

New Jersey Supreme Court

OCEAN GROVE CAMP MEETING
ASSOCIATION OF THE METHODIST
EPISCOPAL CHURCH,

Plaintiff,

On Appeal.

vs.

THE BOROUGH OF BRADLEY BEACH.
Defendant.

STATE OF CASE

PATTERSON & RHOME,

GILBERT COLLINS,

Counsel for Appellant.

WARD KREMER,

Counsel for Respondent.

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NOTICE OF APPEAL

Filed June 28, 1917

MONMOUTH COUNTY COMMON PLEAS

OCEAN GROVE CAMP MEETING
ASSOCIATION OF THE METHODIST
EPISCOPAL CHURCH,

Plaintiff,

vs.

THE BOROUGH OF BRADLEY BEACH.
Defendant.

Action at Law.
Notice of Appeal.

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To WARD KREMER, Esq.,
Attorney for defendant.

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Dear Sir:

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

1. Under the evidence in the cause the trial court should have found and determined that the alleged payment to the collector of the defendant was made without authority of the plaintiff.

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2. Under the evidence in the cause the trial court should have found and determined the issue in favor of the plaintiff and against the defendant and have ordered judgment for the full amount claimed in the complaint instead of finding and determining said issue, as was done, in favor of the defendant.

the foregoing ground of appeal be not sustainable, then, as an alternative ground of appeal, the plaintiff

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says that the trial court, under the evidence in the cause, should have at least found and determined the issue in favor of the plaintiff and against the defendant to the extent of that portion of the amount involved in the action that was received by the collector of the defendant for the use of the defendant, that is to say, Borough taxes, excluding that portion of the amount that was received by said collector for state and county taxes.

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PATTERSON & RHOME,
Attorneys for plaintiff-appellant.

Due and legal service of the within Notice of Appeal is hereby acknowledged this 27th day of June, A. D. 1917.

WARD KREMER,
Attorney for defendant.

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JUDGMENT RECORD

MONMOUTH COMMON PLEAS COURT

THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE,

Plaintiff,

vs.

THE BOROUGH OF BRADLEY BEACH, A MUNICIPAL CORPORATION.

Defendant.

Judgment Record.

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The defendant in this cause was summoned to answer unto the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, body corporate, the plaintiff therein, in an action at law upon the following complaint.

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I do hereby depute and appoint Frederick W. Collier my special deputy to serve and execute the within writ.

Witness my hand this 11th day of August, A. D. 1916.

CORNELIUS B. BARKALOW,
Sheriff.

RETURN

Duly and personally served on James E. Jones, Clerk of the Borough of Bradley Beach (a municipal corporation) upon whom process may be served on August 12, 1916.

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CORNELIUS B. BARKALOW,
Sheriff.

per FREDERICK W. COLLIER,
Special Deputy.

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STATE OF NEW JERSEY }
 MONMOUTH COUNTY } ss.

Frederick W. Collier, of full age, being duly sworn, according to law, on his oath says, that on the 12 day of August, 1916, he served a true copy of the within summons and complaint on the within named defendant the Borough of Bradley Beach (a municipal corporation) by giving same to James E. Jones, Clerk of said Borough upon whom process may be served, personally, by handing the same to him and informing him of the contents thereof.

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FREDK. W. COLLIER

Sworn and subscribed before me this
 12th day of August, 1916.

WILLIAM R. O'BRIEN,
 a Commissioner of Deeds in and for the County of Monmouth in the State of New Jersey. Commission expires May 1, 1919.

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SUMMONS

THE STATE OF NEW JERSEY to the Borough of Bradley Beach, a Municipal Corporation.

(L. S.)

YOU ARE SUMMONED to answer the annexed complaint of the Ocean Grove Camp Meeting Association of

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the Methodist Episcopal Church, Body Corporate, in an action at law in the MONMOUTH COUNTY COURT OF COMMON PLEAS. And take notice that unless you file your answer to said complaint with the Clerk of the said Monmouth County Court of Common Pleas, at Freehold, within twenty days, after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. (And see Notice endorsed hereon.)

20

WITNESS: R. V. Lawrence, Esquire, Judge of the said Court at Freehold, this Tenth day of August, Nineteen Hundred and Sixteen.

PATTERSON & RHOME,
Attorneys.

JOS. McDERMOTT,
Clerk.

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COMPLAINT

MONMOUTH COUNTY COMMON PLEAS

10	THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE, Plaintiff, vs. THE BOROUGH OF BRADLEY BEACH, A MUNICIPAL CORPORATION, Defendant.	} Action at Law. Complaint.
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PLAINTIFF, a corporation of the State of New Jersey, having its principal office at Ocean Grove, New Jersey, says that:

20 1. Plaintiff is the owner of certain property situate in the taxing district of the Borough of Bradley Beach, consisting of an electric light and water plant, a water tank and an ice house.

2. Said property was assessed by the defendant for the purpose of taxation for the year 1915, as follows:

	Valuation	Amount of Taxes
Electric Light and Water Plant	\$80,000.00	\$2,068.00
Water Tank	2,000.00	51.70
Ice House	1,000.00	25.85
	\$83,000.00	\$2,145.55

30 3. On December 9, 1915, an appeal was taken by plaintiff from said assessments to the Monmouth County Board of Taxation.

4. Said Board of Taxation, after hearing and considering said appeal, rendered its judgment reducing said assessments from \$83,000.00 to \$50,000.00, without apportionment.

40 5. On December 20, 1915, the said sum of \$2,145.55, taxes as aforesaid, was paid by the plaintiff's agent to the

defendant through a mistake and in ignorance of the fact that said appeal had been taken.

6. On March 22, 1916, an appeal was taken by said plaintiff to the State Board of Taxes and Assessments from the said assessment, and from the judgment of said Monmouth County Board of Taxation.

7. Said State Board of Taxation and Assessment, after hearing and considering said appeal, rendered its judgment reducing the said assessments as follows:

Electric Light and				
Water Plant from	\$80,000.00	to	\$33,400.00	
Water Tank from	2,000.00	to	1,000.00	
Ice House from	1,000.00	to	500.00	

Total	\$83,000.00	Total	\$34,900.00
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8. By reason of said reduction so made by said State Board of Taxes and Assessment, plaintiff has paid to defendant the sum of \$1,243.39 in excess of the amount justly due to the said defendant.

9. Plaintiff has demanded from defendant the re-payment to it of the said sum of \$1,243.39 but defendant has neglected and refused to pay same.

10. Plaintiff demands, as damages, \$1,243.39 with interest thereon from December 20, 1915.

PATTERSON & RHOME,

Attorneys of Plaintiff.

NOTICE to the within named defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you. Lawful service upon a corporation, is deemed personal service for the purpose of this notice (P. L. 1912, p. 394, Rule 56).

PATTERSON & RHOME,

Plaintiff's Attorneys.

AFFIDAVIT OF MERITS

Filed Sept. 2, 1916

MONMOUTH COUNTY COMMON PLEAS COURT

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THE OCEAN GROVE CAMPMEETING
ASSOCIATION OF THE METHODIST
EPISCOPAL CHURCH, BODY COR-
PORATE,

Plaintiff,

vs.

THE BOROUGH OF BRADLEY BEACH,
A MUNICIPAL CORPORATION,
Defendant.

Action at Law.
Affidavit of
Merits.

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William E. Macdonald, of full age being duly sworn according to law on his oath deposes and says: that he is the Mayor and Director of Public Affairs of the defendant corporation; and that he believes that it has a just and legal defense to said above-entitled action on the merits of the case.

WILLIAM E. MACDONALD.

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Sworn and subscribed to before
me this 30th day of August, 1916.

MARGARET R. FORDE,
Commissioner of Deeds of New Jersey.

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ANSWER

Filed Sept. 2, 1916

MONMOUTH COUNTY COMMON PLEAS COURT

THE OCEAN GROVE CAMPMEETING
ASSOCIATION OF THE METHODIST
EPISCOPAL CHURCH, BODY COR-
PORATE,

Plaintiff,

vs.

THE BOROUGH OF BRADLEY BEACH,
A MUNICIPAL CORPORATION,
Defendant.

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Action at Law.
Answer.

The defendant, a municipal corporation of the State of New Jersey, in the County of Monmouth, answering the plaintiff's complaint, says: 20

1. It admits the first paragraph.
2. It admits the second paragraph.
3. As to the statement in the third paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.

4. It admits the fourth paragraph.
5. As to the statement in the fifth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief. 30

6. As to the statement in the sixth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.

7. As to the statement in the seventh paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.

8. The defendant denies the eighth paragraph.

9. The defendant admits the statement in the ninth paragraph that it has refused to repay to the plaintiff the 40

sum of \$1,243.39 and defendant states that it does not owe the said sum to the plaintiff.

10. Defendant denies the plaintiff's claim as set out in the tenth paragraph.

DEFENSES

First Defense

10 The defendant says that the plaintiff's complaint discloses no cause of action.

Second Defense

The defendant says that if any payment was made by the plaintiff to the defendant it was made voluntarily and cannot be recovered back by the plaintiff.

Third Defense

20 The defendant says that this Court has no jurisdiction to try the above entitled cause.

WARD KREMER, Attorney for Defendant.

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REPLY

Filed Dec. 14, 1916

MONMOUTH COUNTY COMMON PLEAS COURT

<p>THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE,</p>	<p>Plaintiff,</p>	<p>Action at Law. Reply.</p>	<p>10</p>
<p>vs.</p>			
<p>THE BOROUGH OF BRADLEY BEACH, A MUNICIPAL CORPORATION,</p>	<p>Defendant.</p>		

The Plaintiff denies every allegation set up by way of defense in the answer.

PATTERSON & RHOME, Attorneys of Plaintiff.

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Dec. 13, 1916, consent is given to the filing of within reply as in due time.

WARD KREMER, Attorney of Defendant.

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STIPULATION

Filed Dec. 23, 1916

10 MONMOUTH COUNTY COMMON PLEAS COURT

OCEAN GROVE CAMP MEETING
ASSOCIATION OF THE METHODIST
EPISCOPAL CHURCH, BODY COR-
PORATE,

Plaintiff,

Action at Law.
Stipulation.

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vs.

BOROUGH OF BRADLEY BEACH,
Defendant.

For the purposes of trial the said defendant admits the third, sixth and seventh paragraphs of the complaint filed in said cause.

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WARD KREMER,
Attorney of Defendant.

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TESTIMONY

MONMOUTH COUNTY COMMON PLEAS

OCEAN GROVE CAMP MEETING
ASSOCIATION,

Plaintiff,

v.

THE BOROUGH OF BRADLEY BEACH,
Defendant.

Action at Law.

Testimony.

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Before Hon. R. V. LAWRENCE, Judge

Asbury Park, N. J., December 23, 1916

APPEARANCES

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For Plaintiff, J. OTTO RHOME, Esq.

For Defendant, WARD KREMER, Esq.

MR. RHOME: I have the minutes here of the Association. There appear to be two entries, one of the meeting of May 27th and another of the meeting of November 18th. Will you admit these?

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MR. KREMER: Yes.

MR. RHOME: It is admitted that the minute books of the plaintiff contain, under date of May 27th, 1915, the following: "The question of the valuations of association property for taxation was referred to M. S. Daniels to report. Prevailed." The taxes in question, your Honor, were the 1915 taxes. Under date of November 18, 1915, said minutes contain the following paragraph: "Mr. Daniels reported on matters which were referred to him." Mr.

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Frank B. Smith — Direct

Kremer, Mr. Daniels makes this written report to the association on the question of the tax matter.

MR. KREMER: This was made on what date?

MR. RHOME: Mr. Daniels' report is referred to there and I just want to show what he reports regarding these taxes.

10 It is admitted that the report submitted is the report referred to in said minutes under date of November 18, 1915, and that said report contains, under the heading of "Tax Matters," the following: "Application to the Bradley Beach Commissioners for reduction of taxes on the Bradley Beach property did not result favorably. A further application will be made to the County Board on the 19th instant, and thereafter, if refused and if deemed wise by counsel, an appeal will be made to the State Board."

20 I offer this report in evidence.

THE COURT: Is it objected to, Mr. Kremer?

MR. KREMER: No.

30 IT IS ADMITTED that the plaintiff paid to the defendant on December 20, 1915, \$2,145.55 in payment of the 1915 assessment against the electric light plant, and land on which tank, icehouse and plant are located, assessment totaling \$83,000.

FRANK B. SMITH, sworn for Plaintiff.

DIRECT EXAMINATION BY MR. RHOME:

Q. In what capacity are you connected with the Ocean Grove Camp Meeting Association?

40 A. As general superintendent of the Ocean Grove Camp Meeting Association.

Frank B. Smith — Direct

BY THE COURT:

Q. Are you also the treasurer, Mr. Smith?

A. I am not.

Q. Who is the treasurer?

A. Mr. John E. Andrus, of Yonkers.

Q. And what is the method of paying bills of the association involving taxes and bills of this character?

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A. All bills have to pass through my hands, whether they are for taxes or anything else.

Q. And you certify them and approve them, do you?

A. I sign them, yes, sir.

Q. And then what becomes of them?

A. I either mail them or I give them — in this particular case I gave them to Mr. Tantum to take over to Bradley Beach to pay them.

Q. How did he pay them, in cash or by check?

A. By check.

20

Q. How did you procure the checks from Mr. Andrus?

A. I asked the bookkeeper to make out the checks and sign them, and I countersigned them and then delivered them to Mr. Tantum.

Q. How was Mr. Andrus' signature secured?

A. He has a man act for him. Mr. Butler signs in Mr. Andrus' place.

Q. So that check then is signed by Mr. Butler in the name of Mr. Andrus?

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A. No, it is not.

Q. How is it signed?

A. It is signed as assistant secretary.

Q. By whom?

A. By Mr. Butler. It is also signed by the president and myself.

Q. Therefore with respect to that particular check, Mr. Andrus had nothing to do with it?

A. Nothing.

Q. Also signed by Dr. Ballard, was it?

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Frank B. Smith — Direct

A. It is.

BY MR. RHOME:

Q. What is the custom as to your producing the signature of Dr. Ballard?

10 A. Dr. Ballard signs some twenty-five checks in blank and turns them over to me. I put them away in an inside box of the safe and as I require them I take out a check.

Q. Did you, Mr. Smith, consult Mr. Andrus between December 9th and the date of making that payment regarding giving this check to the Borough of Bradley Beach?

A. I did not, only in this way: I asked Mr. Andrus if he was going to furnish me the money to pay the taxes or whether I should apply to one of the banks, and he told me, or the executive committee did, that they —

Q. You were speaking generally about taxes?

20 A. Yes.

Q. Did you consult Dr. Ballard regarding the payment of these taxes between those dates?

A. I did not.

Q. Did you consult Mr. Daniels, M. S. Daniels?

A. No.

Q. Do you say that you drew that check and gave it to Mr. Tantum with instructions to pay the —

A. I had the check drawn by Mr. Butler and signed it and then turned it over to Mr. Tantum with all the bills.

30 Q. You instructed Mr. Butler to draw it, did you?

A. I did, yes.

Q. Mr. Smith, at the time of the drawing of that check and the paying of the sum to the defendant were you aware that an appeal had been taken by the Ocean Grove Camp Meeting Association to the Monmouth County Board of Taxation?

A. No, I was not.

40 Q. You heard me read into the record the extracts taken from these minutes regarding the appeal of these taxes. Were you familiar with those proceedings?

Frank B. Smith — Direct

A. I was, yes.

Q. Do you understand what I mean? The proceedings that I am talking about refer to the appeal of these taxes.

A. Excuse me. I think I had no knowledge that an appeal had been taken to the State Board, not to the Monmouth County Board.

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BY THE COURT:

Q. You say that you had no knowledge that an appeal had been taken to the State Board?

A. Yes.

Q. Had you knowledge that an appeal had been taken to the County Board?

BY MR. RHOME:

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Q. Had you knowledge that an appeal had been taken to the County Board prior to the paying of these taxes?

A. Repeat that question again, will you?

MR. RHOME: I don't think he understands it, from the conversations I have had with him. I want to give him the dates.

Q. For your information, Mr. Smith, an appeal was filed with the Monmouth County Board of Taxation on December 9, 1915, and you paid the taxes on December 20, 1915.

30

A. Yes.

Q. Between that period had you any knowledge that an appeal had been taken to the County Tax Board?

A. When was that appeal taken to the County Tax Board?

Q. On December 9th.

A. No, I had no knowledge.

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Frank B. Smith — Cross
CROSS-EXAMINATION

BY MR. KREMER:

Q. Mr. Smith, do you pay all bills of the association?

A. I do. That is this: every check goes out through my hands. I am the last one to have the check.

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Q. Is the authority to pay in you?

A. Anything that is due and payable, yes.

Q. You are the superintendent, you say?

A. Yes.

Q. Are all checks signed in blank by Dr. Ballard?

A. They are, every one.

Q. Without knowledge on his part of what purpose the money is to be used for?

A. That is correct.

Q. The authority is delegated to you?

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A. Yes.

Q. And Mr. Andrus' signature does not appear on the checks in any way?

A. It does not.

Q. Did you pay the Bradley Beach taxes in 1914?

A. The check passed through my hands. I think that there were other signatures on the check. Yes; the answer to that is yes. I did pay the taxes in the same way as I paid them this year. I gave them to some one to take there.

Q. Do you pay all taxes of the association?

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A. I do.

Q. And do you pay them when they come due without express authority from the association?

A. Yes.

Q. That discretion is in you?

A. Yes, that is correct.

Q. When was Dr. Ballard's signature put on this particular check?

A. I couldn't tell you that. It may have been given ten days before and it may have been given a day before.

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Q. At the time it was given there was no intimation

Frank B. Smith — Cross

that that particular check was to be used for this particular purpose?

A. No, not at all.

Q. You say you talked to Mr. Andrus?

A. Yes.

Q. About paying taxes?

A. I did, yes.

Q. What taxes did you mention to him?

A. I meant all taxes, Bradley Beach and Neptune Township. 10

Q. That is all you have, isn't it?

A. Bradley Beach and Neptune Township, yes.

Q. When was that conversation?

A. Why, it was some time previous. It must have been fully ten days previous. It must have been about December 10th.

Q. About December 10th?

A. Yes. 20

Q. Did he say anything to you about taking an appeal?

A. Not a word, nor nobody else.

Q. You asked him, you say, if he wanted — where you were going to get the money to pay the taxes?

A. I asked him if he was going to furnish the money for the taxes, yes.

Q. Did you mention to him which taxes you meant?

A. No; I meant all taxes.

Q. What do you mean by that?

A. I said, "Mr. Andrus, I will need about \$15,000 to pay taxes. Are you going to let me have the money or shall I look to the banks for it?" 30

Q. And you say that was about December 10th?

A. Yes.

Q. Then he said nothing to you about as you have testified?

A. The first knowledge I had of the appeal was when Mr. Rhome called me up a day or two after the taxes had been paid. He said, "Did you pay the taxes?" I said, "Sure." He said, "Didn't Dr. Ballard or Mr. Daniels tell 40

Frank B. Smith — Cross

you not to pay them?" I said, "No, they did not." He said, "Didn't they tell you they were going to take an appeal?" I said, "They did not."

10 Q. Was any word sent to you from the Borough of Bradley Beach beyond the filing with you of your tax bill? Did you receive any communication from the Borough of Bradley Beach beyond the mere filing with you or sending to you of your tax bill that year?

A. I think not.

Q. That is all?

A. I think that is all.

Q. No coercion of any kind?

A. No.

BY THE COURT:

20 Q. Did you hear any conversation among the officials of the association with respect to the appeals to be taken at any time prior to December 20th?

A. No, your Honor, I did not.

Q. Were you present at any meeting of the association directors, or trustees, whatever they may be, — the governing body of the association, — at which the question of the valuation of the property for taxation purposes was discussed?

30 A. Scarcely ever a meeting passed but what something was said that our valuations were too high, but not any particular piece of property.

Q. Were you present at the meeting of May 9th, at which Mr. Daniels was instructed to —

A. I was not.

Q. Were you present at the meeting of November 18th, when the report of Mr. Daniels was received?

A. I am not admitted to the semi-annual or the annual meetings. I am only there when they have executive meetings, present.

40 Q. Did you have any conversation whatever prior to December 20th with any of the officials of the association

Frank B. Smith — Cross

concerning the taxes and the dissatisfaction over the assessments?

A. No.

Q. Did you and Dr. Ballard discuss the assessments for that year?

A. No.

Q. Or Mr. Daniels?

A. No.

Q. Mr. Andrus?

A. No. I knew that the tax matters were left in Mr. Daniels' hands.

Q. How did you know that?

A. I was present at an executive meeting when they were talked of.

Q. And when was that meeting, if you recall?

A. No, I cannot recall, but I know that it must have been one of the first Fridays of the month of 1915.

Q. What month?

A. I couldn't say positively.

Q. And what was that discussion as you now recall it?

A. I think it was in the early part now of 1915. I told them I had been to some meeting over in the Neptune Township High School and listened to the statements that had been made —

Q. A meeting of dissatisfied taxpayers?

A. Yes.

Q. And you reported the discussion there?

A. Yes, in substance.

Q. To the executive committee?

A. Yes, to the executive committee; to Mr. Andrus particularly.

BY MR. RHOME:

Q. That related to Ocean Grove property, didn't it?

A. It did.

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Morris S. Daniels — Direct

BY MR. KREMER:

Q. Did you receive any instructions from any of the officials not to pay these taxes?

A. No, I did not.

BY MR. RHOME:

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Q. I show you the report, part of which has been read into the minutes. Were you familiar with that paragraph of the report?

A. I was not.

BY THE COURT:

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Q. Well, then, Mr. Smith, so far as you were concerned it was simply a routine act on your part, the payment of this bill?

A. The same as any other bill.

Q. The same as any other bill that the association owed?

A. Yes; I knew that it had to be paid and paid it in order not to —

Q. In order to save the penalty of interest and costs?

A. Yes.

BY MR. RHOME:

30

Q. You paid them on the 20th of December, the last date, didn't you?

A. The 20th of December, yes.

MORRIS S. DANIELS, sworn for Plaintiff.

DIRECT EXAMINATION BY MR. RHOME:

40 Q. Mr. Daniels, are you the Mr. Daniels referred to in the minutes of the Ocean Grove Association under the

Morris S. Daniels — Cross

dates of May 27, 1915, and November 18, 1915, extracts of which minutes have been read into the record?

A. I am.

Q. You made this report, did you not?

A. I did.

Q. Mr. Daniels, what did you have to do with this question of the taking of an appeal on these taxes?

A. After the investigation I delivered it into the hands of the attorneys or firm, and in consultation thereafter with Collins & Corbin, Judge Collins particularly. 10

Q. And did any one else assist you or did you handle it entirely yourself?

A. Only incidental assistance.

Q. Did you authorize Mr. Smith to pay these taxes?

A. No, sir.

CROSS-EXAMINATION

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BY MR. KREMER:

Q. Would the authority to Mr. Smith necessarily come to you?

A. I would have thought so.

Q. What position do you occupy in the association?

A. I was then chairman of the Local Affairs Committee and a member of the Executive Committee.

Q. Did Mr. Smith get his authority to pay all bills of the association from you? 30

A. Not at all.

Q. Then why this one?

A. This was a matter which had been referred specifically to me and had been reported by me to the board.

Q. Where did you get your authority to file an appeal with the County Tax Board?

A. Well, it has been read into the minutes here.

Q. Do the minutes show any authority to file an appeal? 40

Morris S. Daniels — Cross

A. Yes; you have it in this report.

Q. You had no authority beyond what is in the minutes?

A. In the minutes and the report.

MR. RHOME: You don't deny the authority to take this appeal, do you?

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MR. KREMER: Your Honor, I don't believe the minutes actually show any authority beyond that of an instruction to investigate. I do not think they show any express authority to take an appeal.

THE COURT: Mr. Rhome, just read that. I was rather impressed with that at the time.

MR. RHOME: Well, your Honor, should not advantage have been taken of that before the County Tax Board?

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THE COURT: Oh, no. That is a wholly different issue. The issue here is whether it was a voluntary payment or not.

MR. RHOME: (Reads:) "The question of the valuation of Ocean Grove properties for taxation were referred to M. S. Daniels to report," under date of May 27th. Under date of November 18, 1915, "Mr. Daniels reported on matters which were referred to him."

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THE COURT: Then what else?

MR. RHOME: Mr. Daniels, what happened —

THE COURT: No, what do the minutes show with respect to any formal action by the association directing an appeal to be taken? That is just his report. Now is there anything to indicate that his report was adopted? What is

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running through my mind is this: whether in the absence

Morris S. Daniels — Cross

of any direct action on the part of the association or the executive committee authorizing this appeal, adopting Mr. Daniels' report and authorizing the appeal, the association has taken any attitude inconsistent with the conduct of Mr. Smith in paying this bill; that is to say, whether there is anything now inconsistent or was inconsistent with his payment of this bill; if, for example, he had paid the bill contrary to the direction of the executive committee or if he had paid the bill with the direction of the board upon the committee's minutes concerning the bill. Now a mere report of Mr. Daniels, without adoption by the governing body of this corporation it seems to me would not necessarily be such a formal act as required by the statute.

10

MR. RHOME: I do not know what statute you refer to, your Honor.

THE COURT: Well, this is a corporation; it is a body politic.

20

MR. RHOME: That is true, but if you will refer to the report of Mr. Daniels, it states that application will be made to the tax board for reduction of taxes. It is followed up by an appeal which was actually prosecuted.

THE COURT: How was the appeal signed, do you remember?

MR. RHOME: "Ocean Grove Camp Meeting Association, by Aaron E. Ballard, President." It was followed up during the hearings by the members of the association being present.

30

THE COURT: Apparently there was no adoption of Mr. Daniels' report by the committee.

MR. RHOME: By implication. They followed it up.

THE WITNESS: If your Honor will permit me, in

40

Morris S. Daniels — Cross

10 referring to this tax matter I first told them that I made an exhaustive study of the matter. I went on, giving them an itemized statement of certain results obtained in the Township of Neptune, then told them what has been read in the minutes here as relates to Bradley Beach, that we have not been so successful and that an appeal would be taken, and thereafter, if refused and if deemed wise by counsel, an appeal will be taken to the State Board. I certainly understood that they adopted the resolution thanking me for this report and covering the labor which I had done —

THE COURT: In other words, the matter was referred to you with power to act upon your part?

20 THE WITNESS: Yes, that it was given to me to investigate and report, then having investigated and reported certain results which were obtained in Neptune Township, resulting in some lowered assessments, and thereafter reporting the procedure to be employed in the matter of appeal of the Bradley Beach, with the resolution which the board adopted, was an approval of the authority to continue it.

BY MR. KREMER:

Q. You say that was your understanding?

30 A. Most assuredly. Thereafter the appeal was signed by the president of the board. It was a commendatory resolution, also in relation to the work which had been done in all these matters and getting them into shape which resulted in that reduction of the assessment.

BY THE COURT:

Q. Does that appear upon the minutes?

A. Yes.

Q. What is that? That was the meeting of November 18th?

40 A. November 18th. Then I may have confused the

Morris S. Daniels — Cross

date, your Honor. It was in relation to this particular matter.

BY MR. KREMER:

Q. Mr. Daniels, did you appeal the Bradley Beach according to the report you made? Did you go to the commissioners? 10

A. Yes, I went to one.

Q. When did you do that?

A. I went first to Mr. Poland with an application for a reduction in assessment, the same as I went to the assessor for Neptune Township too.

Q. And was that refused by the Borough?

A. Paid absolutely no attention to it.

Q. Then did you go to Mr. Rhome yourself?

A. Yes.

Q. Then did you speak to Dr. Ballard about signing it? 20

A. I don't think so. It was referred back to the attorney.

MR. RHOME: It was attended to by me entirely.

Q. You say beyond what the minutes show you had no instructions to file an appeal, beyond the minutes and your report?

A. I certainly understood —

Q. I didn't ask you what you understood. 30

A. I understood instructions, yes, sir, in the adoption.

Q. But beyond that did you have any instructions?

A. None.

BY MR. RHOME:

Q. You were a member of the executive committee, did you state, at that time, in May?

A. In May, yes, sir. 40

Morris S. Daniels — Cross

Q. Did you have any conversation with your co-members at all about this matter?

A. Only I think at the time it was referred to me to investigate. So far as meetings were concerned, the report was made at the annual meeting in written form, duly signed, and I wrote it personally.

10 BY MR. KREMER:

Q. Did you make such report as that each year?

A. To all matters referred to me, invariably.

Q. Are tax matters as a rule referred to you?

A. They have been from that date to this, and are still referred to me.

Q. Well, then that is the first time they were?

A. No, from May 27th.

Q. May 27th?

20 A. The appeal to the Borough of Bradley Beach, which you referred to a moment ago, was in pursuance of that authority.

Q. What I am asking you is this: did you at each annual meeting submit a report on taxation conditions of the Ocean Grove Company's property, with such recommendations as you deemed wise?

A. There was only one annual meeting since that date, and that one has been adjourned; it has not been completed.

30 Q. But in your former connection with the association.

MR. RHOME: He is assuming that you have been in the association for several years past.

BY THE COURT: How long have you been connected with the association?

A. I have been connected with the association since 1910.

40 Q. In what capacity?

Morris S. Daniels — Cross

A. As a member, and during the period of time up to this meeting of November 18, 1915, I was a member of the executive committee.

BY MR. KREMER:

Q. Beginning when?

A. Beginning at the time of the adoption of the by-laws in February, 1915. 10

Q. Had you ever submitted an annual report of this kind before this one?

A. I had no occasion to.

Q. Do you know whether there is such an annual report submitted each year by the member in whose charge these matters are?

A. The matter is left in my charge altogether.

THE COURT: No, prior to 1915. 20

Q. Prior to 1915.

A. Not to my knowledge.

Q. You don't know whether there was or not?

A. I don't know. I never heard of one.

BY THE COURT:

Q. Why didn't you notify Mr. Smith not to pay those taxes? 30

A. The matter was left entirely in the hands of the attorney. I am not a resident of Ocean Grove. I am in business in New York. I do not live here.

Q. And therefore you are not in daily attendance at the office of the association?

A. Oh, no.

Q. How often do you get down?

A. Well, I am coming now probably once a month. I was here a week ago to attend court and I was held over. I suppose I have been here three times this month. 40

Morris S. Daniels — Cross

Q. Between May 29th and December 20th how often were you at the association office?

A. I have no recollection. I may not have been there at all. But I know as pertains to the tax matters, I had investigated, I had made my report to the association, I had instructed the attorneys to prepare the appeal, I had consulted with Judge Collins and Mr. Rhome, the appeal had been prepared, had been signed by Dr. Ballard and it had been lodged with the County Board.

Q. Did you make a report to any formal meeting of the executive committee?

A. No, sir; because the matter was not in shape for that.

Q. Did you ever make a report to the executive committee in regular session?

A. No, sir.

Q. Never have?

A. No, sir.

Q. This report then has simply been made to individual members?

A. Oh, this is to the annual meeting of the association.

Q. And when was that annual meeting held?

A. November 18th.

Q. Now what do you mean by an annual meeting, of the trustees?

A. Yes, sir.

Q. And do you recall whether Mr. Smith was present at that meeting at all?

A. He was not.

Q. Was he at the office?

A. He may have been at the office downstairs. I presume he was but I have no recollection. This report was made right to the annual meeting of the association, to the board of trustees.

BY MR. RHOME:

Q. Who are the other members of the executive committee?

J. Otto Rhome — Direct

A. They were at that time Dr. Ballard and Mr. Blanchard, — may I refer to the memorandum, and I will get it exactly correct. (Refers to memorandum.) The executive committee consisted of M. E. Blanchard, chairman, A. J. Palmer, secretary, A. E. Ballard, J. E. Andrus, L. B. Wilson, E. C. Stokes, F. L. Wilson, M. S. Daniels, B. G. Moore.

Q. And the greater part of those reside outside of Ocean Grove? 10

A. All of them at that time with the exception of Dr. Ballard.

BY MR. KREMER:

Q. Didn't you know that Mr. Smith would pay the taxes if you didn't instruct him not to?

A. I had no idea that they would be paid.

Q. Don't you know that it had been his custom in the past to always pay the bills of the association? 20

A. I was not familiar with the custom.

Q. How long did you say you had been a member?

A. 1910.

Q. Did you know that taxes would be due in these various municipalities December 20th?

A. Yes.

J. OTTO RHOME, sworn for Plaintiff. 30

THE WITNESS: The Monmouth County Board of Taxation held its meeting on the plaintiff's petition on January 5th at Asbury Park and on January 14th at Freehold. Prior to taking up the trial of the appeal before the County Board I stated to them that these taxes had been inadvertently paid. That they were paid by Mr. Smith without knowledge of the appeal. The Borough of Bradley Beach was represented at those meetings by Mr. Poland as its attorney; he is also one of the commissioners of Bradley Beach, and is the Commissioner of Revenue and Finance. 40

J. Otto Rhome — Cross

The meeting before the State Board of Taxation was held on April 26th in Asbury Park. The plaintiff was represented by Gilbert Collins and myself and the defendant was represented by Mr. Kremer. Judge Collins stated to the State Board of Taxation that these taxes had been paid inadvertently by Mr. Smith without knowledge of the pending of the appeal. That was also incorporated in the State Board appeal. Mr. Poland was also present at that meeting. At the various meetings before the County Board and also the State Board the defendant, through Mr. Poland and Mr. Kremer, entered into the prosecution of the appeal and cross-examined the plaintiff's witnesses, and at no time made any objection as to the appeals being improper, nor did they at any time enter any objection as to the jurisdiction of the County Board or the State Board by reason of the taxes having been paid. I took up this question of appeal with Mr. Daniels a great many times. He came to my office and I also went to Jersey City, I think, on one occasion, and consulted Judge Collins. I did not consult any one else, except that I drew the petitions and sent Mr. Morgan, who is connected with my office, to Dr. Ballard's office with a request that he execute the petitions, which he did. I did not know the taxes were paid until I received a letter from Mr. Daniels asking me to ascertain if they had been paid, I think by reason of his having heard that Mr. Smith had paid same on December 20th. I called up Mr. Smith and Mr. Smith told me they had been paid, and appeared to be surprised that an appeal had been taken. I informed Mr. Smith that appeals had been taken at that time. That is the first time that I had so informed Mr. Smith or held any conversation with him regarding these appeals.

CROSS-EXAMINATION

BY MR. KREMER:

Q. Mr. Rhome, you say you dealt solely with Mr. Daniels?

Frank B. Smith recalled — Direct

A. Mr. Daniels.

Q. Then you sent for Dr. Ballard to come and sign the petition?

A. I did not. I sent them to Dr. Ballard.

Q. With instructions to sign them?

A. With instructions to sign the petitions.

MR. RHOME: I do not know whether it is necessary for me to offer anything in evidence in view of these stipulations, but I will offer the minute book in evidence, the report of Mr. Daniels, the receipted tax bill and the canceled vouchers, and for the sake of the record we would like to have them marked in evidence.

10

(Two separate pages of the minute book marked Exhibits P 1 and P 2; report of Mr. Daniels marked Exhibit P 3; receipted tax bills marked Exhibit P 4 and P 5; canceled checks marked Exhibits P 6 and P 7.)

20

FRANK B. SMITH, recalled for Plaintiff.

DIRECT EXAMINATION BY MR. RHOME:

Q. Mr. Smith, I again show you the two checks marked Exhibits P 6 and P 7. They are the checks with which you paid these taxes, are they not?

A. They are.

30

Q. I note that the two aggregate a sum greater than the amount of the taxes which you paid. Were they also intended as payment of other taxes?

A. Yes, they were.

BY THE COURT:

Q. In other words, those checks were utilized to pay the tax which is in dispute; that is right, isn't it?

A. Yes, that is right.

40

Frank B. Smith recalled — Direct

MR. RHOME: At least also additional taxes which are not in dispute.

10 THE COURT: You will be allowed to put in the judgment of the County Board and also the State Board. I understand, however, this is a stipulation covering that subject. Mr. Kremer, representing the Borough of Bradley Beach, has admitted that the County Board took certain definite action as stated in the complaint, and that the State Board did likewise, reducing the assessment on this property from the original assessment to a definite sum, fifty odd thousand dollars, as I recall, — from \$83,000 to \$34,900. Now that is admitted, Mr. Kremer, is it not?

MR. KREMER: Yes.

20 THE COURT: You may put in the judgment if you like, but it is unnecessary, I think.

MR. RHOME: And it is admitted that the appeals were signed as follows: —

THE COURT: By the way, I think the dates of the judgments of the County Board and the State Board should appear in the record.

80 MR. RHOME: It appears on the pleadings, your Honor. Pardon me; it does not. You mean of the judgment?

THE COURT: Yes, the judgment of the County Board.

40 MR. RHOME: I have here the County Board's judgment. It is admitted that the Monmouth County Board of Taxation filed its judgment on January 31, 1916, and that the State Board of Taxation filed its judgment on May 23, 1916. It is also admitted that the petitions to the Mon-

Frank B. Smith recalled — Direct
 mouth County Board of Taxation and the State Board of
 Taxation are signed as follows: "The Ocean Grove Camp
 Meeting Association of the Methodist Episcopal Church,
 by A. E. Ballard, President."

THE COURT: And filed when with the County
 Board?

MR. RHOME: And that the petition to the County
 Board was filed December 10, 1915, and the petition to the
 State Board —

10

THE COURT: Signed in the same manner?

MR. RHOME: I had it before, your Honor — was
 filed March 22, 1916. It is also admitted that the petition
 to the State Board, among other things, contained the fol-
 lowing —

20

THE COURT: It speaks for itself.

MR. RHOME: I wanted to get it in the record if I
 could.

THE COURT: Why?

MR. RHOME: I started to offer it in evidence and
 you suggested that I not offer it, — that these stipulations
 covered it.

80

THE COURT: Well, the stipulations did cover with
 respect to the fact of the appeal.

MR. RHOME: I want to bring before your Honor's
 attention that the petition to the County Board sets up the
 question of the payment of the taxes.

THE COURT: All right.

40

Frank B. Smith recalled — Direct

MR. RHOME: It is admitted that the petition to the State Board, among other things, contained the following: "That through inadvertence, after the filing of the petition of appeal with the Monmouth County Board of Taxation the taxes assessed were paid without the authority of your petitioner, and your petitioner is advised that such payment does not deprive your Honorable body of jurisdiction in the premises."

10

MR. KREMER: Just as a matter of correction, the complaint states that the appeal was taken to the County Board December 9th, and I believe Mr. Rhome states it was December 10th.

THE COURT: No, as to the time of filing.

MR. RHOME: It was taken on December 9th and
20 filed on December 10th.

PLAINTIFF RESTS

30

40

Motion for Nonsuit

MOTION FOR NONSUIT

MR. KREMER: At this time, if your Honor please, I wish to move for a nonsuit, on the ground that the plaintiff has failed to establish the most essential thing to entitle it to recover in this case; namely, that the payment was involuntary. I have been unable to find any more lucid statement of the essentials necessary to the recovery of a tax paid than that set out by Judge Dillon, in which he says: (Reads first and second grounds).

10

That element is also lacking here, because, as your Honor well knows and we will be able to show if we go into our case, a percentage of this money was turned over to the state and county, and the Borough of Bradley Beach did not receive this money for its own use; and the cases which have permitted recovery, such as the Edwards case, have been those in which the municipal corporation received the money for its own use only. I believe it was a street assessment, and no portion of the money went to any one else. So that your Honor can readily see that under the only doctrine by which they can come into court, namely, by the doctrine of unjust enrichment, they have no right to come into court. We have not the money, only a very small portion of it. If this action were permitted it would subject us to the litigation of trying to recover from the county and the state moneys which we have turned over to them.

20

30

The third element is that it must have been paid upon compulsion. (Reads.) Now certainly there has been nothing of that nature shown here. There has been no attempt to show that there was any coercion or any compulsion. I think attempting to construe a mere mistake on their part, if there was such a mistake, into an involuntary act, is a fallacy; that the compulsion, the involuntary element which the statute contemplated, is an actual coercion, such as Judge Dillon has set forth. I do not think any mistake on the part of the payor can be deemed compulsory.

40

Motion for Nonsuit

Therefore, as they have failed to establish any of the essential elements to entitle them to recover, I apply to your Honor to grant a nonsuit.

10 THE COURT: Decision upon this motion will be reserved. I will allow you, Mr. Kremer, to put in proof showing that this tax was not distinctly a borough tax, but involved the general taxes, including the state and county apportionment.

20 THE COURT: There is absolutely nothing on these tax bills to indicate for what purpose this assessment was made and the tax paid, other than it appears upon the borough tax bill, that is all. There is no itemized statement here as to how the \$2,068 representing the tax on this electric light plant property in question is distributed. I will allow you to put in proof, Mr. Kremer. I shall not deny the motion at this time, but shall reserve it, with the understanding that counsel may file briefs, because I shall give it consideration. I won't give it any offhand opinion.

MR. RHOME: Can you confine it on the question of nonsuit to any special point you want answered? Because I am unable to determine at this time just what his points are.

30 THE COURT: Yes, I will indicate to counsel. Of course counsel may stipulate that this was a general tax, involving state, borough and county taxes.

MR. RHOME: I assume that, just as your Honor does.

THE COURT: There is nothing on the bill to indicate. I think it would be better, in order to clarify the record, that the proof be put in.

James E. Jones — Direct

DEFENDANT'S TESTIMONY

JAMES E. JONES, sworn for Defendant.

MR. KREMER: I might say I did not have Mr. Jones bring the tax duplicate, owing to the fact that it was a bulky book, and I thought this would be ample proof, although not the best record. 10

DIRECT EXAMINATION BY MR. KREMER:

Q. What is your official position, Mr. Jones?
A. Borough clerk of Bradley Beach.

MR. KREMER: Before going into this I would like to take up with him the matter of payment. 20

THE COURT: Yes; all right.

Q. Were you clerk of the Borough of Bradley Beach in December, 1915?

A. I was deputy clerk at that time.

Q. Do you recall the payment of the tax made in behalf of the Ocean Grove Association?

A. Yes, sir.

Q. Was the money received by you? 30

A. No, sir; Mr. Poland.

Q. Who gave the receipt? Who received the bills?

A. Mr. Poland received the bills.

Q. Were you present at that time?

A. I was.

Q. Was any protest made by the payor?

A. None whatever.

Q. Mr. Jones, have you any record of the Borough of Bradley Beach to show the distribution of the money paid to the Borough by the Ocean Grove Association? 40

James E. Jones — Direct

A. I have a record here where we paid the county and state taxes on December 28th.

BY THE COURT:

10 Q. Do you remember who it was that delivered the check or produced the check for the association to pay Mr. Poland?

A. Mr. Tantum, I remember.

Q. And who was Mr. Poland?

A. He was the collector.

Q. A member of the Bradley Beach Commission?

A. Yes, sir.

Q. And collector of taxes?

A. Yes, sir.

Q. Who was Mr. Tantum, did you know?

20 A. Mr. Tantum, I did know that he was connected with the Ocean Grove Association.

Q. A gentleman representing the Ocean Grove Association?

A. Yes, because he stayed there awhile discussing association affairs.

MR. RHOME: Do you want an admission on my part? It will clear up the record.

30 THE COURT: As to what?

MR. RHOME: As to Mr. Tantum's capacity.

THE COURT: Mr. Smith has already testified that he sent Mr. Tantum over with the check, as I recall it. I just want to identify on the record.

BY MR. KREMER:

40 Q. What is the book you have before you?

A. I have the cash paid out book by the Borough of

James E. Jones — Direct

Bradley Beach, all checks that are paid from the Borough.

BY THE COURT:

Q. Disbursements book?

A. Yes, disbursements book.

BY MR. KREMER:

10

Q. Will you refer to the page which will show disbursements made by the Borough to the state and county?

A. It was on December 28th, and was made to C. F. MacDonald, county collector.

(Objected to.)

BY MR. RHOME:

20

Q. What disbursement do you refer to? Is it part of this fund or not?

A. It is no doubt part of this fund.

THE COURT: I assume that he will connect it. It is preliminary.

A. It is made to C. F. MacDonald, county collector. It is for state, school and county taxes. 30

BY MR. KREMER:

Q. What was the nature of that disbursement?

(Objected to as immaterial and irrelevant.)

THE COURT: I am going to admit them. The objection is overruled.

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

James E. Jones — Direct

Q. What do those disbursements in question represent?

A. It represented the county, state and school tax that is levied against the Borough of Bradley Beach.

Q. Was it a proportion of the taxes collected by the Borough of Bradley Beach for the year 1915?

A. Yes, sir.

10 Q. And what was the sum paid?

A. \$19,782.71.

Q. Have you any record to show the exact proportion of the check received from the Ocean Grove Association which was paid to Mr. MacDonald as collector of the county?

A. I have a record, yes, but that is in the tax duplicate. I took a statement from that tax duplicate and have it here with me if the judge would admit it.

20 MR. KREMER: Mr. Rhome, I ask you if you will admit his statement taken from the tax duplicate.

MR. RHOME: Yes.

Q. Will you refer to that statement, Mr. Jones?

A. Ocean Grove Association paid the Borough of Bradley Beach on the —

Q. It doesn't read that way on your book, does it?

A. No.

30 MR. RHOME: I think it ought to read like his duplicate.

A. Ocean Grove Association; the icehouse was assessed at \$1,000, the water tank \$2,000, the electric light plant \$80,000; total, \$83,000; and they paid on that assessment \$2,145.55.

Q. As taxes?

40 A. As taxes, yes, sir. And the proportion of that tax that went to the county was \$339.23; to the borough school,

James E. Jones — Direct

\$468.95; to the state school, \$219.12; a total of \$1,087.30, that we received from the Ocean Grove Association, that went for other purposes than borough purposes.

BY MR. KREMER:

Q. That was disbursed?

A. Yes.

10

Q. Those amounts, I assume, were predicated upon the proportion of the tax rate per thousand which was to go for state and school purposes, according to the tax bills sent to the association?

A. Yes.

Q. What date did you say that disbursement was made?

A. On December 28th.

Q. Between December 20th and 28th did you receive any notice of an appeal or protest in your position as Clerk of the Borough of Bradley Beach by the association?

20

(Objected to.)

THE COURT: He may answer it. It may not be conclusive.

MR. RHOME: The appeal has been served on his principal, Mr. Poland, and the record shows it. Your record of the admission shows it was served upon Mr. Poland.

30

THE COURT: But under the statute appeals must be filed with the clerk of the municipality.

MR. RHOME: That is who it was served upon. I have the certificate.

THE COURT: Oh, you were assistant clerk; Mr. Poland was clerk.

40

James E. Jones — Cross

MR. KERMER: I didn't know that. The question is withdrawn.

Q. When did you usually turn over to the county collector —

10 MR. RHOME: I object to what he usually does. I do not see how it can bind the Ocean Grove Association.

Q. Are you compelled to turn over —

MR. RHOME: I object. The law speaks for itself.

THE COURT: I know what the law is upon the subject. The law speaks for itself.

CROSS-EXAMINATION

20

BY MR. RHOME:

Q. Mr. Jones, assuming that the petition of appeal was served on Mr. Ward Kremer, clerk of the Borough of Bradley Beach, on the 9th day of December, 1915, within how many days after did you turn over the money to the county authorities?

A. We turned over the money December 28th — thirteen days.

30

Q. How many days?

A. That is about thirteen days, isn't it?

Q. Thirteen days after the notification to the Borough that an appeal had been taken; that is so, is it?

A. I believe so.

Q. Did you take up with Mr. Poland the question of withholding these taxes from the county?

A. No, I didn't.

Q. Why didn't you?

A. I had no knowledge of the appeal.

40

Q. You had no knowledge?

James E. Jones — Cross

- A. No, I had no knowledge.
- Q. In what capacity are you employed by the Borough?
- A. I was employed at that time as deputy Borough Clerk.
- Q. Deputy Borough Clerk?
- A. Yes.
- Q. So you turned this over also without knowledge, did you? 10
- A. What is that?
- Q. I say you paid this to the county tax collector without knowledge of the appeal?
- A. I did myself, yes, sir.
- Q. How did you pay the money to the county, by cash or check?
- A. Check.
- Q. Have you got the check with you?
- A. No; I have the stub, I haven't the check. 20
- Q. Who would the check be drawn to?
- A. To the county collector, C. F. MacDonald.
- Q. Who would sign it?
- A. The Board of Commissioners and myself.
- Q. You mean all of them would sign it?
- A. Yes, sir.
- Q. That would include Mr. Poland?
- A. Yes, sir.
- Q. He was Director of Revenue and Finance, was he not? 30
- A. Yes, sir.
- Q. Did he tell you to withhold making that proportion of the payment to the county?
- A. He did not.
- Q. Did you ever talk to him about it?
- A. No, sir.
- Q. Is Mr. Poland here today?
- A. He is not.
- Q. Where is Mr. Poland?
- A. He is out of town today. 40

James E. Jones — Cross

Q. Did Mr. Kremer tell you that this appeal had been served upon him?

A. I don't think so. I don't recall any such conversation.

Q. Didn't he ever tell you?

A. I don't think Mr. Kremer ever did personally, no.

Q. You were assistant clerk too, weren't you?

10 A. Yes, sir.

Q. You mean to say that Mr. Kremer never told you that this appeal had been served on him?

A. I don't see why it was necessary for him to tell me.

Q. No, the question is whether he did or not.

A. No, he didn't.

Q. You really were the acting clerk, weren't you?

A. Yes.

Q. Mr. Kremer never did anything as clerk, did he?

A. Yes, he did oftentimes.

20 Q. Who wrote up the minutes?

A. I wrote up the minutes.

Q. Do your minutes contain any mention of this appeal having been taken?

A. No, I don't think they do.

Q. Have you got your minute book with you?

A. I have not, but I can say sure that it did not.

Q. What happened to this appeal after it was served upon Mr. Kremer, do you know?

A. I don't know.

80 Q. You never heard of it?

A. No, sir.

Q. You never heard Mr. Poland talk about it?

A. I never heard — yes, I did hear him talk about it.

Q. When did you hear him talk about it?

A. Why, I think after the money was paid over.

Q. But before the money was paid over you didn't hear anybody say anything about this appeal?

A. No, sir.

40 Q. Was Mr. Daniels ever down to see you regarding the question of this tax?

James E. Jones — Cross

A. I don't remember ever seeing Mr. Daniels before.

MR. RHOME: Your Honor, I would like to have permission to put a stipulation on record, that this petition was served upon Mr. Ward Kremer, Borough Clerk, on December 9, 1915.

THE COURT: Well, I think that is a fact. Why not admit it? 10

MR. KREMER: Absolutely.

THE COURT: It is stipulated that the petition of appeal to the County Board was served upon Mr. Kremer, Clerk of the Borough, on December 9, 1915.

MR. RHOME: Personally. 20

MR. KREMER: The only idea I had in mind is that my recollection is that I acknowledged service of this as attorney for the Borough, and that might make a difference.

MR. RHOME: Well, I can't see how it would make any difference. You appeared and contested the appeal before the County Board and the State Board.

BOTH SIDES REST 30

(Adjourned for three weeks for the submission of briefs.)

This action was tried before Judge Rulif V. Lawrence, without a jury, at the May Term of the Monmouth Common Pleas Court on December 23, 1916. The case having been heard, the court reserved decision, whereupon on February 13, 1917, the court filed the following conclusions: 40

OPINION

Filed February 13, 1917

MONMOUTH COMMON PLEAS COURT

10

OCEAN GROVE CAMPMEETING AS-
SOCIATION OF THE METHODIST
EPISCOPAL CHURCH, BODY COR-
PORATE,

Plaintiff,

vs.

THE BOROUGH OF BRADLEY BEACH,
Defendant.

Action at Law.

Conclusions.

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This action is instituted to recover of the defendant, a municipal corporation of the County of Monmouth, a sum of money representing the difference between the amount of taxes paid the defendant's tax collector on an original valuation of property of the plaintiff situate within the territorial limits of the borough, pending an appeal to the County Tax Board and the State Board of Equalization of Taxes, and the amount which would have been due on the reduced valuation as fixed by the latter board.

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The following facts are found:

The assessor of taxes of the defendant borough, in the performance of his statutory duty, levied an assessment for state, county and municipal taxes for the year 1915 against the electric light plant, water tank, ice house and land on which the same stood of the plaintiff association. The property was located within defendant's municipal territory and was concededly subject to such taxation. The valuation for the purpose of the assessment was fixed by the assessor at \$83,000. Prior to December 9, 1915, the tax collector of

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the borough sent the usual bill covering the assessment and

Opinion

amount of tax to the association. On the last named date, an appeal from the assessment on the ground of excessive valuation was made out in the name of the association and filed with the County Tax Board on December 10, 1915. A copy of this appeal was served on the Clerk of the Borough on the day of its preparation. On December 20, 1915, the Secretary of the Association whose duty it was to pay its current obligations caused a check for the full amount of the tax bill, signed by the President and Assistant Secretary, and countersigned by himself as such Secretary, to be sent by messenger to the tax collector of the Borough, who received the check, receipted the tax bill, returned it to the messenger, and deposited the check to the Borough's account. The check was paid in due course by the Bank on which it was drawn and charged to the Association's account. It appears that the check used was one of a series signed in blank by the President, in accordance with a custom, and in possession of the Secretary for his general use in paying obligations of the Association. Before sending the check, the Secretary consulted the Treasurer with respect to the source of the moneys from which the annual taxes were to be paid and after being advised drew and placed in transit the check in question in payment of the full amount of the tax. There is no evidence that the Tax Collector of the Borough had any knowledge of the appeal filed with the County Tax Board. That board, subsequently, after hearing the evidence offered on the appeal, and after the taxes had been paid, reduced the valuation of the property for taxing purpose for the year 1915, from \$83,000 to \$50,000. On March 22, 1916, the Association filed a further appeal with the State Board of Equalization and that body later determined the appeal by further reducing the valuation to \$34,900. After the decision of the State Board, the Association demanded of the defendant borough the sum of \$1,243.39, the difference between the amount of taxes assessed and paid on the original valuation of the local assessor and the amount due on the valuation finally fixed by the State Board. The Borough refused to return the sum

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Opinion

10 claimed. The evidence further discloses that the Board of Trustees of the Association early in the year 1915, discussed the question of the valuation of its various properties liable to local taxation and delegated the matter to Mr. Daniels, a member of the Board, for investigation and treaty with the local authorities. Such investigation was made and a more or less informal report was subsequently made to the executive committee of the Board, in which the statement appears that communication had been had with the local taxing authorities, but no satisfactory conclusion had been reached. In a later report, the investigator advised the executive committee that an appeal would be taken to the County Tax Board, but no formal action of the Board of Trustees or of the executive committee ratifying the report and authorizing the appeal appears on the official minutes of either the Board or Executive Committee. It appears that the Secretary who caused the original tax to be paid had no notice, formal or informal, of the filing of the appeal to the County Board, at or prior to the time the check was sent. At the hearing of the appeals both before the County Board and the State Board, the defendant Borough was represented by its attorney and defended the correctness of the original assessment. This action is predicated on an assumpsit for money had and received.

20 The gravamen of the plaintiff's claim is that the excess tax was paid through inadvertence and mistake of fact by the Secretary of the Association.

80 The defendant resists the right to recover on the ground that the payment was voluntarily made and that a portion of the tax paid — the greater portion — was for state and county purposes, which was transmitted by its collector to the county collector, and can not legally in consequence be recovered of the borough.

The solution of the question involves the fact as to whether or not the payment was voluntary.

40 The Secretary of the plaintiff association was admittedly its agent for the payment of its current obligation. He was apparently clothed, by recognized custom, with

Opinion

ample authority as such, and blank checks signed by the President were placed in his custody for the purpose of paying such obligations. He knew that the taxes in question fell due on December 20, 1915, and before paying them, consulted the Treasurer with respect to the source of the funds from which they were to be paid, whether he — the Treasurer — would advance the money or he — the Secretary — should borrow on the credit of the Association from a local bank. An arrangement was made between these officers, apparently, and the payment made as stated. No one advised the Secretary of the pending appeal and he, therefore, paid the tax in due course. No formal action authorizing the appeal appears to have been taken by the Board of Trustees, by means of which the Secretary would have received notice, and since his action involved a performance of his customary duty in the general management of the affairs of the association, the payment of the tax by him in the circumstances must be regarded as the act of the Association.

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Blake v. Domestic Mfg. Co., 64 N. J. Eq., 480:

Clement v. Amusement Co., 70 N. J. Eq., 677.

Whether the appeal in question was ever properly authorized by the Association does not appear to be of importance, although under the evidence such authority may be questioned.

Titus v. Cairo R. R. Co., 37 N. J. L., 98:

Millville Traction Co. v. Gooden, 53 N. J. Eq., 448.

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If the payment of the tax in question was the voluntary act of the Association, can there be a recovery of the excess part thereof?

In Dillion on Municipal Corporations (4th Ed.) Vol. 2, page 1145 (Sec. 940) the following elements are stated to be necessary to warrant or admit of a recovery in the circumstances here shown:

1st. The authority to levy the tax or to levy it upon the property in question must be wholly

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Opinion

wanting or the tax itself wholly unauthorized, in which cases the assessment is not simply irregular but absolutely void.

10 2d. The money sued for must have been actually received by the defendant and received for its own use, and not as an agent or instrument to collect and assess money for the benefit of the state or other public corporation or person: and

 3d. The payment by the plaintiff must have been made upon compulsion, as for example, to prevent the immediate seizure of his goods or the arrest of the person and not voluntarily.

20 Bearing in mind the character of the tax here involved, it is unnecessary to cite the provisions of the Constitution of the State or the general tax act to sustain its legality. No suggestion, in fact, is made that the authority to levy the tax was not full and complete. The valuation for such purpose placed upon the property was merely an administrative duty in which the several judgments of the assessor, and the appellate Boards differed.

30 That the tax paid included moneys lawfully raised for state, county and municipal purposes is admitted and that the defendant's tax collector was the mere agent in the collection of that part thereof levied for state and county purposes and by him paid to the county collector prior to the institution of this suit does not admit of dispute. The case fails to disclose any compulsion on the part of the Borough authorities by way of threat of immediate sale of the property assessed or otherwise.

40 Therefore, applying the test laid down by recognized authority, the case is wholly barren of evidence justifying the conclusion that the payment in question was involuntary.

Opinion

The fact that the Secretary had no knowledge of the appeal, or, indeed, the Treasurer whom he consulted, before paying taxes for the year, is not evidence of a payment in mistake of fact or inadvertence of which their principle — the Association — can take advantage. It was not a mistake in fact, because the legality of the assessment, that is to say, that the property was subject to tax, is unquestioned. The correctness of Mr. Dillon's text is undoubtedly recognized in *Jersey City v. Riker*, 38 N. J. L., 225, and in *Elizabeth v. Hill*, 39 N. J. L., 555. In both of these cases, the original assessments were illegal and were wholly set aside by judicial decree. 10

In the case in hand, it was not the legality of the assessment that was involved, but the value of the property. The assessor fixed or determined upon a certain value, the County Board dissented, and fixed a lower valuation, and the State Board disagreed with the County Board, resulting in a valuation being determined upon which became final so far as the assessment for that year was concerned, under the evidence before the respective Boards. 20

A carefully considered case in which a similar situation was involved apparently is that of *Shenango Furnace Co. v. Fairfie Twp.*, 78 Atl. Rep., 937. The Court there held:

“Equity will not compel the refunding of a road tax levied on a wrong valuation if the tax has been voluntarily paid.

“Mistake as a basis for compelling a refunding in equity of taxes paid is misapprehension or misunderstanding arising from ignorance as distinguished from that inattention or absence of thought which are inherent in negligence. 30

“Where taxes are voluntarily paid to the proper public authorities without duress or threats or misstatements by them and without protest by the person paying them or notice of an intent to reclaim any part of the sum paid, they cannot be recovered back.” 40

Opinion

That a voluntary payment of taxes cannot be recovered is a settled rule of law in this state will be found reiterated by the Court of Errors and Appeals in the recent case of *Koewing v. West Orange*, 99 Atl. Rep., 203. The authorities cited together with this case may be regarded as decisive of the case in hand.

10 If the plaintiff desired to avoid the payment of interest and penalties on the delinquent tax, pending the disposition of the appeals, it had a complete remedy in the provisions of P. L. 1906, p. 20 (C. S. 5115).

Inasmuch as it seems manifest that the payment of the tax in question was voluntarily made, its right to recover the sum sought in this action must be denied and judgment may, therefore, be entered for the defendant, but without costs.

RULIF V. LAWRENCE,
P. J.

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Judgment

JUDGMENT

Whereupon it is adjudged that judgment be given in favor of the defendant, the Borough of Bradley Beach, and against the plaintiff, the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, without costs. 10

Judgment entered February 13, 1917.

Whereupon the court ordered a general verdict to be entered in favor of the defendant and against the plaintiff, without costs.

Judgment entered and signed February 13, 1917, 2 P.M.

State of New Jersey }
Monmouth County } ss. 20

Joseph McDermott, Clerk of said County, do hereby certify that the foregoing is a true copy of the complaint, pleas, and record of judgment, as the same remain on file in my office.

L. S.

IN WITNESS WHEREOF,
I have hereunto set my hand
and affixed the official seal of 30
said County this twenty-
eighth day of June, A. D.
1917.

JOSEPH McDERMOTT,
Clerk.

EXHIBITS

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Exhibit P 1

From minute book of plaintiff under date of May 27, 1915, as read into minutes.

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Exhibit P 2

From minute book of plaintiff under date of November 18, 1915, as read into minutes.

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Exhibit P 3

Daniels' Report referred to in minutes under date of November 18, 1915, as read into minutes.

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Exhibits

Exhibit P 4

<p>TAX NOTICE 1915 Bring or send this bill with your payments.</p>	<p>RATES PER \$1,000 County \$4.81 State School \$2.64 Special School \$5.65 Municipal \$12.75 <hr/>Total \$25.85</p>	<p>10</p>
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Folio 166

Bradley Beach, N. J., November 1, 1915

M Ocean Grove Association

The valuation of your taxable property and your assessment
for taxes in the

BOROUGH OF BRADLEY BEACH 20

for the year 1915 is as follows:

NUMBERS LOT	OR AVENUE STREET	LAND VALUE OF REAL ESTATE	BUILDINGS REAL ESTATE	VALUATION TOTAL	OF TAXES TOTAL AMOUNT	
Electric Light Plant			80,000	80,000	2,068.00	
Land on which Tank, Ice house and plant are located		3,000		3,000	77.55	30
					2,145.55	

Make all checks payable to the Borough of Bradley
Beach.

PAID BY CHECK
SUBJECT TO COLLECTION
Date, Dec. 20, 1915

Received Payment
BERNARD V. POLAND,
Collector

40

Exhibits

Exhibit P 5

	TAX NOTICE	RATES PER \$1,000
	1915	County \$4.81
10	Bring or send this bill with your payments.	State School \$2.64
		Special School \$5.65
		Municipal \$12.75
		Total \$25.85

Folio 165

Bradley Beach, N. J., November 1, 1915

M Ocean Grove Association

The valuation of your taxable property and your assessment
for taxes in the

20

BOROUGH OF BRADLEY BEACH

for the year 1915 is as follows:

LOT NUMBERS	STREET OR AVENUE	VALUE OF REAL ESTATE LAND	BUILDINGS	TOTAL VALUATION	TOTAL AMOUNT OF TAXES
802	Brinley	600		600	15.51
804	Fifth	600		600	15.51
	Water Tank		2,000	2,000	51.70
	Ice House		1,000	1,000	25.85

98.57

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Make all checks payable to the Borough of Bradley Beach.

PAID BY CHECK

SUBJECT TO COLLECTION

Date, Dec. 20, 1915

Received Payment

BERNARD V. POLAND,

Collector

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Exhibits

CANCELLED CHECKS

Exhibit P 6

THE OCEAN GROVE CAMP MEETING
ASSOCIATION

No. 5642 10

Ocean Grove, N. J., December 20th, 1915

Pay to the order of Borough of Bradley Beach \$2881.38

Twenty-eight hundred eighty-one 38-100.....Dollars

To the ASBURY PARK AND OCEAN GROVE BANK,
Asbury Park, N. J.

A. E. BALLARD, *President*
S. G. BUTLER, *Asst. Sec.*

Not payable until countersigned by Genl. Supt.
Countersigned and entered.

FRANK B. SMITH, 20
General Superintendent

Exhibit P 7

THE OCEAN GROVE CAMP MEETING
ASSOCIATION

No. 5643 30

Ocean Grove, N. J., December 20th, 1915

Pay to the order of Borough of Bradley Beach \$18.10

Eighteen 10-100Dollars

To the ASBURY PARK AND OCEAN GROVE BANK,
Asbury Park, N. J.

A. E. BALLARD, *President*
S. G. BUTLER, *Asst. Sec.*

Not payable until countersigned by Genl. Supt.
Countersigned and entered.

FRANK B. SMITH, 40
General Superintendent

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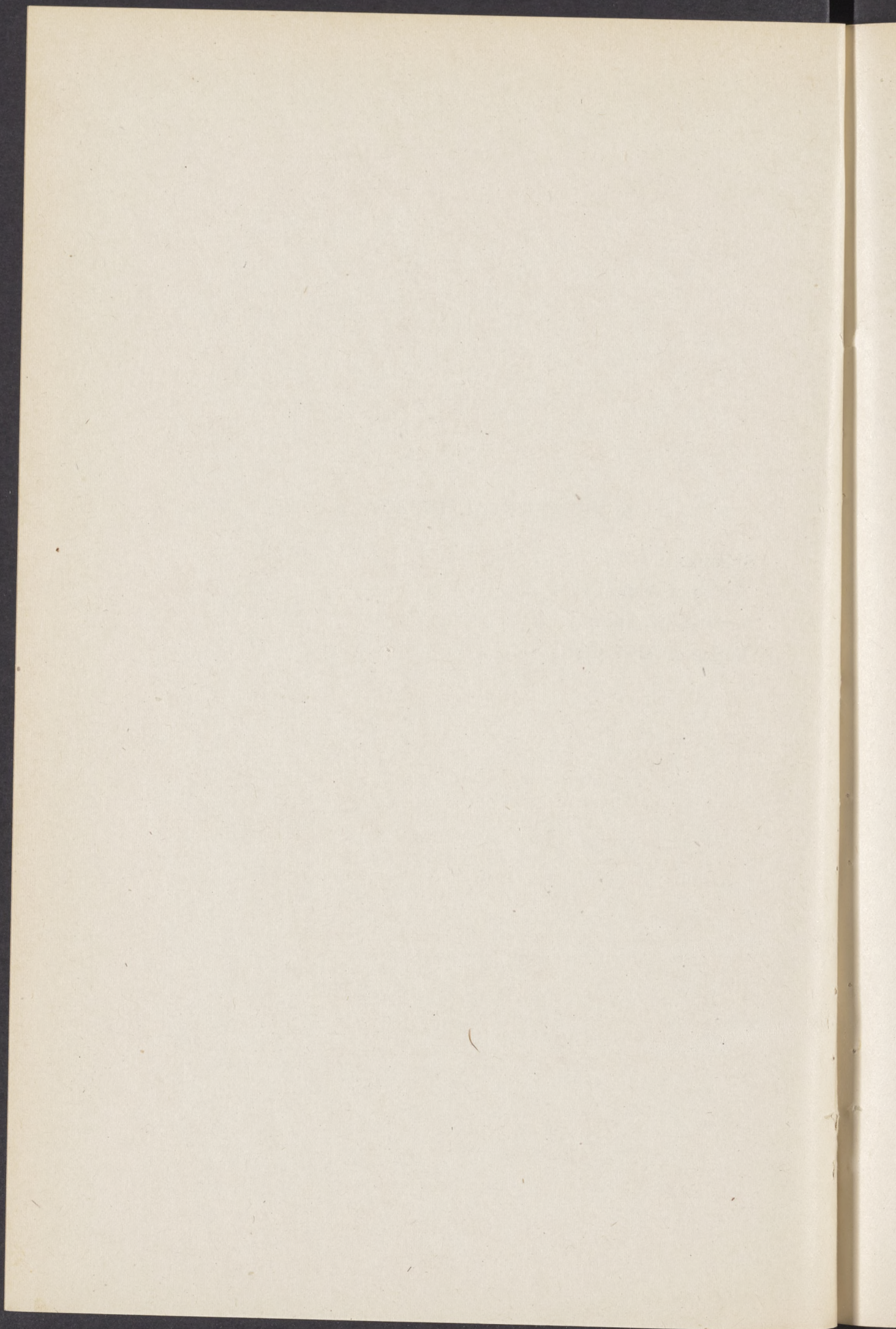
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SUPPLEMENTAL INDEX.

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SYLLABUS

NEW JERSEY SUPREME COURT.

Nov. T., 1917.

Ocean Grove Camp Meeting
Association,

vs.

The Borough of Bradley Beach.

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Appeal from Monmouth County Common Pleas.

Argued before Gummere, Chief Justice, and Justices
Parker and Kalisch.

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For the appellant, Patterson & Rhome and Gilbert
Collins.

For the respondent, Ward Kremer and Charles E. Cook.
The opinion of the Court was delivered by Gummere,
C. J.

This is an action on assumpsit brought to recover
back a certain proportion of the taxes paid by the
Ocean Grove Camp Meeting Association to the Borough
Clerk of Bradley Beach for the year 1915. These
taxes were assessed upon an electric light plant, water
tank and ice house owned by the association, and lo-
cated in the borough. The valuation put upon this
property by the local tax assessor was \$83,000. The
association appealed from this valuation to the County
Board of Taxation on the 9th day of December, 1915;
and notice of the appeal was duly served on the borough
on the same day. Notwithstanding the taking of this
appeal, however, the superintendent of the plaintiff
association, who was clothed with general authority to
pay outstanding debts of the association, and who had

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in his possession certain blank checks signed by its president for the purpose of making such payments, filled out one of them to the order of Bradley Beach for the whole amount of the tax, assessed—\$2,145.55—and on the 20th of December paid the check to the borough. This payment was made without the knowledge of the officers of the association, who were the superintendent's superiors, and without knowledge on his part that an appeal had been taken. The prosecution of the appeal before the County Board resulted in a slight reduction in that valuation. A further appeal was then taken to the State Board of Taxation and Assessment, and an additional reduction was ordered by that body, fixing the true value of the property at \$34,900 and reducing the amount of the tax by \$1,243.39. The present suit was brought to recover the amount of the overpayment, and was tried by the Court without a jury. The trial resulted in a judgment for the defendant, upon the theory that the payment of the tax was voluntary, and that, therefore, the Ocean Grove Association was without remedy.

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20 From the judgment entered in the court below the Ocean Grove Camp Meeting Association appeals.

We do not find it necessary to determine the interesting question argued by counsel whether or not a payment of taxes made by the association's superintendent under the conditions we have recited was a voluntary payment by the association itself. Assuming that it was, then we have this situation. The authority of the borough to assess the tax was not wholly wanting. The tax itself was only invalid to the extent that the taxing official disregarded the constitutional requirement that property must be assessed for taxes at its true value—that is to say, to the extent that the valuation put upon the property as the basis of levying the tax was in excess of its true value. The tax itself was paid pending the appeal. On these facts the question presented seems to us not to vary in its legal essence from that decided by this court in *Jersey City, vs. Riker*, 38 N. J. L., 225. In that case the facts and the law applicable thereto are set forth by Beasley, C. J., as follows: "The authority to levy the tax was not wholly wanting, and the payment, in the legal sense, was voluntary. Had this suit been brought upon the payment of the tax, and before any change in the situation had occurred, the case would have been the

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ordinary one presented in the reports and ruled by the decisions. But that is not so; there is a new element here, and that is, the tax which was paid has been set aside. The consequence is the payment has nothing, either in theory or in fact, to rest upon. The party is debarred from his action after a voluntary payment, because, of his own motion, he abandons his defense to the claim; this the present plaintiff did not do; on the contrary, he pushed his defense to a successful result. The payment of the tax in this instance has not added, in the least degree, to the litigation, and public policy, therefore, does not require a frustration of this procedure. The assessment being vacated by direct judicial action, the law raises an assumption to refund the money which can no longer be honestly retained. Upon the vacation of a tax assessment the money paid cannot, in good conscience, be retained by the public."

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It is argued on behalf of the defendant borough that the decision in the cited case only applies where the tax is vacated by the Supreme Court, or by the Court of Errors and Appeals upon a review of the former Court's judgment; and the words "by direct judicial action;" used in the opinion, are appeal to as indicating such a limitation on the right of the taxpayer to recover a tax illegally assessed. We are satisfied that no such limitation was intended to be expressed. The language used correctly describes a duly constituted authority exercising a judicial function with relation to the matter before it. That this was the principle intended to be declared by the distinguished writer of the opinion is made plain by a subsequent opinion delivered by him for the Court of Errors and Appeals (*Campion vs. Elizabeth*, 41 N. J. L. 355), where he fully recognizes the power of the legislature to confer this judicial function upon the Common Council of Elizabeth.

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We conclude that the present case is controlled by our earlier decision in *Jersey City vs. Riker*, and that, therefore, the judgment under review must be reversed.

The proofs submitted show that some two weeks after the plaintiff's notice of appeal was served upon the borough, the collector of that municipality paid to the county collector, out of the moneys received from the plaintiff, the sum of \$339.23; this payment being

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made on account of the state school tax, and of county taxes. It is argued that the borough cannot now recover these moneys from the county collector, and, therefore, ought not to be compelled to refund them to the plaintiff. The payment was made by the borough with full knowledge of the fact that the validity of the tax had already been challenged by the plaintiff before a legally constituted tribunal; and if it saw fit to make the payment without awaiting the determination of that tribunal (or of the State Board on a further appeal), it did so at its peril. Having assumed the responsibility of that risk it cannot now escape the consequences of its act, and call upon the plaintiff to bear the loss which resulted therefrom.

Reverse.

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ADDENDUM.

NOTICE OF MOTION FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, Plaintiff-Appellant, vs. The Borough of Bradley Beach, Defendant-Respondent.	}	On Appeal from Monmouth County Court of Common Pleas.	10
	}	Notice of Motion for Judgment Final.	

To Ward Kremer, Esq.,
 Attorney for defendant-respondent. 20

Dear Sir:—

TAKE NOTICE that on Tuesday, June 4, 1918, at 11 o'clock in the forenoon, or as soon thereafter as we can be heard, at the State House in Trenton, we shall move before the Chief Justice and Justices Parker and Kalisch for leave to enter judgment in accordance with the rule a draft of which is here to annexed.

Yours, etc., 30

PATTERSON & RHOME,
 Attorneys for plaintiff-appellant.

Dated, May 24, 1918.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

10 The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church,
Plaintiff-Appellant,
vs.
The Borough of Bradley,
Beach,
Defendant-Respondent.

} Rule for Judgment.
On Appeal from
Monmouth County Court
of Common Pleas.

20 This appeal coming on to be heard at the November Term, 1917, of this court, and being argued by Gilbert Collins, of counsel with the plaintiff-appellant, and Ward Kremer, of counsel with the defendant-respondent, and the court having taken time for consideration, and it appearing that the judgment appealed from was in an action at law tried in said Court of Common Pleas without a jury and decided in favor of the defendant, and the appeal being in the nature of a re-hearing upon the questions of law involved in said judgment, and the court being of opinion that said judgment was erroneous and that judgment should have been given in favor of the plaintiff for the sum claimed in the complaint with interest:

30 It is ORDERED that the said judgment be and the same hereby is reversed with costs, and that judgment final be entered in this court in favor of the plaintiff-appellant and against the defendant-respondent for the sum of One Thousand Two Hundred and Forty-three and 39-100 Dollars, with interest thereon from December 20, 1915—in all the sum of One Thousand Four Hundred and Twenty-six and 41-100 Dollars; besides costs of suit to be taxed.

Rule entered June 4, 1918,

On motion of

PATTERSON & RHOME,

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Attorneys for plaintiff-appellant.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, Plaintiff-Appellee, vs. The Borough of Bradley Beach, Defendant-Appellant.	}	Notice of Appeal.	10
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To Patterson & Rhome, Attorneys for Plaintiff-Appellee:

Sirs: 20

Take notice that the Borough of Bradley Beach, a municipal corporation, defendant, appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause.

WARD KREMER,
 Attorney for Defendant-Appellant.

Dated June, 1918. 30

Due and legal service of the within notice of appeal is hereby acknowledged this day of June, 1918.

PATTERSON & RHOME,
 Attorneys for Plaintiff-Appellee.

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GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERROR AND APPEALS.

10	<p style="text-align: center;">Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, Body Corporate, Plaintiff Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">The Borough of Bradley Beach, a Municipal Corporation, Defendant Appellant.</p>	}	Grounds of Appeal.
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20 The Defendant, the Borough of Bradley Beach, assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above case:

1. Because the Supreme Court reversed the decision of the Monmouth County Court of Common Pleas in the case.

2. Because there was error in the following portion of the opinion of the Supreme court:

30 "We do not find it necessary to determine the interesting question argued by counsel whether or not the payment of taxes made by the Association's superintendent under the conditions we have recited was a voluntary payment by the Association itself.

"This payment was made without the knowledge of the officers of the Association who were superiors and without the knowledge on his part that an appeal had been taken."

40 3. Because under the facts of the case, the superintendent of the Plaintiff Appellee was vested with authority to bind the corporation and his act in paying the taxes to the Borough of Bradley Beach, which are the subject of this suit, was conclusive and binding upon his corporation.

4. Because the Supreme Court refused to hold that in order for an action for the recovery of taxes paid to be maintainable, it is necessary that the following requisites co-exist:

a. The authority to levy the tax or to levy it upon the property in question must be wholly wanting or the tax itself wholly unauthorized, in which case the assessment is not simply irregular but absolutely void.

b. The money sued for must have been actually received by the defendant corporation and received by it for its own use and not as agent or instrument to collect and assess money for the benefit of the State or other public corporation or person and

c. The payment by the Plaintiff must have been made upon compulsion as, for example, to prevent the seizure of his goods or the arrest of the person, and not voluntary. (Dillon on Municipal Corporations, Fourth Edition, Vol. 2, Page 1145, Section 940.)

5. Because although the above three elements did not co-exist in the above case, yet the Supreme Court held that it was the duty of the Borough of Bradley Beach to refund the money paid, even though the payment was voluntary.

6. Because the finding of the Monmouth County Court of Common Pleas was legal and should have been sustained by the Supreme Court.

7. Because there was error in the decision and opinion of the Supreme Court.

WARD KREMER,

Attorney for Defendant Appellant,
Borough of Bradley Beach.

JOSEPH M. TURNER,
of Counsel.

Service of the within grounds of appeal is hereby acknowledged this 24th day of February, 1919.

PATTERSON & RHOME,

Attorneys for Plaintiff-Appellee.

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NOTICE OF ARGUMENT.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	<p>Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, Plaintiff Appellee,</p> <p style="text-align: center;">vs.</p> <p>The Borough of Bradley Beach, a Municipal Corporation, Defendant Appellant.</p>	} Notice of Argument
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Sirs:

20 Please to take notice that the argument of the appeals in the above stated cause will be brought on before the above entitled Court at the State House in the City of Trenton on Tuesday, the 19th day of November, 1918, at 11 o'clock in the forenoon of that day or as soon thereafter as the Court can attend to the same.

WARD KREMER,
Attorney for Defendant Appellant.

Dated November 16, 1918.

30 To Patterson & Rhome,
Attorneys for Plaintiff Appellee.

Due and legal service of the within notice of argument is hereby acknowledged this 16th day of November, 1918.

PATTERSON & RHOME,
Attorneys for Plaintiff Appellee.

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New Jersey Court of Errors and Appeals

THE OCEAN GROVE CAMP MEETING
ASSOCIATION OF THE METHODIST
EPISCOPAL CHURCH,

Plaintiff-Respondent,

vs.

THE BOROUGH OF BRADLEY BEACH,
Defendant-Appellant.

On Appeal.

BRIEF For Plaintiff-Respondent

PATTERSON & RHOME,

Attorneys for Respondent.

GILBERT COLLINS,

Counsel for Respondent.

Schuyler Press,  Asbury Park, N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS.

	THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, Plaintiff-Respondent,	} On Appeal From Supreme Court.
	vs.	
10	THE BOROUGH OF BRADLEY BEACH, Defendant-Appellant.	

BRIEF FOR PLAINTIFF-RESPONDENT.

20 The opinion of the Chief Justice, read for the Supreme Court, in reversing the Monmouth Pleas and ordering judgment for the plaintiff, is so lucid and comprehensive that no argument is needed for its support. Some phases of the case the Supreme Court found it unnecessary to discuss. As the appellant now presents anew those phases, we append to his brief the one submitted to the Supreme Court in order that nothing shall be left unanswered. The stress that is laid by counsel for appellant on the doctrine that money voluntarily paid cannot be recovered back is entirely misplaced. The doctrine, well illustrated by the recent cases cited by counsel for appellant, notably *Loewing v. West Orange* (Walker C. loq.) 99 Atl. Rep. 203, is inapplicable to the case of the payment, though voluntarily of a tax that is afterwards set aside or reduced by competent authority. This is demonstrated by the Chief Justice in the opinion read for the Supreme Court.

The judgment should be affirmed.

GILBERT COLLINS,
Of Counsel with Respondent.

40 PATTERSON & RHOME,
Attorneys for Respondent.

NEW JERSEY SUPREME COURT

THE OCEAN GROVE CAMP MEETING
ASSOCIATION OF THE METHODIST
EPISCOPAL CHURCH,
Plaintiff-Appellant,
vs.

THE BOROUGH OF BRADLEY BEACH,
Defendant-Respondent.

On Appeal from
Monmouth County
Common Pleas

10

BRIEF FOR PLAINTIFF-APPELLANT

Prefatory

The plaintiff, a quasi-municipal corporation, owning an electric light plant, water tank and ice house in the neighboring Borough of Bradley Beach, was assessed therefor in 1915 on an aggregate valuation of \$83,000. On appeal, the Monmouth County Board of Taxation reduced the assessment to \$50,000, and on appeal to the State Board of Taxes and Assessment that Board reduced the assessment to \$34,900. (Case, p. 36.) 20

The appeal to the County Board was taken December 9, 1915, was served on the Borough Clerk on that day, and filed with the County Board December 10, 1915. On December 20, 1915, Frank B. Smith, the General Superintendent of the plaintiff, assumed to pay the plaintiff's taxes in Bradley Beach, including those assessed on the property involved in that appeal, amounting to \$2145.55. He did this on his own responsibility, without authority from anyone, and without knowledge that an appeal had been taken from the assessment (Case, p. 19). He was accustomed to pay bills as they matured, and knowing that taxes fell due on December 20th he thought they ought to be paid. There were taxes also in other municipalities which he paid. It was the custom of 30 40

the President of the Association to leave with Mr. Smith from time to time 25 checks signed in blank which he used as required (Case, p. 18). For the payment in question he used two of these checks, filling them up himself and procuring them to be further signed by the Assistant Secretary of the plaintiff, who was accustomed to sign checks instead of the Treasurer, and countersigned them himself. Those checks are Exhibits P-6 and P-7 (Case, p. 61). The trial judge fell into error when he said (Case, p. 51) that it was the Secretary of the Association who paid the taxes and that it was his duty to pay current obligations. It was Mr. Smith, the General Superintendent, who issued these checks, and he did so without any authority whatever and without knowledge that an appeal had been taken. Had he consulted Dr. Ballard, the President, or Mr. Daniels, of the Executive Committee, who had the matter of these taxes in hand, he would not have made the payment. The fact remains that at the time of payment an appeal was pending to the knowledge of the Borough authorities, and the County Board, as stated, went on to hearing and reduced the assessment, though not to the extent prayed. In the appeal to the State Board of Taxes and Assessment it was stated that through inadvertence, after filing the petition to the County Board, the taxes were paid without authority of petitioner, and it was submitted that the payment did not deprive the Board of jurisdiction (Case, p. 38). The matter was explained to the Board at the hearing (Case, p. 35).

Applying the tax rate (Case, p. 59; Exhibit P-4) to the valuation fixed by the State Board, makes the proper tax \$902.16, instead of \$2145.55 the sum paid. To recover the excess, viz., \$1243.39, with interest from December 20, 1915, the present action was brought in the Monmouth County Common Pleas and was tried by Judge Lawrence without a jury. His decision was in favor of the defendant on the ground that the payment was voluntary, and that therefore the excess above the proper tax could not be recovered. See his opinion (Case, p. 50). From the judgment entered on his finding the present appeal has been taken.

Argument

I

THE PAYMENT OF THE TAX WAS WITHOUT AUTHORITY FROM THE PLAINTIFF AND WAS MADE IN IGNORANCE OF THE VITAL FACT THAT AN APPEAL HAD BEEN TAKEN.

It may be that the plaintiff is estopped from denying the validity of the blank checks filled out and used by the Superintendent in paying the Bradley Beach taxes; but that is aside from the point. The question is whether the payment was "voluntary" within the meaning of the adjudications. Certainly the plaintiff never meant to pay these taxes; and that it gave no authority to pay them should absolve it from the consequences of a voluntary payment. 10

But if the Superintendent is to be taken as standing in the place of the plaintiff, the case, nevertheless, falls within the qualification made in all the cases that to prevent recovery of money voluntarily paid the payment must be with full knowledge of the facts. The Superintendent had no knowledge that an appeal had been taken from the tax, and therefore recovery by the plaintiff is not barred. 20

Judge Lawrence expresses some doubt as to whether there was any authority for the *appeal*, but this doubt is scarcely worth mentioning. The appeal was signed by the President, the chief executive officer of the plaintiff, and was prosecuted by it without challenge on the part of the Borough, whose counsel and officials contested the appeal on the merits. 30

II

MONEY VOLUNTARILY PAID FOR TAXES
LAWFULLY IMPOSED MAY NEVERTHELESS BE
RECOVERED BACK IF THE ASSESSMENT IS
AFTERWARDS SET ASIDE OR REDUCED.

10 The opinion of the learned Trial Judge (Case. p. 50) was devoted entirely (1) to a presentation of the reasons why the tax-payment in the case in hand should be considered voluntary, and (2) to a reference to the adjudications holding that in such a case there can be no recovery of money voluntarily paid. True, he cites the leading cases of *Jersey City ads. Riker*, 38 N. J. L. 225, (approved in *Jersey City v. O'Callaghan*, 41 N. J. L. 349), and *Elizabeth v. Hill*, 39 N. J. L. 555, where a recovery of money voluntarily paid as for taxes was upheld by this Court, but he mistakes the rationalé of those cases. He seems to think

20 that they warrant recovery only where the tax was *illegal* and was *wholly* set aside. He says that in the case in hand the tax was not illegal but was merely excessive. * Of course, the doctrine of the cases cited applies as well to a judicial *reduction* of an excessive tax, though legal, as to illegality. The imposition in each of the cases was of an assessment for supposed benefits, but such an imposition is under the taxing power, and indeed the assessments were considered as taxes. As condensed in the headnotes the decision was:

30 " 1. Money voluntarily paid, *with full knowledge of the facts*" (see Point 1) "cannot be recovered back — and this rule applies to a voluntary payment of taxes.

" 2. But this rule is not applicable where the tax so paid has been set aside by judicial decision."

40 Beasley, C. J., resorted to the analogy of money paid upon a judgment that is afterwards annulled. He said, "The principle of this course of law is, that after the judg-

ment is annulled the money paid upon it is due to the defendant *ex aequo et bono* and that there is no paramount inconvenience in allowing its reclamation. Certainly a tax assessment cannot be put upon higher ground; upon its vacation the money paid cannot, in good conscience, be retained by the public. In the present instance, the defendant has not a particle of right to the money in question; it is due to the plaintiff according to the principles of common honesty, and it is, therefore, not to be regretted that the attempt to withhold it by the *summum jus* has failed."

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Of course, where the law permits judicial *reduction* of a judgment the excess paid can be recovered. On review of a tax-assessment by certiorari the statute permits the court to determine the true amount that should have been assessed (Certiorari Act. sec. 11; Comp. Stat. 405); and after this is done, if the tax had been paid before the writ was allowed, the excess is of course recoverable. A voluntary payment may induce the court to withhold its prerogative writ, but once allowed and judgment given there is no escape from restitution.

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III

THE REDUCTION BY THE DULY AUTHORIZED STATUTORY BOARD HAD THE SAME EFFECT AS A JUDGMENT BY A COURT.

10 We must not be misled by the use of the word "judicial" in some of the opinions, as qualifying the setting aside, or reduction, of a tax. The writers of those opinions were treating of cases where the action was by a court or there had been no action at all, as in *Danforth v. Elizabeth*, 41 N. J. L. 362, where the point decided was that even the unconstitutionality of a statute imposing an assessment voluntarily paid did not "so long as it remains uncanceled by judicial authority" (Beasley, C. J., *loq.*) warrant recovery of the money paid. "Judicial" was *obiter*, as there had been no cancellation of any authority. A more careful expression was that by Magie, J., in *Turrell v. Elizabeth*, 20 43 N. J. L. 272: "This action is not maintainable unless the assessment on which the plaintiff paid the money he seeks to recover has been set aside by some competent authority."

That the learned Chief Justice did not mean to say that Court action was necessary is evident from the fact that shortly afterwards he spoke for the Court of Errors and Appeals in affirmance of a judgment in recovery of the difference between a new assessment and a former one voluntarily paid and afterwards set aside by a municipal board under statutory authority. *Jersey City v. Green*, 30 42 N. J. L. 627.

There can be no difference between action by a court and action by a duly authorized reviewing board or officer. Indeed, in both cases the action is "judicial."

The State Board of Taxes and Assessment constituted by P. L. 1915, page 438, has all the powers of the Board of Equalization of Taxes of New Jersey constituted by P. L. 1905, page 123; Comp. Stat. 5110. Section 5 of the Act last cited gives power to the Board, on verified complaint filed on or before the first day of April following the 40 assessment of property of any kind "to review and correct

the action of the local assessors or other taxing officers and of all boards of review by reducing or increasing such assessment." The action of the board is necessarily judicial, and its order must have the same effect as a judgment of court. Perhaps the Board ought not to exercise jurisdiction where the tax has been paid; but if it does so its determination cannot be collaterally attacked.

The Act of 1906 (Comp. Stat. 5115), referred to by Judge Lawrence, provides in case of appeal for payment of an amount agreed on, or fixed by the Board, in order to save penalty and directs that the payment shall not operate to prejudice the claim of either party upon the appeal. This statute has no applicability to the case in hand where the payment was made in ignorance of the appeal; unless indeed it is arguable, and we submit that the point is well worth consideration, that the receipt of the tax after the appeal was in effect an agreement that the amount paid should be without prejudice; but the value of the Act is in its inferential postulate that there may be a recovery if there is a reduction to such an extent that the proper tax is less than that paid. I take it that in such a case the taxpayer is entitled to refund notwithstanding the reduction has not been made *by a court*.

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THE FACT THAT THE BOROUGH PAID OVER THE PROPORTION OF THE TAXES ASSESSED FOR COUNTY AND SCHOOL PURPOSES IS IMMATERIAL.

10 Had such payment been made before the appeal was taken, there might be force in the argument, but such was not the case. The petition of appeal was served on the Borough December 9, 1915, and the payment to the County Collector of the proportion of the taxes due to the State and County was not made until December 28, 1915. Such payment, therefore, was made by the Borough at its peril. This has been held where the conditions were reversed and the County was the Collector not only for itself but for the State and the municipality. It was held: "It is no defence to an action against a county for state, county and town taxes, erroneously collected by the county treasurer, that
20 after commencement of the action the part of the tax collected for the state and the town has been paid to them out of the county treasury, since the pendency of the action is sufficient notice of the taxpayer's right to the money." *Dubois v. Lake County*, 10 Ind. App. 347, 37 N. J. E. 1056; *Byles v. Golden*, 52 Mich. 612.

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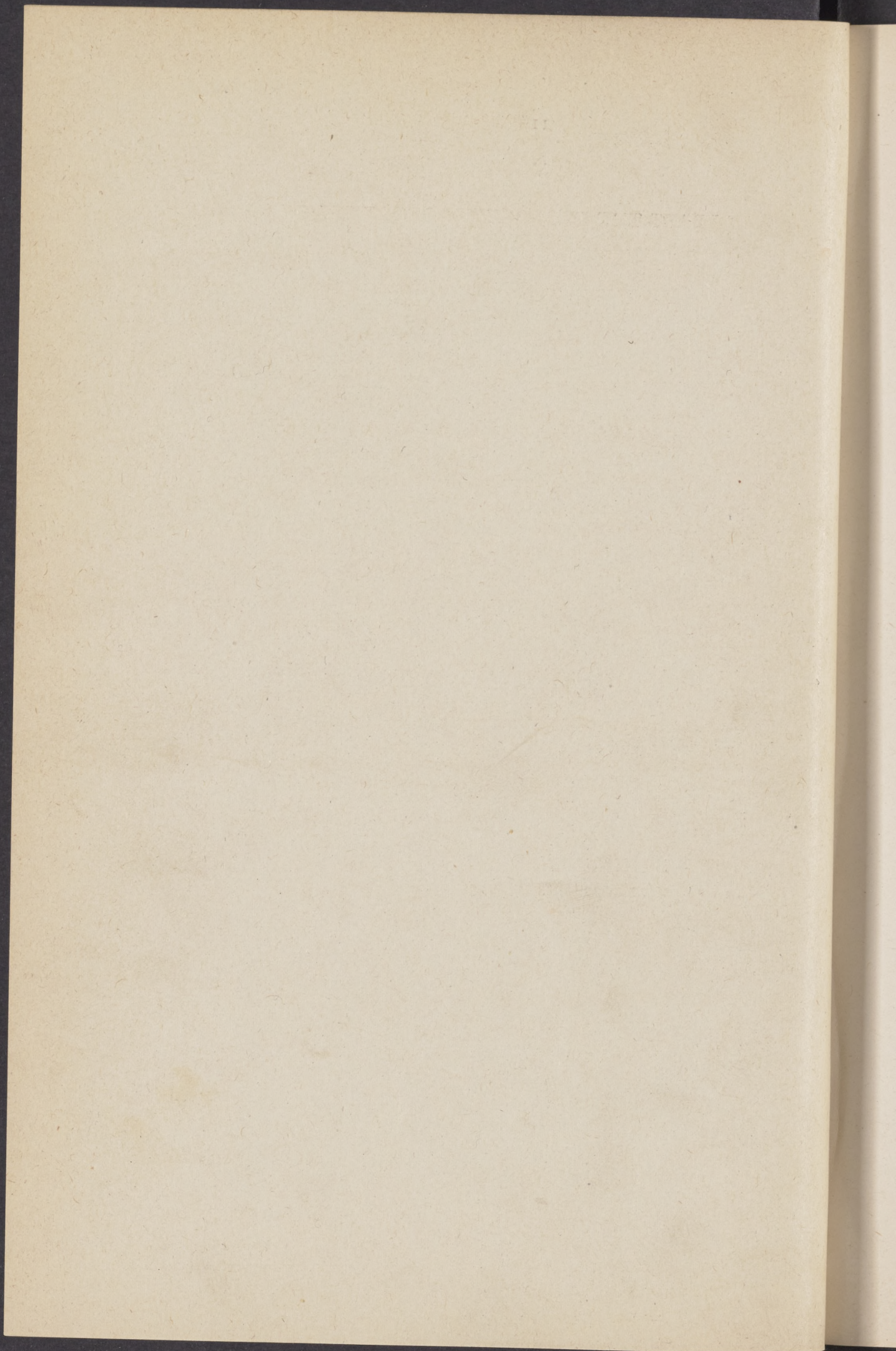
AT LEAST THE PROPORTION OF EXCESS OF
BOROUGH TAXES IS RECOVERABLE.

If for any reason plaintiff is barred from recovering so much of the excess payment as was applicable to State and County taxes, there is no reason why the Borough should not refund what was received for Borough taxes in excess of a rightful assessment. The tax bill (Exhibit P-5, Case, p. 59) shows the rate per thousand dollars for each class of taxes. The municipal or borough tax was \$12.75 per thousand. Applying this rate to the assessment of \$83,000, we find that there was collected for Borough taxes, \$1058.25. On the true valuation of \$34,900, the true tax payable was \$444.97, a difference of \$613.28 — which at least is recoverable from the Borough. 10

The judgment of the Common Pleas should be reversed and *venire de novo* should be awarded, or under the new Practice Act as amended in 1916 (P. L. p. 109) judgment should be rendered in this court in favor of the plaintiff either for \$1243.39 or for \$613.28, according as it shall be held that all the taxes or only those assessed for Borough purposes are recoverable, together with interest from December 20, 1915, and costs. 20

GILBERT COLLINS,
Of counsel for appellant. 30

PATTERSON & RHOME,
Attorneys for appellant. 40



NEW JERSEY COURT OR ERRORS AND APPEALS.

The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church,	}	Brief for Borough of Bradley Beach,	10
Plaintiff Appellee,			
vs.			
The Borough of Bradley Beach,	}	Defendant Appellant.	10
Defendant Appellant.			

PREFATORY.

The Ocean Grove Camp Meeting Association is the owner of an Electric Light Plant, a Water Tank and other property in the Borough of Bradley Beach. In 1915, the Board of Commissioners of Bradley Beach assessed the Association's property at Eighty-three Thousand Dollars (\$83,000.) On December 22, 1915, Frank B. Smith, the General Superintendent of the Ocean Grove Association, paid the Association's taxes as assessed by the Board of Commissioners and sent the Association's check for Two Thousand One Hundred and Forty-five Dollars and Fifty-five Cents (\$2,145.55) to the Borough Collector's office. All bills of the Association passed through Mr. Smith's hands and he certified them. (Case, Page 17). He had the authority and was vested with the discretion to pay all bills and was, in fact, the General Superintendent of the Association. (Case, Page 20). Beyond the mailing of the tax bill, no demand was made by the Borough and no duress or coercion was used by the Borough or any of its officials against the Association. (Case, Page 22).

On December 9, 1915, a notice of appeal to the Monmouth County Board of Taxation was filed with the Bradley Beach Borough Clerk, on behalf of the Ocean Grove Association. The County Board reduced the assessment of the Association's property to Fifty Thousand Dollars (\$50,000). A further appeal was

10 taken to the State Board of Taxation on March 22, 1916, and it reduced the assessment to Thirty-four Thousand, Nine Hundred Dollars (\$34,900). The taxes, according to the valuation fixed by the State Board, would have been Nine Hundred and Two Dollars and Sixteen Cents (\$902.16) instead of Two Thousand, One Hundred and Forty-five Dollars and Fifty-five Cents (\$2,145.55), the sum actually paid. The Association, therefore, instituted suit in the Monmouth Common Pleas Court for the difference or the alleged over-payment of One Thousand, Two Hundred and Forty-three Dollars and Thirty-nine Cents (\$1,243.39). Judge Lawrence, who heard the case, decided in favor of the Defendant. An appeal to the Supreme Court was then taken by the Ocean Grove Association, and the judgment of the Monmouth Common Pleas Court was reversed, and an order made that judgment be entered in favor of the Association for the full amount of its claim with costs.

ARGUMENT.

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I.

In the opinion of the Supreme Court, delivered by Chief Justice Gummere, the fact that the payment of the taxes by Frank B. Smith, Superintendent of the Association, was made without the knowledge of some of his superior officers in the Association, is regarded as throwing some doubt upon the binding effect of the payment upon the Association. The first question, then, which will be dealt with in this Brief, is the question of the power and authority of Mr. Smith to bind the Association in making the payment he made.

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The Defendant Appellant respectfully submits that the power to make this payment was vested in Mr. Frank B. Smith, and that the payment made by him was binding upon the Association.

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Mr. Smith testified (Case, Page 17), that all bills of the Association passed through his hands and must be approved by him. The Treasurer of the Plaintiff Corporation is not a resident of Ocean Grove, where the Association does business and his authority to sign checks is delegated to another person. The custom of the Association is to have Dr. Aaron E. Ballard, the

President, sign some twenty-five (25) checks in blank, and to have these handed to Mr. Smith. (Case, Page 18). Mr. Smith uses them as he requires them. (Case, Page 18). All authority to use the checks as he sees fit is delegated by Dr. Ballard and by the Association to Mr. Smith, and the President signs the checks without any knowledge as to what they are to be used for. (Case, Page 20.)

It is quite evident, the Defendant-Appellant submits, that Mr. Smith is the General Active Business Manager of the Association and that he is clothed with authority to pay all bills and was clothed with authority to pay this one, namely the taxes in question. In fact, he stated on cross-examination, that he pays all taxes when due, without any express authority from the Association, and that the discretion to do so is vested in him. (Case, Page 20). That Mr. Smith, as General Manager, had ample authority to pay the taxes in question, is undoubted. See *Blake vs. Domestic Manufacturing Company*, 64 N. J. Eq., 480, in which it was held,

"Where a corporation's treasurer acts as its general agent from time to time, endorsing large quantities of its commercial paper, it will be bound thereby, if the directors ought to have known that he was so doing."

It is important to compare the action of Mr. Smith in paying the taxes, proceeding from the authority vested in him, as recited above, and the action of the Association in taking the appeal it prosecuted from the Borough's decision. The Minute Book of the Association contain under the date of May 27, 1915:

"The question of valuation of Association Property for taxation was referred to M. S. Daniels, to report." (Case, Page 15).

A report was offered in evidence by the Association which was admitted by the Defendant to be the one made by Mr. Daniels in pursuance of the reference to the matter of taxes to him. This report was submitted to the meeting of the Association and contained under the head "Tax Matters" the following:

"Application to the Bradley Beach Commissioners for reduction of taxes to the Bradley Beach Property, did not result favorably. A further application will be made to the County Board on the 19th inst. and thereafter, if deemed wise by counsel, an appeal will be made to the State Board." (Case, Page 16).

10 There is nothing to show that this report was ever accepted or that the further appeal was authorized by the Association. Moreover, none of the officials ever instructed the Superintendent, Mr. Frank B. Smith, that an appeal would be taken from the first assessment and that therefore he must defer payment of the taxes to the Borough pending an appeal. (Case, Page 24). The officials of the Association knew, or are presumed to have known, the extent of Mr. Smith's authority to pay bills and beyond listening to the report of Mr. Daniels, they made no move nor did they take any step inconsistent with the payment of these taxes by their official who was properly vested with the power to make the payment and whose duty it was to make such payment in the absence of instructions to the contrary from them.

20 Mr. Daniels, after submitting his report to the Association, consulted attorneys (Case, Page 24) and then consulted Mr. J. Otto Rhome, attorney for the Association, who, at the request of Mr. Daniels, prepared an appeal from the assessment of the County Board to the State Board of Equalization of Taxes. Mr. Rhome consulted no one but Mr. Daniels and then sent the petitions to Dr. Ballard with a request to sign them which Dr. Ballard accordingly did. (Case, Page 27). After this, Mr. Rhome informed Mr. Frank B. Smith, who had already paid the taxes, of the appeals, and this was the first time Mr. Smith had any knowledge of them. (Case, Page 22).

30 The Defendant respectfully urges that no authority moving from the Association to Mr. Daniels or to anyone else to prosecute an appeal from the Borough's assessment has been shown. That Mr. Daniels had no authority in the absence of an express authorization upon the minutes of the corporation, to prosecute the appeals in question, is manifest from the decisions upon the subject. The director of a corporation is not authorized as director, to act for the corporation, except in his place as a member of the Board of Directors. *Clement vs. Amusement Co.*, 70 N. J. Eq., 677. Directors by virtue of their office cannot as individuals represent the corporation as agents. *Titus vs. Cairo R. R. Co.*, 37 N. J. L., 98. The President has no authority to contract beyond matters incident to the management of the corporation business. *Millville Traction Co. vs. Gooden*, 53 N. J. Eq., 448.

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The very wording of the minutes authorizing Mr. Daniels "To report," would negative the idea that he was vested with power to act. (Case, Page 15). He did report, but his report was never adopted and his action, moreover, even in taking the appeal, not only was never authorized, but has never been ratified by the Association.

The position of the Association in this regard then, given the most favorable consideration which can be placed upon it, simply establishes the fact that one official of the Association, clothed with unquestioned authority, paid the taxes which were due, and which it was his duty to pay, and that another official, whose authority to act throughout in the manner in which he has acted, may seriously be questioned, has prosecuted an appeal for the corporation of which he is a member. The Defendant-Appellant most strenuously urges that there can be no question of the power of Frank B. Smith to make the payment he made and that the same is binding upon the Association in view of his position and of the circumstances under which it was made.

II.

The most important question in this case is whether or not the payment made by the Association was voluntary in the legal sense and whether being voluntary, it can, in the light of the subsequent developments,—namely, the reduction of the taxes,—be recovered back.

The Borough of Bradley Beach resisted the Association's suit in the Trial Court on the theory that, the payment being voluntary, it could not be recovered back. In this view, the Trial Judge concurred. The legal steps applicable to the case have nowhere been more clearly set down than by Judge Dillon in his work on Municipal Corporations, (Fourth Edition, Vol 2, Page 1145, Section 940), in which the rule is stated as follows:

"In order for such an action to be maintainable it is necessary that the following requisites co-exist: 1. The authority to levy the tax or to levy it upon the property in question must be wholly wanting or the tax itself wholly unauthorized, in which case the assessment is not simply irregular, but absolutely void; 2. The money sued

for must have been actually received by the defendant corporation and received by it for its own use and not as an agent or instrument to collect and assess money for the benefit of the state or other public corporation or person, and; (3). The payment by the Plaintiff must have been made upon compulsion, as, for example, to prevent the seizure of his goods or the arrest of the person, and not voluntarily."

10 In the present case, not only do these three elements not co-exist but it may be said that none of them exists. There is no want of authority in the Borough of Bradley Beach to levy this assessment on property within its jurisdiction and the assessment could not therefore be said to be void on that account. As to the second element, in relation to the distress of the proceeds of the tax, it only partially exists in the present case, because only a portion of the fund collected was retained by the Borough of Bradley Beach, and the balance was turned over to the State and County Taxing authorities who were legally entitled to receive the same. As to the third element, which Judge Dillon recites, namely that the payment must be made under compulsion, there is no proof of any duress, compulsion or threat of any kind and from this standpoint, the case of the Association fails entirely.

20 Throughout the progress of the case, there has been considerable discussion of the applicability of the case of Jersey City vs. Riker, 38 N. J. L., 225, to the present case. In that case, an assessment for the construction of a sewer was set aside on Certiorari by the Supreme Court and a suit was brought to recover back the payment made. In the opinion of the Court, delivered by Chief Justice Beasley, unqualified approval was given to the principles laid down by Judge Dillon and it was held that the assessment, having been set aside, is void, and recovery could be had.

30 It is respectfully urged that in that decision, the Court was simply giving effect to the first element set down by Judge Dillon, namely,

"The authority to levy the tax or to levy it upon the property in question must be wholly wanting or the tax itself wholly unauthorized, in which case, the assessment is not merely irregular, but absolutely void."

40 The assessment in the case of Jersey City vs. Riker, *Supra*, was absolutely void. The authority to levy the assessment was wanting and for that reason

the assessment was set aside and vacated. It is not difficult to distinguish this situation from the one now under consideration, in which there was an existing authority to levy the assessment, but which was simply alleged to be excessive. The Defendant-Appellant submits that there is nothing in the case of *Jersey City vs. Riker, Supra*, which cannot be harmonized with the position of the Borough of Bradley Beach in the present case.

There are innumerable decisions to the effect that a payment made voluntary and not under compulsion cannot be recovered back. A case which is analagous in almost every particular to the one under consideration is the case of *Shenango Furnace Company vs. Fairfield*, a Pennsylvania case reported in 78 Atl., 937. This was an action for an accounting to ascertain the amount paid by the Plaintiff inadvertantly and by mistake on account of such tax in excess of the amount legally due and for a decree that the Defendants pay to the Plaintiff the amount of such excess. The opinion of the Court follows:

"MESTREZAT, J. In ascertaining the right of the Plaintiff to have refunded the sum of One Thousand, Five Hundred and Sixty-six Dollars and Thirty-six Cents (\$1,566.36), two questions must be considered: 1. Was the payment a voluntary one in the legal sense, which prevents its recovery back?; 2. Was it made under such mistake or ignorance of facts that the Plaintiff is entitled to have the money repaid;

"1. Was the payment of the money under the facts of the case voluntarily made by Plaintiff so that he, for this reason, is not entitled to have it refunded? This question is settled by a long line of decisions in this State and hence we are not required to treat or consider it as one of first impression. C. P. Dyer, the Vice-President of the Plaintiff Company, and authorized to act for it in the matter, directed the payment to be made by the proper officer of the Company. While testifying at length in the case, the facts found by the Learned Referee and the Court Appeal being based upon his testimony, he does not even suggest that any official of the Defendant Township at any time ever threatened to resort to legal process for the collection of the taxes or exacted them by duress or went beyond making a demand for their payment. The case is entirely barren of any such facts and it is therefore clear that under the settled law of this State, the payment was voluntary and not such as to justify the Plaintiff in demanding the repayment of the money. (939). If the tax were paid by reason of Dyer's negligence or inadvertance, it is no ground for relief. (943)."

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In this case, the case of *Lackey vs. Mercer County*, 9 Pa., 318, is cited, in which Gibson, C. J., delivering the opinion of the Court, said:

"A single fact in the cause turns the scale against the Plaintiff—the payment was voluntary. The cases agree that a party who has paid an unfounded demand without consideration, cannot recover it back; it was his folly to part with his money and he must submit to lose it. His course was to appeal from the Assessor to the County Commissioners and if they would not exonerate him, stand a distress and sale, for which he would infallibly have recovered by action of trespass."

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It may be further added that in the case of the *Shenango Furnace Co. vs. Fairfield*, *Supra*, the assessment was subsequently reduced as it was in the present case.

This same theory has been adhered to in New Jersey by the Court of Errors and Appeals in the recent case of *Koewing vs. West Orange*, 98 Atl. Rep., 203.

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The authorities cited, together with this case, may be regarded as decisive of the case in hand. In the case of *Koewing vs. West Orange*, *Supra*, Chancellor Walker, delivering the opinion of the Court, said:

"Among the six reasons upon which the motion to strike out was grounded, one was that the complainant showed the taxes to have been paid voluntarily and did not show compulsion. If this contention be sound, it is wholly sufficient to sustain the order appealed from.

"We are of the opinion that the payment sought to be recovered was free from the taint of duress or other compulsion and was voluntary. Therefore the complaint was properly stricken out as it showed no cause for action.

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"If a person, without mistake of fact, or in the absence of fraud, duress, or coercion, pays money on a claim which is not enforceable against him, the payment is deemed a voluntary one and cannot be recovered."

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That the decisions are universal on the subject, is unquestionable from the decisions in other States. Action will not lie to recover the amount of taxes illegally assessed but voluntarily paid. *Dunnell Manufacturing Company vs. Newell*, 15 R. I., 233. If the taxpayer voluntarily pays taxes, he cannot afterwards recover them back, even if he afterwards discovers in the higher taxing authority, on account of the State validating defects in the assessment. *Sexton vs. Pepper*, 28 Hun. (N. Y.) 31. Where the State Treasurer

had made no demand upon the Plaintiff for the payment of taxes nor had he made any levy upon any of his personal property nor threatened to seize any thereof, to enforce payment of the said taxes, no recovery could be had. *Baker vs. Grand Rapids* (Mich.) 8 West Rep., 135.

One who pays without protest is estopped from disputing the legality of the tax. *Busy vs. Noland*, 39 Ind., 234; *Cooley on Taxation*, 812. Where the payment is made without protest, the fact that an appeal is brought by others to have the tax declared void, is not enough to entitle the parties paying to recover back. *McCricart vs. Pittsburgh*, 88 Pa., 133. 10

III.

In the opinion of the Learned Chief Justice Gummere, in the present case, mention is made of the fact that a Notice of Appeal was served upon the Borough Collector and that after the receipt of such appeal the Borough Collector paid certain of the moneys to the County Collector. The Learned Chief Justice decides that the Borough, if it made the payment with full knowledge of the existence of an appeal, must suffer the consequences of its act and cannot call upon the Association to bear the loss. The Defendant-Appellant respectfully submits that the payment made School and County Taxes, was made because the Borough of Bradley Beach is legally bound to make the same at the time it was made. There is no legal machinery by which a municipal taxing authority would be entitled to retain moneys due to the State and County authorities merely on account of the pendency of an appeal. There is also a duty upon the municipality to pay over a proportion of its collectable taxes even though they have not yet been collected, based upon the assessment made by the municipality and a penalty results from the failure of the municipality to do so. Serious confusion would certainly arise if this proportionate amount was subject to constant change by the subsequent later decisions of appellate tax boards. The Defendant-Appellant respectfully urges that the onus was upon the Ocean Grove Association and that by pursuing a course legally provided for it, namely an appeal to the County Tax Board, and the withholding of the payment of its taxes, the present 20 30 40

situation could have been avoided. By reason of its failure or neglect to avail itself of its legal remedies, a loss has occurred which it, and not the Borough of Bradley Beach should bear.

SUMMARY.

10 In summary, the Defendant-Appellant submits that the judgment of the Supreme Court should be reversed and the finding of Judge Lawrence in the Monmouth County Common Pleas Court affirmed, for the following reasons:

1. The Superintendent of the Ocean Grove Association was clothed with the authority of the Association to make the payment in question and that payment having been made, was binding upon the corporation and must be regarded as a voluntary payment by it.

20 2. There was authority in the Borough of Bradley Beach to levy the assessment. The payment by the Association was not made under that compulsion which would entitle it to a legal remedy. The Defendant has not received all of the amount in question for its own use but has collected a large part thereof merely as agent for other political corporations and a verdict against it would penalize it for a mistake of another corporate body, namely, the Ocean Grove Association.

30 3. There being authority in the Borough of Bradley Beach to levy the assessment and the same having been not void but merely excessive and having been voluntarily paid, it cannot be recovered back.

The Borough of Bradley Beach therefore respectfully submits that the Ocean Grove Association should be denied recovery and the decision of the Supreme Court allowing recovery should be reversed.

WARD KREMER,

Attorney for Defendant-Appellant,

JOSEPH M. TURNER,

of Counsel.

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Wuthen Bond

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