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*May 7.

SIMEON JONES (PLAINTIFF).....APPELLANT;

AND

THE CITY OF SAINT JOHN (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Assessment and taxes—Appeal from assessment—Judgment confirming—Payment under protest—Res judicata.*

J., having been asssessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council and then applied to the Supreme Court of New Brunswick for a writ of certiorari to quash the assessment, which was refused. An execution having been threatened he then paid the taxes under protest. In 1897 he was again assessed under the same circumstances, and took the same course with the exception of appealing to the Supreme Court of Canada from the judgment refusing a certiorari, and that court held the assessment void and ordered the writ to issue for quashing. J. then brought an action for repayment of the amount paid for the assessment in 1896.

*Held*, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a certiorari to quash the assessment in 1896 was *res judicata* against J., and he could not recover the amount so paid.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside a verdict at the trial in favour of the plaintiff and ordering judgment to be entered for the defendant.

The material facts are set out in the above head-note.

*Currey K.C.* for the appellant. The assessment for 1896, the amount of which was paid by plaintiff and which he now seeks to recover, was precisely the same

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Girouard JJ.

as that for 1897 which was declared illegal by this court. *Jones* v. *City of St. John* (1). He has, therefore, a right to be repaid the money to which the city was never entitled. *City of London* v. *Watt* (2); *Preston* v. *City of Boston* (3).

The appeals committee was without jurisdiction as the assessment was illegal and consequently the judgment refusing certiorari is not *res judicata* against the plaintiff. *Mayor, &c., of London* v. *Cox* (4).

*C. J. Coster* for the respondent. The appellant cannot set up want of jurisdiction in the inferior court unless such defect appears on the face of its proceedings. *Colonial Bank of Australasia* v. *Willan* (5) following *Reg.* v. *Bolton* (6). See also *Brittain* v. *Kinnaird* (7).

The appellant having paid the tax voluntarily after the judgment refusing a certiorari such judgment is *res judicata*. *Flitters* v. *Allfrey* (8).

The judgment of the court was delivered by;

THE CHIEF JUSTICE (oral).—I have read very carefully the opinion delivered by Mr. Justice Barker in the Supreme Court of New Brunswick, and I entirely agree with it. The taxes of 1896, which form the subject of the present action, fall within the same category as those of 1897 in respect to which we gave our former judgment (1). But putting this entirely out of the question, here we find that Mr. Jones, after having been assessed, applied to the statutory tribunal, the appeals committee of the common council, which had authority to deal with the subject matter, and rendered the decision in consequence of which he paid

(1) 30 Can. S. C. R. 122.
(2) 22 Can. S. C. R. 300.
(3) 12 Pick. (Mass.) 7.
(4) L. R. 2 H. L. 239.
(5) L. R. 5 P. C. 417.
(6) 1 Q. B. 66.
(7) 1 Brod. & B. 432.
(8) L. R. 10 C. P. 29.

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the taxes now sought to be recovered. This alone would have constituted *res judicata* against him, but we have more. The plaintiff appealed to the Supreme Court of New Brunswick, before making the payment, which he made only after that court had affirmed the decision of the appeals committee. As was suggested by my brother Taschereau, if the Supreme Court had decided the other way, it would have been *res judicata* in favour of Jones.

I think the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *L. A. Currey.*

Solicitor for the respondent: *C. J. Coster.*