

The account remaining unpaid, the auditor, towards the close of 1916, instructed the plaintiff that, in accordance with the system of accounting referred to, a cheque for \$149.33 should issue in favour of the corporation. This method was advised by the auditor and adopted by the plaintiff, not with the idea of the plaintiff forgoing his right to payment, but as a mere transfer for bookkeeping purposes, the plaintiff understanding that such a course was not to prejudice his right to the money.

On the 5th February, 1917, the plaintiff, was, by by-law, appointed treasurer for 1917, at a salary of \$80 per month, and in that year effected another tax sale. He claimed commission on the fruits of that sale also, and interest.

Section 166 of the Assessment Act, R.S.O. 1914 ch. 195, provides that every treasurer shall be entitled to  $2\frac{1}{2}$  per cent. commission upon the sums collected by him; but, where he is paid a salary for his services, such commission may, "by arrangement with the council," be paid into the funds of the municipality like any other revenue.

The plaintiff, by reason of this section, was *prima facie* entitled to the commission sued for; and the onus was upon the defendants to establish the contrary.

The defence was that, "by arrangement with the council," the plaintiff was not so entitled.

Until after the tax sale of 1916 and until after the plaintiff became entitled to the commission, there was no "arrangement with the council" that he was to forgo it. He had then earned the money, and had received no consideration for surrendering his right to it. To hold that the adoption of the accounting system referred to constituted an "arrangement with the council" would be to find that the plaintiff had made a gift of the fund to the corporation. As an officer of the corporation, he signed the cheque above-mentioned, but he did so merely as a bookkeeping act; he did not intend to make a gift to the corporation; and his signature would not prejudice his right to the money.

The learned District Court Judge had accepted the evidence of the plaintiff and the auditor throughout, and was well warranted in so doing.

To constitute a perfect gift, the donor must intend to give. The resolution of the council of the 4th December, 1916, was inoperative to affect the plaintiff's rights—being passed after the plaintiff had earned the money. The plaintiff was, therefore, entitled to payment of the commission in respect of the moneys realised in 1916.

In regard to the proceeds of the sale of 1917, the defence was the resolution of the 4th December, 1916. By by-law of the 5th February, 1917, the council re-appointed the plaintiff treasurer