N. J. COURT OF ERRORS & APPEALS

GEORGE H. FARRIER,
Plaintiff in Error,

vs.

THE STATE, ex rel., HUGH DUGAN,
Defendant in Error.

In Error to Supreme Court.

Brief of GILBERT COLLINS and R. B. SEYMOUR, Counsel for plaintiff in error.

The Board of Chosen Freeholders of Hudson County is created and regulated by the "Act to incorporate the chosen freeholders in the respective counties of the State," approved April 16, 1846 (Rev. p. 127) and a special act passed in 1875 (Laws 1875, p. 374).

The office of Collector of Hudson County exists under the general law of 1846, which declares as follows: "Section 19. That each of the said corporations shall, at their annual stated meetings, elect some fit person, being a freeholder and resident in such county, and not a member of such corporation, to the office of County Collector, who shall before he enters upon the execution of his office, give bond, with two sureties, being freeholders and residents in the county, to the said corpora-

tion, in such penal sum as they shall think proper, conditioned for the faithful performance of the duties of his said office as Collector of such county according to law, and who shall continue in office, and exercise all the rights and discharge all the duties appertaining thereto, until his successor shall be lawfully elected and shall have given bond."

By the Act of 1875 the Board was made to consist of two members from each Assembly District of the County, elected annually in April, and a Director elected biennially in November by the vote of the County at large. This officer was called in the act "Director-at-Large." His term began in the month of his election, but the Board organized annually after the April elections, on the first Tuesday after the first Monday in May. The powers of the Director-at-Large under the Act of 1875 were very great. On nearly all action he had a veto which it required a two-thirds vote to overcome, and to some action his approval was essential. He also had the appointment of all committees. Thus individual members of the Board could have but little power or influence, except through his justice or favor.

In consequence of being vested with these almost unlimited powers, the "Director-at-Large" wielded an influence in the Board far greater than that of any other member, and equal to several votes.

The Legislature of 1885 passed an act which abolished the office of Director-at-Large and required the Board to elect a new presiding officer.

The act is as follows:

An Act concerning the constitution of the Boards of Chosen Freeholders of this State and to make uniform the selection and duties of directors of such boards.

1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That hereafter only those persons elected by the various townships, or other politi-

cal divisions from which chosen freeholders are authorized to be elected by the laws of this State, shall constitute the Boards of Chosen Freeholders in the respective counties of this State; and no member or director of any Board of Chosen Freeholders shall be elected by the vote of the electors of a county-at-large, any law to the contrary hereof notwithstanding.

2. And be it enacted, That the Boards of Chosen Freeholders in the several counties of this State shall elect their own Director from among their own number in accordance with the provisions of the act entitled "An Act to incorporate the Chosen Freeholders in the respective counties of the State," approved March sixteenth, eighteen hundred and forty-six; and such Director shall have the powers and perform the duties prescribed by said Act and no other powers and duties.

3. And be it enacted, That any office of Director of a Board of Chosen Freeholders created by any law of this State other than said Act shall be and the same hereby is abolished, and in any county where there has hitherto been such an office, the Board of Chosen Freeholders shall immediately elect a director from their own number.

4. And be it enacted, That all acts and parts of acts, general or special, public or private, inconsistent with the provisions of this act, be and the same hereby are repealed.

5. And be it enacted, That this act shall be deemed a public act and take effect immediately.

This Act became a law March 25, 1885, and from that date Mr. Govern, the then Director at Large of the Board of Chosen Freeholders of Hudson County, ceased lawfully to hold that office or be a member of said Board.

The annual stated meeting of said Board that year oc-

curred May 5, 1885, and under the provisions of the second section of said Act of 1885, and of the seventh section of the Act of 1846, it became the first duty of the members elect of the new Board when they assembled, May 5, 1885, to elect one of themselves as Director to preside over their meetings.

The 7th section of the Act of 1846 is as follows:

"7. That it shall and may be lawful for every such corporation to elect, annually, one of their own members to preside at their meetings, who shall be called the Director of the Board; *and in case of his absence* or refusal to act, then such corporation *shall proceed to the election of another.*"

The 8th section of the Act of 1846 requires said corporation to annually elect a clerk, whose duty it is to keep the minutes, etc., and "who shall, *before he enters upon the execution of his office*, take and subscribe an oath or affirmation *before the Director of the Board.*"

On said May 5th the persons who had been elected in April, preceding, as members of said Board for the succeeding year, assembled at the usual meeting place of said Board. Having come into the meeting room, and before any attempt at organization was made, Mr. Govern, the former Director-at-Large, took the chair and called the persons so assembled to order, and called off the names of the persons elected as freeholders for the ensuing year. No attempt was made to elect "one of their own members" to preside, nor was there any election of a presiding officer.

The assembly consisted of the twenty persons who had been elected members of the Hudson County Board of Freeholders for the ensuing year and Mr. Govern.

This unlawfully constituted body of *twenty-one* men, with an intruder in the chair, pretended to elect a County Collector to succeed the plaintiff in error. Plaintiff, notwithstanding this action, refused to surrender his office, claiming that his successor had not been "*lawfully*

elected," and his term by the statute above cited, continues until that event happens. The only question then is: Has Hugh Dugan, the defendant, been "*lawfully elected*" County Collector? He will naturally contend in the support of the affirmative of this proposition:

First. That, inasmuch as the twenty district members elect, did not object to proceeding with a stranger in the chair, and all voted in the pretended election of a County Collector, and he received a majority of the votes, he is lawfully elected, even though the act of 1885 be constitutional and the proceeding an irregular one.

Second. That the Court will not inquire at this time into the constitutionality or even the existence of the Act of 1885, but will recognize his election as valid on the ground that it was made by a *de facto* Board of Chosen Freeholders.

Neither of these contentions can prevail. Let us consider them in order.

I.

The Defendant has not been lawfully elected County Collector.

Assuming therefore, that the act of 1885 is constitutional, has the relator ever been elected County Collector by a lawfully constituted Board of Chosen Freeholders of the County of Hudson? We say, no.

The first essential of corporate action is a parliamentary organization. "The members of a corporation-aggregate cannot separately and individually give their consent in such a manner as to oblige themselves as a collective body; for in such case it is not the body that acts."

Angell and Ames on Corp. sec. 232.

The point in dispute is really a question of parliamentary law.

"Parliamentary law is a branch of the common law and as well settled as any other."

"The law of parliament is part of the common parliamentary law of this country, and belongs to every legislative assembly of English origin, by the mere fact of its creation."

"In all councils and other collective bodies, it is necessary that a certain specified number, called a quorum, of the members, should meet and be present, in order to the transaction of business."

Cushing's Law and Practice of Legislative Assemblies, section 247.

"Every legislative assembly, when duly constituted, has power to compell the attendance of its members; but, until so constituted, it has no such power, *as it has itself no legal existence.*"

Cushing, section 264.

"The three essential parts of an organization are the qualification of the members, and the choice of the presiding and recording officers."

Cushing, section 276.

"When either branch is duly organized to proceed to business, *which takes place* when the members returned have taken the necessary oaths, *and have chosen their presiding officer.*"

Cushing, section 277.

The legislative body "*when duly organized*, may proceed to the transaction of business."

Cushing, section 278.

"The principal officers *necessary* to enable a legislative assembly to perform its various functions are three, namely: A presiding officer, called the speaker, or president," &c.

Cushing, section 284.

The presiding officer is required to be chosen by the

assembly itself, and by an absolute majority of votes. "The rule can hardly be considered as admitting of an exception, even in those legislative bodies, in which for special reasons, the presiding officer is designated by the constitution, instead of being chosen by the members; inasmuch as in these cases, the presiding officer is chosen by the same authority by which the members are chosen."

Cushing, Section 208.

"In every legislative assembly in which it is not otherwise provided, either by some law or by a rule of its own, its ordinary functions are suspended during the *absence* of the presiding officer from sickness or from any other cause.

Idem, 315.

The members must be assembled as a legislative body; but singly or separately they have no legislative power whatever.

Idem 529, 2 Whitelock, 192.
2 Mass., 27.

"Each assembly until it adopts rules and orders for itself, is without any other rules for its government, than those which result from the common parliamentary law."

Cushing, Sections 613, 792.

In the case of Dey *vs.* Jersey City, 4th C. E. Gr., p. 412 (416), Chancellor Zabriskie, speaking of a Common Counsel, says:

"The object and nature of its creation show that the Common Council is a body or board, and must act and can only act as such; that it must act *when* assembled at stated or special meetings, and *organize with a president to conduct* and a clerk to record its proceedings." To the same effect is the opinion of Vice-Chancellor Dodd in Shumm against Seymour, 9th C. E. Gr., 143 (153).

"The words 'organize' and organization' mean the

election of officers, constituting the body complete for the transaction of business."

New Haven, &c. R. R. Co. *v.* Chapman 38, Conn., 56.

"The life of a corporation dates from its organization."

Hanna *v.* International Petroleum Co., 23 Ohio St., 622.

"No business (of a Common Council) can be transacted until organization."

State *v.* Green, 37 Ohio, 227 (229).

See also Dillon on Mun. Corp., sec. 197, on the general subject.

The members of the boards of Chosen Freeholders are elected for one year.

In April of each year certain persons are selected who are entitled to call the corporation into existence.

"The creation of a corporate existence can *never take effect* until the association be formed *and the organization completed.* Under a special charter it is *not until the organization is completed* that existence is given to the artificial being, *and its agency commences;* before this it is not *in esse.* Vitality is given to it by the voluntary association *and organization* of its members. The franchise is not vested until an association is formed."

Falconer *v.* Campbell, 2 McLean, 195.

"It is a general rule that a corporation can only act in the manner prescribed by law. When its agents do not clothe their proceedings with those solemnities which are required by the incorporating act, the informality of the transaction is itself conducive to the opinion that such act was rather considered as manifesting the terms on which they are willing to bind the company, *as negotiations,* than as a contract obligatory on both parties. An

individual has an original capacity to contract and bind himself in such manner as he pleases; but with these bodies which have *only a legal* existence, it is otherwise. The act of incorporation is an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract *than if the body had never been* incorporated."

Head *v.* Providence Ins. Co., 2 Cranch, 127.

By the Charter of the Board of Freeholders the members elect are required to hold an annual meeting at a particular time and place and to *elect one of their own number* as presiding officer. Until they meet and elect a presiding officer, as prescribed by law, and until they organize in the manner required by law, the corporation can have no legal existence, and the action of the members is the mere act of individuals, and not of the corporation.

It has been held, that where the charter required an advertisement of the annual meeting of a corporation, that, notwithstanding there was a by-law fixing the time of annual meetings, an annual meeting convened without the prescribed advertisement had not power to elect managers.

United States *v.* McKelden, 8 Repr., 778.

Where the statute of a State prescribes the manner in which a special meeting of the board of supervisors of a county shall be called, a special meeting held without observing these requirements is not legal.

Goedgen *v.* Manitowoc Co., 2 Biss., 328.

Clearly, the new Board of Chosen Freeholders of the County of Hudson, whose duty it was to hold its annual stated meeting on May 5, 1885, has never organized. It could only do so by selecting a presiding office, called a director, from its own number.

(Rev., p. 128, sec. 7.)

The assemblage of *twenty-one* men (instead of twenty, the lawful number), did not select a presiding officer at all, and we submit that the statements of the information show only an informal irregular *consensus* not binding on anyone.

The said assemblage was not the corporation (which alone had the power to act, to remove or appoint), but a mere caucus, made up of members of the corporation and an outsider.

The fact that a majority of those who would be lawful members of the Board of Chosen Freeholders, when duly organized, expressed their preference for the relator as County Collector, and the fact that the *pseudo* director did not vote, are both entirely beside the question in this aspect of the case. The only inquiry for the Court is: Has the lawful Board of Chosen Freeholders of Hudson County ever organized? And it seems to us that the answer must surely be that they have not.

It may be said that there was an organization *in fact*, and if the lawful members permitted a stranger to conduct their deliberations, that is a matter for them and cannot be questioned collaterally. This will not avail. It would be a new doctrine if the deadlocks which have given municipal bodies so much trouble in the matter of organization, could be broken by a stranger's taking the chair, and the members proceeding to action without objection. A presiding officer has many rights and privileges, and it is because of this, that the contests in evenly-divided boards are so protracted and bitter. In Hoboken recently, the Council was evenly divided on factional lines. After hundreds of ineffectual ballotings the deadlock continued and the city's interest suffered. What an easy solution would there have been of the problem if the *Mayor* could have stepped to the chair, picked up the gavel, called the Councilmen to order, and they have been permitted to proceed with the pressing business which the needs of the city demanded, and have resumed their factional quarrel at pleasure. Instead of that, when by some accident a Councilman, who did not wish

to serve, received a majority of votes, the tax-payers had to go to a justice of this Court and begin proceedings by mandamus to compel him to serve.

But there is a deeper objection than mere formality involved in this case. Mr. Govern was not acting as a mere stranger permitted by common consent to conduct the proceedings. The information properly states that in all that he did he professed to act *as Director-at-Large*, and by color of the authority of the act of 1875. To sustain the proceedings of that meeting forces upon Hudson County for an indefinite period the evils which the act of the Legislature was intended to remedy. Morever, a direct injury upon the plaintiff is inflicted. Let it be remembered that the act of 1875 gave immense power to the Director-at-Large; such power as amounted to moral coercion of the district members who would be mere ciphers in the Board if he so willed. He could dispense his favors at pleasure. A majority of the new members, presumably of the same political faith with him, would not deem it politic for reasons of party advantage, to resist his illegal attempt to retain power, and having decided on that course they must conciliate him in order to get recognition in the Board. Who can assume to say that the narrow margin of four votes which the defendant received over the plaintiff, would have been preserved had the members been free to act as the law of 1885 provided. (Ll. 1885, page 137).

Mr. Govern claimed the right to preside at said meeting on the ground that he still held the office of Director-at-Large, notwithstanding the Legislature had abolished said office. As such officer he had the absolute appointment of all committees. No one could obtain a position upon any committee, no one could even obtain the floor to make a motion, or advocate or oppose any measure, except by sanction of the Director. The great powers hitherto vested in said office would certainly give the Director sufficient influence to draw away from the plaintiff the three additional votes which would have retained the plaintiff in his said office without question.

II.

A Mere De Facto Board Could Not Displace a Lawful Officer and Moreover there was no de facto Board.

A. In trying the title to an office, the Court will look behind the mere form of an organization. It will not be sufficient that a *de facto* board has elected. The relator has a right to demand the election of his successor by a *de jure* board. The principle that the law will not permit the validity of the acts of a *de facto* board or officer to be questioned depends upon reasons of public policy. The law does not prefer a *de facto* board. It prefers a *de jure* board. When the reason ceases the rule ceases. The reason for recognizing a *de facto* board is that the interests of the public require that municipal and governmental powers shall be exercised and a *de facto* board is better than none. Furthermore, the law must protect innocent third parties who deal with a *de facto* board. Neither of these reasons applies to the matter of appointments to office by a board whose own title is questionable. The public has no interest in who shall fill a particular office. If a *de facto* board is good enough as to third parties a *de facto* officer is equally good. The Court surely will not oust a man originally lawfully in office and entitled to hold until his successor is lawfully appointed, simply because for reasons of public policy it is forced to recognize as *de facto* the board which, if *de jure*, would have a right to appoint—and that in face of the fact that the officer sought to be ousted can show to the Court that such *de facto* board is not *de jure*. The improperly organized Board of Chosen Freeholders of Hudson county *may be de facto* as to the public and its action valid, and still its pretended election of an officer may be void as to the officer sought to be displaced.

B. But there is no *de facto* Board of Chosen Free-

holders in Hudson County. The presence of the intruding director vitiated all its actions.

Dillon on Mun. Corp., Sec. 211, note 3, and cases cited.

Intendant, &c., *vs.* Sorrell, 1 Jones (N. C. L.) 49.

The principle of the validity of acts of *de facto* officers does not apply to a non-existing *office.*

Dillon on Mun. Corp., Sec. 214.

See Scudding *vs.* Lorant, 5 Eng.L. & E. R., 16 (30), a decision of the House of Lords, as to the reason why acts of *de facto* officers are valid. It is because the public should not be put to the risk of deciding who is the *person* entitled to fill an existing office.

There is no such thing as a *de facto office.*

High on Ext. Leg. Rem., Sec. 694.

Even as to officers *de facto*, where color of authority ceases, their acts are void.

Rochester, &c., R. R. *v.* Clark Nat. Bank, 60 Barb., 234.

Kimball *v.* Alcorn, 45 Miss., 151.

Surely no one is bound by the acts of one who untruly asserts that he is holding an office that does not exist? Applying these principles, what do we find?

Everyone is presumed to know the law. Everyone therefore, knows that there is no longer any such office as Director-at-Large, and that a board professedly consisting of twenty district members *and* a Director-at-Large, is not the lawful corporation known as the "Board of Chosen Freeholders of the County of Hudson." No one can be deceived by dealing with such a body. There is not even a dispute over the interpretation of conflicting statutes. There is no room for doubt. The trouble that exists in Hudson County arises from bold defiance of the law. In nearly all the cases which we have examined wherein this Court has been called on to pass

upon the constitutionality of statutes, the parties interested have obeyed the law in the first instance and then have brought their *quo warranto* or other proceedings to test its validity.

Shall it be said that ignorance of the law excuses no one; but that the law being known, an open defiance and total disregard of it will be excused by the Courts?

All corporate affairs must be transacted at an assembly convened upon due notice.

Willcock's Municipal Corporations, Sections 58, 59.

But if one who is entitled to preside at their meetings be absent, although he have no right to vote, or have only a casting vote, *all their acts are void.*

Willcock's M. C., §78.
R. *v.* Theodorick, 8 East., 543.
R. *v.* Gaborian, 11 East., 86.
R. *v.* Hill, 4 B. C., 441.
Musgrave *v.* Nevinson, 2 Ld. Ray., 1359.
Machell *v.* Nevinson, 2 Ld. Ray., 1357.

On the charter day for the election of the Mayor, the corporation, although by unanimous agreement, cannot proceed to any extraordinary business until they have completed the election.

Willcock's M. C., §84, 85.
R. *v.* Parkyns, 3 B. A., 674.

The legal head officer (the Director elected by the Board) must be present, or the corporate assembly is incomplete.

Willcock's M. C., §94.
R. *v.* Sir Atkyns, 3 Mod., 23.
S. C., 2 Shower, 238.
Tremayne, 233.
1 Rol. Abr., 514. 20.
R. *v.* Corry, 4 East., 380.
R. *v.* Trew, 2 Barnard 370.
Musgrave *v.* Nevinson, 1 Str., 584.

The person who presides must be the *legal officer*. If an officer *de facto* usurp the place, and be afterward ousted in *quo warranto*, all the corporate acts which have been done under the sanction of his office are voidable.

Willcock's M. C., §97.
R. *v.* Hebden Andr., 391.
R. *v.* Dawes, 4 Bur., 2279.
R. *v.* Smith, 5 M. S., 279.
R. *v.* York, 5 T. R., 72.

All the corporate and ministerial acts of the intermediate assemblies (under the presidency of a *de facto* officer) are void.

No assembly is sufficiently constituted unless the legal head officer preside.

Willcock M. C., §98–95.
R. *v.* Thornton, 4 East., 308.
R. *v.* Carter, Cowp., 59.
R. *v.* Smart, 4 Bur., 2243.
R. *v.* Ipswich, 2 Ld. Ray, 1237.
R. *v.* Corry, 5 East, 379.

At common law, if a sole head officer was not legally elected, where there was no power of holding over, the corporation was suspended for want of a legal president.

Willcock's M. C., §101, 102, 103.
R. *v.* Lisle, Andr., 174.
S. C., 1 Smith, 111.
R. *v.* Williams, 2 M. S., 141–144.

Where a Common Council exists, an assembly of them, though a select class, must be considered a corporate assembly, and the presence of the legal president is necessary.

Wilcock's M. C., Sec. 126.

Whenever a particular business is delegated to a select body, if others (an ex-director-at-large) join in the performance of it, the act is void.

Willcock's M. C., Sec. 128–524.

Parry *v.* Berry, Comyns, 269.
R. *v.* Head, 4 Burr., 2521.
R. *v.* Westwood, 4 B. C., 799–818.
Green *v.* Dunham, 1 Bur., 131.
R. *v.* Head, Str., 625.
Cowp., 507.
Austin *v.* Osborn, Comyns, 240, 246.

Again, by Section 12 of the said act of 1875, the Hudson Freeholders are brought under the general act of 1846. Under the law the term of office of the chosen freeholders elected in the spring of 1884 continued *until the organization* of the members elected in 1885.

In re Highway, 1 Harr., 91.

There was no organization of the members elected in 1885, so that at the time of the pretended election of the defendant, the members of 1884 were yet the legal freeholders. The members of 1885, in order to become possessed of the offices to which they were elected, must effect an organization. There could not be two boards of freeholders, or more than twenty members in Hudson County.

It has been held necessary that a quorum should be present.

State, Mason *v.* Mayor, 6 Vr., 190.

An organization is just as necessary as a quorum. The case of the election of Speaker of the House of the Thirty-first Congress cited below by counsel for defendant is against his claim.

21 Cong. Globe, part 1, p. 5.

The case shows that no one thought it possible for a legislative body to transact any business prior to organization. The *first* business before the House was the election of Speaker, and by parliamentary law all motions incident and relavent to *that* business were in order.

From a period beyond which the memory of man doth not run to the contrary legislative assemblies and munici-

pal corporations have dead-locked upon the question of organization. No one hitherto had imagined that organization might be skipped over, and that without any presiding officer or clerk, or even temporary organization, a mob of persons, elected to membership in such body, could assemble together, and with or without outside accessories, place outsiders in positions of the greatest responsibility, and oust those who had previously held these trusts.

Is not this contrary to public policy and public safety?

The door which no one hitherto has ventured to unlatch, the Court has thrown wide open. Whither does it lead?

To Anarchy and Chaos.

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