INDEX

Complaint

(Filed August 27, 1936.)

(Summons issued August 18, 1936.)

New Jersey Supreme Court

PASSAIC COUNTY

CITY OF CLIFTON, a municipal corporation of the State of New Jersey,
Plaintiff,
vs.
EAST RIDGELAWN CEMETERY, a corporation of New Jersey,
Defendant.

Action-at-Law
Complaint

FIRST COUNT

Plaintiff, a municipal corporation of the State of New Jersey by way of complaint against defendant says:

1. Plaintiff was on December 12, 1905, a municipal corporation of the County of Passaic, State of New Jersey, known as the Township of Acquackanonk.

2. In 1917, Chapter 135, P. L. 1899, page 283 was duly adopted and the Township of Acquackanonk became incorporated as the City of Clifton

and by operation of law became the successor to the Township of Acquackanonk.

3. Defendant East Ridgelawn Cemetery was incorporated under the laws of the State of New Jersey as a cemetery association in accordance with an Act entitled, "An Act to authorize the incorporation of rural cemetery association and regulate cemeteries", and was such a corporation at the time hereinafter mentioned.

4. In 1905, defendant, East Ridgelawn Cemetery filed a petition with the Township Committee of the Township of Acquackanonk praying for permission and consent to establish a cemetery in the said Township of Acquackanonk on property described in ordinance hereto annexed and marked Schedule "A".

5. On December 12, 1905, the Township Committee of the Township of Acquackanonk adopted an ordinance entitled, "An Ordinance giving consent and approval to East Ridgelawn Cemetery, a body corporate, to locate a new cemetery in the Township of Acquackanonk, which ordinance was passed by a vote of the Township Committee, approved by the Chairman, and attested by the Township Clerk, a copy of which ordinance is attached hereto and marked Schedule "A".

6. By said ordinance so passed, the Township of Acquackanonk gave its permission and consent to defendant, East Ridgelawn Cemetery to locate a new cemetery in the Township of Acquackanonk and to use and occupy for cemetery purposes, the lands and premises described therein which lands and premises are shown on de-

scriptive map annexed hereto and marked Schedule "B".

7. Said ordinance provided that the said defendant East Ridgelawn Cemetery shall pay to the Township One ($1.00) Dollar for each interment made in the cemetery so described on the said map so long as the land is used for burial purposes and is exempted by the laws of the State of New Jersey from taxation because it is used as a cemetery.

8. It was expressly understood and agreed that the amount to be paid each year should not be less than Three Hundred ($300.00) Dollars and that the same shall be due and payable on or before the first day of December after the passage and acceptance of said ordinance.

9. Upon and after the passage of the said ordinance the defendant, East Ridgelawn Cemetery accepted the terms of the said ordinance and used and occupied the said property therein described and shown on said descriptive map from the date thereof to the present date for burial purposes and was exempt under the laws of the State of New Jersey from taxation because it was so used as a cemetery.

10. In accordance with the terms of said ordinance heretofore mentioned defendant, East Ridgelawn Cemetery became indebted to the City of Clifton for the year 1930 in the sum of $300.00.

11. Plaintiff has demanded payment of the said sum of $300.00, but defendant has failed and refused to pay the same.

12. There is due to plaintiff the sum of $300.00 and interest from December 1, 1930, no part of which has been paid.

Plaintiff demands on this count the sum of $300.00 and interest from December 1, 1930, and costs of Court.

SECOND COUNT

1. Plaintiff repeats paragraphs one to eleven, inclusive of the first count and makes them part of this count.

2. There is due to plaintiff the sum of $300.00 and interest from December 1, 1931, no part of which has been paid.

Plaintiff demands on this count the sum of $300.00 and interest from December 1, 1931, and costs of Court.

THIRD COUNT

1. Plaintiff repeats paragraphs one to eleven, inclusive of the first count and makes them part of this count.

2. There is due to plaintiff the sum of $300.00 and interest from December 1, 1932, no part of which has been paid.

Plaintiff demands on this count the sum of $300.00 and interest from December 1, 1932, and costs of Court.

FOURTH COUNT

1. Plaintiff repeats paragraphs one to eleven, inclusive of the first count and makes them part of this count.

2. There is due to plaintiff the sum of $300.00 and interest from December 1, 1933, no part of which has been paid.

Plaintiff demands on this count the sum of $300.00 and interest from December 1, 1933, and costs of Court.

FIFTH COUNT

1. Plaintiff repeats paragraphs one to eleven, inclusive of the first count and makes them part of this count.

2. There is due to plaintiff the sum of $300.00 and interest from December 1, 1934, no part of which has been paid.

Plaintiff demands on this count the sum of $300.00 and interest from December 1, 1934, and costs of Court.

SIXTH COUNT

1. Plaintiff repeats paragraphs one to eleven, inclusive of the first count and makes them part of this count.

2. There is due to plaintiff, the sum of $300.00 and interest from December 1, 1935, no part of which has been paid.

Plaintiff demands on this count the sum of $300.00 and interest from December 1, 1935, and costs of Court.

JOHN G. DLUHY
Attorney for Plaintiff

Schedule "A" Annexed to Complaint

An ordinance giving consent and approval to East Ridgelawn Cemetery, a body corporate, to locate a new cemetery in the Township of Acquackanonk.

Whereas, application has been made in writing by the East Ridgelawn Cemetery to the Township Committee of the Township of Acquackanonk for their consent and approval of the locating of a new cemetery in said township and to use and occupy for such cemetery a certain tract of land and premises situate in said township bounded and described as follows, to wit, northwesterly by the Dwas Line road, Passaic Avenue and the lands of William W. Scott and H. Schaettgene; southeasterly by Franklin Avenue and the lands of I. McCleece; northeasterly by the Hilton boulevard; and southwesterly by lands of I. McCleece, Stone House Plains road, and land of H. Schaettgene, H. Brown, estate of H. Romaine and estate of Florence Verdin. Said above bounded and described tract of land containing one hundred and twenty-five acres; which application was accompanied by a descriptive map of the said land and premises. And the said application having been read and duly considered.

Therefore, the said Township Committee of the Township of Acquackanonk, in the County of Passaic, do grant the said application and do ordain as follows:

Section 1. That the said East Ridgelawn Cemetery, a body corporate, have the consent and approval, and such consent and approval is hereby granted to said East Ridgelawn Ceme-

tery, to locate a new cemetery in the Township of Acquackanonk, in the County of Passaic and State of New Jersey, and to use and occupy for such cemetery the lands and premises above described, being the same as mentioned in its said application and shown on the descriptive map annexed thereto.

Section 2. That the said East Ridgelawn Cemetery shall pay to the township one dollar for each interment made in the cemetery above described so long as the land is used for burial purposes and is exempt under the laws of the State from taxation because it is used as a cemetery. And it is expressly understood and agreed that the amount to be paid each year shall not be less than three hundred dollars and shall be due and payable on or before the first day of December after the passage and acceptance of this ordinance, which acceptance shall be signified by a writing under the hand of the Chairman and the seal of said cemetery within ten days from the passage of this ordinance.

Passed by vote of the Township Committee December 12, 1905.

HENRY FREDERICK,
Chairman

Attest:

Allison J. Van Brunt,
Township Clerk.

Schedule "B" Annexed to Complaint.

(Not printed by consent of counsel.)

Answer

(Filed September 8, 1936.)

The answer of the defendant, East Ridgelawn Cemetery, a corporation of the State of New Jersey, to the complaint of the City of Clifton, a municipal corporation of the State of New Jersey.

ANSWER TO FIRST COUNT:

1. It admits the allegations of Paragraphs 1, 2, 3, 4, 5, 6 and 7, except it refers to the original petition and ordinance when produced for further certainty as to their contents.

2. It denies the allegations of Paragraphs 8 and 9, except that it admits that the said property referred to has from the date of said ordinance to the present date been used and occupied for burial purposes.

3. It denies the allegations of Paragraphs 10, 11 and 12, except that it admits that it has not paid the City of Clifton the said sum of One Dollar ($1.00) for any interment in its cemetery.

ANSWER TO SECOND COUNT:

1. For answer to Paragraph 1 plaintiff repeats its answers to Paragraphs 1 to 11, inclusive, of the First Count, and makes them part of this answer as though set out herein at length.

2. It denies the allegations of Paragraph 2.

ANSWER TO THIRD COUNT:

1. For answer to Paragraph 1 plaintiff repeats its answers to Paragraphs 1 to 11, inclu-

sive, of the First Count, and makes them part of this answer as though set out herein at length.

2. It denies the allegations of Paragraph 2.

ANSWER TO FOURTH COUNT:

1. For answer to Paragraph 1 plaintiff repeats its answers to Paragraphs 1 to 11, inclusive, of the First Count, and makes them part of this answer as though set out herein at length.

2. It denies the allegations of Paragraph 2.

ANSWER TO FIFTH COUNT:

1. For answer to Paragraph 1 plaintiff repeats its answers to Paragraphs 1 to 11, inclusive, of the First Count, and makes them part of this answer as though set out herein at length.

2. It denies the allegations of Paragraph 2.

ANSWER TO SIXTH COUNT:

1. For answer to Paragraph 1 plaintiff repeats its answers to Paragraphs 1 to 11, inclusive, of the First Count, and makes them part of this answer as though set out herein at length.

2. It denies the allegations of Paragraph 2.

FIRST SEPARATE DEFENSE TO ALL COUNTS:

This defendant says that any agreement on its behalf to make the payment of One Dollar ($1.00) to the plaintiff for each interment in its cemetery was ultra vires.

SECOND SEPARATE DEFENSE TO ALL COUNTS:

This defendant says that any provision in the ordinance referred to in the complaint granting

consent to this defendant to use the said lands for cemetery purposes, providing for the payment to the plaintiff or its predecessor of the sum of One Dollar ($1.00) for each interment made in the cemetery, is void and of no effect, and in violation of the statute in such case made and provided.

THIRD SEPARATE DEFENSE TO ALL COUNTS:

This defendant says that the statute under which the permission was granted by the plaintiff or its predecessor, for the use of the lands of this defendant for cemetery purposes, and particularly Section 6, Chapter 64, of the Laws of 1905 (1 Comp. Stat. of N. J. p. 380), makes no provision for the plaintiff or its predecessor providing as a condition for said consent for the payment by this defendant of One Dollar ($1.00) for each interment in the cemetery lands of this defendant.

FOURTH SEPARATE DEFENSE TO ALL COUNTS:

This defendant says that the provision contained in the ordinance referred to in the complaint for the payment of One Dollar ($1.00) for each interment in the cemetery land of this defendant, was an improper and illegal attempt to tax the lands of this defendant used for cemetery and burial purposes, and in violation of the statute in such case made and provided, and illegal and of no force and effect.

FIFTH SEPARATE DEFENSE TO ALL COUNTS:

This defendant says that since the adoption of the ordinance referred to in the complaint, this

defendant has never acquiesced in or accepted the said provision for the payment of One Dollar ($1.00) for each interment, nor has it paid anything under said provision; that the plaintiff and its predecessor, the Township of Acquackanonk, recognized the illegality of said provision and has never attempted to enforce the same. This defendant says that the plaintiff is estopped from attempting to enforce said provision or requiring payments thereunder at this late date.

CAREY & LANE,
Attorneys for Defendant.

Reply

(Filed September 15, 1936.)

Plaintiff, through its attorney, John G. Dluhy, by way of replication to answer filed herein by the defendant says that:

1. Plaintiff denies each and every allegation set forth in the first, second, third, fourth and fifth separate defenses to all counts.

JOHN G. DLUHY,
Attorney for Plaintiff.

Trial

NEW JERSEY SUPREME COURT

PASSAIC CIRCUIT

CITY OF CLIFTON, a municipal corporation of New Jersey, *Plaintiff*,
vs.
EAST RIDGELAWN CEMETERY, a corporation of New Jersey, *Defendant*.
At Law.

Paterson, N. J., October 8, 1937.

Before—Hon. JOSEPH G. WOLBER, Judge, Without a Jury.

APPEARANCES:

For the Plaintiff: JOHN G. DLUHY, Esq.
For the Defendant: CAREY and LANE, Esqs., by HARRY LANE, Esq.

STIPULATION

Mr. Lane: If your Honor please, it has been agreed between counsel for the plaintiff and counsel for the defendant that this case should be determined by your Honor without a jury, upon the pleadings and upon a written stipulation which has been signed by counsel for both plaintiff and defendant, and which I assume we should have marked in evidence.

(Paper marked Exhibit P-1 in Evidence.)

Mr. Lane: That stipulation being, in effect, the plaintiff's case and the defendant's case, I assume we are now in a position where both sides have closed.

The Court: There is no other factual matter?

Mr. Lane: No, if your Honor please.

The Court: In other words, this is a suit for money damages.

Mr. Lane: It is already stipulated as to how much.

The Court: For money damages. There is an answer and we are at issue.

Mr. Dluhy: And a replication.

The Court: Yes, and then the proofs are contained in the stipulation.

Mr. Lane: Yes, sir.

Mr. Dluhy: That is right.

The Court: And the jury is waived.

Mr. Lane: Yes.

The Court: And we are at the point where you are going to sum up, I suppose, or argue.

Mr. Lane: Well, before summing up, as we never know how the upper courts look upon these records that we try to get in a hurry, I assume that I should move formally for a direction of a verdict for the defendant, or the entry of a judgment for the defendant, and state my grounds.

The Court: All right.

Mr. Lane: I desire to state the grounds as follows for that motion:

First, that the complaint does not set forth a good cause of action.

Second, that there is nothing contained in the evidence or the stipulation of facts which would sustain a verdict or a judgment for the plaintiff.

Third, that the provisions in the ordinance referred to in the complaint and the stipulation, granting consent to defendant to use its lands for cemetery purposes and providing for the payment to plaintiff or its predecessor of the sum of one dollar for each interment made in the cemetery, is void and of no effect and in violation of the statute in such case made and provided, and particularly the Rural Cemetery Act.

Fourth, that there is no agreement on the part of the defendant to make the payment of one dollar per burial to the plaintiff, and even if there were it would be *ultra vires.*

Fifth, that the statute under which the permission was granted by the plaintiff or its predecessor for the use of the lands for cemetery purposes, particularly the Rural Cemetery Act, and particularly Section 6, Chapter 64 of the Laws of 1905, 1 Compiled Statutes of New Jersey, page 380, makes no provision for the plaintiff or its predecessor providing as the basis of said consent for the payment by defendant of one dollar for each interment in the cemetery lands of defendant. Such condition or provision contained in the ordinance was *ultra vires.*

Sixth, that the provision contained in the ordinance for the payment of one dollar for each interment in the cemetery lands of defendant was an improper and illegal attempt to tax the lands of defendant used for cemetery and burial purposes, in violation of the statute in such case made and provided, and particularly the Rural Cemetery Act and the General Tax Act, and illegal and of no force or effect.

Seventh, that since the adoption of the ordinance defendant has never acquiesced in or accepted the provision contained therein for the payment of one dollar for each interment, nor has it paid anything under said provision. Defendant contents that plaintiff and its predecessor recognized the illegality of said provision and has never prior to the institution of this suit attempted to enforce the same.

Eighth, that defendant further contends that plaintiff is estopped from attempting to enforce said provision or require payments thereunder at this late date.

Ninth, that under the provisions of the statute, and particularly the Rural Cemetery Act, the cemetery lands of defendant are exempt from taxation and defendant cannot be forced or obliged to pay any moneys to the municipality or make any contribution to the municipality to be used for its general financial expenses.

Tenth, that there is no evidence contained in the stipulation or the facts before the Court that there was any waiver by the cemetery association, the defendant, of its right to exemption from taxation under the statute.

I would most respectfully ask that in view of the fact that your Honor will probably take this matter under advisement, it being quite a difficult question of law, as I see it, that your Honor will consider that if your Honor should decide to deny my motion to grant judgment for the defendant, that your Honor will allow me an exception to it, because I assume at that time I will not be here before the Court, and it will be understood.

The Court: When I determine it, if I deny your motion, I will allow you an exception. Oh, yes, I will preserve your right.

Mr. Dluhy: If the Court please, the City of Clifton moves also for a judgment in its favor for the sum set forth in the original stipulation, which is now marked in evidence, for the respective years therein set forth, together with interest from the dates that we have agreed upon. The motion for a judgment in its favor is based upon the following grounds:

First, that the ordinance in question, dispensing with the reading of it at present, granting the franchise upon certain conditions named therein, when accepted and privileges exercised, as in this case, we contend is a contract between the company, the cemetery company, and this municipality.

Second, that a condition in such ordinance, requiring the payment of money, when accepted does not constitute a tax in violation of the statute granting an exception from general taxes.

Third, that such contract contained in the ordinance is valid and not *ultra vires* in the municipality if the statute under which consent is sought requires the approval of the governing body of the municipality.

Fourth, in addition to that I wanted to take from my brief certain other points which I want to now urge as grounds for a judgment, that the requirement for payment of a one-dollar interment fee, as contained in the ordinance, is not a tax, nor is it in violation of the provisions of the Rural Cemetery Act granting exception.

Fifth, we further urge that if your Honor should hold that it is a tax, that in this case, under the circumstances as set forth in the stipulation, this defendant company, the cemetery company, has waived the benefit of the exemption provision by entering into the contract.

Sixth, that the defendant cemetery company cannot escape its obligation under the ordinance by a plea of *ultra vires*, itself or the corporation, it having accepted the benefit and exercised the privileges since the time that the ordinance was passed which contains this one-dollar interment fee provision.

I think that in short covers my motion, with the same stipulation as my opponent has made, that when your Honor considers it if the motion is denied that I also have an exception.

The Court: What I will have before me will be a motion on behalf of the plaintiff for a direction of a verdict and a motion on behalf of the defendant for a direction of a verdict, and when I decide it, in the event of a determination against the defendant he has an exception, and if I decide against the plaintiff you have your exception. That will be the record.

Mr. Dluhy: And my grounds as urged now are argued more fully in the brief.

The Court: All right. Those are the questions I must consider.

(Decision Reserved.)

Exhibit P-1—Stipulation of Facts

The following facts are hereby stipulated by and between the respective parties hereto, and it is agreed that this Stipulation may be offered in evidence and filed as proof thereof:

1. The Township of Acquackanonk was on December 12, 1905, a municipal corporation of the County of Passaic, State of New Jersey.

2. In 1917, Chapter 135, P.L. 1899, page 283 was duly adopted and the Township of Acquackanonk became incorporated as the City of Clifton and by operation of law became the successor to the Township of Acquackanonk.

3. Defendant, East Ridgelawn Cemetery, was on the 30th day of September, 1905, duly incorporated under "An Act to authorize the incorporation of rural cemetery associations and regulate cemeteries" (Rev. 1877, p. 100), and the amendments thereof and supplements thereto, and has since that time duly existed and operated as a cemetery corporation in accordance with the provisions of said act and the amendments thereof and supplements thereto.

4. In 1905, defendant, East Ridgelawn Cemetery, filed a petition with the Township Committee of the Township of Acquackanonk praying for permission and consent to establish a cemetery in the said Township of Acquackanonk on property described in the ordinance referred to in Paragraph 5 hereof.

5. On December 12, 1905, the Township Committee of the Township of Acquackanonk adopted an ordinance entitled, "An Ordinance giving consent and approval to East Ridgelawn Cemetery, a body corporate, to locate a new cemetery

in the Township of Acquackanonk, which ordinance was passed by a vote of the Township Committee, approved by the Chairman, and attested by the Township Clerk, a copy of which ordinance is annexed to the complaint filed in this case and marked Schedule "A".

6. By said ordinance so passed, the Township of Acquackanonk gave its permission and consent to defendant, East Ridgelawn Cemetery, to locate a new cemetery in the Township of Acquackanonk and to use and occupy for cemetery purposes, the lands and premises described therein, which lands and premises are shown on descriptive map annexed to the complaint filed herein and marked Schedule "B".

7. Ever since the adoption of said ordinance the said defendant, East Ridgelawn Cemetery, has been in possession of the lands covered by and referred to in said ordinance and the map thereto annexed, and operated said lands as a cemetery for the burial of the dead.

8. The said defendant, East Ridgelawn Cemetery, has never paid to the said Township of Acquackanonk, or to plaintiff as its successor, the sum of $1.00 for each interment made in the cemetery, as provided in said ordinance, nor has it paid any sum for any interment, but has at all times refused to make such payments. The plaintiff herein and the Township of Acquackanonk have never instituted any proceedings to collect the sum of $1.00 for each interment made in said cemetery until the institution of this suit, nor has defendant at any time instituted any proceedings to test the validity of Section 2 of said ordinance. The plaintiff and the Township of Acquackanonk have on several occasions de-

manded payment from defendant and authorized proceedings to be instituted for collection of sums due it under said ordinance.

9. The number of burials made in said cemetery during the years hereinafter specified is as follows:

1930	603
1931	598
1932	524
1933	563
1934	516
1935	738

Should judgment be entered in favor of plaintiff it shall be based upon the number of interments set forth above for the years designated and interest thereon in accordance with demand in counts for such years.

10. Under the provisions of "The Rural Cemetery Act", the said cemetery lands are exempt from taxation when actually set apart and used for burial purposes. The City of Clifton has levied and assessed taxes against a portion of said lands included in the ordinance for the years 1931, 1932, 1933, 1934 and 1935, on the theory that said portions have not actually been set apart and used for burial purposes and defendant has not taken any proceedings to contest the same, nor has defendant paid said taxes so assessed, the defendant contending that the entire tract, including the portions so assessed for taxes, were and are used for the burial of the dead and cemetery purposes.

JOHN G. DLUHY
Attorney for Plaintiff

CAREY & LANE
Attorneys for Defendant

Dated,

Memorandum of Judge Wolber

DECIDED: JANUARY 6, 1938

John G. Dluhy, Esq., attorney for plaintiff.

Messrs. Carey & Lane, attorneys for defendant.

WOLBER, C. C. J.

This suit is submitted to me for my determination on law and facts, without a jury by consent of both parties. An action at law was instituted by the City of Clifton, by summons issued August 18, 1936, to recover from East Ridgelawn Cemetery such sum as represents the aggregate amount of $1.00 for each interment made in the cemetery during the years 1930 to 1935 inclusive. The matter is presented to the court by consent upon the complaint, answer, reply, and a stipulation of facts. The stipulation was offered in evidence and filed as proof, being marked Exhibit P-1.

It appears therein that the Township of Acquackanonk was on December 12, 1905 a municipal corporation of the County of Passaic. In 1917, under the provisions of Chapter 135 of the Laws of 1899, page 283, 1 *C. S.* 1368, and the amendments thereof and supplements thereto, the Township of Acquackanonk became incorporated as the City of Clifton, and by operation of law became the successor to the Township of Acquackanonk.

The defendant was on September 30, 1905 duly incorporated under "An Act to authorize the incorporation of rural cemetery associations and regulate cemeteries." (Rev. 1877, p. 100; 1 *C. S.* p. 372.) and the amendments thereof and supplements thereto, and has since that time

duly existed and operated as a cemetery corporation, in accordance with the provisions of said act and its amendments and supplements.

In 1905 the defendant filed a petition with the Township Committee of the Township of Acquackanonk praying for permission and consent to establish a cemetery in said township on property described in an ordinance hereinafter referred to. On December 12, 1905, the Township Committee of the Township of Acquackanonk adopted an ordinance entitled: "An ordinance giving consent and approval to East Ridgelawn Cemetery, a body corporate, to locate a new cemetery in the Township of Acquackanonk," which ordinance was passed by a vote of the Township Committee, approved by the Chairman, and attested by the Township Clerk. By said ordinance, the Township gave its permission and consent to the defendant to locate a new cemetery in the Township and to use and occupy for cemetery purposes the lands and premises described therein.

Ever since the adoption of said ordinance on December 12, 1905, the said defendant has been in possession of the lands covered by and referred to in said ordinance and the map thereto annexed, and operated said lands as a cemetery for the burial of the dead. The said defendant never paid to said Township of Acquackanonk, or to the plaintiff as its successor, the sum of $1.00 for each interment made in the cemetery, as provided in said ordinance, nor has it paid any sum for any interment, but has at all times refused to make such payments.

The plaintiff herein and its predecessor, the Township of Acquackanonk, have never instituted any proceedings to collect the sum of $1.00

for each interment made in said cemetery until the institution of this suit, nor has the defendant at any time instituted any proceedings to test the validity of Section 2 of said ordinance, which is in the following language:

> "Section 2. That the said East Ridgelawn Cemetery shall pay to the township $1.00 for each interment made in the cemetery above described so long as the land is used for burial purposes and is exempt under the laws of the state from taxation because it is used as a cemetery. And it is expressly understood and agreed that the amount to be paid each year shall not be less than $300 and shall be due and payable on or before the first day of December after the passage and acceptance of this ordinance, which acceptance shall be signified by a writing under the hand of the chairman and the seal of said cemetery within 10 days from the passage of this ordinance."

The plaintiff and the Township of Acquackanonk have on several occasions demanded payment from defendant and authorized proceedings to be instituted for the collection of sums due it under said ordinance. The number of burials made in said cemetery during the years hereafter specified are as follows:

1930	603
1931	598
1932	524
1933	563
1934	516
1935	738

Should judgment be entered in favor of the plaintiff, it shall be based upon the number of interments set forth above for the years designated, and interest thereon in accordance with the demand in the counts of the complaint for such years.

Under the provisions of the Rural Cemetery Act, 1 *C. S.*, Section 8, page 375, the said cemetery lands are exempt from taxation when actually set apart and used for burial purposes. The City of Clifton has levied and assessed taxes against a portion of the lands included in the ordinance for the years 1931, 1932, 1933, 1934 and 1935, on the theory that said portions have not actually been set apart and used for burial purposes, and defendant has not taken any proceedings to contest the same, nor has defendant paid said taxes so assessed, the defendant contending that the entire tract, including the portion so assessed for taxes, were and are used for the burial of the dead and cemetery purposes.

In meeting the claim of the plaintiff, the defendant contends:

(1) There was no agreement on the part of the defendant to make the payment of $1.00 to the plaintiff for each interment in its cemetery. Even if there was, it would be *ultra vires*.

(2) The provision in the ordinance granting consent to the defendant to use its lands for cemetery purposes, providing for the payment to plaintiff or its predecessor of the sum of $1.00 for each interment made in the cemetery, is void and of no effect, and in violation of the statute in such case made and provided.

(3) The statute under which the permission was granted by plaintiff, or its predecessor, for the use of the lands of the defendant for cemetery purposes, and particularly Section 6, Ch. 64 of the Laws of 1905, Section 27, 1 *C.S.*, p. 380, makes no provision for the plaintiff or its predecessor providing as a condition for said consent, the payment by defendant of $1.00 for each interment in the cemetery lands of defendant. Such condition or provision contained in the ordinance was *ultra vires*.

(4) The provision contained in the ordinance for the payment of $1.00 for each interment in the cemetery lands of defendant was an improper and illegal attempt to tax the lands of defendant for cemetery and burial purposes, in violation of the statute in such case made and provided, illegal, and of no force and effect.

(5) Since the adoption of the ordinance, defendant has never acquiesced in or accepted the provision contained therein for the payment of $1.00 for each interment, nor has it paid anything under said provision. Defendant contends that plaintiff and its predecessor recognized the illegality of said provision and has never, prior to the institution of this suit, attempted to enforce the same. Plaintiff is estopped from attempting to enforce said provision or requiring payments thereto at this late day.

(6) Under the provisions of the statute, the cemetery lands of defendant are exempt from taxation, and defendant cannot be forced or obliged to pay any monies to the municipality or make any contribution to the municipality to be used for its general financial expenses.

Defendant's arguments for a verdict in its favor may be grouped into three classes, namely, *ultra vires,* estoppel, and attempt to tax the cemetery lands of defendant in the face of the statutory exemption therefrom.

Is the defense of *ultra vires* available to the defendant in this case?

It has been repeatedly held in this State that where some burden is lawfully imposed by a municipality upon a street railway company as a condition of the grant of its franchise, the acceptance of such a condition by the company constitutes a contract between the company and the municipality. *Fielders* v. *North Jersey St. Ry. Co.,* 68 L. 343 (E. & A. 1902, Pitney J.), citing *Wilbur* v. *Trenton Passenger Railway Co.,* 57 L. 212; *Railroad Co.* v. *Cape May,* 58 L. 565; *Cape May* v. *Transportation Co.,* 64 L. 80; *Dean* v. *City of Paterson,* 67 L. 199.

It has also been held that it is not open to the traction company to raise the question that the grant of its local privileges and franchises was *ultra vires* the municipal corporation, while at the same time the company retains and uses and enjoys those privileges and franchises. The plea of *ultra vires* is not admitted in such circumstances except where it is practicable to restore the *status quo ante. Rutherford* v. *Hudson River Traction Co., supra,* citing *Camden* and *Atlantic Railroad Co.* v. *Mays Landing Railroad Co.,* 48 L. 530, 562; *Jersey City* v. *North Jersey Street Railway Co.,* 72 L. 383.

The defense that plaintiff is seeking to tax the exempted cemetery lands of the defendant is disposed of by the fact that plaintiff in this action is relying upon a voluntary engagement, a

contract deliberately and solemnly undertaken by the defendant itself, for a full and valuable consideration. *Jersey City* v. *North Jersey St. Ry. Co.*, 72 L. 383 (Sup. Ct. 1905, Pitney, J.)

There is no contention on behalf of the plaintiff that the obligation sought to be imposed upon the defendant is one *in invitum*. A valid, binding contract is relied upon, and there appears to be no contention made on behalf of the defendant that if a valid contract was entered into by the parties to this suit, the terms imposed upon the defendant were unreasonable. *Rutherford* v. *Hudson River Traction Co.*, 73 L. 227 (Sup. Ct. 1906, Pitney, J.).

In *Jersey City* v. *North Jersey St. Ry. Co., supra,* it was also pointed out, in answer to a plea that the defendant company had ceased to pay license fees with the consent and approval of the plaintiff, that the plaintiff was a municipal corporation, a public body politic, acting for public purposes only, through agents of limited powers, chosen by the people for defined public purposes; that nothing had been called to the attention of the court to any act of the Legislature that empowered the municipal authorities to bar the public rights by non-action.

If these principles of law govern the instant situation, they would adversely dispose of all of defendant's contentions.

Defendant, however, seeks to point out that under the Rural Cemetery Act (1 *C. S.* p. 380, par. 27), providing for the consent and approval of the governing body and board of health of a municipality to locate such a cemetery, there is no authority for the imposition of any conditions for the granting of such consent by the municipality.

At the time defendant made application to the municipality to locate its cemetery within the limits of the Township of Acquackanonk, it was not lawful to locate any cemetery or burying ground without the consent and approval of the governing body and Board of Health of the township in which it was proposed to locate such cemetery or burying ground upon application in writing for that purpose made. (Sec. 27, 1 *C.S.*, page 380.)

Laying aside the unavailability of the defense of *ultra vires* to the defendant, the power of the municipal agencies to impose conditions when consenting to the establishment of a new cemetery under Section 6 of the Rural Cemetery Act (1 *C. S.* 380) has been considered by our Supreme Court.

In *Schinkel* v. *Fairview,* 76 L. 445 (Sup. Ct. 1908, Voorhees, J.) the writ of *certiorari* brought up for review the action of a common council in granting consent by resolution to a cemetery association to locate a new cemetery in the Borough of Fairview, Bergen County. The court, after discussing the terms upon which the consent was granted, set the resolution aside because it determined that such act of the common council was not merely incidental to the administrative conduct of the business of the municipality and therefore required an ordinance instead.

But in *Long* v. *Union,* 79 L. 70 (Sup. Ct. 1909), Mr. Justice Reed, following the reasoning in *Traction Co.* v. *Board of Works,* 56 L. 431 (Sup. Ct. 1894, Reed J.; affirmed 57 L. 710; E. & A. 1895; On opinion below), held that the township committee in granting consent for the location of

a cemetery within the limits of the municipality was exercising *quasi*-judicial functions, and that the question remained whether the inducements held out by the cemetery company were such as to illegally influence the judgments of the township committee and the board of health. Justice Reed at page 75 said:

> "The ground upon which control over burial plots was placed under police regulations is that while the devotion of some grounds for burial purposes is necessary, yet the amount of space and the location and surroundings of a cemetery should be controlled by some governmental body, so that the least injury shall be done to other property and to the public by the location of the burying-ground.
>
> "The degree in which the place shall subserve the purpose of the public is a factor in determining the location of the cemetery, and accessibility to the place is a fact to be considered. Therefore a condition, the performance of which is secured by contract or otherwise, that a road to the cemetery shall be opened, or kept in repair, may be unobjectionable.
>
> "So, again, a condition or contract that the cemetery company shall pay taxes upon the property, or insure the township against its loss by reason of the statutory immunity of cemetery property from taxation, would, I think, be legal."

The court further held that it would be no infringement of public policy if the cemetery

company had agreed to pay the amount which would have been received from the tax upon the property if left free from cemetery uses, but that it was questionable whether the township committee and the board of health were not illegally influenced in deciding whether the grant should be made by an interest, as residents of the township, arising out of the amount to be received by the township.

The contract executed by the cemetery company contained no reference to the purpose for which the ten $1,000 bonds were to be given to the Township of Union by the cemetery company, but it appeared from the testimony that the purpose was to secure the township against the loss of taxes on this property. The amount received by the Township was not limited to or measured by the amount of taxes lost by the township.

Both ordinance and resolution, however, were vacated by direct attack in certiorari because the contract provided for the building and operation of a trolley line, which the court held was clearly an illegal inducement to the judicial action of the committee and the board, and constituted a bribe which changed the sentiment of those in the vicinage from opposition to friendliness toward the cemetery project, and undoubtedly influenced the judgment of the municipal officials in arriving at the conclusion that the location for the cemetery at the particular point should be permitted.

The provision in Section 2 of the ordinance of December 12, 1905 requiring a formal acceptance of the terms of the ordinance by writing under the hand of the Chairman and the seal of such

cemetery within ten days from the passage of the ordinance was not complied with.

But there is evidence that the ordinance was passed after the cemetery had filed a petition with the Township Committee praying for its permission and consent to establish a cemetery on its property, and that from the time of the adoption of the ordinance, the cemetery association has been in possession of the lands covered by the ordinance and has operated said lands as a cemetery for the burial of the dead.

In *Trenton & Mercer County Trac. Corp.* v. *Trenton,* 90 L. 378 (Sup. Ct. 1917, Swayze, J.) a new agreement was reached between the municipality and the traction company with regard to fare rates, and a resolution was adopted by the company directing its officers to execute an agreement which was already prepared immediately after passage of an ordinance by the City of Trenton. The ordinance was passed by the City, but after its passage, the traction company rescinded its original resolution. The company argued that it was not intended that there should be a complete contract until a written agreement was executed. At page 382 the court said:

> "The draft agreement had been submitted by the city to the company; the company had assented to its terms; all that remained was for the executive officers to execute the written instrument in which the terms of the agreement were set forth; but the officers had no power to vary the terms, and it was not contemplated that the directors should again pass on the matter. The case is, as if, in *Water Commissioners of Jersey City* v. *Brown,* 32 L.

504 (E. & A. 1866, Elmer, J.), the agreement had been already prepared and adopted by the water commissioners."

In Volume 4 of *McQuilan Municipal Corporations,* Section 1777, there appears the following:

"An ordinance granting a franchise confers no rights and imposes no obligations on the grantee unless it is accepted. Acceptance of the franchise ordinance by the grantee is usually evidenced in a formal manner by entry upon the municipal records. However no formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company; and the use of a franchise constitutes an acceptance. Where no obligations are imposed on the grantee the acceptance of the thing granted may be inferred from slight circumstances. But where the grant of the franchise requires an acceptance in writing, the municipality may waive such acceptance, and the act of the company in using the streets may be sufficient as an acceptance. *Postal Tel. Cable Co.* v. *City of Newport,* 78 S. W. 159.

"The acceptance of a franchise is an acceptance of the conditions therein. *Jamestown* v. *Home Tele. Co.,* 109 N. Y. S. 297, 125 App. Div. 1.

"If a company has no right to act except under the conditions of an ordinance granting permission, full acceptance of the conditions is implied in going ahead and

using the streets pursuant to such municipal permission. *Detroit* v. *Detroit City Railway Co.*, 37 Mich. 558."

Defendant seeks to distinguish the instant case from the aforementioned cases embodying principles of law with respect to street using corporations, on the ground that the defendant corporation is a charitable trust, contending that this finding was finally adjudicated in the case of *Atlas Fence Co.* v. *West Ridgelawn Cemetery,* 110 Eq. 580 (E. & A. 1932, Parker, J.). That decision, after holding that such a cemetery corporation is a charitable trust, states that it is subject to the jurisdiction in the Court of Chancery in that aspect; that in a proper case, Chancery may appoint a receiver to administer a charitable trust under its general equitable powers; and that such jurisdiction exists touching maladministered trusts. It also holds that such a corporation can have creditors even though they are by law deprived of the usual methods of collecting their claims. 1 *C. S.* 375, Sec. 9. Such a finding presupposes the power to make contracts. Express power therefor will be found in Section 3 of the Rural Cemetery Act, 1 *C. S.* 373. *Bittles* v. *West Ridgelawn Cemetery,* 111 Eq. 417 (E. & A. 1932, Parker, J.).

I am of the opinion that the character of the defendant as a charitable trust does not shield it in this case from the principles of law which have been held applicable to street using corporations. None of the cases to which defendant refers bears out the distinction which it seeks to make in order to sustain the contentions to free it from the obligations sought to be enforced by the municipality in this action.

I will therefore find a verdict in favor of the plaintiff and against the defendant for a sum which represents the aggregate amount of $1.00 for each interment made in the cemetery during the years 1930 to 1935 inclusive, and will sign a postea to that effect upon its presentation to me. The foregoing findings shall be included in the postea, in accordance with Rule 113 of the Supreme Court.

Postea

(Filed January 24, 1938.)

This case was tried before Judge Joseph G. Wolber, without a jury by consent of both of the parties thereto, at the Passaic Circuit, on October 8, 1937.

After hearing the agreed state of the case and counsel for plaintiff and defendant, the Court finds:

1. That the Township of Acquackanonk was on December 12, 1905 a municipal corporation of the County of Passaic, and that in 1917, under the provisions of Chapter 135 of the Laws of 1899, page 283, 1 *C. S.* 1368, and the amendments, thereof and supplements thereto, the Township of Acquackanonk became incorporated as the City of Clifton, and by operation of law became the successor to the Township of Acquackanonk.

2. That the defendant was on September 30, 1905 duly incorporated under "An Act to authorize the incorporation of rural cemetery associations and regulate cemeteries." (Rev. 1877,

Postea

p. 100; *C. S.* 372.) and the amendments thereof and supplements thereto, and has since that time duly existed and operated as a cemetery corporation, in accordance with the provisions of said act and its amendments and supplements.

3. That in 1905 the defendant filed a petition with the Township Committee of the Township of Acquackanonk praying for permission and consent to establish a cemetery in said township on property described in an ordinance hereinafter referred to and that on December 12, 1905, the Township Committee of the Township of Acquackanonk adopted an ordinance entitled, "An Ordinance giving consent and approval to East Ridgelawn Cemetery, a body corporate, to locate a new cemetery in the Township of Acquackanonk," which ordinance was passed by a vote of the Township Committee, approved by the Chairman, and attested by the Township Clerk, and reads as follows:

"Whereas, application has been made in writing by the East Ridgelawn Cemetery to the Township Committee of the Township of Acquackanonk for their consent and approval of the locating of a new cemetery in said township and to use and occupy for such cemetery a certain tract of land and premises situate in said township bounded and described as follows, to wit, northwesterly by the Dwas Line road, Passaic Avenue and the lands of William W. Scott and H. Schaettgene; southeasterly by Franklin Avenue and the lands of I. McCleece; northeasterly by the Hilton Boulevard; and southwesterly by lands of I. McCleece, Stone House Plains Road, and lands of H. Schaettgener, H. Brown, Estate

Postea

of H. Romaine and Estate of Florence Verdin. Said above bounded and described tract of land containing one hundred and twenty-five acres; which application was accompanied by a descriptive map of the said land and premises. And the said application having been read and duly considered.

"Therefore, the said Township Committee of the Township of Acquackanonk, in the County of Passaic, do grant the said application and do ordain as follows:

"Section 1. That the said East Ridgelawn Cemetery, a body corporate, have the consent and approval, and such consent and approval is hereby granted to said East Ridgelawn Cemetery, to locate a new cemetery in the Township of Acquackanonk, in the County of Passaic and State of New Jersey, and to use and occupy for such cemetery the lands and premises above described, being the same as mentioned in its said application and shown on the descriptive map annexed thereto.

"Section 2. That the said East Ridgelawn Cemetery shall pay to the township one dollar for each interment made in the cemetery above described so long as the land is used for burial purposes and is exempt under the laws of the State from taxation because it is used as a cemetery. And it is expressly understood and agreed that the amount to be paid each year shall not be less than three hundred dollars and shall be due and payable on or before the first day of December after the passage and acceptance of this ordinance, which acceptance shall be signified by a writing under the hand of the chairman

and the seal of said cemetery within ten days from the passage of this ordinance.

"Passed by vote of the Township Committee December 12, 1905.

"HENRY FREDERICK,
"Chairman

"Attest: Allison J. Van Brunt
Township Clerk."

4. That by said ordinance, the Township of Acquackanonk gave its permission and consent to the defendant to locate a new cemetery in the Township and to use and occupy for cemetery purposes the lands and premises described therein, and that ever since the adoption of said ordinance on December 12, 1905, the said defendant has been in possession of the lands covered by and referred to in said ordinance and the map thereto annexed, and operated said lands as a cemetery for the burial of the dead.

5. That the said defendant never paid to said Township of Acquackanonk, or to the plaintiff as its successor, the sum of $1.00 for each interment made in the cemetery, as provided in said ordinance, nor has it paid any sum for any interment, but has at all times refused to make such payments.

6. That the plaintiff herein and its predecessor, the Township of Acquackanonk, have never instituted any proceedings to collect the sum of $1.00 for each interment made in said cemetery until the institution of this suit, nor has the defendant at any time instituted any proceedings to test the validity of Section 2 of the said ordinance.

Postea

7. That the plaintiff and the Township of Acquackanonk have on several occasions demanded payment from defendant and authorized proceedings to be instituted for the collection of sums due it under said ordinance.

8. That the number of burials made in said cemetery during the years hereafter specified are as follows:

1930	603
1931	598
1932	524
1933	563
1934	516
1935	738

and that should judgment be entered in favor of the plaintiff, it shall be based upon the number of interments set forth above for the years designated and interest thereon in accordance with the demand in the counts of the complaint for such years.

9. That under the provisions of the Rural Cemetery Act, 1 *C. S.*, Section 8, page 375, the said cemetery lands are exempt from taxation when actually set apart and used for burial purposes. The City of Clifton has levied and assessed taxes against a portion of the lands included in the ordinance for the years 1931, 1932, 1933, 1934, 1935, on the theory that said portions have not actually been set apart and used for burial purposes, and defendant has not taken any proceedings to contest the same, nor has defendant paid said taxes so assessed, the defendant contending that the entire tract, including the portion so assessed for taxes, were and

Postea

are used for the burial of the dead and cemetery purposes.

10. That although the provision in Section 2 of said ordinance of December 12, 1905 requiring a formal acceptance of the terms of the ordinance by a writing under the hand of the Chairman and the seal of such cemetery within ten (10) days from the passage of the ordinance was not complied with, the defendant by filing its petition with the Township Committee of the Township of Acquackanonk praying for its permission and consent to establish a cemetery on its property and from the time of the adoption of the ordinance, having been in possession of the lands covered by the ordinance and exercised the privileges granted therein by operating said land as a cemetery for the burial of the dead, did accept the provisions of said ordinance and became legally bound thereby.

11. That the amount due the plaintiff from defendant under the provisions of said ordinance for the year 1930 and interest thereon is $859.28; for the year 1931 and interest thereon is $816.27; for the year 1932 and interest thereon is $683.82; for the year 1933 and interest thereon is $700.94; for the year 1934 and interest thereon is $611.46; and for the year 1935 with interest thereon is $830.25, making a total of $4,502.02.

12. The court finds for the plaintiff and against the defendant upon the grounds set forth in a memorandum heretofore filed by the Court which is incorporated herein by reference, for the sum of $4,502.02.

(Sgd.) Joseph C. Wolber
C. C. Judge and S. C. C.

Judgment

(Entered January 24, 1938.)

Whereupon it is adjudged that the plaintiff City of Clifton, a municipal corporation of the State of New Jersey do recover of the said defendant East Ridgelawn Cemetery, a corporation of New Jersey the sum of Four thousand five hundred two dollars and two cents damages together with its costs which have been taxed at the sum of Seventy dollars and forty-six cents, making in the whole the sum of Four thousand five hundred seventy-two dollars and forty-eight cents.

$4502.02
70.46
$4572.48

Judgment entered and signed January 24, 1938.

THOMAS J. BROGAN
Chief Justice

Notice of Appeal

(Filed Mar. 3/38)

To: JOHN G. DLUHY, Esq.,
Attorney for Plaintiff.

SIR:

TAKE NOTICE that the East Ridgelawn Cemetery, a corporation of the State of New Jersey, the defendant in the above entitled cause, appeals from the whole of the judgment entered in this cause in the above entitled court, to the Court of Errors and Appeals of New Jersey in the last resort in all causes.

CAREY & LANE
Attorneys for Defendant.

Dated: Jersey City, N. J., February 16th, 1938.

(Copy duly served February 25, 1938.)

Grounds of Appeal

(Filed March 26, 1938)

NEW JERSEY COURT OF ERRORS AND APPEALS

CITY OF CLIFTON, a municipal corporation of the State of New Jersey, *Plaintiff-Respondent,* *vs.* EAST RIDGELAWN CEMETERY, a corporation of New Jersey, *Defendant-Appellant.*	Action at Law On Appeal Grounds of Appeal

The above named, East Ridgelawn Cemetery, a corporation of New Jersey, defendant below—appellant, assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above case:

1. The Court below erroneously denied defendant's motion for the direction of a verdict and the entry of a judgment for the defendant.

2. The Court below erroneously granted plaintiff's motion for the direction of a verdict and the entry of a judgment in favor of the plaintiff.

3. The Court below erroneously found that although the provision in Section 2 of said ordinance of December 12, 1905 requiring a formal acceptance of the terms of the ordinance by a writing under the hand of the Chairman and

the seal of such cemetery within ten (10) days from the passage of the ordinance was not complied with, the defendant by filing its petition with the Township Committee of the Township of Acquackanonk praying for its permission and consent to establish a cemetery on its property and from the time of the adoption of the ordinance, having been in possession of the lands covered by the ordinance and exercised the privileges granted therein by operating said land as a cemetery for the burial of the dead, did accept the provisions of said ordinance and became legally bound thereby.

4. The complaint filed herein does not set forth a good cause of action.

5. The proofs do not sustain a judgment for the plaintiff.

6. The provisions in the ordinance referred to in the complaint and in the proofs, granting consent to defendant to use its lands for cemetery purposes and providing for the payment to plaintiff or its predecessor of the sum of $1.00 for each interment made in the cemetery, is void and of no effect, and in violation of the statute in such case made and provided, and particularly the Rural Cemetery Act.

7. The proofs do not disclose an agreement on the part of the defendant to make the payment of $1.00 per burial to the plaintiff.

8. There is nothing in the proofs to indicate or show an express agreement on the part of the defendant to pay to plaintiff $1.00 for each interment in the cemetery lands of defendant.

9. Any agreement on the part of the defendant to make the payment of $1.00 per burial to the plaintiff would be ultra vires.

10. The statute under which the permission was granted by the plaintiff or its predecessor for the use of the lands for cemetery purposes, particularly the Rural Cemetery Act, and particularly Section 6, Chapter 64 of the Laws of 1905, 1 Compiled Statutes of New Jersey, page 380, makes no provision for the payment to the plaintiff or its predecessor, providing as the basis of such consent for the payment by defendant of $1.00 for each interment in the cemetery lands of defendant. Such condition or provision contained in the ordinance was ultra vires.

11. The provision contained in the ordinance for the payment of $1.00 for each interment in the cemetery lands of defendant was an improper and illegal attempt to tax the lands of defendant used for cemetery and burial purposes, in violation of the statute in such case made and provided, and particularly the Rural Cemetery Act and the General Tax Act, and illegal and of no effect.

12. The defendant has never acquiesced in or accepted the provision contained in the ordinance for the payment of $1.00 for each interment, nor has it paid anything under said provision.

13. Plaintiff and its predecessor recognized the illegality of the provision contained in the said ordinance for the payment of $1.00 for each interment in the cemetery lands of defendant, has never prior to the institution of this suit attempted to enforce the same, and plaintiff is

estopped from attempting to enforce said provision or require payments thereunder.

14. Under the provisions of the statute and particularly the Rural Cemetery Act, the cemetery lands of defendant are exempt from taxation, and defendant cannot be forced or obliged to pay any moneys to the plaintiff municipality, or make any contribution to the municipality to be used for its general financial expenses.

15. There is nothing in the proofs to show any waiver by the defendant of its right to exemption from taxation under the statute.

16. As soon as the consent was given for the use by the defendant of its lands for cemetery and burial purposes, the public became involved and the lands became impounded with a charitable trust.

CAREY & LANE
Attorneys for Defendant-Appellant.

(Copy duly served.)

Stipulation

(Filed March 27, 1938)

It is hereby stipulated and agreed that the argument of the above appeal noticed for the May Term, 1938, be on the opening day of the Term marked "Off For the Term".

Dated: March 25, 1938.

JOHN G. DLUHY,
Attorney for Plaintiff-Respondent.

CAREY & LANE,
Attorneys for Defendant-Appellant.

New Jersey Court of Errors and Appeals

CITY OF CLIFTON, a municipal corporation, of the State of New Jersey,
Plaintiff-Respondent,
v.
EAST RIDGELAWN CEMETERY, a corporation of New Jersey,
Defendant-Appellant.

Action at Law.
On Appeal from New Jersey Supreme Court.

BRIEF OF DEFENDANT-APPELLANT

This is an appeal from a judgment entered in the New Jersey Supreme Court, Passaic Circuit, by Judge Wolber, sitting without a jury, in favor of the plaintiff and against the defendant for $4,502.02 and costs.

In this brief we will call appellant the "defendant", and respondent the "plaintiff".

Grounds of Appeal

The grounds of appeal are printed in the state of case at pages 41-44, and are 16 in number. Defendant relies upon all of them, which will be argued under one or other of the points.

Statement

This suit was instituted by the City of Clifton against the defendant, East Ridgelawn Ceme-

tery. The case was tried on the pleadings and a Stipulation of Facts which was admitted in evidence as Exhibit P-1 (pp. 18-20). There is no dispute as to the facts. They are fully set forth in the Stipulation of Facts, in the memorandum of Judge Wolber (pp. 21-25), and in the Postea (pp. 34-39).

The following is a brief statement of the facts:

The City of Clifton is the successor of the Township of Acquackanonk. The defendant was incorporated on September 30, 1905 under the Rural Cemetery Act. In 1905 defendant filed a petition with the Township Committee of the Township of Acquackanonk, praying for permission and consent to establish a cemetery in the said Township of Acquackanonk. The lands of the cemetery are described in the ordinance giving consent and approval to defendant to locate a new cemetery in the Township. A copy of the ordinance is annexed to the complaint as Schedule A (pp. 6-7). The ordinance was adopted by the Township Committee and approved by the Chairman on December 12, 1905. The ordinance gave the Township's permission and consent to the defendant to locate a new cemetery in the Township and to use and occupy for cemetery purposes the lands and premises described therein. Since the adoption of the ordinance defendant has been in possession of said lands and operated said lands as a cemetery for the burial of the dead. Section 2 of the ordinance (p. 7) provides as follows:

> "That the said East Ridgelawn Cemetery shall pay to the township one dollar for each interment made in the cemetery above described so long as the land is used for burial purposes and is exempt under the laws of the State from taxation because it

> is used as a cemetery. And it is expressly understood and agreed that the amount to be paid each year shall not be less than three hundred dollars and shall be due and payable on or before the first day of December after the passage and acceptance of this ordinance, which acceptance shall be signified by a writing under the hand of the Chairman and the seal of said cemetery within ten days from the passage of this ordinance."

Defendant has never paid to the Township of Acquackanonk or to plaintiff as its successor, the sum of $1 for each interment made in its cemetery, nor has it paid any sum for any interment, but has at all times refused to make such payment. The Township of Acquackanonk and the plaintiff have never instituted any proceedings to collect the sum of $1 for each interment made in said cemetery until the institution of this suit, but have on several occasions demanded payment from defendant and authorized proceedings to be instituted for collection of sums alleged to be due it under said ordinance. Defendant has never instituted any proceedings to test the validity of Section 2 of the ordinance.

The suit was instituted to collect the sum of $1 for each interment made during the years 1930 to 1935, both inclusive, with interest.

It is stated in Paragraph 10 of the Stipulation (p. 20) that taxes have been assessed against certain portions of the cemetery lands for the years in question on the ground that they have not actually been set apart for burial purposes; that defendant has not taken any proceedings to contest the same nor has the defendant paid them, the defendant contending that the entire

tract, including the portions so assessed for taxes, were and are used for the burial of the dead and cemetery purposes.

The contentions of the defendant might properly be grouped under the following headings:

1. The provision contained in the ordinance for the imposing the fee of $1 for each interment is ultra vires and an improper and illegal attempt to tax the lands of defendant used for cemetery and burial purposes in violation of the Rural Cemetery Act and the General Tax Act, and illegal and of no force or effect. The cemetery lands are exempt from taxation.

2. There was no agreement on the part of the defendant to make the payment of $1 for each interment to the plaintiff, and even if there were, it would be ultra vires and against public policy.

3. The imposing of the payment of $1 for each interment made in the cemetery is against public policy and the provisions of the statute respecting cemeteries.

4. The defendant, as a cemetery, is a charitable trust.

5. There was no waiver by the cemetery association of its right to exemption from taxation.

The arguments under the above headings are so interwoven together that they will be argued under one point.

ARGUMENT

The entry of judgment in the court below in favor of the plaintiff and against the defendant was erroneous and the judgment should be set aside.

There is a well defined policy in this state to exempt cemetery lands from taxation.

The provision for the exemption of the cemetery lands from taxation is contained in Section 8 of the Rural Cemetery Act, 1 Comp. Stat. 375, Rev. 1937, Title 8:2-27. The statute provides as follows:

> "The cemetery lands and property of any cemetery association, however incorporated, actually used for cemetery purposes, and the bonds and mortgages given to secure the purchase money of such lands, shall be exempt from all taxes, rates or assessments, and shall not be liable to be sold on execution, or be applied in payment of debts due from any individual proprietors or owners of plots or lots in such lands; but the proprietors and their heirs or devisees shall hold the same exempt therefrom so long as the same shall remain dedicated to the purpose of a cemetery." Rev. 1937, 8:2-27

There is also a tax exemption provision in the Tax Act, Rev. 1937, 54:4-3.9.

There is therefore an express statutory provision exempting cemetery lands from taxation, which cannot be waived, particularly in view of the fact that our courts have held that land dedicated for burial purposes is a "charitable trust". However, there has been no waiver on the part of the cemetery.

There apparently was some confusion as to a cemetery being a charitable trust until the opinion of the Court of Errors and Appeals in the case of *Atlas Fence Co.* v. *West Ridgelawn Cemetery,* 110 N. J. Eq. 580. In that case Mr. Justice Parker, after reviewing all of the cases on the subject, said at the top of page 594: "We conclude then, that the defendant corporation is a charitable trust".

In this respect the situation respecting a cemetery (a charitable trust) is entirely distinguishable from the situation appearing in the cases cited by the trial court in its memorandum which refer to street car lines using the public streets. Cases of this nature are *Jersey City* v. *North Jersey St. Ry. Co.,* 72 N. J. Law 383; *Rutherford* v. *Hudson River Traction Company,* 73 N. J. Law 227; *Fielders* v. *North Jersey St. Ry. Co.,* 68 N. J. Law 343, and *Camden & Atlantic Railroad Co.* v. *Mays Landing Railroad Co.,* 48 N. J. Law 530, and are clearly distinguishable from the case at bar.

Two of the cases, *Schinkel* v. *Fairview,* 76 N. J. Law 445, and *Long* v. *Union,* 79 N. J. Law 70, cited in the memorandum of the trial court would seem at first to sustain plaintiff's contention. We desire, however, to point out that both of these cases were decided long before the *Atlas Fence Co.* case and that at that time and thereafter, the condition as to a public cemetery being a charitable trust was not so clear but that in the *Linden Cemetery* case in 85 N. J. Equity, the Court of Errors and Appeals reserved its opinion on this point. At 110 N. J. Equity, at page 591, Mr. Justice Parker said:

> "It is true that this court, in Attorney-General *v.* Linden Cemetery Association, 85

N. J. Eq. 501, 507, reserved its opinion on the point, which the late Vice-Chancellor Howell, in the same case, had expressly decided (Bliss *v.* Linden Cemetery Association, 81 N. J. Eq. 394, 396), and the late Vice-Chancellor Stevens had twice suggested. Corin *v.* Glenwood Cemetery, 69 Atl. Rep. 1083 (not officially reported); East Ridgelawn Cemetery Co. *v.* Frank, 77 N. J. Eq. 36."

Furthermore, the quotation (p. 29) of the trial judge from the opinion of the Supreme Court in the case of *Long* v. *Union,* 79 N. J. L. 70, was clearly dictum. The point actually decided in that case was that the action of the committee and the board was a judicial action for which there was clearly an illegal inducement and that, therefore, the ordinance and resolution should be vacated (see page 77). Furthermore, in that case there was not only an actual consent but the matters constituting the illegal inducement were actually proposed to induce the municipal authorities to grant their consent.

Likewise, the statement on this question in the opinion of the Supreme Court in the case of *Schinkel* v. *Fairview,* 76 N. J. Law 445, is merely dictum. The sole point actually decided in that case was that the consent by the municipality for the establishment of a cemetery must be by ordinance and set aside the resolution granting such consent.

Counsel for plaintiff in his brief below cited many cases holding that a tax is not a voluntary payment or donation but is an enforced contribution. These cases, however, are mainly in relation to consents to utilities to use the public streets and highways and were decided upon the ground of an express consent to the imposition

of the payments provided for in the ordinances under review.

In the determination of the case of *Jersey City* v. *Jersey City and Bergen Railway Co.*, 70 N. J. Law 360, the case was determined upon the premise that there was *"a contract between the municipality and the railway company, made under legislative authority and confirmed by express legislative sanction"* (Italics ours). The court quoted from the opinion in the case of *Jersey City and Bergen Railway Co.* v. *Jersey City and Hoboken Horse Railroad Co.*, 20 N. J. Eq. 61; 21 N. J. Eq. 550, in which case the Chancellor (20 N. J. Eq. 74) said "this ordinance, its acceptance, the obligation, and the supplement to the charter are matters between the city and the complainant; as between them they amount to contracts".

As we have pointed out, in the case at bar there has been no consent or waiver on the part of the cemetery, or contract entered into. Nor has there been any confirmation by the legislature of any such contract. We contend that in fact any such contract would have been in violation of the provisions of the statute.

Under the Rural Cemetery Act (1 Comp. Stat. p. 380—Par. 27) it is provided that it shall not be lawful to locate any new cemetery without "the consent and approval of the governing board or body and Board of Health of the City, Town, Township, Borough or other municipality in which it is proposed to locate or enlarge such cemetery". Under this provision the only action which the municipality has the power to take is to either consent or refuse to consent. There is no authority for the imposing as a condition to the giving of the consent of any

conditions whatever. There is no contract entered into between the cemetery and the municipality such as is said to be entered into between a company, desiring to use the public highways for street railway purposes, expressly agreeing to certain matters as a condition for the granting of the consent. Under the Rural Cemetery Act and in our case, there is no express contract or agreement on the part of the cemetery. As soon as the consent is given and the lands thereby dedicated for burial purposes, the public is involved and the lands become impounded with a charitable trust. Because of the public interest and for various reasons which have been referred to in the cases, the lands so dedicated for burial purposes are expressly exempted from taxation by the statute. In the face of this expressed statutory provision, how can it be said that the municipality can impose taxes upon the cemetery lands, or force the cemetery to agree as a condition of the giving of its consent that the cemetery lands should be taxable or that the cemetery would waive its exemption. Likewise, how can it be said that the lands are exempt from taxation, if the municipality can exact, as a condition for the consent, a sum equivalent to or in lieu of the taxes, to be paid into the *municipality treasury* as a contribution to general municipal expenses the same as sums received for taxes. To hold that the provision in the ordinance for the payment of this One ($1.00) Dollar for each interment in the cemetery lands can be exacted is, we respectfully contend, flying in the face of the expressed provision of the statute and rendering it nugatory. By whatever name it is called there is no question but that the imposing of the payment of $1.00 for each burial to the

municipality is *in effect* the imposing of a tax. If they could impose $1.00 for each burial there is no reason why they could not impose $100.00 or provide that the payment should be such sum as would equal the amount of the taxes which would be levied except for the statutory exemption from taxation.

In discussing the fixed public policy of the legislature to provide special provisions affecting and to protect cemetery lands, including the exemption from taxation, Mr. Justice Parker in his opinion in the case of *Atlas Fence Co.* v. *West Ridgelawn Cemetery, supra,* said at page 591:

> "In the 'Old Burying Ground' Case, Stockton *v.* Mayor, &c., of Newark, 42 N. J. Eq. 531, Chancellor Runyon held that there was a charitable trust; and on appeal, this court, while reversing the decree, took occasion to express its entire concurrence in that view. 44 N. J. Eq. 178, 183. We cannot perceive any substantial difference in the use, between a public burying ground conveyed for burial purposes to a municipality, and a burying ground owned and operated by a cemetery corporation under our statute. In the East Ridgelawn Case, 77 N. J. Eq. 39, the vice-chancellor points out the provisions of the statute committing the management of a cemetery to trustees elected by the lot owners; exempting the lands from taxation and assessment; making lots generally inalienable after an interment therein; conferring limited powers of eminent domain; authorizing the holding of property real and personal, upon trust to apply the income to the improvement and embellishment of the grounds; and the investment of proceeds of sale of lots for the same purpose; and directing by law the application of all proceeds of sale of lots to paying for

the property, putting and keeping it in order, improving and 'embellishing' it, and for 'incidental expenses'. In short, there is to be no stock as the word is generally used (Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149), and the receipts belong to the corporation for the purposes stated in the act, and not to the promoters, officers or other individuals not creditors. So where, in the Linden Case, 85 N. J. Eq. 501, supra, the attempt was to create a speculative value in certificates issued to the seller of lands to the cemetery, by enabling him to participate in the rising value of lots, the court held him to a value of certificates based on the value of the land at the time he sold it to the cemetery.

"In Moore's Executor *v.* Moore, 50 N. J. Eq. 554, Vice-Chancellor Van Fleet (at p. 558), used this language: 'In construing this statute, it is important to remember that the corporations, whose capacity the legislature were defining, are endowed with immortality for the purpose of providing places of burial for the dead, where their dust may rest undisturbed and inviolate forever, and that the use of any part of their lands by the owner of a lot or plot, for the burial of the dead, withdraws such lot or plot from all the ordinary uses to which land may be put, and renders it inalienable forever thereafter except as a place of sepulture. Rev. p. 102, §11. This legislative declaration gives impression to a sentiment common to mankind. The place where the dead are buried is regarded generally, if not universally, hallowed ground. We express our love for our dead by placing their bodies in the earth tenderly and sorrowfully; we try to perpetuate their memories by the erection of monuments, and we give expression to our veneration for their dust by adorning and beautifying the spot where it reposes. Their dust is sacred

> to us. Our reverence for it creates a strong natural desire that it shall never be disturbed or desecrated, and that the place where it rests shall be regarded as consecrated ground and its beauty preserved until the end of time'."

It cannot be said that the provision for the payment of $1.00 for each interment is a license fee to take care of any regulatory measures. By the ordinance granting the consent to the cemetery association and providing for this license fee or tax, no duties were imposed upon the cemetery regarding safeguards to health and the like in the development and operation of the cemetery. Therefore, this provision imposed by the ordinance is not for the purpose of regulation under the police power, but for the purpose of gaining some revenue from the use of the land as a *quid pro quo* for the loss of ratables. *In effect an attempt to impose a tax on the cemetery lands in an indirect method which under the provisions of the statute it could not levy directly.*

As to the purpose behind any license fee and the distinction between police regulations and revenue regulations, it was said by the Supreme Court in *Dunn* v. *Hoboken,* 85 N. J. Law, 78 at page 86:

> "The distinction between the power to license as a police regulation and the same power as a revenue measure is of the utmost importance. If granted with a view to revenue, the amount of the tax, if not limited by the legislature, is in the discretion and judgment of the municipal authorities; if given as a police power, it must be exercised as a means of regulation only—not as a source of revenue—and is subject to review in this court. North Hudson County Rail-

way *v.* Hoboken, 12 Vroom 71; Margolies *v.* Atlantic City, 38 Id. 82."

Furthermore, the ordinance provides that the tax shall only be due after the formal execution by the officers of the cemetery company under seal, of the acceptance of the ordinance. *There was no such acceptance ever executed.* Neither was there any proof in this case of any action by the board of directors of the cemetery company directing its officers to execute an agreement which was already prepared immediately after passage of the ordinance as was the case in *Trenton & Mercer County Trac. Corp.* v. *Trenton,* 90 N. J. Law 378, cited by Judge Wolber in his memorandum at page 31 of the State of Case.

As stated before there was no agreement. The City permitted the cemetery association to use the lands for cemetery purposes and make burials therein without interference or the payment of the sum of $1.00 for each burial for 30 years. The lands are now and have been for all these years dedicated for cemetery purposes and numerous burials made in there. The plaintiff is estopped from instituting this suit.

CONCLUSION

It is respectfully submitted that the action of the trial court in entering a judgment for the plaintiff was erroneous, and that a judgment for the defendant should have been entered.

CAREY & LANE,
Attorneys for Defendant-Appellant.

ROBERT CAREY,
HARRY LANE,
Of Counsel.

To be argued by HARRY LANE.

New Jersey Court Of Errors and Appeals

CITY OF CLIFTON, a Municipal Corporation of New Jersey, Plaintiff-Respondent,	Action at Law.
vs.	ON APPEAL FROM
EAST RIDGELAWN CEMETERY, a Corporation of New Jersey, Defendant-Appellant	NEW JERSEY SUPREME COURT

BRIEF OF PLAINTIFF-RESPONDENT, City of Clifton.

This is an appeal taken from a judgment entered against East Ridgelawn Cemetery, in the New Jersey Supreme Court, Passaic Circuit, by Judge Joseph G. Wolber, sitting without a jury, in favor of the City of Clifton, a municipal corporation of New Jersey for $4,502.02 and costs.

STATEMENT OF CASE

The facts as outlined in the brief of defendant are substantially complete and for the purpose of the argument are adopted as correct.

In this brief, respondent will be called plaintiff, and the appellant, defendant.

The main point of plaintiff is that the action of the trial Court was correct, and all points hereinafter argued when considered together shall be the argument of plaintiff that the Court below committed no error.

The grounds of appeal are numerous but may be combined for the sake of convenience, into five groups.

Grounds of appeal Nos. 1 and 2 standing alone are not proper grounds for the purpose of reviewing the proceedings of the lower Court because they are general and do not specify the error.

Golden Realty Co. v. Grant B. & L. Assn.—109 N. J. L. 129.

The remaining grounds of appeal are grouped as follows:

1. That there exists no valid contract binding upon the defendant (grounds 3, 4, 5, 7, 8 and 12).

2. That the contract is ultra vires both corporations (grounds 6, 9 and 10).

3. That the ordinance is an attempt to tax lands of cemetery (grounds 11 and 14); and that the cemetery did not waive its exemption (ground 15).

4. That the plaintiff is estopped because of its failure to act heretofore (ground 13).

5. That the defendant is a charitable trust (ground 16).

POINTS I and II

A

Breach of the obligation arising out of provisions of the ordinance is not denied.

The issue in the lower Court was, "Is there a valid and enforceable contract existing between the defendant and the plaintiff?"

The ordinance (pages 6 and 7) granted consent and aproval to locate a new cemetery and in the second section provided, "*that said East Ridgelawn Cemetery shall pay to the township* $1.00 *for each interment made in the cemetery so long as the land is used for burial purposes and is exempt under the laws of the State from taxation because of its being used as a cemetery.*"

The law under which application for the approval was made (1 Rev. Stat. 1937, Sec. 8:3-2—Source P. L. 1906, Chapter 152, Sec. 1, page 284) *required* the approval of the plaintiff before it could establish a cemetery, in the following language:

> "It shall not be lawful to locate any new cemetery * * * without the consent and approval of the governing board or body and board of health of the City * * * in which it is proposed to locate or enlarge such cemetery or burying-ground, upon application in writing for that purpose made * * *."

If the legislature granted the franchise directly to the defendant, it could have imposed like conditions as those imposed in the case at bar.

By the above provision, the legislature of this State delegated to its political subdivisions the right to grant such franchise and placed no restrictions upon the right so delegated.

The plaintiff, therefore, had the right to do what the State could have itself done, that is, impose terms and conditions for the acceptance and enjoyment of the franchise.

26 C. J. 1030, Sec. 69.

Jersey City v. Jersey City & Bergen Railroad Company, 70 N. J. L., page 360, at 362.

The plaintiff was free to deny the application for the cemetery franchise but instead arrived at an agreement with the defendant as evidenced by the terms of the ordinance of December 12, 1905. In effect the plaintiff offered its consent to locate a new cemetery if the defendant would agree to reimburse the plaintiff by the payment of $1.00 for each interment. The consideration for this agreement was a valuable one, for the plaintiff was foregoing perpetually the right to tax the lands upon which the cemetery was to be located while the defendant obtained the valuable right to operate the premises as a cemetery.

By virtue of said ordinance, defendant has operated a cemetery at the place in question for the past thirty-three years.

It has been held in this State that where a burden is lawfully imposed upon a street railway company as a condition of the grant of

its franchise, the acceptance of such condition by the company constitutes a contract between the company and the municipality.

In *Jersey City v. Jersey City & Bergen Railroad Company*, 70 N. J. L., page 360, the Court on page 362 said:

> "As the legislature was itself the representative of the general public and had power to grant unconditionally to the company the right to construct its railroad through the streets of Jersey City, the fact that the right was granted upon the condition that the consent of the common council should first be obtained, indicates that such consent might be given or withheld on grounds of advantage or disadvantage to the local public represented by the municipal body. The construction of the railroad through the streets of Jersey City might in various ways lead to an increase in the burdens of the municipality, and its consent was made requisite, doubtless in order that provision should be made to meet or mitigate these burdens. What the provision should be the legislature did not prescribed, and so long as it was satisfactory to the city and the company, other persons were not concerned. *These parties chose, by the ordinance of the Council and its acceptance by the company, to put the provision in the form of an annual contribution by the latter to the municipal treasury, graduated by the company's use of the streets, and we see no reason to question their power of doing so, or the legality of their bargain. If the right of the city to impose*

such a condition was to be denied, the ordinance should not have been accepted, but should have been attacked directly, for if the Council had not that right the consent which was given on this condition, and was inseparably connected with it, must fall on its annulment. Davis v. Town of Harrison, 17 Vroom 79, 85." (Italics ours)

In the case of *City of Trenton v. Trenton Street Railway Company,* 72 N. J. L., page 317, the municipality passed an ordinance consenting to the operation of street cars upon condition that the company repave designated portions of streets when called upon by the municipality. The Court held that upon acceptance of the ordinance by the company there was constituted a valid contract between the municipality and the railway company, resting upon the agreement of the parties and not upon any attempt of the municipality to compel the defendant to repave any portions of the public streets against its will and without its consent. Another point raised was that the contract was ultra vires the municipality. The Court in deciding the said point rested solely upon the act concerning street railways which permitted the use of the streets for the operation of trolleys, *provided the company first obtained the consent of the municipality, and upheld the power of the municipality to make such a contract in the following language,* on page 322:

"and if the legislature, as was held

> in the Jersey City case, made the consent of the municipality requisite, in that case, to the original construction in order that provision should be made to meet or mitigate the municipal burdens growing out of such construction, a similar object must have been intended by that body in requiring the consent of the municipality to the change in motive power by these companies and the accompanying erection of poles and wires in the public streets."

In *Schinkel v. Borough of Fairview*, 76 N. J. L., page 445, Justice Voorhees in setting aside a resolution granting consent to the establishment of a cemetery held that such permission should have been by ordinance and said at page 447:

> "While it is true that the property proposed to be devoted to cemetery purposes is not the property of the Borough in the sense that the Borough has the title to it, yet while it is used for general purposes, it is in a sense an asset of the Borough and produces an income by way of taxation. To remove this land, by allowing it to be used for cemetery purposes, from the power of taxation, is to take away from the Borough an asset which yields an annual sum to the treasury of the municipality, and it cannot be doubted that the management, regulation, protection and control of the finances may be said to be exercised not only by holding, under the taxing power, the property within the Borough, but as well as by action which allows such property

> to be relieved from its liability to re-respond to the general revenues, and for that reason it seems to us that the consent and protection of the finances of the Borough are involved in the granting or non-granting of a consent diminishing the amount of ratables of the municipality."

In *Long v. Union,* 79 N. J. L., page 70, Justice Reed, on certiorari, passed upon an ordinance granting consent and approval for a new cemetery in the Township of Union. The writ brought up an agreement made between the cemetery and the Township of Union which agreement was executed as an inducement to procure the passage of the ordinance. The purpose of the writ was to have the consents given by the ordinance and the resolution vacated.

The consent sought for the cemetery was like that granted in the case at bar.

The Court set aside the ordinance on the ground that the Township Committee passed upon a judicial matter and that the contract held out an illegal inducement to the members who so acted.

The Court however, on pages 75 and 76 said as follows:

> *"So again, a condition or contract that the cemetery company shall pay taxes upon the property or insure the township against its loss by reason of the statutory immunity of cemetery property from taxation. would, I think, be legal."*

"The cemetery act (Gen. Stat., p. 350, paragraph 8, and p. 360, paragraph 56) provides that cemetery lands and property of any association, a bond and mortgage given to secure the purchase shall be exempt from all public taxes, rates and assessments. This clause did not constitute a contract of exemption. Cemetery Company v. Newark — 21 Vroom 66.

"If it did constitute such a contract, nevertheless it would not prevent the company from waiving the exemption thus granted. Given v. Wright — 12 Vroom 478; affirmed, 14 Id. 455; 12 Cyc. 382.

There would therefore, I think, have been no infringement of public policy had the cemetery company agreed to waive its exemption from taxation, or agreed to pay the amount which would have been received from the tax upon this property if left free from cemetery uses." (Italics ours)

The law as laid down in the above case has never been brought into question in our Courts but on the contrary has in effect, been followed in subsequent litigation concerning the cemetery involved in *Long v. Union*, supra.

In the case of *Fidelity Union Trust Company, Trustee v. Union Cemetery Association* —102 N. J. Eq., page 100, a bill was filed to foreclose a mortgage covering the cemetery property. Vice Chancellor Backes held that the mortgage was a lien upon the cemetery

property only to the extent of such sums as were advanced by the promoters for cemetery purposes. On exceptions to the Special Master's report concerning the amount found due the complainant in accordance with the decision, Vice Chancellor Backes wrote an opinion reported in 104 Equity, page 326 in which the following appears on page 329:

> "There is an item of $10,000.00 expended by the promoter to secure the Township, granting the franchise against loss of taxes, which seems to have been overlooked in the argument. If this outlay inured to the advantage of the Association, it ought to find expression in the mortgage. Counsel may state their views."

The file in the Clerk's office in the case of *Fidelity Union Trust Company, Trustee, v. Union Cemetery Association*—Docket 61, page 142, shows that after the last cited opinion, a decree was advised by the Vice-Chancellor allowing the mortgage the value of the cemetery lands, plus improvments *and the sum of* $10,000.00 *expended by the promoters by payment to the municipality to insure payment of taxes due and to become due upon the property affected as a cemetery.*

This decree in effect follows the principle laid down by Justice Reed in the *Long v. Union* case, for it recognizes as legal the deposit of the sum of $10,000.00 to insure the Township which granted the cemetery consent, against its loss by reason of statutory

immunity of cemetery property from taxation.

See also:

Dintenfass v. Willat Film Corporation—108 N. J. L., page 195.
Barr v. New Brunswick—58 N. J. L. 255.
Rutherford v. Hudson River Traction Co.—73 N. J. L. 227.
Hutchinson v. Belmar—61 N. J. L. 443; affirmed 62 N. J. L. 450.
Asbury Park, etc. v. Neptune—73 N. J. Eq. 323.
Reed v. Trenton—80 N. J. Eq. 503.

In other states in the Union, the Courts have construed ordinances of municipalities which contain conditions imposed upon the company receiving a franchise, holding them to be contracts enforceable by the municipality:

Federal Gas & Fuel Co. v. City of Columbus—118 N. E. 103.
State ex rel Subway Co. v. St. Louis—46 S. W., 981.
Allegheny City, etc. v. Millville, etc.—28 Atl. 202.
Providence, etc. v. Union R. R. Co.—12 R. I. 473.
Byrne v. Chicago General Ry. Co.—48 N. E. 703.
Mitchell v. Dakota Central Tel. Co.—127 N. W. 582.
Jamestown v. Home Telephone Co.—109 N. Y. S. 297.
St. Louis v. Western Union Tel. Co.—148 U. S. 92.

Columbus Citizens Tel. Co. v. City of Columbus—104 N. E. 534.

In *City of Columbus v. Columbus Gas Co.*, 81 N. E., page 440 where suit was brought for sums alleged to be due under an ordinance granting a franchise to lay gas pipes, etc., the ordinance required payment of $4,000.00 a year to the City "for the benefit of the gas and light fund of said City." The company claimed that such sum is used for general revenue and therefore it pays an additional tax, which the City is not authorized to exact. Judgment was given for the City.

On page 445, the Court said:

> "We have observed that the gas company can establish its plant and system of pipes, etc., *only with the consent of the City Council, and we now say that a reasonable condition may be fixed for such consent.* This is not prohibited by statute, and it is evident that the privilege and its fruits were of great value to the company * * *. The City, being charged with the care and control of its streets and public places, became responsible to third parties for their safe condition, and hence an additional burden was cast on the City to supervise and see that such safe condition prevailed, which increased responsibility was attended with additional expense, in order that the gas company might be compelled to keep its agreement of regulation, and in case of its neglect, to make the public places occupied by the company safe and free

> from nuisance. *In the contemplation of the parties to the ordinance contract, the sum of* $4,000.00 *per year was considered reasonable, and it was so stipulated and the presumption that it was reasonable might be indulged until it is overthrown.*" (Italics ours)

At the time of passage of the ordinance upon which the claim is made, the plaintiff had to forego its right to tax the lands and property of the defendant, although it was not relieved of its duty to protect defendant's property, provide police and fire protection, make and repair roads, provide lighting facilities, enforce health measures and such other duties of a municipality toward, its citizens and their property. *The sum provided by the contract between the parties was considered reasonable and nothing is shown to the contrary.*

In the case at bar all the elements for a valid contract as required by aforesaid decisions are present.

B

The defendant now argues in order to resist liability that Section 2 of the ordinance was not accepted in accordance with its terms, *but does not directly deny the acceptance of the remainder of the ordinance which granted it privileges still exercised at the present time.* The ordinance itself provides for the method of acceptance of the whole ordinance but admittedly the procedure set forth was not fol-

lowed. (page 19, line 21). The fact that the defendant has dedicated its lands and used them during the past thirty-three years according to the ordinance, is evidence sufficient of a binding acceptance by it.

The lower Court found that the ordinance had been accepted and based such finding upon evidence that the ordinance was passed after the cemetery had filed a petition with the Township Committee praying for its permission and consent to establish the cemetery on its property, and that from the time of adoption of the ordinance the cemetery association had been in possession of the lands covered by the ordinance and has operated said lands as a cemetery for the burial of the dead. (Page 31, lines 6-15).

This Court has held that where the trial Court sitting without a jury decides a question of fact, it will not disturb such finding as long as it is supported by evidence.

Lapayowker v. Levitzky—102 N. J. L. 164.
Bound Brook Stove Wks. v. Ellis—98 N. J. L. 523.
Mayor, etc. Jersey City v. Tallman—60 N. J. L. 239.

There is evidence for such finding of the lower Court and the same should not be disturbed.

The defendant admittedly has not challenged the said ordinance or any provision thereof (Page 19, lines 39-41). It has chosen not to test the validity of the ordinance and

at this late date should not be permitted to say on the one hand that the franchise granted by the ordinance is a valid property right belonging to the defendant, and on the other, claim that the provision for payment of the interment fee is invalid. The ordinance must be considered as a whole. If the second provision is invalid the whole ordinance ought to fall.

In *Davis v. Town of Harrison* 46 N. J. L., page 79, the litigation was with regard to a contract for supplying water for a period of twenty years, where under the act its power was limited to a period of ten years. The municipality in granting the consent to the company to use the streets annexed thereto certain conditions. It was argued that if there was no power to make the contract for twenty years, it should stand for a period of ten years.

The court said on page 86, as follows:

> "When objectionable parts of ordinances are severable from the rest, and unessential, they will be disregarded. But when void parts are essential, and connected with the remainder of the ordinance, the whole is void. State Chamberlain, pros., v. Hoboken 9 Vroom 110; Staats v. Washington, 16 Vroom 318; Siedler v. Chosen Freeholders, 10 Vroom 632.
>
> "In this case the resolution forms, with its condition, one complete act of this municipal body. It is impossible to say that the stipulation for a twenty

> years' contract is not an essential part of the act inseparably connected with the remainder. On the contrary, I think it must be treated as incapable of severance. The resolution must therefore be set aside, with costs."

Although the case of *Wilson v. Windolph*—103 N. J. Eq., page 275, holds that no enforceable contract was made there appears on page 278 the following excerpt from Professor Parsons' works on contracts:

> "There is no contract unless the parties thereto assent; and they must assent to the same thing in the same sense. * * * *It becomes a contract only when the proposition is met by an acceptance which corresponds with it entirely and adequately.* * * * *The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter.*" 2 Pars. Cont. Ch. 2 Par. 1." (*Italics ours*)

If it be said that the cemetery has accepted the franchise right it must of necessity be said that it accepted the obligations that went with it. The cemetery company was required to either accept the ordinance as provided for within the time and the manner specified in the ordinance, or the municipality had the right to repeal the ordinance so that the cemetery could not operate upon said property. The municipality at its option, also had the right to waive the manner and time for acceptance and did so in this case.

In 13 Corpus Juris, page 280, section 85 appears the following:

> "As a general rule if a particular mode of acceptance is prescribed by the offer, the condition must be complied with, unless it is waived."

The fact that the municipality has not revoked the offer by repealing the said ordinance is a waiver of the requirement as to the manner and mode of acceptance of its terms, and the operation of the cemetery and the exercise of the privileges under the ordinance by the defendant, is an acceptance of the offer.

The same rule would affect the present plaintiff if it should attempt to take away from the defendant its right to continue operating the lands as a cemetery on the ground that there has been no formal acceptance in accordance with the ordinance.

In *Devlan v. Wells* 65 N. J. L., page 213, the Court said:

> "If the contract required the plaintiffs to give a bond to defendants for the faithful performance of their work, the defendants cannot take advantage of the failure to give such bond after permitting the plaintiffs to complete their work without exacting the bond."

Also in *MacDonnell v. Vitille* —111 N. J. Eq., page 502, the above rule was applied and the Court on page 510 said that there was a waiver of the requirement for an architect's certificate under a building contract.

In the *St. Louis v. Western Union Tel. Co.*— 148 U. S. 92 case the following language appears on the bottom of page 102 and the top of 103:

> "Again, it is said that by ordinance No. 11,604 the city contracted with defendant to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm of any pole for its own telegraph purposes, free of charge; and in support of that proposition the case of New Orleans v. Southern Telephone & Telegraph Co., 40 La. Ann. 41, is cited. But in that case it appeared that the telephone company had set its poles and constructed its lines under and by virtue of the grant made by the ordinance, and hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard. As stated in the opinion page 45: '*Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the Dartmouth College Case, 4 Wheat.* 518.' *The same principle controlled the cases of Commonwealth v. New Bedford Bridge, 2 Gray,* 339; *Kansas City v. Corrigan,* 86 *Missouri,* 67; *Chicago v. Sheldon, 9 Wall,* 50." (Italics Ours)

In the case of *Trenton & Mercer County Traction Corp. v. Trenton* —90 N. J. L., page 378, the facts indicate that in 1909 a new agreement was reached with regard to fare rates and a resolution was adopted by the Railroad company directing its officers to execute an agreement already prepared, immediately after passage of an ordinance by the City of Trenton. The ordinance was passed but the company after its passage, rescinded its original resolution. The company argued that there was no intention that the contract would be complete until a written document was executed. The Court on page 382 said:

> "The draft agreement had been submitted by the city to the company; the company had assented to its terms; all that remained was for the executive officers to execute the written instrument in which the terms of the agreement were set forth; but the officers had no power to vary the terms, and it was not contemplated that the directors should again pass on the matter. The case is, as if, in Water Commissioners of Jersey City v. Brown, the agreement had been already prepared and adopted by the water commissioners."

In *Postal Tel. Cable Co. v. City of Newport* —76 Southwestern 159, suit was brought for moneys required to be paid under an ordinance giving the company the right to use streets for the purposes named in the ordin-

ance. Defendant erected poles and strung wires and since enjoyed privileges granted, the city claiming that this amounted to an acceptance. Defendant answered saying that the ordinance which was passed provided that if the company failed within thirty days after approval to signify its acceptance in writing subject to the limitations, then all rights granted should become null and void. It alleged that it did not accept in writing *but admitted it began erection of poles, etc., and operated its system.*

The Court said on page 160:

"It had no authority to do so, except under the ordinance. Its action was an acceptance of the ordinance in the absence of some expressed disclaimer which is not alleged. Its failure to accept the ordinance in writing might be waived by the city, and this waiver may be implied from its acquiescence in the defendant's acts. (Italics ours)

* * *

"This is not the case of a license tax imposed on a telegraph company already in use of the streets and alleys of the city. The defendant entered the city and got the use of the streets and alleys by virtue of the ordinance, and it took its rights subject to the charge which the city made for the grant. The question of reasonableness of the grant was for the parties to decide. If the defendant was not satisfied with the terms of the grant it could have re-

fused to accept it. * * *"

In Volume 4 of McQuilan Municipal Corporations, Section 1777, there appears the following:

"An ordinance granting a franchise confers no rights and imposes no obligations on the grantee unless it is accepted. Acceptance of the franchise ordinance by the grantee is usually evidenced in a formal manner by entry upon the municipal records. However no formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company; and the use of a franchise constitutes an acceptance. Where no obligations are imposed on the grantee the acceptance of the thing granted may be inferred from slight circumstances. But where the grant of the franchise requires an acceptance in writing, the municipality may waive such acceptance, and the act of the company in using the streets may be sufficient as an acceptance. Postal Tel. Cable Co. v. City of Newport—78 SW 159.

"The acceptance of a franchise is an acceptance of the conditions therein. Jamestown v. Home Tele. Co. 109 N. Y. S. 297, 125 App. Div. 1.

"*If a company has no right to act except under the conditions of an ordinance granting permission, full acceptance of the conditions is implied in going ahead and using the streets pursuant to such municipal permission.* Detroit v. Detroit City Railway Co.—37 Mich. 588."

The remedy of the defendant was not to accept the ordinance but to attack it directly.

Jersey City v. Jersey City & Bergen Railroad Co., supra.

This it failed to do and because of its laches, cannot now obtain such relief.

Zabriskie v. Hudson City—29 N. J. L. 115.
Budd v. Camden—69 N. J. L. 193.
Ninth St. Imp. Co. v. City of Ocean City—90 N. J. L. 106.
Brodhead v. Hunderton—72 N. J. L. 118.
Pompton Steel Co. v. Wayne—65 N. J. L. 487.
Glori v. Bd of Police Com.—72 N. J. L. 131.
Lucille v. Hoboken—78 N. J. L. 245.

The defendant ought not now be heard to collaterally attack the ordinance in an action based upon its breach thereof.

C

Assuming but not admitting that the act of the parties in making the contract upon which suit is brought was without legal authority, and ultra vires as to the City or the cemetery, the latter is estopped from setting up such plea in order to escape its obligations under the ordinance.

Since the case of *Camden and Atlantic R. R. Co. v. Mays Landing, &c., R. R. Co.*—48 N. J. L., page 530, it has been the law in this state as laid down by this Court that when a transaction is complete and the party seeking re-

lief has performed on his part, the plea of ultra vires by the corporation which has acquiesced in the matter is inadmissible in an action brought against it for not performing its side of the contract in all those instances where the party who performed cannot, upon rescission, be restored to his former status.

The Court on page 569 said as follows:

> "Why should the corporate body be permitted to plead its own wrongful act, and set up its own infirmity as a bar to the recovery by the other party of what it should in right and justice be accorded?
>
> "It is true that a person cannot, by his own act, acquire a right against another; the other must, in some way, bind himself. The acquiescence in the contract, in virtue of which the other party performs, and the acceptance of its benefits, constitute the binding acts, and raise the estoppel. I am unable to see how, upon a just conception of the legal principles involved, a different rule can be applied where the corporation has acquiesced in the contract, and the other party, by performance on his part, has been led into a position from which he cannot be extricated."

On the part of the plaintiff the contract was fully performed at the time of the passage of the ordinance, and its acceptance by the exercise of all privileges thereupon for the past thirty-three years. Performance by the plaintiff has been so complete that it cannot seek

and obtain rescission thereof and be placed in status quo. The establishment and operation of a cemetery for a period of thirty-three years and the interment of bodies as shown by the agreed state of facts, indicates that there is no possibility of placing plaintiff in its original position.

In the following cases, the doctrine set forth in the *Camden and Atlantic R. R. Co. v. Mays Landing, &c., R. R. Co.*—48 N. J. L., 530, has been followed.

First Presbyterian Church v. State Bank—57 N. J. L., 27. The defendant filed the plea of ultra vires, on an undertaking it entered into to pay a certain sum of money if the plaintiff refrained from extending its building so as to obstruct the light. The Court held the plea bad and gave judgment upon demurrer to plaintiff.

In *Chapman v. Iron Clad Rehostat Co.*—62 N. J. L., 497, suit was brought upon an agreement whereby plaintiff was employed by the defendant company with a stipulation that if he was discharged certain shares in the company held by him would be purchased by it. Defendant claimed that it had no right to purchase its own stock and therefore the contract was unenforceable. The Court held that plaintiff had fully performed the contract on his part and cannot be restored to his former status nor be honestly dealt with otherwise than by holding the defendant to performance of its share in the bargain and held a plea of ul-

tra vires is inadmissible.

In *Jersey City v. North Jersey St. Ry. Co.*—72 N. J. L., 383, on page 391, the Court said:

> "By the averments of the declaration, admitted for the purposes of these demurrers, it appears that in fact municipal consent was given in the ordinances of 1871 and 1874; in fact conditions were imposed by those ordinances precisely as in the ordinance of April 24th, 1863; among which was the payment of annual license fees; in fact the ordinances were accepted by the company subject to those conditions, and the lines were constructed by it and have since been maintained and operated by it and its successors, including this defendant. It is now too late for the defendant to set up that the defacto contract thus entered into acted upon, and from which benefits have thus accrued to the defendant and its predecessors, was ultra vires the municipal corporation. Camden and Atlantic Railroad Co. v. May's Landing, 19 Vroom 530."

In *Board of Education of the City of Millville v. Empire State Surety Company, of New York*—83 N. J. L. 293, where the plea of ultra vires was made in a suit upon a bond made by the defendant company as surety, to secure performance of a contract to erect a school building, the Court in giving judgment to plaintiff on demurrer said on page 295:

> "It is settled in this state that a corcorporation cannot avail itself of the

> defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the Performance. Camden and Atlantic Railroad Co. v. May's Landing and Egg Harbor City Railroad Co., 19 Vroom 530. The same rule holds e converso. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. Chester Glass Co. v. Dewey, 16 Mass. 94; Rutland and Burlington Railroad Co. v. Proctor, 29 Vt. 93; Union National Bank v. Matthews, 98 U. S. 621; Parish v. Wheeler, 22 N. Y. 494; Whitney Arms Co. v. Barlow, 63 Id. 62. And this is true with relation to municipal as well as to private corporations. Mayor, &c. of New York v. Sonneborn, 113 Id. 423, 426; City of Buffalo v. Balcom, 134, Id. 532."

In *Dintenfass v. Willat Film Corporation*—108 N. J. Eq. 195, it was contended that the agreement with the Borough of Fort Lee was ultra vires because the Borough had no right to accept notes secured by a mortgage in payment of taxes. The Court held that defendant had received certain benefits and it came too late with such plea.

In *Hudson Cooperative Loan Association, Inc. v. Horowytz*—116 N. J. L. 605, in a suit upon a note for balance due thereon, the defense was that the plaintiff was doing busi-

ness as a banking corporation which it had no power to do. The Court held that defendant could not escape the obligation because this was a suit on an executed contract and that the defendant had received the benefits therefrom and used the money.

The Court on page 609, said:

> "To allow a successful plea of ultra vires under such circumstances would not only be contrary to every instinct of fair dealing but also contrary to all principles of simple justice. Downs v. Jersey Central Power Co., 115 N. J. Eq. 348; 170 Atl. Rep. 835; affirmed, 117 N. J. Eq. 138; 174 Atl. Rep. 887.
>
> " 'The doctrine of ultra vires when invoked for or against a corporation is not allowed to prevail where it would defeat the ends of justice or work a legal wrong.' Earle v. American Sugar Refining Co., 74 N. J. Eq. 751, 763; 71 Atl. Rep. 391, and cases therein cited."

In *Downs v. Jersey Central Power and Light Co.*— 115 N. J. Eq. 348, the complainant filed his bill seeking to obtain redemption of certain shares of stock of defendant company, alleging fraud at the time of sale, in that an agreement was made that defendant would re-purchase the stock from plaintiff. Defendant alleged that it was a public utility corporation and that it had no authority to make such a contract. The Court held that the defense of ultra vires is not available to the defendant. On page 352, it said as follows:

> "The defendant has accepted all the benefits of its agreement and seeks to hide behind its alleged incapacity as a means of escape from its liability. But after receiving the fruits of its bargain, it is estopped to set up its own incapacity to make such a contract. The doctrine of estoppel is applied in cases of this kind 'for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty.' Bradley v. Ballard, 55 Ill., 413. The underlying principle is that a corporation cannot set up its own infirmity when it is unconscionable to do so. Rules of fair dealing apply alike to individuals and corporations. Louisville, N. O. and C. Railroad Co. v. Flanagan, 113 Ind. 448; 14A C. J. 775 Par. 2845."

The above cases and those not cited which are numerous in this state and other states amply support the doctrine that where a person or corporation has entered into a contract with another and accepted the fruits thereof, it cannot after a great many years plead that the bargain it made was illegal, without restoring the other into a status quo position.

POINT III

A

The plaintiff does not deny that cemetery lands are exempt from general taxation when actually set apart and used for burial purposes (1 Rev. Stat. 1937—8:2-27). It does however assert that the statute relating to exemption is not in issue in this case. The ordinance of 1905 is not a statute taxing the land and properties of the defendant such as would be invalid under said ordinance if brought before the Court for review. The requirement to pay under said ordinance arises under a contract and is a voluntary payment and therefore distinguishable from a tax.

The power of the state and any of its subdivisions to tax its citizens is the power to impose taxes for the support of the government in return for the general advantages and protection which the government affords the taxpayer and his property. A tax is not a voluntary payment or donation but is an enforced contribution. The obligation to pay taxes is not derived from any contract between the State and the individual taxed.

This doctrine is enunciated by our Supreme Court in *City of Camden v. Allen*—26 N. J. L. 398, where on page 398 it said.

> "A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by au-

> thority of government, upon its citizens or subjects, for the support of the state. It is not founded on contract or agreement. It operates in invitum. Peirce v. The City of Boston, 3 Metc. 520. A debt is a sum of money due by certain and express agreement. It originates in, and is founded upon contract express or implied."

The above language is followed in the case of *Baker v. Orange*, 95 N. J. L., page 365.

In *Columbus Citizens' Telephone Co. v. City of Columbus*—104 N. E., p. 534, which involved a suit for a percentage of receipts of the company pursuant to a franchise granted by the City to use the streets, one defense was that such payments are a tax for general revenue and unauthorized.

The Court on page 535, said:

> "The debtor company accepted the grant, acquiesced in its terms during three years and has enjoyed all its privleges and emoluments. The Company was free to promise the annual payment, or refuse the grant. Certainly the demand for a debt thus voluntarily incurred as a recompense for a grant can with no propriety be called a tax in any sense. A tax is imposed by sovereign power; it creates an involuntary obligation."

In the instant case, it is not claimed that the monies due the plaintiff are a tax imposed against defendant's will and in contravention of the provisions of the Rural Cemeteries Act.

The claim is based, however, upon the contractual undertaking entered into by the defendant in consideration of the plaintiff granting it permission to locate and operate a cemetery, which consent under legislation then in existence it was necessary to first receive. Defendant accepted this contract and cannot deny doing so, for it has exercised the privileges granted by the ordinance for thirty-three years and reaped the benefits.

The ordinance in question is not a taxing ordinance or an exercise of the police power of the City. It is a contract for the payment of certain monies and not violative of the provisions of the Rural Cemeteries Act.

See also:

Newport v. South Covington—11 S. W. 954.
Plattburg v. People's Tel. Co.—88 Mo. App. 306.
Trenton v. Trenton St. R. R. Co.—72 N. J. L. 317.
Fielders v. North Jersey R. R. Co.—39 Vroom 343.

B

It is well settled in this state that exemptions from payment of taxes are not favored, and statutes granting immunity from taxation must be strictly construed against the grantee, as it is in derogation of the sovereign authority and of common right.

So also any agreement or waiver of such exemption should be construed in favor of the state's right to tax.

Assuming but not conceding that the charge of one dollar per interment is a tax which is prohibited by the statute, the fact that the defendant applied for the consent, proceeded to locate the cemetery in accordance with the ordinance and operated it for the last thirty-three years, is certainly a waiver of the statutory exemption, and the defendant at this late date is estopped from challenging its validity. It is well settled that a contract waiving an exemption from taxation under a statute is a valid one and not contrary to public policy.

In *Given v. Wright*—41 N. J. L. 478, affirmed 48 N. J. L. 455, the question as to the right to tax certain lands arose. By an act of the legislature certain lands upon which Indians were to reside, were declared to be exempt from taxation. A tax levied thereon was held to be illegal and so also an act of the legislature repealing the exemption clause. After the last decision and for a period of sixty or more years the lands were assessed and taxes paid thereon. Thereafter the power to levy taxes was challenged and the Court held: that in view of the fact that the owners, with full knowledge of their rights, paid the taxes for so long a period, a conclusive presumption arose that by some convention with the state the right to exemption was surrendered.

In *Given v. Wright*—117 U. S. 648, page 656,

on writ of eror issued to the New Jersey Supreme Court, Mr. Justice Bradley speaking for the United States Supreme Court said:

> "If an exemption from taxation can be lost in any case, by long acquiescence under the imposition of taxes, it would seem that an acquiescence of sixty years, and, indeed, a much shorter period, would be amply sufficient for this purpose, by raising a conclusive presumption of a surrender of the privilege. An easement may be lost by nonuser in twenty years, and even in a less time if it is affected by positive acts of invasion. A franchise may be lost in the same way, nonuser being one of the common grounds assigned as a cause of forfeiture. 3 Bl. Com. 262. ⁋*Exemption from taxation being a special privilege granted by the government to an individual, either in gross, or as appurtenant to his freehold, is a franchise. Nonuser for sixty, or even thirty years, may well be regarded as presumptive proof of its abandonment or surrender.*⁋ The present case is a strong one. The nonuser consists of acquiescence in actual taxation, or an actual invasion of the franchise, year by year, for a period of years reaching almost beyond the memory of man. It is not merely a case of nonuser, but one of disaffirmance of the privilege for this long period." (Italics Ours)

In the case at bar there is more than a presumption which the Court in the *Given v.*

Wright case said was sufficient. We have here an express undertaking by the acceptance of the ordinance to pay a stipulated sum each year, and if such payment is a tax, there certainly is an express contract made by the defendant to waive the provisions of the Rural Cemeteries Act which entitled it to an exemption from taxes imposed against it.

POINT IV

Although the City has not heretofore actually brought suit for the fees due it under the ordinance, it did not in fact waive its right to do so, but on the contrary has claimed such right in the face of refusal by defendant to pay, and authorized proceedings for collection (Page 19, lines 34-42 and page 20, lines 1-8).

The law in this State is clear that the failure of a municipality to act, does not bar public rights or result in a presumption of release thereof.

In *Jersey City v. North Jersey Street Railway Co.*—72 N. J. L., page 383, at page 392, the Court said:

> *"It is true, the pleas aver that the company ceased to pay license fees with the consent and approval of the plaintiff. But the plaintiff is a municipal corporation, a public body politic, acting for public pur-*

> *poses only, through agents of limited powers chosen by the people for defined public purposes. Our attention is not called to anything in the charter of Jersey City, or in any other act of the legislature, that empowered the municipal authorities of that city either to bar the public rights by non-action or to participate in the functions of the general legislature of the State by assuming to place a construction upon its legislative acts.*" (Italics ours)

In *Jersey City v. North Jersey Street Railway Co.*—78 N. J. L., page 72, the plea of release was raised by the pleadings, the City having failed to collect the fees since 1868 while suit was instituted about 1909. It was claimed that there was a presumption of a release which was not rebutted. The Court there said that when the party is a municipal corporation, the authority to execute a release must appear before the execution can be presumed.

The Court on page 75 said:

> "The failure to exact the license fees does not lead irresistibly to the conclusion that there was a release; the more natural inference is that the financial officers failed to assert the city's claim, but such failure would not bar the claim until the statute of limitations had run, and here there was no express exemption or release as in Wells v. Savannah."

The defendant has not shown the authority of the plaintiff to bar the latter's rights under

the ordinance because of failure to bring suit heretofore.

POINT V

The defendant cannot avail itself of the ground of appeal set forth as No. 16, that it is a charitable trust.

Nowhere in the pleadings before the trial Court does there appear the contention that the defendant is a charitable trust. It was not considered by the Court below, except upon insistance of the defendant that the instant case can be distinguished from the cases cited herein embodying principles of law with respect to street using corporations, on the ground that it is a charitable trust.

It is raised for the first time as a ground of appeal.

This Court has refused to consider a question not raised and argued in the Court below unless it goes to jurisdiction or involves public policy.

Punk v. Botany Worsted Mills—105 N. J. L. 648.
A. Makray, Inc. v. McCullough—103 N. J. L. 346.
Shaw v. Bender—90 N. J. L. 147.
Slate v. Heyer—89 N. J. L. 187.

Without waiving the above point, we proceed to an analysis thereof. In the language

of ground of appeal No. 16, it is difficult to find what error is complained of. Admitting for the purpose of the argument that the defendant is a charitable trust, does it now contend that the Supreme Court was without jurisdiction in the matter? If that be so, such contention is without merit, as the record on its face, shows that the Court below had jurisdiction of the parties and the matter.

If the defendant attempts to argue that as a charitable trust it could not enter into the contract upon which suit is based, it is answered by saying that a corporation having for its purpose the management of a charitable trust is bound by the same rules of laws with relation to contracts, as other corporations. If it has the power to make contracts it can be sued for a breach thereof. (11 C. J. 374, Sec. 105).

A cemetery has all the general powers and privileges of a corporation. This is expressly provided in the statute concerning Rural Cemeteries (8:1-3 Revised Statutes 1937— Source Rev. 1877, page 100, Sec. 3, C. S. p. 373, Sec. 3).

In *Atlas Fence Co. v. West Ridgelawn Cemetery*— 110 N. J. Eq. 591, this Court held that a corporation organized under the Rural Cemetery Act can have creditors even though they are by law deprived of the usual methods of collecting their claims. Such a finding presupposes the power to make contracts.

The defendant, ostensibly asserting its

right to operate the cemetery, now pleads that it could not have accepted the liability imposed upon it by the ordinance because it is a charitable trust. Having all the attributes of a private corporation, subject only to restrictions set forth in the Rural Cemeteries Act, defendant cannot escape a just obligation owing to the general public, by proclaiming itself a public trust.

CONCLUSION

It is respectfully urged that the action of the trial Court in entering judgment for plaintiff, City of Clifton, against defendant, East Ridgelawn Cemetery, should be affirmed.

Respectfully submitted,

JOHN G. DLUHY,
Attorney for and of Counsel with
Plaintiff-Respondent.

To be argued by John G. Dluhy.

New Jersey Court of Errors and Appeals

CITY OF CLIFTON, a municipal corporation, of the State of New Jersey, *Plaintiff-Respondent,* *v.* EAST RIDGELAWN CEMETERY, a corporation of New Jersey, *Defendant-Appellant.*	Action at Law On Appeal from New Jersey Supreme Court

REPLY BRIEF OF DEFENDANT-APPELLANT

I

Counsel for the respondent in his brief argues under Point 5 that appellant cannot avail himself of the Ground of Appeal set forth as No. 16 (p. 44), for the reason that it was not raised and argued in the court below. This is not so.

All of the questions raised in the Grounds of Appeal and argued in appellant's brief were raised and argued in the court below, and considered by that court in arriving at its determination.

At the conclusion of the trial there was a lengthy oral argument which was not taken down stenographically, in which all of these questions were most vigorously presented.

In addition, on page 2 of defendant's memorandum in the court below the question of charitable trust was expressly raised. In fact, the argument on pages 5, 6, 7, 8, 9, 10 and 11 of appellant's brief in this court, is practically a verbatim copy from the argument contained in its memorandum in the court below.

The question of public policy was considered by the trial court in its memorandum at the foot of page 29.

The question of charitable trust was considered by the trial court in its memorandum at page 33.

II

Counsel for respondent, in his brief, cites numerous cases holding the general principle that a corporation having accepted the benefits of a contract will not be heard to disavow any of its terms. Most of the cited cases involved ordinary corporations which have no statutory restrictions placed upon them. This is, of course, generally the law. Yet the courts of this state in relation to cemeteries organized under the Rural Cemetery Act, have held that agreements made by cemetery associations to pay half of the proceeds of the sale of cemetery lands in payment for or as the purchase price of the conveyance of lands to the cemetery are against the scheme of the statute and unenforceable.

See:

East Ridgelawn Cemetery v. *Frank,* 77 N. J. Eq. 36;

Attorney General v. *Linden Cemetery Association,* 85 N. J. Eq. 501;

Atlas Fence Co. v. *West Ridgelawn Cemetery*—Docket 83/751;
Unreported memorandum of V. C. Bigelow filed September 20, 1933.

Respectfully submitted,

CAREY & LANE
Attorneys for Defendant-Appellant.

ROBERT CAREY,
HARRY LANE,
Of Counsel.

To be argued by HARRY LANE.

Appeal Printing Co., Inc., 130 Cedar St., New York
(7220)

INDEX.