NEW JERSEY

Court of Errors and Appeals.

NICHOLAS C. DEMAREST, *Pl'tff in Error,* vs. THE INHABITANTS OF THE TOWNSHIP OF NEW BARBADOES, IN THE COUNTY OF BERGEN, *Def'dts in Error.*	*Writ of Error to Bergen Circuit.*

POINTS OF PLAINTIFF IN ERROR.

I. The Township Committee is authorized by law to audit the accounts of the township officers, and superintend the expenditure of township moneys, and in auditing and settling the bills of Mr. Demarest it acted within the scope of its authority.

See Nixon's Digest, p. 979, *Sec.* 12.

II. In making the settlements, both the Collector and the Township Committee acted in good faith. It was believed that the charges were proper and legal, and there was no fraud or mistake of facts.

III. If there was a mistake of law with reference to the fees to which the Collector was entitled, no advantage can now be taken of that mistake. The accounts having been settled and ordered paid, in writing, by the Township Committee—the agent ot the Inhabitants—the corporation is bound by that settlement.

IV. By the 12*th Section* of the Township act, *Nixon's Digest, p.* 979, the Township Committee is directed to report its accounts and expenditures to the inhabitants at any annual or other town meeting, and by *Section* 109 of said township act, *Nixon's Digest, p.* 993, the Township Clerk is directed to publish annually the accounts, receipts and expenditures of the Committee. These accounts and reports, including the payments to Mr. Demarest, were regularly made; but the inhabitants of the township, neither by vote, resolution, or other act, repudiated the settlement; on the contrary, they approved the same by voting appropriations for each current year thereafter, without any reference to or calculation upon the recovery of any overpayments from Mr. Demarest.

V. By the 39*th Section* of the tax law, *Nixon's Digest, p.* 943, it is provided that all Township Collectors shall render to the Township Committee, when required, a true account of all moneys which they shall have received and not paid over to the County Collector, which moneys such officers are to pay on demand to the Township Committee; and, in case of default, the Township Clerk is authorized and required to prosecute for the same in the name of the inhabitants of the township. In this case Mr. Demarest did settle with each of the Township Committees for the years he was Collector, and no subsequent Township Committee had the power or right to call him to a further account. The transactions for those years are closed, and cannot be opened again.

VI. Even if he could be called upon to account under the said 39*th section* of the *tax law* no demand was ever made upon him; besides that section only refers to a recovery of such moneys as belong to the county.

VII. The only provisions in the statute for bringing suit against the township Collector are

1. When he refuses to perform his duty, and thereby taxes are lost.

See Nixon's Digest, page 940, *sec.* 15.

2. Where he refuses or neglects to perform any duty by law imposed, and then he shall forfeit $32 for each offense. *Nixon's Digest, p.* 939, *Sec.* 14.

3. Where he does not pay over to the County Collector, he can be sued by that officer.

Nixon's Digest, p. 941, *Sec.* 25.

4. Where he refuses to account to the Township Committee when required.

Nixon's Digest, p. 943, *Sec.* 39.

This case does not come within either of those provisions, and there are no other statutes upon the subject, except *Sec.* 108, *page* 957, *Nixon's Digest*, which provides that if any Collector shall unlawfully retain any taxes collected by him he shall be guilty of a misdemeanor.

VIII. It is alleged that the over-payments were taken in part from the township taxes, the county taxes, the State School fund, and the Hackensack Improvement fund. These several accounts have long since been settled and adjusted, and the township has no right or claim to the over-charges (if any), taken from the State, School, and the Hackensack Improvement funds.

IX. The Township Committee have a discretionary power in using and appropriating the funds in hand belonging to the township, so long as the same are used for township purposes; these funds were used in settlement of claims made against the township.

See State, Bradley, pros. v. Council of Hammonton, 9th Vroom, p. 430, *and cases there cited.*

The Township Committee may not have power to run the township in debt. In making settlement with Mr. Demarest

only funds in hand were used. These settlements were regularly made under resolutions passed by and entered on the minute books of the Township Committee.

X. It is claimed, that under the statute the Collector is only "entitled to receive" certain fees, and indeed he could not by suit at law recover more than lawful fees, but the question was what were the proper fees, and both the Collector and the Township Committee preferred an amicable adjustment of the accounts to litigation, and therefore the Committee exercised its discretionary power.

See State, Lewis, pros. v. Freeholders of Hudson, 8th Vroom, p. 254.

XI. Any powers that are discretionary, are in their nature judicial.

See Township of Morris, v. Carey, 3 *Dutcher, p.* 377, and authorities there cited.

If then the Township Committee exercised its discretionary power or acted judicially, its action cannot be reviewed in a suit against the plaintiff in Error.

XII. In making the settlement there was no mistake in matter of fact, and no fraud, and the money having been voluntarily paid, it cannot be recovered back.

See Mayor of Jersey City, &c., v. Riker, 9th Vroom, p. 225, *McGregor v. Erie Railway,* 6 *Vroom, p.* 89. 2 *Dillon on Corporations, p.* 859. *Supervisors of Onondaga v. Briggs.* 2 *Denio, p.* 26, *and* 2 *Hill, p.* 135. Snelson v. Comr. of Madison 16 Ind p 29

XIII. The fees paid to the Collector were not in excess of those allowed by law.

NEW JERSEY

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Court of Errors and Appeals.

NICHOLAS C. DEMAREST, Plaintiff in Error. *vs.* The Inhabitants of the Township of New Barbadoes in the County of Bergen, Defendant in Error.	*Error to Bergen Circuit.* *Points of Def't in Error*

1. Collector is not entitled to any fees except such as are given by some statute.

2. Township Committee have no power to allow him any other fees.

They have no common law powers (Callahan vs. Township of Morris, 1 Vroom p. 160.)

Their statutory power is found in Nixon, p. 979, Sec. 12, authority to *examine, inspect and report.*

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Bergen Circuit.

THE INHABITANTS OF THE TOWNSHIP OF NEW BARBADOES, in the County of Bergen, vs. NICHOLAS C. DEMAREST.	*In Case.*

The declaration in above case contains only the common counts.

The plea is the general issue.

The following bill of particulars was furnished on demand, viz.:

NICHOLAS C. DEMAREST *to the Inhabitants of the Township of New Barbadoes, in the County of Bergen, Dr.*

To moneys of the plaintiffs' retained by the defendant, or paid to him as fees or compensation as collector, without authority of law, as follows, viz.:

1873—April 8.	Overcharged 274 names at 12 cts.,	$32	88
" 8.	State School Tax 1,334 names at 8 cts	106	72
" 8.	Commission Tax, 839 names at 8 cts.	67	12
" 8.	Special School Tax No. 32, 546 names at 8 cts., . .	43	68
" 8.	Special School Tax No. 10, 59 names at 8 cts., . . .	4	72
" 8.	Overcharged percentage on school mon ey $8,726.89 at 3-4 of 1 per cent., . . .	65	45

April 8.	Fees illegally charged and paid, 16 names at 24 cts., . . .	$3 84
		$431 13

Interest will be claimed on the said sum of four hundred and thirty one dollars and thirteen cents from the twelfth day of April, 1873, until the entry of judgment final.

1874—April 10.	Overcharged 250 names at 12 cts.,	$30 00
" 10.	County tax, 1,156 names at 6 cts.,	69 36
" 10.	Bounty and interest tax 1,156 names at 6 cts., . . .	69 36
" 10.	Town poor and road tax, 1,156 names at 6 cts., . .	69 36
" 10.	State school tax, 1,156 names at 6 cts.	69 36
" 10.	Special school tax, 971 names at 6 cts.	58 26
" 10.	Commission tax, 808 names at 8 cts.,	64 64
" 10.	Overcharged percentage on school moneys $13,454.36 at 3-4 of 1 per cent., . .	100 90
" 10.	Fire tax, 1,070 names at 6 cts.,	64 20
		$595 44

Interest will be claimed on the said sum of five hundred and ninety-five dollars and forty-four cents, from the 10th day of April, 1874, until the entry of judgment final.

1875—April 8.	Overcharged 250 names at 12 cts.,	$30 00
" 8.	County tax, 1,200 names at 6 cts.,	72 00
" 8.	Bounty tax, 1,200 names at 6 cts.,	72 00
" 8.	Road, poor and town tax, 1,200 names at 6 cts., . .	72 00
" 8.	State school tax, 1,200 names at 6 cts.,	72 00
" 8.	Special school tax, 1013 names at 6 cts.	60 78
" 8.	Commission tax, 841 names at 8 cts.,	67 28
" 8.	Fire tax, 1,135 names at 6 cts.,	68 10
" 8.	Overcharged percentage on school money, $12,491.80 at 3-4 of one per cent. . .	93 68
		$607 84

Interest will be claimed on the said sum of six hundred and seven dollars and eighty-four cents from April 9, 1875, until the entry of judgment final.

SAMUEL R. DEMAREST, Jr.,
Atty. for Plffs

The following bills show the fees received by the defendant and allowed by the Township Committee for the respective years the defendant was collector:

EXHIBIT B.

HACKENSACK, April 8, 1873.

New Barbadoes Township to N. C. DEMAREST, *Collector's Fees.*

To 1,750 names at 12 cts., - -	$210 00
260 dogs, at 2 cts, - - -	5 20
State school tax, 1,334 names at 8 cts., -	106 72
Bounty tax, 1,334 names at 8 cts., - -	106 72
Commission tax, 839 names at 8 cts., -	67 12
Special school No. 32, 546 names at 8 cts., -	43 68
Special school No. 10. 59 names at 8 cts., -	4 72
Percentage on school money, - -	112 24
16 names at 24 cts., - - -	3 84
	$660 24
Commissioners of Appeals one day, -	2 00
	$662 24

Rec'd payment,

N. C. DEMAREST.

EXHIBIT E.

Township of New Barbadoes, for the year 1874, *to* N. C. DEMAREST, *Collector.*

To 1,549 names at 12 cts., - -	$185 88
To 1,156 names, county at 6 cts., - -	69 36

To 1,156 names, bounty and interest at 6 cts.	69 36
To 1,156 names, town, poor and road at 6 cts., -	69 36
To 1,156 names, State school at 6 cts., -	69 36
To 971 names, special school at 6 cts., -	58 26
To 808 names, Commission at 8 cts., -	64 64
To 256 dogs at 5 cts., - - -	12 80
To Percentag on $21,203.04 school money at 3-4 of 1 per cent., - - -	159 02
Collector's fees, Palmer, - - -	6 87
Advertising the same, - -	3 20
Adjourning the sale 4 times, - -	5 00
1 day's meeting Com. Appeals, - - -	2 00
1070 names, fire at 6 cts., - - -	64 20
	$839 3[illegible]

Rec'd payment,

N. C. DEMAREST

EXHIBIT II.

Township of New Barbadoes to N. C. DEMAREST, *Collector, Dr.*

April 8.	To State tax, 1,553 names at 12 cts.,	$186 36
	To county tax 1,200 names at 6 cts ,	72 00
	To bounty, 1,200 names at 6 cts.,	72 00
	To road, poor and town, 1,200 names at 6 cts.	72 00
	To State school 1,200 names at 6 cts.	72 00
	To special school, 1,013 names at 6 cts.,	60 78
	To Commission, 841 names at 8 cts.,	67 28
	To fire, 1,135 names at 6 cts., -	68 10
	No. dogs, 257 names at 5 cts., - -	12 85
	Percentage on school money, $21,091.52 at 3-4 of 1 per cent., - -	158 18
		$841 55

Bergen Circuit Court.

The Inhabitants of the Township of New Barbadoes, in the County of Bergen, *vs.* Nicholas C. Demarest.	*Before Judge Dixon.*

January 12, 1878.

the day and place within contained, that is to say, on the eenth day of December, A. D. 1877, before the Hon. Jonathan Dixon, Associate Justice of the Supreme Court, at New Barbadoes, in the county of Bergen the said issue within contained came on to be tried before said Justice (a jury by the consent of the attorneys of the plaintiff and defendant being waived). The plaintiff's case was opened by Mr. Demarest.

The plaintiff to prove the issue on its part read the following depositions:

Nicholas C. Demarest the defendant being duly sworn on his oath saith— 1

I have here the collector's duplicate for the year 1872. This is it.

(Book produced by witness and marked for identification Exhibit A.)

I rendered a bill for the collector's fees for 1872 and 1873.

(Paper being shown witness says);

This is the bill for the year from April 1872 to April 1873. The first year I was collector. (Bill is marked Exhibit B.)

2 The amount of this bill is $662 24. Was paid to me for the matters mentioned in the bill, by the Township Committee. They passed it.

Question. The money or the amount $662 24, was paid by you to yourself as collector out of moneys collected by you as collector of the township of New Barbadoes, was it not?

Answer. Yes, sir.

Q. What is meant by the first item, "1.750 names."

A. "1,755 names" is for State taxes, I suppose. The names are on the book. I mean that that is the number of

3 names of persons on this book.

Q. Are not some of those names counted more than once in making up that number?

A. I suppose there are some names counted more than once in that book, in making up that number.

The item "260 dogs" means that there were 260 dogs taxed.

The seventeen hundred and fifty names includes the names of persons who did not pay their tax, as well as those that did. I did not collect all the taxes that were assessed on this book. I connot tell exactly the amount of taxes on the book I did not

4 collect. There were a few delinquents that I did not get, bad debts, or moved away or could not be found.

The book, (Exhibit A), does not indicate those that could not be found. The pencil crosses in the margin indicate those taxes which were paid. There may be some who paid and who are not marked with a cross. Those that are not marked with a cross on my duplicate (exhibit a) were not paid unless they appear on my private book.

5 (A book produced by witness and marked Exhibit C, being referred to, he says)

This is the private book that I mean. This book and another private book which I have here, contain a statement

of all the taxes collected, after the settlement with the Town Committee in each year.

(The last book referred to is marked Exhibit D). 6

Q. Can you tell what amount of taxes for the year 1872 have been collected by you since you settled with the Town committee in 1873?

A. No, sir; not now.

I have paid over to the Township Committee all the taxes of 1872, I have ever collected. The taxes collected after the first settlement I accounted for in my next settlement with the committee.

After April 8, 1873, I next settled with the Township Com- 7
mittee in April 1874. I think in April. It was in that Spring.

(Paper being shown witness and marked Exhibit E, he says)

This is my bill for the year from April 1873 to April 1874.

Q. On your first bill, Exhibit B, you have charged 1,334 names State School tax. Why is that different from the number of names for State tax?

A. There was not as many. The difference represents the 8
number of those who only pay poll tax.

The item "Commission tax, 839 names," refers to taxes collected for the Hackensack Improvement Commission.

The item "Per centage on School money" is the 3-4 per cent. on State School money, and all other school money to which the collector is entitled. I can't tell how much money I charged the per centage on. I told them the amount at the time. They did not put it on the bill.

The item "16 names" refers to that number of names that were assessed and collected by me, and which are in the back of the book. I have here the duplicate for 1873. (Witness 9
produces the same and it is marked Exhibit F.)

Where there are names marked, it indicates that they are paid. There may be a few that were paid and are not marked.

Q. Have you no book which shows what taxes have been received by you for taxes for that year, and when they were so received?

10 A. No, sir.

Q. Then there is no way of ascertaining what taxes you have received for the year 1873 except by the crosses marked opposite the names in the collector's duplicate for that year, and the entries which are found in these two private books which you have mentioned.

A. No.

Q. In Exhibit E you charge per centage on $21,203.04, school. What does that mean?

A. School money at 3-4 per cent. It means there was that

11 amount of school money received and paid out that year.

I did not receive $21,203.04 from the County Collector. I received the State money from him, I collected all the School money on the duplicate, and the Special School Tax I paid to the districts on orders. The State tax I paid to the County Collector, who repaid to me the amount to which the township was entitled.

Q. Did the amount so repaid to you by the County Collector and the Special School Taxes of that year, collected by you, aggregate the sum of $21,203.04?

12 A. I think it did. I don't think any of these books show the amount the County Collector paid back to me. There is a book that shows it. The private book already marked shows it. The amount for 1873 $5882.58.

Q. Can you give the items of the amount $21,203.04 of School money, on which per centage is charged?

A. I also received the additional sum of $1,178.80 from the County Collector, being our share of the State appropriation of one hundred thousand dollars. The Special School Taxes which I collected are to be added to this, and the State School moneys which I paid to and received from the County Collec-

tor and paid to the schools, make up the amount. 13

I have here the Collector's duplicate for the last year that I was in office. This is it.

(Duplicate produced, being for the year 1874, and is marked Exhibit G).

I was paid $83 93, for Collector's fees for 1873. For 1874, I was paid $841.53 for Collector's fees. This is the bill for that.

14

(Bill for 1874 produced and marked Exhibit H.)

It was settled for April 8, 1875, or about that time.

I have had a settlement with the Township Committee since that time. I had a settlement in 1876, after my term expired. That was the last one. I have collected a few dollars since then $49·07. I have paid all this over to the present Collector Samuel Taylor. I paid the last of it some time last Fall. The Tax warrants for 1872, 1873 and 1874 are in my possession at home. I will produce them at a future hearing. 15

Examination adjourned to Monday evening Nov. 12, 1877, 7 o'clock, by consent of all parties.

Monday November 12, 1877, 7 *o'clock, P. M.* 16

Examination resumed pursuant to adjournment, in the presence of the same parties whereupon the defendant, Nicholas C. Demarest, further deposes and says:

I cannot tell from the Tax warrant what part of the taxes of 1872 are unpaid. The Tax warrants will show, but I cannot tell, as I have not examined them. The same is true of the Tax warrants of 1873 and 1874. All the taxes that were paid were marked with a cross opposite the names on the Tax warrant, except in the case of the warrant of 1874. All the real
17 estate tax in that warrant has been taken out and put in a warrant to Mr. Taylor the present Collector.

Q. Can you tell me what you paid out to schools in 1874?

A. Yes, sir; from April 1874 to April 1875, I

Paid to	District	32	$4,076.97
"	"	31	2,711.87
"	"	33	1,762.96

This is what I paid to schools. I paid to County Collector
18 for same year—State School money, $7,191.96. I received from County Collector State School Surplus and Apportionments $5,380.57.

For the 1873 I paid to	District	32	$3,628.30
	"	31	2,665.46
	"	33	1,358.58
	"	10	96.44

	Paid County Collector State School Money	7,571.58
19	Received from " " " " "	5,882.58

For the year from April 1872 to April 1873, I paid as follows:

To	District	No. 33	$1,060.38
"	"	" 32	2,719-34
"	"	" 31	2,107.03
"	"	" 10	152.18
"	County Col. State School Money		7,627.91
Rec'd from	" " " " "		5,118.77

Q. Can you give us any more light on your accounts with 20
the township as collected, than you have done?

A. No more than I have done so far.

Q. Can you tell how many names in your bill for 1872
have been charged for more than once?

A. No, sir.

Q. Can you tell how many names have been charged for more than once in your bill for 1873?

A. I can't tell any more than this. They were charged once in every School District where they owned property, if they owned property in different districts. If they owned
more than one parcel of property in a district they were only 21
charged once. It was the same in 1874.

Q, Can you tell what the total amount of taxes of all sorts, put in your hands to collect for 1872, was?

A. The duplicate will tell.

(Witness referring to duplicate says):

22

I think it states here $50,330.20, if it is added right. I cannot tell by this book what the Commissioners of Appeals deducted. I think they deducted about $500.

Q. Can you tell from these books and papers here, the total amount of taxes collected by you for 1872?

A. I cannot. I have not the report in my possession.

Q. Can you tell the amount of taxes put in your hands for collection for 1873.

A. $55,039.37, which appears on the duplicate. There was also the sum of $72.98 taxes which I assessed, not on the duplicate. I cannot tell what the total of my collections was for 23
that year. I have not the report in my possession. The report of the Town Committee will show.

Q. How did you ascertain the results that went into your report?

A. At the proper time, all the names of persons whose

taxes were unpaid were taken from the duplicate and included in a tax warrant.

After executing the warrant, the taxes paid were checked off, and the amount of those unpaid was deducted from the duplicate and the balance should be the amount collected.

24 The duplicate for 1874 calls for $52,251.86. I have no idea what amount of uncollected taxes for the three years that I was collector remained.

I don't know anything about it. I could not say whether it would be as much as four or five thousand dollars.

Being cross-examined, witness says:

25

The Township Committee the first year I served were James C. Demarest, David Van Horn, William Harrison, David Parcels and William Van Saun. Van Saun is one of the Township Committee now.

He had been collector before me.

When I settled with the Township Committe, I produced my duplicate and all my accounts for that year.

My books and accounts were then examined by the committee.

26 The report was made out there by me and them. I did not then know how to make out my bill, except what I learned from the assessor. The Township Committee sanctioned the bill that it was all right.

In the first year the number of names 1,750, on the bill was so large, because we counted every name on the duplicate as often as it appeared. I understood it at that time to be right. The committee did not object to any of the charges or items of my bill for that year. I was paid by their giving me an order for the amount of my bill.

27 The second year I was collector the committee was James C.

Demarest, David Van Horn, William H. Harrison. I think John Berdan Conkling and David Parcels I think.

At the time I settled with the committee, I produced all my accounts and documents before them. They examined my books and accounts. The report was made out by me and them. I presented my bill to the committee. They did not make any objections to the items or charges.

The bill also was paid by order of the Township Committee.

The third and last year I was collector the committee was, I think, David Van Horn, James C. Demarest, William H. 28
Harrison, David Parcels, and Jacob H. Tanis.

In my settlement with this committee I produced all my books and accounts. They examined them and made no objections at all to the accounts or the report, except that I had charged myself, by mistake, with dog money, which they corrected in my favor. They objected to some of the items in my bill. They objected to two items, which they left to the advice of their counsel. These they afterwards settled according to the bill. I also agreed to submit the matter to their counsel and abide by his decision. The counsel decided that 29
the bill was correct. I think one item was for fire taxes.

Q. Did you, in any of the settlements you made with the Township Committee keep back any of your accounts, or in any way mislead them with reference to the number of names or amounts of money collected by you and paid out?

A. No, sir.

I explained to them my accounts and made out two bills with all the names and the number I charged in my bill. I did not withhold any information from the committee while I was collector.

My bill for the last year was paid by warrant from the 30
committee.

Q. Have you withheld from the Township any money collected by you and due to it during the three years that you were collector?

A. No, sir; not that I am aware of. I have no moneys

now in hand belonging to the Township that I know of.

Q. Was your bill the first year that you were collector
31 made out as similar bills were made by the previous collector?

A. I could not say positively; only by hearsay.

I got my advice from the assessor, and made out my bill according to the information derived from him, as to what other collectors charged. That assessor was Jacob M. Hill. He was elected the same year that I was. I was elected the last time in 1874.

When I received the order from the committee for my bill, I receipted the bill and endorsed the order, and put it with the other vouchers which I gave to the Township Committee.

I think it was this last year that I first learned that the
32 Township Committee claimed that I had received illegal fees.

It was early last spring. They have never presented me with any statement of the items of their claims.

Re-direct:

I am sure that I have paid over to the Township all interest that I have received on taxes.

33 NICHOLAS C. DEMAREST.

Sworn and subscribed to before me, this twelfth day of November, 1877.

W. M. JOHNSON, M. C. C.

The plaintiff then called John Westervelt, who, being duly
34 sworn for the plaintiff, testified as follows:

Q. Have you examined any of those duplicates, with reference to which the Collector was examined?

A. Yes, sir; the Collector's duplicates for 1872, '73 and '74

Q. Have you examined to see what the number of names is on those duplicates that have been repeated, and counting those that have been repeated more than once?

A. I have counted the number of names upon the duplicates 35
of 1872 that do appear more than once.

Q. How many do you find of such?

A. There are 170 re-charged from twice to thirteen times.

Q. What do you mean?

A. I can tell better by referring to my paper. I was mistaken in my statement. There are 127 that appear more than once, some twice, three times, four times, and five times, so along up to thirteen times.

Q. How many appear twice?

A. I cannot tell now without going through this list. I think 36
there are 71 that appear twice, and the balance of them ranging from that to thirteen times; I can read them all off.

By the Court:

Q. The thing Mr. Voorhis wants to know is, how many names there would be on the duplicate if each name was written only once? 37

A. There would be only 127 where there appears now 270; adding 127 and 270 together, would give the amount of names that do appear on the duplicate.

Q. There are 270 that appear but once?

A. Yes, sir; there are 397 names which should be counted only 127.

Q. You think there are how many on the duplicate altogether?

A. 1766.

Q. 1496 would be the exact number on the duplicate counting every name but once? 38

A. Yes, sir; I believe so.

By Mr. Voorhis:

Q How many do you find on the duplicate of the next year?

A. I could not ascertain.

Q. What did you do about it?

39 A. I left it as it was.

Q. Did you make any examination at all?

A. I did; I went over the books, and found it was impossible to find that out, according to the way it was described by Mr. Demarest, and the same with 1874.

Q. Did you find any names that occur more than once?

A. Yes, sir; but I made no minute of it.

Q. You can not tell how many they aggregated?

A. I can not.

40

The plaintiff then called William H. Harrison, who, being duly sworn for plaintiff, testified as follows:

Q. You are the Town Clerk of the township of New Barbadoes?

A. Yes, sir.

Q. Have you the books of minutes of the Town Commit-
41 tee?

A. Yes, sir.

Q. Have you them here—the original books?

A. Yes, sir.

Q. Will you produce them?

A. Yes, sir. (Book produced).

Q. Does that book show the annual reports of the finances of the township at the close of the years that Mr. Demarest was Collector?

A. Yes, sir.

Q. Turn to those pages?

A. The first year's report is April 12th, 1873. 42

Q. What is the date of the next one?

A. The date of the next one is April 11th, 1874.

Q. And the next?

A. April 9th, 1875.

Q. How were those statements and reports recorded there

made up? Were you present at the making up of them?

A. Yes, sir; I was present at each one; I was a member of the Township Committee at that time. 43

Q. Was Mr. Demarest present at the making up of those reports?

A. The first year he was there very little, on account of the very severe illness of his child. He stated to the Committee that he was under the impression the child was dying. Each other time he was there. I assisted in making up the report as recorded here. He had always books and papers there that were required, or asked for by the Township Committee.

44

Cross-Examination by Mr. Ackerson:

Q. Please look at the first report—what is that book?

A. It is the minute book of the Township Committee of New Barbadoes.

Q. For how long—commencing when?

A. Commencing from the year 1858, April 16.

Q. The reports for each year are in there, from that time down to the present?

A. Yes, sir; the written report of each year is in here; the printed report of last year is in the other book.

Q. All Mr. Demarest's are in there? 45

A. Yes, sir; the printed copy of his last report is in the other book.

Q. Does it differ from this book?

A. No, sir; each year we paste the printed copy of the report in the book. I have the report now dated April 12th, 1873; that is the time it was made up. The Township Committee met on that day.

Q. That is the first one?

A. Yes, sir.

46 Q. The Township Committee met the day before that?

A. Yes, sir; they never get through in one day; it generally took one, two, and sometimes three days.

Q. How long were they at work making up this report?

A. I can tell by referring to the minutes. Two days, according to the minutes I have here—April 11th and 12th.

Q. Were you one of the members of the Township Committee then?

A. Yes, sir.

Q. Did you assist in making up the reports?

47 A. Yes, sir; generally did the most myself.

Q. What papers did you have of Mr. Demarest?

A. His journal, his receipt book, and his vouchers.

Q. Is the amount of his bill included in this report?

A. I presume it is; it ought to be.

Q. Just see?

A. "N. C. Demarest, Collector, $662.64."

Q. Who were the Township Committee besides you at that time?

A. David Van Horn, James C. Demarest, myself and John B. Conklin.

48 Q. Were the Township Committee all there at the time of making that report?

A. They were.

The Court:

You may take it for granted that all these things were regu-

larly done. It is hardly necessary to prove all things in detail. 49

Mr. Voorhis:

We admit that, if it was not unanimous, it was done by a lawful majority of the Committee.

50

Q. Was his bill there at that time, or any of those times?
A. The bill was there this day; it was there that time, or the day previous.

The Court:

It may be conceded, I suppose, that these bills were regularly audited and passed.

51

Mr. Voorhis:

We admit that the bills were regularly before them, and they were audited and passed by them.

52

Q. In what way was the Collector's bill paid?
A. By giving him a draft for the amount of money, which drafts are now in my possession, with the exception of the first year, which I cannot find. It was undoubtedly given.

By the Court:

A draft on himself?
A. Yes, sir.

53

By Mr. Ackerson:

Q. Have you them here?
A. Yes, sir; I have the two last. (Witness produces them). They are drawn up and signed by the chairman of the Township Committee.
Q. Did Mr. Demarest return his receipted bill to the Committee?
A. Yes, sir. The Committee do not follow out the custom
54 of having all bills receipted; they take the vouchers.
Q. These were endorsed by Mr. Demarest, and handed back?
A. Yes, sir; and the Committee examined them in making out all the vouchers. I cannot find a voucher for the first year, but that is my impression that it was the same. Those vouchers correspond with his bill each year.
Q. The orders were given by the chairman of the Township Committee by authority of the board?
A. The chairman ordered the clerk to draw the draft for the amount of money. The clerk drew the draft and the
55 chairman signed it by the consent of a majority of the board, not always by a unanimous vote.

Plaintiff's counsel offered in evidence the papers containing reports referred to.

The Plaintiff then called Nicholas C. Demarest, who being
56 duly sworn for plaintiff, testified as follows:

Q. Will you take the duplicate of your second year, 1873 and 1874, and tell us, whether on the duplicate for the second year any names occur more than once. First, what is the whole number of names on the duplicate that you hold in your hands now, the duplicate of 1873.

A. The whole number is 1,778.

Q. Now on that does the name of any person appear more than once?

A. Not to my knowledge. It does occur different times in this book; yes, sir.

Q. Could you tell without much delay about how often 57
the same name occurs?

A. I cannot, only from a statement of my own. I have examined it.

(Witness examines papers.) The whole amount is 1,778 for the year 1873, charged once 1549.

By the Court:

58

Q. What do you mean by "charged once?"

A. Charged in my bill. The whole number is 1376, county and interest.

Q. The whole number includes those that are duplicated and triplicated?

A. Yes, sir.

By Mr. Voorhis: 59

Q. How many are there in all, counting once?

A. 1549, bounty and interest. The whole number on the duplicate is 1,376, charged once 1,156; county taxes 1,376, whole number charged once 1,156; township poor and road 1,376, charged once 1,156; state and school tax the same;

special school 1,178, whole number charged once 971; fire taxes 1,280, charged once 1,070; commission whole number
60 1,006, charged once 808.

Q. I understand you to say that in the year 1873, you did not count any name more than once?

A. That is it, sir.

Q. So with 1874?

A. Yes, sir; it was only the first year.

Q. Are you not mistaken about that?

A. I do not believe that I am, that is, as near as I can get at it. It does not appear to me to be but once.

Q. This first item of 1,750 names is the whole number of
61 names on this duplicate?

A. Yes, sir.

Q. The state school tax is the school tax that appears there in a column marked "school tax?"

A. Yes, sir.

Q. The bounty tax appears there too?

A. Yes, sir.

Q. That is the county tax for the war debt?

A. Yes, sir.

Q. War debt and interest on it?

62 A. Yes, sir.

Q. Commission tax, what is that.

A. Moneys ordered to be raised by the Hackensack Improvement Commission.

Q. Special school tax, Dist. 32, is a special tax ordered in that district in that year?

Q. In that year?

A. Yes, sir.

Q. So as to special school tax, Dist. 10?

A. Yes, sir.

Q. That is a special tax in that district which appears in
63 the same column opposite the moneys for the persons taxed in that?

A. Yes, sir.

Q. The next item in this bill is percentage on school money.

Do you mean by that this special school tax which has just been named?

A. School money, it means, paid out, not for the collecting part.

64

By the Court:

Q. Three quarters per cent. commission on the amount of money paid out?

A. Yes, sir.

Q. How do you ascertain the amount upon which you take per cent.?

A. I have almost forgotten, it was so long ago; I can 65
hardly tell. I added it up before I took the bill, and then took the three-quarters of one per cent. This money I paid to the County Collector, and received from him and paid out to the school. It is included in the amount that I have given in my statement heretofore.

Q. The state school tax, 1,334 names, you paid the whole of that money to the County Collector?

A. No, sir; I did not get as much back as I paid to him.

Q. You first put down the whole amount you paid to him?

A. Yes, sir. 66

Q. And under that the amount he paid you?

A. Yes, sir.

Q. And under that the special item of school tax?

A. The amount that I paid out is included.

Q. You first put down the amount you paid in?

A. Yes, sir.

Q. Then you put under that the amount he paid you?

A. Yes, sir.

Q. Then you put under that the amount you paid to the school?

A. No, sir. 67

Q. Did you put any more under that?

A. No, sir: those are included in the amount; this special school tax was included.

Q. You did not pay that to the County Collector?

A. No, sir; I only paid him the State School tax.

Q. Then you paid part of that amount to each school district?

68 A. Yes, sir.

Q. Then these two items are for special district tax which you did not pay the County Collector. Did you put those under there too?

A. Yes, sir.

Q. This commission, if I understand it, you charged on school moneys paid out?

A. Yes, sir; I collected a certain amount and paid the Collector, a certain amount that goes down, then I received a certain amount and that goes down.

69

By the Court:

Q. You say you are entitled to 3 1-4 per cent. on what you received as well as what you paid out?

A. Yes, sir.

Q. Do I understand you to say then that the per centage of 3-4 of one per cent. on school moneys you charge on the amount that you paid to the Collector for the State tax, on the amount that you received from the County Clerk as being the
70 township appropriation, and also upon such amounts as you paid out of the school moneys to the several school districts?

A. That is it exactly.

Q. Whether those amounts are special tax or otherwise?

A. It does not make any difference.

By Mr. Voorhis:

Now take the duplicate for the next year. Your second

item in the bill of that year is County taxes. Is that by itself 71
in a column there opposite the names?

A. Yes, sir.

Q. And the bounty?

A. Yes, sir.

Q. And the town, poor and road?

A. Yes, sir; poor and township and road, those two are separate.

Q. Those are in the other duplicate in the same shape the duplicate of the former year?

A. I think they are.

Q. They are in every year Town, Poor and Road? 72

A. Yes, sir.

Q. State School, Special School, Commission, Dog—you ascertain the amount there again in the same way as before?

A. Yes, sir.

Q. And you give the figures here as $21,203.04.

A. Yes, sir.

Q. "$1,070, Fire," what is that?

A. That is the Fire Tax.

Q. Assessed under the Commission Act?

A. I think it is, I am not certain. 73

Q. For the Hackensack Improvement Commission?

A. I think so.

Q. In the next year you ascertain your per centage on the school money in the same way?

A. Yes, sir.

By the Court:

Q. These names, the State School tax, bounty tax names and the Commissioners tax names, and the Special School tax 74
names are all included in the aggregate number of names on which you first charged 12 cents a name, are they not?

A. I think they are.

Q. Are the names written for each one of the taxes, or does one writing cover all the tax. I take this name for instance, (referring to the book) now all of these several items are here opposite that one writing?

A. Yes sir.

Q. You count that name in charging the six or twelve cents,
75 first in charging the twelve?

A. Yes, sir.

Q. Then you charge it in the school tax six cents per name besides?

A. Yes, sir.

By Mr. Voorhis:

Q. In each of your duplicates it appears?

76 A. Yes, sir.

Q. It is marked out on this one line here?

A. Yes, sir.

By the Court:

Q. On that last year the total number of names was what?

A. 1,698. The whole number of bounty and interest is 1,314. The whole number of County is 1,314. The whole
77 number of Township, Poor and Road is the same. State School and special School 1,109. Fire 1,231. Commissioners, 938.

By Mr. Ackerson:

Q. On the Special School did you charge more than once?

A. No, sir; only once when I paid it out.

Q. Did you charge something for collecting it?

A. By the names only, by paying it out I only charged. 78

By the Court:

Q. If you had a balance on hand it went over into the next year?

A. Yes, sir.

Q. Was there any charge on that balance?

A. Not till I paid it out.

Q. When your terms finally closed when somebody else 79
succeeded you you charged the balance to him?

A. Yes, sir; I did not charge for it.

Q. No charge?

A. No, sir; no charge.

By Mr. Ackerson:

Q. What was that first 1549 for?

A. State tax.

Q. 1156? 80

A. That is county. The reason of that is, there is poll tax included in the first 1549, which is included in the county, bounty, &c.

By the Court:

The county, and bounty, and school, are all property taxes?

A. Yes, sir; and those others are poll taxes included.

81

By Mr. Ackerson:

Q. Is that bounty tax, special tax?

A. Yes, sir; it is all special tax, if I understand it.

Q. By whom was the bounty tax ordered, if you know?

A. I suppose by the Freeholders to the Asssessor. I am am not sure, I do not know. It is something I had nothing to do with.

Q. Have you the number of names for the first year?

A. For the year 1872, the whole number is 1767 on the du-
82 plicate charged once 1450; duplicate 1872, whole number 1450. That is for the commission 839.

By the Court: Mr. Westervelt said 1496, instead of 1450.

A. Yes, sir; I went over it carefully. I might have missed one or two. The whole number on the duplicate Commission is 839, charged once on duplicate 619; whole number State School Tax 1334; charged on duplicate once 1115. Bounty and Interest on duplicate 1334, charged once 1115; special school
83 district No. 32, 546, charged once 445; special school No. 10, 59; charged once 53. These 16 names I assessed myself; they were not assessed by Assessor, and they told me I was entitled to pay upon both.

By Mr. Ackerson:

Q. You examined the books since your testimony was given in reference to getting these figures?

A. Yes, sir.

84 Q. Had you examined any books at the time of your examination before Mr. Johnson?

A. No, sir; I had not noticed them, had not seen them for two years.

Q. You have since examined them, and these are made out from actual counts?

A. Yes, sir; I examined them all through.

Q. Have you made out the amounts that were paid to the school districts for 1872 and 1873?

A. Yes, sir; I have a statement somewhere to that effect.

85 Q. What is that you have there?

A. This is the statement of the school money for each year which I received and paid out, do you want me to read it?

Q. What have you made it out from?

A. From my book account.

Q. When did you make it out, before or since?

A. Since; I made it out before I copied it. It is the same thing as I stated on my examination. It is a statement of each year.

(Papers offered in evidence as a synopsis of the books).

86

By Mr. Voorhis:

Q. Is this statement made up from April to April?

A. It is made up to the time I settled with the Township Committee each year.

Q. This appears to be the annual report for 1873 and 1874. Received from the County Collector, school district tax, $5,882,58?

A. Yes, sir.

Q. Special School District No. 10, $137,05?

A. That is the year before, that is the amount I paid out. 87

By Mr. Ackerson;

Q. Has any demand been made on you for these fees, any notice served on you for the payment of them?

A. No, sir; not for any amount.

Q. I mean by the present Township Committee, before this was commenced?

A. No, sir; never made any demand on me for any amount of money. 88

By the Court:

I suppose you would not paid them if they had?

A. No, sir.

By Mr. Voorhis:

89 Q. Did you not receive a written notification from the clerk of the township in reference to their claim that you had been overpaid?

A. They notified me they wished me to appear.

Q. The note stated, did it not, what was required of you, and what the difficulty was?

A. I have almost forgotten what was in that statement. They wanted me to appear for some purpose that I did not know, and of course I did not go.

Q. Did not you know they claimed you had been overpaid?

A. I believe that was the substance of it, I suppose it was
90 the substance of it. I paid very little attention to it, I heard the talk on the streets before I got the notice.

Q. You talked this on the street, didn't you?

A. Not much; I did not say much about it.

(Plaintiff offers books and papers which have been shown in evidence, and rests).

91 It being admitted that there is no fraud, and no mistake of fact alleged on the part of the plaintiff, the defendants rests his case.

The court having duly considered the evidence, and the arguments of counsel, rendered the following opinion.

92 In this action the plaintiff seeks to recover from the defendant moneys alleged to be township moneys, and alleged to have been retained by the defendant, the township collector, in excess of moneys that he was entitled by law to retain. The defendant insists, in the first place, that the township (even if he

did retain more moneys than he was entitled by law to keep), cannot recover those moneys, because he retained the moneys with the acquiescence of the Township Committee upon their examination of his accounts, and that the Township Committee so acquiesced with full knowledge of all the facts, and there 93
was no mistake and no fraud; and he seeks to have applied against the corporation the rule that governs voluntary payments. I think that this rule cannot be applied, for the reason that the defendant was a public officer who had, in reference to the moneys that be received out of which he retained these in controversy, the public duty imposed upon him of accounting for all the moneys and paying over to the corporation all the law did not authorize him to keep.

That public duty was imposed upon him, not by the Township Committee, but by the act of the Legislature, the same 94
authority that imposed upon the Township Committee its public duties, and the Township Committee, by no acquiescence of theirs, could release him from the public obligations in which he stood. As a public officer he is bound to perform his duties even though the Township Committee consents that he need not perform them; and among those duties plainly was the duty of accounting for all public moneys that he received and paying over to the township corporation all that he had no right in the law to retain.

The defendant further insists that the action of the Town- 95
ship Committee in examining and passing upon his accounts was judicial action; that the Township Committee were judges; and their action cannot be impeached collaterally—that is, in such a suit as this, a legal proceeding not bringing up directly for review before an appellate tribunal the action of the committee.

I think that this contention also is not well founded.

If the Township Committee were by law made judges, to determine what moneys the collector should pay over to the corporation, we would expect that the Legislature had made provision for giving some notice to the corporation to appear 96
and defend its rights before the Township Committee. For it

is a general principal of law, that the rights of no party shall be passed upon until that party has had an opportunity to be heard in reference to those rights. But there is no provision in the law for the representation of the corporation before the Township Committee, save such representation as the Township Committee itself may make.

97 Doubtless that is the legal position of the Township Committee. But then comes in conflict with the idea that they are made judges; this notion that if they are made judges, then a party is made judge in his own cause. For if the Township Committee is a representative of the corporation in that adjustment of accounts, whatever it may be, why they cannot be the judges, for even if it be in the power of the Legislature to make a man a judge in his own cause, no court will ever think that the Legislature intended so to do, unless they use language that is not capable of any other construction. The powers de-
98 volved upon the Township Committee, out of which it is sought to raise this power of judicial determination, are that the Township Committee shall examine and inspect and make report upon vouchers of the township officers, and superintend the expenditure of township moneys. But I do not think that by any necessary construction must there be drawn from the language the idea that the Township Committee is to be a judge any more than you would say that a bookkeeper of a firm is a judge to pass upon the accounts presented against the firm, simply because he is to examine them for the purpose of
99 determining whether they are correct or not. Their position is just that. They are, as it were, auditors of the township; but they are not judges as between the corporate officers and the corporation. If they are judges having power to render a judgment against the corporation, they must likewise have power to render judgment against the township officer; and supposing in this case that they adjudged that all the vouchers that Mr. Demarest presented to them were insufficient, and had reported that he had on hand more money than in law he had, would the corporation be able to bring suit against Mr. Demarest, and present in evidence that report, and upon the strength

of that conclusively shut out all defenses that he might make, 100
and say, "You must account for just so much money," or else drive Mr. Demarest to an action by *certiorari* to review that report?

I do not think it could be contended against township officers that the Township Committee could in that way, with that effect, pass upon their vouchers, so as to give the corporation the power to recover all that the Township Committee might choose to say was due from the officers to the corporation. They are not made judges between the two, so that their action is final until reversed. I therefore think there is no legal 101
obstacle in the way of the corporation's recovering from Mr. Demarest any moneys that he has received and retained without authority of law.

The next question is, then: Whether he has retained any moneys without authority of law? And this makes necessary an examination of the statutes, under which alone his rightful retention of those moneys can arise. For no public officer can be entitled to compensation for his public services save to express enactment; express legal authority must be shown for all fees that he seeks to hold as a public officer, I have examined the statutes of the State in reference to the fees of township 102
collectors with some considerable care. I think I have seen all of those of a public nature, since before the beginning of the present century. And I will consider those statutes, and refer to them as they relate, first to the taxes which may be known as State, county and township taxes.

Prior to the beginning of this century, the fees of collectors were a per centage upon the amounts of money collected; but, by an act passed June 10, 1799, found in Patterson's Revision, page 404, the fees of township collectors were fixed at four cents for collecting the State tax from every person mentioned in the duplicates, and paying the same to the County Collector. Prior to that, by an act of February 13, 1798, and found in 103
Patterson's Revision, page 266, the collector for collecting the County taxes was to be allowed like compensation as is prescribed by law, for the time being, for collecting taxes for the

use of the State, except that if ordered to be raised at the same time as State taxes, he was to be entitled to only one half of those fees. And by an act of February 21, 1798, found in Patterson's revision, page 276, for collecting township taxes, he was to have like fees as those for collecting County taxes. By force of these three statutes, it will be seen that, after June
104 1799, when a collector collected State and county and township taxes together' he was entitled to eight cents for every person mentioned in the duplicates, four cents for State taxes, two cents for county taxes and two cents for township taxes, if they were all collected together. This continued to be the position of the law till March 15, 1837, when an act found in Elmer's Digest, page 560, was passed which provides that the collectors should be entitled to receive eight cents for each name on their respective duplicates in collecting the township, city or borough and county taxes, instead of the fees then allowed by law.

105 It is evident, from the conjunctions used in this statute, that the Legislature had in mind two classes of taxes—one was the township, city or borough, and the other was county taxes—and that for collecting these two the collector was to be entitled to eight cents for each name. That is the same amount as he would have been entitled to before the passage of that act, in case the township and county taxes were ordered to be collected at a different time from the State taxes. But this act has the effect of giving him the same fees for collecting township and county taxes in conjunction with State taxes that he
106 would have been entitled to before that act, in case he had collected them at different times. And this act makes his fees for collecting State, county and township taxes twelve cents for each name or each person. The next change in the law we find in the revision of 1846. On April 14, in that year, an act was passed, to be found in the Revised Statutes, page 1006, section 16, which declared that the assessors and collectors of the several townships, cities, wards and boroughs of this State, are to be entitled to receive eight cents, and no more, for each name on their respective duplicates for assessing, levying and collecting the township, city, ward, borough and State taxes.

If that act stood alone I do not see how it could have any con- 107
struction other than that the eight cents was to cover the ren-
dering of services in collecting all these classes of taxes, for the
conjunction used is the copulative conjunction "and." He is
to have eight cents, and no more, for each name for col-
lecting the township, city, ward, borough, county *and* State
taxes. But it does not stand alone; for, in the same Revision,
and on the 16th of April, two days after the passage of this act
of April 14, in the Revised Statutes of that year, page 182,
section 13, the act of February 13, 1798, which gives
the collector for collecting county taxes the same compen-
sation as is provided by the law at the time for 108
collecting State taxes, except that, if they are ordered to
be collected at the same time, he is to have one half the usual
fees was re-enacted, and on April 14, same Revision, section 11,
page 1019, the act of February 21, 1798, which gives the collec-
tor the like fees for collecting township taxes as for collecting
county taxes, was also re-enacted and the rule of law being that
statutes passed at the same time and upon the same subject matter
must always be construed together, I am unable to see how
effect can be given to the act in reference to compensation for
county taxes and the act in reference to compensation for the 109
township taxes, unless the general act providing that he is to
receive eight cents, and no more for each name for collecting
township, city, ward, borrough, county and State taxes, is to
have a distributive construction. That is that the Legislature
intended by it to give him eight cents for State taxes, eight
cents for township taxes and eight cents for county taxes. I
do not think that the Legislature deliberately mean that. I
think it is the result of an oversight of the revisers. But I
think this construction would follow by force of the rule that
all the statutes must have effect. This would result in giving
a collector, when he collected city and county and township 110
taxes together, sixteen cents for each name—eight cents for
State, four cents for county and four cents for township taxes.
That was the condition in 1846, under the revision then made.
And that continued until the act of March 28, 1862, found in

the statutes of that year, page 344, section 22. This act provided that the assessors and collectors of townships should be entitled to receive twelve cents, and no more, for each name on their respective duplicates for assessing, levying and collecting township, city ward, borough, county and State taxes, and the
111 assessor or collector should not be paid for one name more than once, although that name might occur more than once on the duplicate. This is substantially the language of the act of 1846, except that twelve cents is substituted for eight, but we are no longer obliged to construe that act in conjunction with the old township and county acts of 1846, because it was not passed at the same time; it was passed afterward. And it was intended to change the law as it was made by the acts of 1846, so we are left to give this act of 1862, its proper and natural construction depending upon its own phraseology. Am I unable to construe its language otherwise than to say that twelve cents and
112 no more for each name on the respective duplicates, was given for collecting these classes of taxes conjunctively—township, city, ward, borough, county and State taxes—not twelve cents for each, but twelve cents for all of them. But this act of 1862 was itself repealed by an act passed April 11, 1866, found in Nixon, page 951, and that is the law now in force fixing the Collector's fees. And this act, even if the act of 1862 be said to be capable of a distributive construction, is not capable of such construction. That provides, in section 10, that the duplicates shall show, in sepa-
113 rate columns, the names of persons assessed and the number of acres for which they are assessed, the value of the land, the value of their personal estate, the amount deducted for debts, the net value assessed to each person, the rate per dollar assessed, the sum assessed on each person for State, county, city, township, poor, school, road, poll, dog and other taxes. And it then provides, in section 30, that the assessors and collectors of townships shall be entitled to receive twelve cents, and no more, for each name on their respective duplicates, for assessing, levying and collecting all taxes by them assessed and collected, provided that no name, occurring more than once, shall be counted

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more than as one man. Twelve cents for collecting *all* the taxes. Now, that word "all" cannot be distributive. That means just what it says—twelve cents for collecting all taxes—twelve cents for each name. And as the law then stood, it embraced all of the taxes that the collector should collect—State, county, township, poor, school, poll, dog and other taxes. Except so far as that act has been modified by subsequent legislation, therefore, it must limit the legal right of a collector to twelve cents for each name on his duplicate.

Now we come to the consideration of the puestion as to whether there is any change since that time as to any taxes. 115
First as to the dog tax. By an act passed on June 20, 1787, found in Patterson's Revision, page 80, the same fees are to be allowed a collector for collecting taxes on dogs as for collecting State taxes. By a subsequent act, passed June 9, 1820, found in Pennington's Revision, page 754, the collector was to have for collecting dog taxes the same fees as for collecting State, county or township taxes. By an act passed March 6, 1850, found in pamphlet laws, page 234, the assessor and collector were to be allowed two cents for each dog assessed. And by an act passed March 23, 1871, found in pamphlet laws, page 61, 116
the assessor and collector were to have twelve cents for every dog assessed. That, therefore, is operative in fixing the collector's fees in this case, so long as that act remained the law, twelve cents for every dog assessed. It remained in operation up to April 3, 1873, when an act was passed, found in pamphlet laws, page 120, which provided that the assessor and collector were to have five cents, and no more, for every dog assessed. That act of 1873 will, therefore, govern the collector's fees in this case.

The next question is that of special taxes, upon which the 117
collector claims fees, and these are, first, the school taxes. The first general act which I find for the establishment of schools in this State was an act to establish common schools, passed February 24, 1829, found in pamphlet laws of that year, page 105. It provides for the distribution of State funds to the counties, and then by the counties to the township, and author-

izes the townships to raise taxes for school purposes. But it gives the collector no fees specially. And for this plain reason
118 that the township is to assess and collect the school tax just as other township taxes, and the collector's duty as to that is embraced within his general duty to collect township taxes, and he receives his compensation for them with others. That act of 1829 was repealed by act of February 16, 1831, found in pamphlet laws, page 145, which act, however, re-enacted most of its provisions in substance, but gave to the collector no additional compensation. Then follows an act of March 1, 1838, found in Elmer's Digest, page 500. It does not change the aspect of affairs as to the township collector's fees at all. Under
119 these acts the township might be divided into school districts, but no power was given to them to vote and raise taxes aside from those which the township itself received. The next act is that of March 14, 1851, found in pamphlet laws, page 267. This act authorizes the inhabitants of incorporated school districts to vote a tax for schools, but they are to be assessed and collected as township taxes, and paid by the township collector to the township superintendent. And this gives the collector no fees for collecting them. He collects them as he does other township taxes, Then the act of March 21, 1867, which is
120 found in Nixon, page 868, authorizes district school taxes and township taxes for school also, to be levied and they are to be collected by the township collector as other township taxes, and it gives no fees for the collection of them. But it does provide that the township collector shall receive and hold all school monies, whether of township or district, whether from State, township or district tax, or other source, and pay the same out out only by an order of the district clerk, and pay the balance to his successor on the order of the township committee; and, as compensation, he shall have three-fourths per cent. on all school funds received and paid out by him for such purposes
121 during the year, to be paid by the township committee from the funds of the township. And it repeals all other general acts on the subject of public schools. Here, then is the compensation to the township collector, not for collecting taxes for

school purposes, but for receiving, holding and paying out the monies for such purposes—that is, school purposes—during the year. That act is in force still. And it is necessary to determine upon what amount this three-fourths of one per cent. shall be allowed to the collector. The plaintiff contends that it 122
should be allowed only upon such monies as are both received and paid out. In other words, that it should be allowed upon such as he pays out, for of course he does not pay out any which he does not receive. If the limitation is to be upon such monies as are both received and paid out, the limitation will be upon such as are paid out. I think this is not a fair construction to be given to the statute. The legislature has said "received and paid out." If it intended that the amount upon which the per centages should be levied was only to be that paid out, it would have been very easy for it just to say 123
that and no more. But it has used here the word "received," and it is my duty to give to that word also some effect. I cannot strike out words from the statute any more than I can interpolate them for the purpose of reaching any particular construction. It is to be noticed, however, that there must be funds received and paid out for school purposes. The question, then, is what funds does he receive or pay out for school purposes. He collects in this case the district school tax. That, I think clearly, he receives for school purposes. It comes to his hands and is to be held by him for school purposes. the same thing is true of the township school tax. That also, 124
he receives for school purposes. As soon as it comes into his hands it is money devoted for that purpose. But that is not so true of money he collects for the State. That he does not receive for school purposes. He receives that to pay into the State treasury. That is the purpose for which he collects that tax—to pay it over to the county collector, that it may go to the State treasurer. What the State shall do with it afterward is a matter for the State, and not for the collector. Then he receives money from the county collector. That money he receives for school purposes. Just as soon as it reaches his 125
hands, it is devoted to school purposes. He holds it for that,

and is to pay it out only for such purposes. Then the monies that he pays on the order of the district clerks, he pays for school purposes. I should be inclined to think also that whatever he received from his predecessor in office and whatever he paid over to his successor in office were received and paid for school purposes, except that I do not think the Legislature in-
126 tended that the two percentages should be levied upon the same funds. And from that consideration I will hold that upon whatever balance he has received of his predecessor he shall not be allowed the three-fourth per cent., and upon whatever balance he pays over to his successor he shall not be allowed the three-fourths per cent. The result then is that the three-fourths per cent. must be calculated upon the amount of district school tax that he collects, the amount of the township school tax that he collects, the amount that he receives from the county collector for school purposes, and the amount that he pays on order
127 of the district clerks. That fund will represent the sum on which three-fourths of one per cent. should be calculated. Since the act of 1875, which does not at all effect the case, the township collectors will be entitled to receive five cents on each name for collecting the district school tax. That act does not effect this case. It was passed after the present collector's duties were performed.

Then it is claimed that he is entitled also to special fees upon collecting bounty tax. I think he is not. That is covered by the law that fixes his compensation for collecting county taxes. The bounty tax is a mere county tax which the county, when it
128 receives it, devotes to the purpose of paying the bounty debt. No special fees are given for that any more than for collecting taxes appropriated to the maintenance of the jail and court house. They are county taxes collected for county purposes.

Then it is claimed that he is entitled to special compensation for collecting the tax of the Hackensack Improvement Commission, and so he is. But the statute is express that he is to receive such compensation from the commissioners of the Hackensack Improvement Commission, eight cents for each name for collecting the tax

of that commission. That eight cents is given under the ac- 129
which authorizes a tax to be collected for road purposes, passed April 1st, 1868. The act passed April 2d, 1871, which authorizes the Hackensack Improvement Commission to raise money for fire purposes gives to the collector no additional fees. Therefore eight cents for each name would be all that he would be entitled to for collecting both of those taxes. But he is to receive them not from the Township Committee or the township, but from the Hackensack Improvement Commissioners. He has not power therefore to withhold the township moneys because of any claim he may make for compensation for collect-
ing those taxes. 130

These, then, are the principles, I think, upon which the fees of the collector in this case are to be ascertained, and applying them to the case in hand, I find that on his bill for 1873, the collector retained these moneys that he was not entitled to retain, and for which, therefore, he must account to the plaintiff: He retained upon 1,750 names, at 12 cents a name, when he should have retained only upon 1,496 names, that being the number of names, reckoning no name more than once—the difference, 254 names, at 12 cents, is $30.48. Then he retained 8 131
cents per name on 1,334 names for State school taxes—$106.72 that he was not entitled to. The same amount for bounty tax. Eight cents per name on 839 names of the Hackensack Improvement Commission taxes, $67.12; that he is not entitled to. 546 names for special school tax for No. 32, at 8 cents per name, $43.68; 59 names special school tax, No. 1^, at 8 cents, $4.72. Those he is not entitled to. Then he retained 3-4 of 1 per cent. on some school moneys, which he was not entitled to, the exact amount of which I cannot ascertain from any facts that are before me. If counsel can ascertain accurately, they can do so; as near as I can come at it, it is $6,700. The percentage, therefore, would be $50.25. He also charged on 260
dogs only 2 cents, while he was entitled to 12 cents that year; 132
and therefore he is entitled to a credit of 10 cents for 260 dogs, being $26. This will leave the balance of overcharge for that year, $383.64.

For the year 1874 there are 1,156 names county tax, at 6 cents, $69.36 ; 1,156 names bounty tax, at 6 cents, $6936, same, amount of township, poor, road, State, and school taxes. Then on 971 names for special school tax, at 6 cents, $58.26; 808 names Commission tax, at 8 cents, $64.64; 1,070 names fire tax, at 6 cents, $64.20 ; and then 3-4 of 1 per cent. on $5,700,
133 as I estimate, of school monies, $42.75. This makes an overcharge of $507.29.

For the year 1875, 1,200 names county tax, at 6 cents, $72. Same amount of bounty, road, poor, township, State, and school taxes. 1,013 names for special scool tax at, at 6 cents, $60.78 ; 841 names Commission tax, at 8 cents, $67.28; 1,135 fire tax, at six cents, $68.10 ; 3-4 of one per cent. on overcharge of school monies, that I estimate at $4,000—$30 ; making a total for that year of $514.16.

It is also said on behalf of the defendant that the township
134 cannot recover the overcharge of school moneys because it is not entitled to school moneys ; and the case of the Township of Morris against Carey, in 3 Dutcher, is cited in support of that doctrine. That case is entirely different from this one. The township is clearly entitled to whatever of township money has been retained over what are the legal fees of the township collector. The act which gives him this 3-4 per cent. declares that he is to retain it or receive it, not out of the school moneys, but out of the township moneys; and having retained more of the township moneys therefore than he is entitled to, he must
135 account for and pay it over under his public duty.

It is also said that the township is not entitled to maintain this action, because they did not make a demand. I think the proof is that they did make sufficient demand, even if the bringing of the suit itself was not a sufficient demand; but I think that the bringing of the suit itself also is a sufficient demand for the money, and hence that contention of the defendant will likewise fail.

The amount for these three years' overcharge I make to be $1,405.04. Interest on that sum will be allowed only from the

beginning of the suit. Counsel may ascertain it, and may en- 136
ter judgment accordingly.

And thereupon the counsel for the defendant excepted to all those parts of the opinion or finding of said Justice, which are as follows:

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First, to all that part where said Justice says:

"The defendant insists, in the first place, that the township (even if he did retain more moneys than he was entitled by law to keep), cannot recover those moneys, because he retained the moneys with the acquiescence of the Township Committee upon their examination of his accounts, and that the Township Committee so acquiesced with full knowledge of all the facts, and there was no mistake and no fraud; and he seeks to have applied against the corporation the rule that governs voluntary payments. I think that this rule cannot be applied, for the reason 138
that the defendant was a public officer who had, in reference to the moneys that be received out of which he retained these in controversy, the public duty imposed upon him of accounting for all the moneys and paying over to the corporation all the law did not authorize him to keep.

"That public duty was imposed upon him, not by the Township Committee, but by the act of the Legislature, the same authority that imposed upon the Township Committee its public duties, and the Township Committee, by no acquiescence of theirs, could release him from the public obligations in which he stood. As a public officer he is bound to perform his duties 139
even though the Township Committee consents that he need not perform them; and among those duties plainly was the duty of accounting for all public moneys that he received and paying over to the township corporation all that he had no right in the law to retain.

Second, to all that part where said Justice says:

"The defendant further insists that the action of the Township Committee in examining and passing upon his accounts was judicial action; that the Township Committee were judges; and their action cannot be impeached collaterally—that is, in
140 such a suit as this, a legal proceeding not bringing up directly for review before an appellate tribunal the action of the committee.

"I think that this contention also is not well founded.

* * * * * * The powers devolved upon the Township Committee, out of which it is sought to raise this power of judicial determination, are that the Township Committee shall examine and inspect and make report upon vouchers of the township officers, and superintend the expenditure of township moneys. But I do not think that
141 by any necessary construction must there be drawn from the language the idea that the Township Committee is to be a judge any more than you would say that a bookkeeper of a firm is a judge to pass upon the accounts presented against the firm, simply because he is to examine them for the purpose of determining whether they are correct or not. Their position is just that. They are, as it were, auditors of the township; but they are not judges as between the corporate officers and the corporation. * * I therefore think there is no legal obstacle in the way of the corporation's recovering from Mr.
142 Demarest any moneys that he has received and retained without authority of law.

Third, to all that part where said Justice says:

* * * * * But this act of 1862 was itself repealed by an act passed April 11, 1866, found in Nixon, page 951, and that is the law now in force fixing the Collector's fees. And this act, even if the act of 1862 be said to be capable of a distributive
143 construction, is not capable of such construction. That

provides, in section 10, that the duplicates shall show, in separate columns, the names of persons assessed and the number of acres for which they are assessed, the value of the land, the value of their personal estate, the amount deducted for debts, the net value assessed to each person, the rate per dollar assessed, the sum assessed on each person for State, county, city, township, poor, school, road, poll, dog and other taxes. And it then provides, in section 30, that the assessors and collectors of townships shall be entitled to receive twelve cents, and no more, for each name on their respective duplicates, for assessing, levying and collecting all taxes by them assessed and collected, provided that no name, occurring more than once, shall be counted 144
more than as one man. Twelve cents for collecting *all* the taxes. Now, that word "all" cannot be distributive. That means just what it says—twelve cents for collecting all taxes—twelve cents for each name. And as the law then stood, it embraced all of the taxes that the collector should collect—State, county, township, poor, school, poll, dog and other taxes. Except so far as that act has been modified by subsequent legislation, therefore, it must limit the legal right of a collector to twelve cents for each name on his duplicate."

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Fourth, he also excepts to all that part of the opinion or finding of said Justice, wherein he holds that the collector is not entitled to any fees for collecting special school taxes, except the three-fourths of one per cent. on all moneys received and paid out by him for school purposes during the year.

Fifth, he also excepts to all that part of the opinion or finding of said Justice where he says:

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"I shall be inclined to think also that whatever he received from his predecessor in office, and whatever he paid over to his successor were received and paid for school purposes, except that I do not think that the Legislature intended that the two percentages should be levied upon the same funds. And from

that consideration I will hold that upon whatever balance he has received of his predecessor he shall not be allowed the three-fourths per cent., and upon whatever balance he pays over to his successor he should not be allowed the three-fourths per cent."

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Sixth, he also excepts to that part of said opinion or finding where said Justice holds that the defendant is not entitled to special fees for collecting the bounty tax, because the bounty tax is a mere county tax.

Seventh, he also excepts to that part of said opinion or finding where said Justice holds that the defendant is not entitled as Collector to any additional fees for collecting the fire tax for
148 the Hackensack Improvement Commission, and that he has no power to hold the eight cents per name for collecting the tax of the Hackensack Improvement Commission from the township moneys.

Eighth, he also excepts to that part of the finding or opinion of said Justice when he says that the defendant in his bill for the year 1873, "retained 8 cents per name on 1334 names for "State School tax—$106.72 that he was not entitled to. The
149 "same amount for bounty. Eight cents per name on 839 "names of the Hackensack Improvement Commission taxes, "$67.12; that he is not entitled to. Five hundred and forty-"six names on special School tax for No. 32, at 8 cents per "name, $43.68; 59 names special School tax No. 10, at 8 cents, "$4.72. Those he is not entitled to. Then he retained 3-4 of "1 per cent on some School moneys which he was not entitled "to. * * * * * * "This will leave the balance of overcharge for that year, $383.64."

"For the year 1874 there are 1,156 names county tax, at 6 cents, $69.36; 1,156 names bounty tax, at 6 cents, $69.36, same,

amount of township, poor, road, State, and school taxes. Then 150
on 971 names for special school tax, at 6 cents, $58.26; 808 names Commission tax, at 8 cents, $64.64; 1,070 names fire tax, at 6 cents, $64.20; and then 3-4 of 1 per cent. on $5,700, as I estimate, of school monies, $42.75. This makes an overcharge of $507.29.

"For the year 1875, 1,200 names county tax, at 6 cents, $72. Same amount of county, road, poor, township, State, and school taxes. 1,013 names for special school tax at, at 6 cents, $60.78; 841 names Commission tax, at 8 cents, $67.28; 1,135 fire tax, at six cents, $68.10; 3-4 of one per cent. on overcharge 151
of school monies, that I estimate at $4,000—a total for that year of $514.16.

Ninth, he also excepts to that part of the opinion or finding of said Justice, where he holds that the township can recover the overcharge of school moneys, and that the township is entitled to whatever of township money has been retained over what are the legal fees.

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Tenth, he also excepts to that part of the opinion or finding where said Justice holds that sufficient demand had been made upon the defendant, and if no demand had been made, the bringing of the suit was sufficient demand.

And the defendant prays that these, his exceptions, may be sealed, and they are severally sealed accordingly.

JONATHAN DIXON,

[L. S.] Jus. Sup. Ct. 153

New Jersey Court of Errors and Appeals.

THE INHABITANTS OF THE TOWNSHIP OF NEW BARBADOES, in the County of Bergen, *Defendants in Error.* ADS. NICHOLAS C. DEMAREST. *Plaintiff in Error.*	Joinder in Error.

And hereupon the said the inhabitants of the Township of New Barbadoes, in the County of Bergen, by Samuel R. Demarest, jr., their attorney, come and say that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and they pray that the said Court of
154 Errors and Appeals here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid, assigned for error, and that the judgment aforesaid in the manner aforesaid given, may, in all things, be affirmed, &c.

SAMUEL R. DEMAREST,
Att'y, and of Counsel with Def'ts in Error.

NEW JERSEY
Court of Errors & Appeals.

NICHOLAS C. DEMAREST

vs.

THE INHABITANTS OF THE TOWNSHIP OF NEW BARBADOES, in the County of Bergen.

ASSIGNMENT OF ERRORS.

Afterwards, that is to say on the fifth day of March A.D. 1878, before the Court of Errors and Appeals of the State of New Jersey, at Trenton, the Court of last resort in all cases, comes the said Nicholas C. Demarest, by Campbell & DeBaun, his attorneys,, and says that in the record and proceedings, and also in the said matters contained in the said bill of exceptions and also in the opinion and finding aforesaid, there is manifest error in this, to wit.:

1. Because the justice before whom said cause was tried held

that the rule governing voluntary payments could not be applied, even though the defendant, Nicholas C. Demarest, retained the moneys with the acquiescence of the Township Committee upon their examination of his accounts, and with full knowledge of all the facts, there being no mistake and no fraud.

2. Because the said justice held that the Township Committee, by no acquiescence of theirs, could release the defendant, Nicholas C. Demarest, from paying over to the Township Corporation all the money he had no right in law to retain.

3. Because the said justice held that the Township Committee had no authority to settle with the defendant, Nicholas C. Demarest, and pay or allow him any other or greater fees than those fixed by express enactment.

4. Because the said justice held that the action of the Township Committee, in making settlement with the defendant, Nicholas C. Demarest, was not judicial action, and that the action of the Township Committee, in making that settlement, was unauthorized, illegal, and not binding upon the Township Corporation.

5. Because the said justice held that there was no legal obstacle in the way of the Township Corporation recovering from the defendant any money he had received and retained without authority of law, notwithstanding the Township Committee had examined his accounts, passed upon his charges and acquiesced in the payment of his bills.

6. Because said justice held that sufficient demand had

been made upon the defendant, and that if no demand had been made, the bringing of the suit was sufficient demand.

7. Because by the record, aforesaid, judgment appears to have been given by the said justice for the said The Inhabitants of the Township of New Barbadoes, in the County of Bergen, and against the said Nicholas C. Demarest, whereas by the law of the land, the said judgment ought to have been given for the said Nicholas C. Demarest, and against the said The Inhabitants of the Township of New Barbadoes, in the County of Bergen. And the said Nicholas C. Demarest prays that the judgment aforesaid, for the errors aforesaid, and the further errors in said records and proceedings being may be reversed, annulled, and altogether for nothing holden, and that he may be restored to all things which he has lost by reason of said judgment.

CAMPBELL & DE BAUN,
Attorneys.