. 27). His request was refused.

In September, Councilman Maney, who had cast the single vote opposing the acceptance of plaintiffs' bid, moved that action be brought to recover the balance of the rent owing by the plaintiffs (p. 33). This motion was carried and a month later an action was brought by the Borough against Richard West and George P. Joline for \$325, the State of Demand reciting in part:

“That defendants used and occupied all those certain pavilions and bath houses, and the land and beach appurtenant thereto, situated on the east side of Ocean Avenue and

extending to the Atlantic Ocean and adjoining Valentine Street in said Borough of Monmouth Beach, from the first day of June, 1928, to the thirtieth of September, 1928, and defendants took therefrom to their own use, the rents, issues and profits of the bathing beach, bath houses, and pavilions" (p. 146).

Prior to the date fixed for trial in the District Court, Richard West and George P. Joline paid the Borough's claim, together with interest and costs amounting in all to \$337.28 (Ex. P-8, p. 154).

The present action resulted in a verdict being directed in favor of the Borough upon the theory that the plaintiffs had acquired no rights whatsoever in the premises, for which they had paid \$650, in that the Borough officials had not complied with the statute prescribing the manner in which a municipality might lease land (p. 143). No advertising for bids had been affirmatively proved and the Borough claimed that the absence of advertising made its act *ultra vires*. The defense of *ultra vires* had been interposed in the Borough's Answer, and in addition to this defense the Borough claimed it needed the beach and the statute empowered a municipality to lease only premises which it did *not* need. To the directed verdict an exception was duly taken (pp. 143-144).

ARGUMENT.

That the learned Trial Judge erred in directing a verdict in favor of the defendant.

Part I.

The defendant is a Borough and the Act relating to the leasing of public lands by Boroughs is as follows (3 C. S. 3509, as amended by P. L. 1926, p. 33):

“An act to enable counties, towns and boroughs to sell and convey, or to exchange for other lands adapted to the public use for which they are designed, or to lease public lands which are not used, needed or desirable for public purposes.

Sec. 1. It shall be lawful for the Board of chosen freeholders of any county, the common council or other chief governing body of any town or borough in this state which owns or may hereafter own lands and real estate not used or needed for public purposes, or the further use of which, in the judgment of said board, common council, or other chief governing body is no longer desirable, by resolution, adopted by the affirmative vote of at least two-thirds of the entire number of members of such board, common council or other chief governing body, to sell and convey such lands and real estate or any part thereof, or to exchange the same for other lands adapted to the public use for which

they are designed, or to lease for a term of years such lands and real estate, or any part thereof; if in the discretion of said board, common council, or other chief governing body it is deemed more advisable, the moneys received from the sale, exchange or letting of such lands and real estate shall be paid to the collector, treasurer or other officer entitled to receive the moneys of such county or borough for the general uses and purposes of such municipality. (P. L. 1909, p. 128, as amended P. L. 1910, p. 232)."

The defendant inferentially denies that it derived any power to lease from this statute notwithstanding that the Act was not repealed by the *Home Rule Act of 1917*. It will be noted that the title of the *Act of 1909* was amended as recently as 1926 (*P. L. 1926, p. 33*).

In compliance with the 1909 Act the acceptance of plaintiffs' bid was by a resolution adopted by four councilmen [the required two-thirds of the entire members] (p. 26). The money received was paid to the Borough's treasurer and properly deposited (p. 153).

The Borough would have the necessary legislative authority come not from the *Act of 1909* but the *Home Rule Act of 1917, P. L. 1917, p. 455* which has to do with public parks, or places of public resort owned by a borough and not presently needed for the purpose for which acquired. A provision is made for advertising at least ten days prior to the receipt of bids. There was no

proof of any advertising and upon the absence of this proof the Borough rested its claim of *ultra vires*.

Assuming the *Home Rule Act* does apply rather than the *Act of 1909* as amended in 1926, it cannot be successfully claimed that the Borough was without power to lease. Under either Act the right to lease is conferred by the Legislature and with that right to lease would necessarily go the right to contract to lease.

There is a difference between those situations where a municipality possesses a right to contract and those in which no such right has been conferred by the Legislature. This distinction is recognized in *Mercer County v. Tobish*, 97 N. J. L. 439 at 441, where the Court said:

“The cases in our reports recognize a vital legal distinction between those cases in which the municipality had the right and power to enter into the given contract, and those cases in which the municipality had no such power.”

The right to lease being established, it was not incumbent upon the plaintiffs to prove a strict compliance by the Borough with every procedural step prescribed by the statute delegating authority. In the absence of power to act the proceedings of a municipality are presumed lawful and regular until proved otherwise. In directing a verdict because there was no advertising (p. 145), the Court denied the plaintiffs the benefit of the pre-

sumption of regularity. In *Mercer County Traction Company v. The United New Jersey Railroad and Canal Company*, 64 N. J. Eq. 588 at 591, the presumption was extended even to the existence of the power to act, the Court saying:

“It is true that the proceedings were of a statutory body with a limited power, yet so long as nothing appears in the record of their proceedings to exhibit an absence of power to act, and inasmuch as the statute requires no record of the decision of the committee in respect to the fact that the owners of the required feet had consented, it may be assumed, until the contrary is shown, that this fact was satisfactorily proven to exist.”

Still another reason would tend to render improper the defense of *ultra vires*. A tenant is estopped to deny his landlord's title and this estoppel has been held by the courts of other jurisdictions to be mutual. 16 R. C. L. 653.

The action brought by the Borough in the District Court was for use and occupation, an action of statutory origin (3 C. S. 3066) unknown to the common law, *Johnson v. May*, 3 Lev. 150, Bull. N. Y. 138, cited with approval in *Smith v. Stewart*, 6 John. 46; 5 Am. Dec. 186, which will lie only as the statute says, “where the agreement is not by deed” and can never be maintained in the absence of the relation of landlord and tenant. *Brewer v. Admrs. of Conover*, 18 N. J. L. 214.

That the Borough sought to maintain the action

for the remaining rent due for the beach as well for the pavilion and appurtenances, should be some evidence not only of a ratification of the action now claimed to be illegal, but also of the intent of the parties which, as will presently appear, has been held to be a question of fact.

Had West and Joline chosen to defend the District Court action they could not have denied the relationship of landlord and tenant. If they are estopped, why should not the Borough be estopped, particularly after it had accepted the amount claimed to be the balance due for the reasonable rental value of lands, beaches, pavilions, bath-houses and equipment, &c.? (p. 147).

One of the defenses interposed was that the relationship of landlord and tenant never existed between the parties because a written lease was contemplated which was never executed and, secondly, that there was not entered into even a contract to lease. It then inferred that the failure of the Borough to deliver possession of part of the premises could not constitute a breach of any agreement to lease.

These defenses went to the First Count alleging a rental and to the Second Count alleging a breach of contract to lease and were urged and argued on defendant's motion for a non-suit, which was denied.

On the motion for a direction, defendant's counsel approached the case from an entirely dif-

ferent angle. He reiterated the ground of *ultra vires* but in addition said (p. 135, l. 19):

“The proofs in the matter, if any, would disclose an alleged agreement to make a lease. There are no proofs that the Borough of Monmouth Beach at any time entered into a contract of lease or that the Borough of Monmouth Beach made any rental or letting to the plaintiffs.”

Whether this absence of proof of both a lease and a contract to lease were due to the claim of *ultra vires* or to some other ground, urged upon the assumption that the defense of *ultra vires* would fail, the record does not make very clear. If the claim be deemed the advancement of a distinct and separate ground, the Trial Judge either failed to recognize it as such or held it insufficient for the direction was based on the entire absence of a statute delegating to the Borough the power to lease “the exclusive right to use the pavilion and bath-houses as against the public”; the Court first observing that the statute to which its attention had been called provided for advertising (p. 145). The statute of 1909 had been mentioned and there will be found a specific reference to it in the briefs filed on defendant’s unsuccessful motion to strike out the Complaint.

The Court’s observation just alluded to was in response to the following questions (p. 144):

“Mr. Leonard: In other words, the single question raised is whether the municipality had a right to contract.

The Court: No, that is not the single question at all. Even if they had authority to lease these privileges, they did not proceed legally, that is what I say.

Mr. Leonard: By reason of not advertising?

The Court: By reason of not advertising, and moreover, there has not been shown to me any statute relating to Monmouth Beach, the leasing of the bathing privilege and the exclusive right to use the pavilion and bath-houses as against the public; particularly, I mean by that, the taxpayers of the public, under a lease. My attention has not been called, and moreover in the statute to which my attention has been called, which I have not been able to locate, even there I am told that there is a provision that there must be an advertising for bids by the municipality, to the end that the highest responsible bidder may be obtained.

That disposes of this case. You may take this verdict. The jury are directed to return a verdict in favor of the defendant borough."

If, notwithstanding the single and narrow issue thus raised, and which was dispositive of defendant's motion, it should, on this appeal, endeavor to avail itself of its previous claim that the record disclosed no proof of a rental or a contract to lease, not because of *ultra vires* but for some other reason, the effort would invite opposition. First, because the point was not squarely raised as a separate ground independent of *ultra vires* and is therefore not available on this appeal

to justify the result which the Trial Court arrived at in another way. Secondly, because the ground would involve the intent of the parties which is a question of fact. If a question of fact can be properly decided by a Court in the face of considerable evidence tending to show a meeting of the minds, while other evidence might be said to show the contrary, then appellants will undertake to demonstrate that the question should have been resolved against defendant which has their \$650. and which now claims it never intended to do the only thing entitling it to that money.

Part II.

According to the resolution of acceptance (p. 24) the plaintiffs' bid was "for the rental of the Monmouth Beach pavilion and adjoining beach for the current season". By a separate resolution it was moved, "that the solicitor be authorized to draw up a contract covering the rental of the Monmouth Beach pavilion" (p. 25).

Plaintiffs received the keys to the pavilion in June, but at that time no written lease had been submitted to them and indeed no written lease had been prepared.

Not until *after* the passage of a resolution permitting the public to use the beach, showers and parking space free of charge (p. 26) was a written lease submitted. This lease marked Exhibit D-2 (p. 151) contained the language that all residents

and taxpayers were to have access to and from the beach which the lease characterized as public (p. 160).

In that the bid submitted and accepted was for the rental of the bathing pavilion as well as the adjoining beach, the written lease which permitted both residents and taxpayers to use the beach was not in accordance with the contract made between the plaintiffs and the defendant as evidenced by the resolution of acceptance. This written lease was shown to plaintiffs for the first time in the middle of July and was never signed.

Paying for the privileges for which the plaintiffs sought to make a charge, and were prevented by the Borough, was not a new thing. It had been done by the lessee of the premises during the previous season and of this fact the Borough officials were familiar when they accepted the bid as were the plaintiffs.

About three weeks after their bid was accepted, the plaintiff, Richard West, was shown a copy of the lease given to the lessee of the previous year and was told by the collector who afterward gave them the keys, that the plaintiffs would have the same. The lease submitted was not the same. From the collector, who is also characterized as assistant to the Mayor (p. 84) the plaintiffs received the keys in June. The Mayor admitted he also had knowledge of this delivery (p. 121). Plaintiffs went into possession expecting to receive the beach and expecting to charge for its use as their predecessor had done the previous year.

Whether the legal situation arising from these circumstances is called a rental or is called a contract to lease, makes little difference. Certainly the conduct of the Borough constituted a breach of one or the other. That there did exist the relationship of landlord and tenant after the plaintiffs were given the keys would seem a logical and fair inference notwithstanding that a written lease may at one time have been contemplated. The fact remains that a written lease was not prepared before the plaintiffs went into possession and one was not shown to the plaintiffs until after the Borough had interfered with their business which had been peacefully conducted for over a month.

The institution of a suit for use and occupation which, as mentioned, will not lie in the absence of the relation of landlord and tenant, tends to enforce the view that there was a meeting of the minds creating this relation. Under the most favorable aspect the record at the close of the case presented the question of intent which should have been left to the jury. If, by reason of the contemplation of a written lease it can be said that the acceptance of the bid was the making of only a contract to lease then the directed verdict was erroneous, because a clear breach of that contract was demonstrated by the refusal of the Borough to deliver the adjoining beach which was described in the resolution as part of the subject matter for which the bid was received and accepted.

Although the measure of damages may be different from those damages accruing by reason of the failure to deliver the subject matter of prem-

ises leased, damages will lie for the breach of a contract to lease, and were allowed in *McCulloch v. Lake & Risley Company*, 91 N. J. L. 381.

Because a written lease is contemplated does not destroy the legal contractual aspect of the agreement to lease. *McCulloch v. Lake & Risley Company*, 91 N. J. L. 381.

In *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266, cited with approval in *McCulloch v. Lake & Risley Company* (*supra*) and referred to in *Hudson v. Atlantic City*, 103 N. J. L. 121 at 123, Justice Depue speaking for the Court of Errors and Appeals said:

“The fact that parties negotiating a contract, contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, *it is always a question of fact* (Writer’s italics) depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding, and which, for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal written agreement.”

In *Hudson v. Atlantic City* (*supra*), an action was brought for a breach of contract against a municipality. There the Court said the, “test in all these cases is whether a contract has been made, whether a bargain is complete”. It was

further observed that in making this test, "there must be a substantial difference in judging the actions of individuals and that of municipal corporations". None the less the question was deemed one of intent and the non-suit was there justified because only a few days after Atlantic City had passed a resolution accepting a bid, it passed another expressly rescinding the resolution and thereafter rented the premises to other parties.

The first resolution there under scrutiny contained the provision for the payment of \$5,000, "on the signing of the lease", and this was strong if not conclusive evidence that the bargain between the parties had not been consummated prior to that payment. The case turned, however, on the rescission of the resolution a few days after it was adopted and before the date fixed for delivery of possession.

The case at bar is clearly distinguishable from *Hudson v. Atlantic City*. Here the resolution accepting the bid was not conditional. In the *Hudson Case* the resolution recited that a written lease should be *approved* by the city solicitor. Here the bid was accompanied by one-half of the rent which was received, accepted and used. There, no payment appears to have accompanied the bid, the first payment contemplated being a payment of \$5,000 "on the signing of the lease". Before the elapse of time in which a written lease might reasonably be expected, the resolution was rescinded; whereas here a written lease was not submitted until July, almost four months after

the bid was accepted and some weeks after the plaintiffs had begun their business.

Whatever hesitancy a Court should have in characterizing a municipality's bargain as complete in law, and the *Hudson Case* says there should be some, that hesitancy would appear quite out of place in the present case, which might very well be decided on universal concepts of right and wrong as was done in *County of Mercer v. Tobish*, 97 N. J. L. 439, where the same learned Justice who wrote the opinion in the *Hudson v. Atlantic City* case said:

"It would be much to be regretted if these public bodies were without power of doing ordinary justice in these affairs, which must occur not infrequently."

It takes considerable boldness to claim money for the rental of premises, receive and pocket the money and in the next breath claim the entire *absence* of a right to lease the very premises for which the money was paid. This is precisely what defendant's position amounts to.

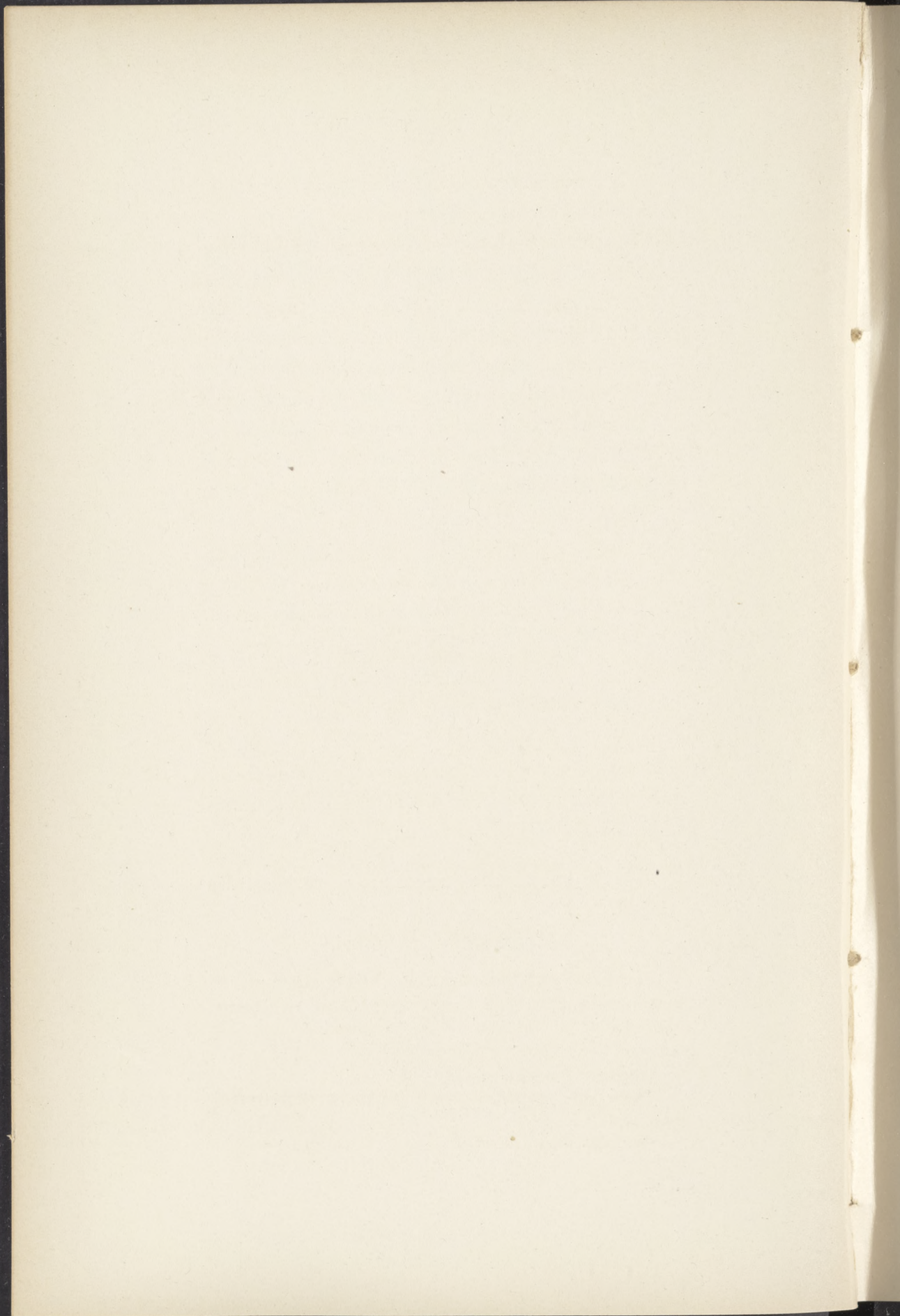
A reversal of the judgment is respectfully urged.

Respectfully submitted,

APPLEGATE, STEVENS, FOSTER & BENEVILLE,
Attorney for and of Counsel with Plain-
tiffs.

LESTER C. LEONARD,
Of Counsel.

October Term, 1930.



New Jersey Court of Errors and Appeals.

RICHARD WEST and GEORGE P. JOLINE,
Plaintiffs - Appellants,

vs.

BOROUGH OF MONMOUTH BEACH, a Mu-
nicipal Corporation of the State of New
Jersey,

Defendant - Respondent.

Action at Law
on Appeal.

BRIEF OF RESPONDENT

Preliminary Statement

It would appear from the brief of the Appellants that the first ground for appeal stated in the notice of appeal has been abandoned because Appellants confine their argument to the proposition that the trial Judge erred in directing a verdict in favor of the Defendant. Consequently the Respondent in this brief has joined issue only on the point urged.

Statement of Facts

On March 13, 1928 the Boro of Monmouth Beach received an offer from the Plaintiffs West and Joline for rental of the Monmouth Beach Bathing Pavilion and adjacent beach for the season of 1928.

(Beatrice Cooper, p. 24)

There was no other public bathing beach in the borough.

(Richard West, p. 45)

There had been no advertisement for bids.

(Richard West p. 91)

The bid was made at the suggestion of the Borough Collector.

(Richard West p. 84-85)

The bid was accepted merely by motion as evidenced by the minutes, and in conjunction therewith the borough solicitor was directed to draw "a contract covering the rental of the Monmouth Beach bathing pavilion".

(Beatrice Cooper p. 24-25)

The plaintiffs took possession, by means of keys delivered to them by Mr. Goodall, about June 1st, 1928.

(Richard West, p. 38)

Mr. Goodall, who was only a subordinate officer of the borough, is variously described as assistant to the mayor,-

(Richard West, p. 38-84)

as collector,-

(Richard West, p. 84-85)

as one "attending to the general business of the borough".

(Richard West, p. 90)

The bathing beach, the bathing pavilion and its contents were all property of the Borough and were considered so by all parties to the controversy.

(Richard West, p. 38-40,46)

No lease was ever signed.

(Richard West, p. 90)

The several parties failed to agree to terms concerning the use of the public beach by certain classes of the citizens of Monmouth Beach.

(Richard West, p. 84-94-96)

(George P. Joline, p. 101-103-105)

The plaintiffs continued to occupy the premises throughout the season of 1928.

(Richard West, p. 44-46-60)

(George P. Joline, p. 52-80)

As late as August 14, 1928 the council of the Borough by formal motion requested the execution of the lease, or surrender of the premises.

(Discussion, p. 28)

(George Joline, p. 102)

At the close of the season the borough instituted action to collect from the plaintiffs the reasonable value of the use and occupancy of the premises.

(Discussion p. 36)

(Exhibit P-7)

The matter was never tried on its merits, but settlement was made by payment upon the recommendation of plaintiff's counsel.

(Discussion p. 35-37)

(Exhibit P-7)

(Exhibit P-8)

ARGUMENT

The propriety of the directed verdict in this matter resolves itself into the question of whether a contractual relation existed between the plaintiffs and the Borough of Monmouth Beach. The complaint alleges in its first count a lease, and in its second count a "contract for rental".

REASON NUMBER ONE

THE PROOFS DISCLOSE NO CORPORATE POWER LEGALLY EMPLOYED.

The Borough of Monmouth Beach was incorporated by an Act of the Legislature of the State of New Jersey (P. L. 1906 p. 28) providing for government of such borough in accordance with the general laws of the State relating to boroughs. Throughout the year 1928, when this controversy arose the Borough of Monmouth Beach continued to be governed under the form of government and powers prescribed by the Borough Act. The Borough Act (Laws of 1897 p. 285) and the several amendments thereto are silent as to any provision for leasing public lands. Any such power must be derived from Acts concerning municipalities generally. The Home Rule Act of 1917 (P. L. 1917 Ch. 152) in Article XVII entitled "Public Lands and Buildings" prescribes a general rule for all municipalities. Section 9 of the aforesaid Article provides for the sale or disposal of any lands or buildings or any right or interest therein not needed for public use. Section 10 of the aforesaid Article provides that every municipality may lease for fixed and limited terms any lands of said municipality not needed for public use. Section 11 sets forth the procedure for the disposal provided for in the previous two sections. Section 11 as amended by the Laws of 1929, Chapter 38 p. 70 reads as follows:-

11. No land or any right or interest therein shall be sold by any municipality except at public

sale and to the highest bidder, after public advertisement given in a newspaper circulating in the municipality in which said land lies, for two insertions at least once a week during two consecutive calendar weeks, the last publication to be not more than seven days prior to the date of said sale; provided, however, that the requirement herein for public sale to the highest bidder shall not apply to any sale of land or any right or interest therein by any municipality to the United States of America, the State of New Jersey, or any political subdivision of said State, and that any deed or deeds heretofore given by any municipality for the sale of any land or any right or interest therein, without public sale to the highest bidder, to the United States of America, the State of New Jersey, or any political subdivision of said State, shall be valid and effectual; provided, further, however that a municipality may dispose of and convey a portion of park lands or streets in exchange for other lands contiguous to such park lands or streets in area equal to or greater than the lands conveyed for the purpose of straightening or rendering symmetrical the boundary or boundaries of said park lands or streets; provided, further, that whenever any road, street, avenue, highway, lane or alley shall have been or shall hereafter be lawfully altered or relocated in such manner as to leave a portion of the original road or street which shall not be needed for public use, and the municipality shall have vacated or released the public rights therein, the municipality, if it be the owner of the fee of said land, is hereby authorized to make a private sale of and convey the lands so vacated to the adjoining property owner or owners at such price as may, in the judgment of the governing body of such municipality, be fair and just; and provided, further, however, that such sales may be adjourned at the time advertised for a period of not more than one week, without readvertising; and provided, further, that any sales heretofore made at public auction by any municipality of this State, are hereby validated and confirmed, if otherwise lawful, notwithstanding any defects or informalities in said sales or the advertisements thereof.

Article XXXVI of the Home Rule Act (*supra*) pro-

vides in Section 13 thereof for the renting of parts of parks or buildings and the letting of privileges therein:

13. The governing body of every municipality may lease, rent or hire, any part of any public park, or place of public resort, owned by it and not presently needed for the purpose for which it was acquired, or any building, or portion thereof thereon not so needed, for any period not exceeding two years. The governing body may let out to any person or persons, corporation or corporations any privileges in any public park or place of public resort, upon such terms and conditions as it may prescribe; and upon the violation of the terms upon which any lease or privilege is granted, the same shall become void, and said governing body shall have power to so declare, and may re-enter any place so leased and prevent the exercise of any privilege so forfeited; any such letting shall be to the highest responsible bidder therefor. The letting thereof shall be advertised in some newspaper circulating in the municipality at least ten days prior to the receipt of bids (L. 1917, c. 152, p. 455).

It will appear from an examination of these acts that there are two prerequisites to leasing which is common to all, namely,

- 1- A determination that the land proposed to be leased is no longer needed for public purposes, and
- 2- That the leasing must be done subsequent to due advertisement for bids.

There is an earlier act originally enacted in 1909 (P. L. 1909 p. 128) which was amended (P. L. 1910 p. 232), and the title of which was amended (P. L. 1926 p. 33). The body of this Act is as follows:-

Section 1. It shall be lawful for the board of chosen freeholders of any county, the common council or other chief governing body of any town or borough in this state which owns or may hereafter own lands and real estate not used or needed for public purposes, or the further use of which, in the judgment of said board, common

council, or other chief governing body is no longer desirable, by resolution, adopted by the affirmative vote of at least two-thirds of the entire number of members of such board, common council or other chief governing body, to sell and convey such lands and real estate or any part thereof, or to exchange the same for other lands adapted to the public use for which they are designed, or to lease for a term of years such lands and real estate, or any part thereof; if in the discretion of such board, common council, or other chief governing body it is deemed more advisable, the moneys received from the sale, exchange or letting of such lands and real estate shall be paid to the collector, treasurer or other officer entitled to receive the moneys of such county or borough for the general uses and purposes of such municipality. (P. L. 1909, p. 128, as amended P. L. 1910, p. 232.)

It will be observed that the original title which embodied the purpose of the Act provides for the leasing of lands "not used, needed or desirable for public purposes". The amended title is not changed in this regard.

The Act of 1909 contains the first prerequisite that the lands to be leased or disposed of by the borough must be such as are not used, needed or desirable for public uses.

The Act in question is silent as to the second prerequisite of advertisement and bids. In this respect, however, it should be read in conjunction with the Home Rule Act which was subsequently passed and which supplies a general course of procedure applicable to all municipalities in the exercise of its function of disposing of public lands.

Above all it is to be borne in mind that the Home Rule act furnishes a full and complete scheme for the governing of municipalities, defining their powers and the procedure and method of enforcing them. *Public Service Ry Co. vs. General Omnibus Co.* 93 N. J. L. on page 349.

Every statute must be considered according to what appears to have been the intention of the

legislature, and even though two statutes, relating to the same subject, be not in terms repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the original act.

The rule does not rest strictly upon the ground of repeal by implication, but upon the principal that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on that subject which shall be obligatory. *Roche v. Mayor &c. of Jersey City*, 40 N. J. L. 257 p. 262.

It need hardly be said that there is no inherent power in the municipality to dispose of its public lands and particularly of park lands.

The general rule, which is well settled, is that property held in a governmental capacity, i. e. for a public use, cannot be sold without legislative authority, but must be devoted to the uses and purposes for which it was intended; but it is otherwise as to property held in a private capacity and not devoted to any special public use. *Mc Quillan: Municipal Corporation No. 1140.*

As to parks the general rule is that authority must be conferred by statute to enable a municipality to alienate lands held and used for public park purposes. Where lands have been dedicated and used for a public park or square the municipal corporation holds the title in trust for the public and has no power, unless specially authorized by the legislature, to appropriate such lands for the use and benefit of private persons or corporations, sell the same, or in any way divert the land from the uses and purposes of its original dedication. *Mc Quillan: Municipal Corporation No. 1141.*

What has already been stated in relation to dis-

posing of municipal property applies equally well whether the transfer is an absolute conveyance or a lease. *Mc Quillan: Municipal Corporation No. 1145.*

Ordinarily a municipality cannot, by lease or license permit property acquired or held by it for public use, to be wholly or partly diverted to a possession or use exclusively private, without specific legislative authority. *Mc Quillan: Municipal Corporation. No. 1145.*

The extent of the corporate power and the limitations thereon were to some degree within the actual knowledge of the plaintiff Richard West who testified that he was a former councilman of the Borough of Monmouth Beach.

(Richard West, p. 84)

And in addition he is chargeable with the knowledge that he was dealing with a corporation of limited power.

The general rule is well settled and is constantly enforced that one who makes a contract with a municipal corporation is bound to take notice of limitations on its power to contract, and also of the powers of the particular officer or agency to make the contract. *Mc Quillan: Municipal Corporation No. 1164.*

Public policy required such restrictive enactments to be rigidly enforced, and the consequences resulting from the void character of the contracts they prohibit, must be the same in equity as at law.....No necessity for immediate action can be said to have arisen, and their conduct in disregarding the plain letter and spirit of the law, must be regarded as an indefensible assumption of power.....It is a general and fundamental principal of law, that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, or its officers, to make the contract; and a contract beyond the scope of the corporate powers void. This is certainly so in all cases where this authority is special and of record, or conferred by statute.

Schumm v. Seymour: 24 N. J. Eq. 143, on 153,

It is impossible to gather from the testimony any disposition on the part of the plaintiffs or any effort on the part of the municipality to exercise its power in accordance with the statutory requirements. The municipality made no advertisement for bids according to the admission of the plaintiff Richard West (page 91). This plaintiff mailed an offer at the suggestion of the Borough Collector (page 84-85). The plaintiffs have caused to be read into the record extracts from the minutes of the meetings of the Borough Council which are the full record of the official actions of that body. No effort was made on the part of the plaintiffs to supplement the minutes or in any way to dispute their accuracy. It is therefore fair to assume that the minutes contain a full record of the Borough's official action. The omission in the minutes of a determination on the part of the municipality that the public beach and bathing pavilion in question were no longer used or needed for public use is presumptive that no such determination was ever had. On the contrary the testimony is conclusive that the beach had formerly been used as a public beach and was very necessary and in demand as a public beach in 1928. There was no other public bathing beach in the Borough, (Richard West p. 45).

A discussion was next held to determine who had the right to the free use of the beach at the bathing pavilion. Minutes of July 10, 1928 (Beatrice Cooper p. 25).

Prior leases had contained a condition providing that all residents of the Borough of Monmouth Beach should have access to and from the beach.

(Richard West p. 87)

(Exhibit D-1 on p. 157)

The plaintiffs had knowledge of this.

(Richard West p. 95)

The controversy between the plaintiffs resolves itself about the question of whether the term "residents of Monmouth Beach" included such residents as live there during the summer season only.

(Richard West p. 96)

It must be obvious that the intention of the plaintiffs

was to secure privately a lease of the building known as the bathing pavilion and its contents and a license to use the public beach without regard to legal formalities.

The general rule is that if a contract is within the corporate power of a municipality but the contract is entered into without observing certain mandatory legal requirements specifically regulating the mode in which it is to be exercised, there can be no recovery thereunder. *Mc Quil-lan: Municipal Corporation No. 1181.*

Where competitive bidding is required by a valid provision in a statute, charter or ordinance, the provision is mandatory and must be fully complied with or else the contract will be invalid and unenforceable against the municipality. *Mc Quil-lan: Municipal Corporation No. 1185.*

See also *Van Reipen v. Jersey City*, 58 N. J. L. 262.

Faist v. Hoboken, 72 N. J. L. 361.

Wilson v. Trenton, 61 N. J. L. 599.

44 L. R. A. 540.

The law is settled beyond controversy that a municipal board cannot bind the corporation which it represents by any contract which is beyond the scope of its powers. The duties and powers of the public agents of a corporation being prescribed by statute, or charter, all persons are bound to know the limitations thereof; and it results from this doctrine that the unauthorized contracts are void, and in actions thereon the corporation may successfully defend on the ground that they are ultra vires. *State, Hoxsey v. Paterson*, 10 Vroom 492, 493. *Fletcher v. Board of Education* 85 L. 1.

The test, then, by which the complainant's claim must be tried is, Have they shown a contract? The facts are free from dispute. The complainants cannot claim that they expended their money upon the faith of a promise. They had no promise from the defendants. Their acts in removing the defendants' poles and substituting their own were entirely unauthorized; they were, in fact, acts of unlawful interference. That that they were done under the superintendence

of one of the defendants' officers, does not change their legal character. He acted without authority, entirely outside of his powers, and his acts were, therefore, those of unlawful intermeddler. *N. J. and N. E. Telegraph Co. v. Fire Commissioners*, 34 Eq. 117 on p. 121.

Public agents can only bind the municipality which they represent when they act within the limits of their chartered authority.

A municipal corporation may always interpose successfully the defence of ultra vires to a contract not within the scope of its chartered powers.

If public agents concede privileges they must restrict the concession to such as may be given without detriment to the public.

This the party to whom the concession is made is bound to understand. *N. J. & N. E. Telegraph Co. v. Fire Commissioners*. 34 Eq. 117 (headnotes)

REASON NUMBER TWO

THE PLAINTIFFS CANNOT RECOVER UPON THE ACTS OF THE BOROUGH WHICH ARE ULTRA VIRES.

In the discussion of this point also we make no distinction as to the form of contract urged by the plaintiffs. If the actions of the municipal council were ultra vires it matters not whether these actions constitute a contract for rental or an actual letting. In either event the ultra vires character of the contract would preclude recovery.

If a contract is **ultra vires** it is invalid and if the municipality is sued thereon, (1) no recovery can be had (2) there can be no ratification, except by the legislature, (3) the municipality cannot be estopped to deny the validity of the contract, and (4) there can be no recovery on an implied contract, altho the municipality has received the benefit of the contract. *Mc Quillan: Municipal Corporation No. 1172*. See 50 L. R. A. 656.

A Municipal corporation cannot be bound by an engagement which it had no power to make: and the corporate powers of such a corporation cannot be extended by the operation of the doctrine of estoppel. *Hill Dredging Co. v. Ventnor City*, 77 Eq. 467.

.....where by law a municipal corporation is disabled from making an express contract for a certain purpose, it cannot be liable upon an implied contract having the same subject matter. A like result follows when the law prescribes limitations with respect to the mode in which contracts are to be made, with intent thereby to limit the powers of the corporate agents. As was said in the Supreme Court, in *Cory v. Freeholders of Somerset 15 Vroom 445* (at p. 455): "Where the charter authorizes a contract to be made by the corporate body in a certain mode, whereby the power of such body is intended to be limited, its officers and agents cannot bind it in any other manner. In such cases only a limited power is granted, and consequently an act done beyond the scope of such power is void". Citing *Brady v. Mayor &c. of New York 20 N. Y. 312*.

Jersey City Supply Co. v. Jersey City, 71 N. J. L. 631 on p. 633.

REASON NUMBER THREE

THERE WERE NO PROOFS OF A LEASEHOLD.

The first count of the complaint alleges a rental from the Borough of Monmouth Beach to the plaintiffs. If this were so there would be a contract definite in terms either oral or written. The original offer contained in the letter of Richard West and George P. Joline was not in evidence. Although the municipality admitted freely its inability to produce the same the plaintiffs made no efforts to supply the details contained in the letter if any. The Official minute of the occasion recites a bid of \$650. for the rental of the Monmouth Beach bathing pavilion and adjoining beach for the current season. This was nothing more than an offer to do business with the Borough and was

meant by the authorization on the part of the council for the solicitor to draw up a contract covering the rental of the Monmouth Beach bathing pavilion. Such a contract was never executed because the two parties never agreed upon the terms of the contract.

(Richard West p. 85-94 to 96)

(George P. Joline p. 101-103-105)

The terms of the proposed lease were submitted to Richard West within three weeks of the time the offer was made.

(Richard West, p. 85)

The lease of a former lessee (Exhibit D-1) was acceptable to the plaintiffs. This lease contained the proviso "all residents of the Borough of Monmouth Beach shall have access to and from the public beach" (State of Case p. 157 line 10). The interpretation placed upon this clause by the plaintiff confined the term "residents" to those residents who live in Monmouth Beach throughout the entire year locally called "natives", and did not include those residents of the Borough who reside there merely during the summer months. The Borough insisted however, that the residents should include all residents of the Borough and particularly those who live there merely during the vacation season but who were tax payers in the municipality. This was the occasion for the resolution of July 10th, and the action for the inclusion of the term of "residents and tax payers" in the form of lease proposed by the Borough and submitted to the plaintiffs (Exhibit D-2. State of Case p. 160 line 24).

It is submitted that the interpretation proposed by the Borough that the term "all residents" should include not only residents of the Borough throughout the year but also residents of the Borough during the summer months who were tax payers of the Borough is not unreasonable. Yet this was the point of disagreement which was never overcome according to the frank admission of the plaintiffs themselves.

(Richard West p. 96)

(George P. Joline p. 101)

The minds of the parties never met in a contract of rental. This is tacitly admitted in the application on

the part of counsel for the plaintiffs at the close of the case to amend his complaint so as to embody a count for a breach of an agreement to lease. (State of case p. 134 line 19)

An effort has been made by the plaintiffs in their brief to show that the possession of the property by the plaintiffs and the institution of the suit for use and occupation creates an inference or an estoppel that the relation of landlord and tenant existed although the relationship was never accomplished by written agreement.

The delivery of the keys by a subordinate officer cannot in any way bind the borough.

He acted without authority, entirely outside of his powers and his acts were, therefore, those of an unlawful intermeddler. *N. J. and N. E. Telegraph Co. vs. Fire Commissioners.* 34 Eq. 117 on page 122.

The assumption of possession by the plaintiffs without warrant cannot be used by them to strengthen their case. They understood that the lease was to be prepared and signed.

(Richard West, p. 129)

A subsequent suit for use and occupancy was predicated upon the demand to surrender the premises which the plaintiffs refused or neglected to do. This demand was made in writing and received by the plaintiff George P. Joline, but was not produced or put in evidence.

(George P. Joline p. 102)

The plaintiffs continued to have the exclusive use and occupancy of the bathing pavilion containing its bath houses and received the revenue derived therefrom. The entire controversy between the plaintiffs and the Borough did not involve the use of the bath houses but only the right of people of Monmouth Beach to the use of the beach.

At the close of the season the Borough in a suit in the District Court required of the plaintiffs that they pay to the Borough the reasonable value of the use and occupancy which had been enjoyed by the plain-

tiffs. No mention of rental or of the relationship of landlord and tenant was contained in the pleading of the district court. If the suit for use and occupancy would not lie in the absence of the relationship of landlord and tenant it was the province of the plaintiffs to plead such defense against the action of the Borough. Instead they elected to pay for their use and occupancy and by this affirmative act on their part endeavored to construct an admission or estoppel against the municipality.

REASON NUMBER IV.

PROOFS WOULD NOT WARRANT A RECOVERY BY THE PLAINTIFFS ON A CONTRACT TO LET THE PREMISES.

The second count of the complaint alleged a breach of contract for rental although it can hardly be said that a contract for rental was adequately pleaded. The bulk of the proofs however were directed towards establishing a contract, made by the municipality to rent the premises in question to the plaintiffs and as has been observed heretofore plaintiff's attorney sought to make his pleadings conform to the proofs by an amendment in that regard.

We respectfully urge that any effort on the part of the Borough Council to make such a contract was deficient in the performance of the mandatory terms of the enabling acts as set forth in reason one of this argument. If any contract ever existed it was invalid in its inception and of no avail to the plaintiffs in any aspect of the case.

The case at bar is not dissimilar from Hudson vs. City of Atlantic City wherein the City by resolution authorized the leasing of the property to Mr. Hudson, the lease to be approved by the City Solicitor. About two weeks later then the resolution was rescinded and an award of the property made to other persons at a rental largely increased. In the case at bar a letting was authorized by the municipal council and

the solicitor directed to prepare a lease. In the initial proceedings at Monmouth Beach no definite term was mentioned and no definite premises were described. There had been a previous lease containing conditions of which the would-be lessors were aware. In the contemplation of the parties at Monmouth Beach the terms of the letting were to be defined in the lease. Negotiations were commenced within three weeks of the receipt of the offer of the plaintiffs and continued several months but no agreement on terms was ever reached. Applying the rule of the Atlantic City case it is impossible to see when the bargain was completed or how a contract was ever made. After discussing the character of the municipal officials as trustees of the public property the court then adds,

"The court should scrutinize their action, when dealing with public property and hesitate to say, that a bargain had been completed in law, unless, it appears to the court, that such has been an accomplished fact and nothing left in treaty."

Hudson vs. Atlantic City, 103 N. J. Law page 121 on 124.

Each of the defendants express himself as being willing to accept the precise terms of the lease of the lessors.

(George Joline page 105)

(Richard West page 128)

These plaintiffs however refuse to agree with the municipality in defining one of the terms of the previous lease and very frankly admit it throughout their testimony.

If we are to disregard the failure to conform to the statutory requirements, and if we concede that the facts spelled a contract for the leasing of the bathing pavilion which was breached by the municipality there yet remains a total absence of the proof of damages to warrant a recovery on the part of the plaintiffs.

The damages shown are estimations made by Mr. West and Mr. Joline of the loss of revenue which might have been obtained from persons using the beach during the summer of 1928.

(George Joline page 57, 58 and page 80)
 (Richard West page 81 and 82)

This is the only proof of the damage in the case. It must be assumed it was offered in support of allegations of the second count of the complaint. Herein it is stated that the defendant municipality interfered with the use and possession of the demised premises.

It must be submitted that this is not the result and damage from a breach of contract to let. The breach of such a contract necessitates by the failure to deliver the premises. The very allegation of the complaint and the frank admission of the plaintiffs in this cause that they were actually in possession of the premises defeats the cause of action so asserted. The interference with the use and possession or the quiet enjoyment thereof is another matter which is not presently under discussion.

The true measure of damages for breach of covenant to let was discussed in only one case which the writer has found in this state

"The question of the measure of damages is not authoritatively answered by our own decisions. The case bears a resemblance in this respect to cases of breach of covenant to convey (*Gerbert v. Trustees*, 59 N. J. L. 160), but the resemblance is superficial. The rule seems well settled that the lessee is entitled to recover at least the value of his term. *Sedgw. Dam.* 986, 1022; *Trull v. Granger*, 8 N. Y. 115; *Jewett v. Brooks*, 134 Mass. 505. In a recent opinion Judge Sheldon has collected authorities. *Neal v. Jefferson* (1913) 29 Ann. Cas. 205. This was the rule followed by the trial judge.

McCulloch v. Lake & Risley Co.
 91 N. J. L. page 382.

By the rule of the case last cited the lessee is entitled to recover the value of his term as damages. The value of such term is the difference between the price stipulated in the contract to let and the rental value which the premises would bring in the open market. No effort was made on the part of the plaintiffs to prove the value of this term. Even though they have

proven the breach of a legal contract they have shown no damages resulting from **that** breach.

The direction of verdict in behalf of the defendant was proper for each and all of the following reasons:

Reason 1. The proofs disclosed no corporate power legally employed.

Reason 2. The plaintiffs can not recover upon the acts of the Borough which are ultra vires.

Reason 3. There were no proofs of a leasehold.

Reason 4. Proofs would not warrant a recovery by the plaintiffs on a contract to let the premises.

MAURICE A. POTTER

Attorney for and of Counsel
with defendant.

