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NEW JERSEY SUPREME COURT

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
John V. Burke, Bert A. Waters, William P. Hanson, Frank J. Codey and John R. Broemel, constituting the BOARD OF EMBALMERS AND FUNERAL DIRECTORS, STATE OF NEW JERSEY,
Respondent-Appellee.

In Certiorari.
Affidavit.

State of New Jersey, }
County of Mercer } *ss.*

Robert Queen, of full age, being first duly sworn according to law, on his oath says:

That he is the attorney of record of the prosecutor in the above entitled cause and has been his attorney during the proceedings hereinafter mentioned;

That on or about August 31, 1928, James Lewis Johnson was served with a notice to appear before the Board of Embalmers and Funeral Directors of the State of New Jersey on the 12th day of September, 1928, at the City of Trenton, and at the same time what purports to be a complaint was also served upon the said prosecutor, which reads and was composed as follows:

State of New Jersey, }
County of Hudson } *ss.*

John A. Carroll being duly sworn according to law on his oath says that he is informed and believes that one James Lewis Johnson, of the City of Camden, County of Camden, and State of New Jersey, a funeral director and embalmer licensed pursuant to the provisions of an act of the Legislature of the State of New Jersey entitled "An act to regulate the business of dealing with dead human bodies, including their preparation, preservation and disposal and the business of funeral directing, embalming and undertaking and to license those engaged in the business of funeral directing, undertaking, embalming and the preparation and preservation and disposal of dead human bodies and to punish persons violating the provisions thereof," approved March twenty-eighth, nineteen hundred and twenty-seven, did, during the month of March, A. D., 1928, violate the provisions of Rule No. 37 of the Board of Embalmers and Funeral Directors of the State of New Jersey adopted July 1, 1927 in pursuance of the provisions of said act, which rule reads as follows:

> "Every funeral director or embalmer shall adopt all proper means to safeguard the public health and shall perform no unnecessary act which shall tend to affect the dignity of death."

and did violate the provisions of subdivision (e) of Section 14 of said act in which he was guilty of unethical and unprofessional conduct.

Deponent therefore prays that the license to engage in the business of embalming and funeral directing issued to the said James Lewis Johnson may be revoked for the causes aforesaid.

Sworn and subscribed before me this 30th day of August, nineteen hundred and twenty-eight.

Ph. P. Sauer,
Master in Chancery of New Jersey.

John A. Carroll.

The prosecutor herein, by the deponent, his attorney, objected to standing trial upon the foregoing complaint, upon the very same grounds now offered as reasons for the setting aside of the action of the said Board of Embalmers hereinafter mentioned and set forth, yet nevertheless, on the said 12th day of September, 1928, the said Board swore and examined witnesses under oath over the objection of prosecutor's attorney, who had filed in writing a motion to dismiss the purported complaint upon the following grounds and reasons:

1. Because the said purported complaint is not what is known in law or fact as a complaint, but an affidavit.

2. Because the said affidavit purporting to be a complaint does not specify as to date, time and place in what manner this respondent violated the rules and regulations of the said Board.

3. Because the said affidavit purporting to be a complaint does not set forth one matter of fact to acquaint the respondent with what he is charged and what charge or charges he must answer.

4. Because the said affidavit purporting to be a complaint does not state in form nor substance a cause of action against the respondent.

5. Because the said affidavit purporting to be a complaint states and sets forth mere conclusions of law, which the respondent should not be called upon to answer.

6. Because the said Board can acquire no jurisdiction upon the said affidavit purporting to be a complaint.

7. Because the said Board cannot lawfully take any testimony upon the said affidavit purporting to be a complaint as the said affidavit sets forth no facts to be established.

Deponent says that the above motion was overruled, and on January 15, 1929, the license of the prosecutor herein, James Lewis Johnson, was revoked by and through the following resolution:

Mr. Bertram A. Waters moved the adoption of the following resolution:

WHEREAS, upon a complaint made by one John A. Carroll, charging and accusing one James Lewis Johnson, with unethical and unprofessional conduct in conducting the business of dealing with dead human bodies and funeral directing, embalming and undertaking, and of preparing, preserving and disposing of dead human bodies at the time and place therein set forth, and The Board of Embalmers and Funeral Directors of the State of New Jersey having on the thirty-first day of August, 1928, served a copy of said complaint and a written notice of the hearing thereon upon the said James Lewis Johnson fixing Wednesday, the 12th day of September, 1928, at 11 A. M. (Daylight Saving Time) to hear said complaint and consider the matter of the revocation of his said license;

AND WHEREAS, said matter came on to be heard at the time and place named in said notice before said Board and in the presence of said James Lewis Johnson and Robert Queen, his attorney, and the Board having heard the proofs and testimony produced before it;

THEREFORE, BE IT RESOLVED, that the said Board of Embalmers and Funeral Directors of the State of New Jersey finds and adjudges the said James Lewis Johnson guilty of unethical and unprofessional conduct as charged in said complaint, pursuant to the statute in such case made and provided; and for that cause the said The Board of Embalmers and Funeral Directors of the State of New Jersey hereby revokes the license of the said James Lewis Johnson to transact the business of funeral directing and embalming, the business of preparing and preserving and disposing of dead human bodies, issued to the said James Lewis Johnson on October 1, 1927, known as license number 905 which is the new license issued in accordance with Chapter 156, Laws of 1927.

Sworn and subscribed to
before me this 18th day of
January, A. D. 1929.

Edna M. Conover,
Notary Public of N. J.

Robert Queen

NEW JERSEY SUPREME COURT

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

In Certiorari.
Rule to Show Cause.

This matter being opened to the Court by Robert Queen, counsel for James Lewis Johnson, upon an application for a writ of certiorari to review the judgment of revocation of license of the said prosecutor, and the Court having read and considered the affidavit of said counsel and ordered same filed;

It is, thereupon, on this eighteenth day of January, A. D., 1929, ORDERED that the said THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY show cause before the Honorable Frank S. Katzenbach, one of the Justices of the Supreme Court, at his chambers in the American Mechanic Building, Trenton, New Jersey, on Friday the 25th day of January, instant, at eleven o'clock in the forenoon of said day, why the application of the said James Lewis Johnson for a writ of certiorari should not be granted.

And it is further ordered that copies of this rule, together with the affidavit herein mentioned, which may be certified by the prosecutor's attorney, be served upon the secretary or president of the said The Board of Embalmers and Funeral Directors of the State of New Jersey, or the Attorney General of the State of New Jersey within three days of the date of this rule.

FRANK S. KATZENBACH, JR.,
Justice of the Supreme Court.

NEW JERSEY SUPREME COURT

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

In Certiorari.
Continuance.

It is, on this 30th day of January, A. D., 1929, ORDERED that argument on the rule heretofore issued herein be, and the same is hereby continued to Friday the 15th day of February next, at four o'clock in the afternoon, or as soon thereafter as the same can be heard, at the Supreme Court Room in the State House, in the City of Trenton.

And it is further ordered that the operation of the resolution suspending the license of the prosecutor be, and the same is hereby suspended from Friday, the 25th day of January, instant, until the date of hearing, or any continuance thereon.

FRANK S. KATZENBACH, JR.,
Justice of the Supreme Court.

Consent to the making and entry of the foregoing rule is hereby given.

ROBERT QUEEN,
Prosecutor's Attorney.

NEW JERSEY SUPREME COURT

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

In Certiorari.
Notice of
Argument.

To the Attorney General of
the State of New Jersey:

PLEASE TAKE NOTICE that I shall move the argument of the Rule to Show Cause issued in the above entitled cause on Monday, the 17th day of June, next, at 10.30 o'clock in the forenoon (Daylight Saving Time), before the Honorable Frank T. Lloyd, one of the Justices of the Supreme Court, at the Court House, Camden, New Jersey.

ROBERT QUEEN,
Attorney for Prosecutor.

Service of a true copy of the foregoing notice of argument is hereby acknowledged this 29th day of May, 1929.

ROBERT PEACOCK,
Assistant Attorney General.

NEW JERSEY SUPREME COURT

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

On Rule to Show
Cause.
Rule to Dismiss.

The Prosecutor in this cause having failed to prosecute his Rule to Show Cause on application for a writ of certiorari, agreeably to law and pursuant to the rules and practice of this Court, it is ordered that the same be dismissed with costs.

FRANK T. LLOYD,
Justice of the Supreme Court.

Dated July 3, 1929.
On Motion of
Robert Peacock,
Attorney of Respondent.

NEW JERSEY SUPREME COURT

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

In Certiorari.
Modified Order.

This matter being opened to the Court by Robert Queen, of counsel with the Prosecutor, and it appearing that a rule to show cause why a writ of certiorari should not issue against the respondents was heretofore granted in this cause, which said rule was returnable on June 17th last, at which time same was dismissed, and application now being made for a modification of the order of dismissal aforesaid, for good cause shown.

It is on this 21st day of August, A. D., 1929, ORDERED that the said dismissal be, and the same is so modified that the prosecutor shall have the right to apply to the Supreme Court at the October term, 1929, for reconsideration of this order and the issuance of the writ heretofore applied for; and the restraint against the respondents denying the prosecutor the right to pursue his calling, as contained in the original rule to show cause, is hereby continued pending the final disposition of the said Supreme Court.

FRANK T. LLOYD,
Justice of the Supreme Court.

Rule entered September 5, 1929.

NEW JERSEY SUPREME COURT

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

In Certiorari.
Notice of Argument.

To the Attorney General of the State of New Jersey,
or
The Board of Embalmers and Funeral Directors of the State of New Jersey:

(OVER)

(over.)

PLEASE TAKE NOTICE that I shall move the Supreme Court for a rule to reconsider the order dismissing the original rule to show cause why a writ of certiorari should not be issued in this cause, and also for a writ of certiorari under said rule, on the first Tuesday of October, next, at 10.30 o'clock in the forenoon (Daylight Saving Time) or as soon thereafter as the same can be heard, before the said Supreme Court of New Jersey, State House, Trenton, N. J.

ROBERT QUEEN,
Attorney of Prosecutor.

Service of a true copy of the foregoing Notice is hereby acknowledged this 5th day of September, 1929.

W. A. STEVENS,
Attorney General.

NEW JERSEY SUPREME COURT

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

On Application for Writ of Certiorari. Rule of Dismissal.

This matter coming on to be heard in the presence of Robert Queen, Esq., for prosecutor and Robert Peacock, Esq., appearing for William A. Stevens, Attorney General, attorney for respondent and the Court having heard the argument of counsel and duly considered the same, and application having been made to dismiss the rule to show cause heretofore allowed, and good cause being shown in the premises for such dismissal, it is on this 20th day of March, 1930, on motion of Robert Peacock, Esq., appearing for William A. Stevens, Attorney General, attorney for respondent, ORDERED that the rule to show cause heretofore allowed by this Court, be dismissed with costs. It is further ordered that the Clerk of this Court tax the costs in accordance with the statute in such case made and provided.

BY THE COURT
THOMAS W. TRENCHARD,
Justice of the Supreme Court.

Entered April 7, 1930.

On Motion of William A. Stevens, Attorney General of the State of New Jersey.

COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY

(over.)

(over)

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

In Certiorari.
Decision of Supreme Court, &c.

On March 13, 1930, the Supreme Court of the State of New Jersey, dismissed the prosecutor's motion in the following opinion:

"The following matters of fact are gleaned from the state of the case which has been laid before us:

"On January 15, 1929, the license of the prosecutor as a funeral director and embalmer issued pursuant to Chapter 156 of P. L. 1927, was revoked by the respondent board after a complaint and hearing.

"On January 18, 1929, the prosecutor was allowed a rule to show cause why a writ of certiorari should not issue, to review such action, returnable January 25, 1929, before a Justice of this Court.

"On motion of the prosecutor the hearing thereof was continued to February 15, 1929. No depositions were ever taken and nothing further was done until July 3, 1929, when on motion of the Attorney General, the rule to show cause was dismissed by such Justice for failure to prosecute.

"However, on August 21, 1929, on motion of the prosecutor, such Justice granted prosecutor leave to apply to this Court at this term for a vacation of such dismissal. Nothing seems to have been done in pursuance of such leave granted. The state of the case laid before us does not disclose or even suggest that there was any impropriety in such action of dismissal, but on the contrary the plain implication is that such action was right, and it is

therefore clear that we would not be justified in disturbing the dismissal of the rule to show cause.

"The result is that the application for a vacation of the order of dismissal is denied and the application for the writ of certiorari is denied, with costs."

NEW JERSEY SUPREME COURT

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

In Certiorari.
Notice of Appeal.

To the Board of Embalmers and
Funeral Directors of the State of New Jersey,
or
The Attorney General of the State of N. J.:

TAKE NOTICE that the prosecutor appeals to the Court of Errors and Appeals in the Last Resort in all Causes in New Jersey, from the whole of the judgment and findings entered in this cause on March 13, 1930, on the following grounds:

1. That the learned Court was mistaken and erred in its finding as expressed in said judgment and opinion, that there was any necessity for the taking of depositions in said cause since only questions of law were raised in said cause.

2. That the learned Court erred and was mistaken in the finding, as set forth in the judgment

and opinion, that nothing was done in the prosecution of said cause from February 15, 1929 to July 3, 1929, as prosecutor's attorney continually and repeatedly made efforts to have the said rule heard.

3. That the rule to dismiss the original rule to show cause was wrongfully and arbitrarily taken and entered in said Court, which had full notice and knowledge that the prosecutor's attorney was prevented from being present on the return day of his motion on account of death in his family.

4. That the learned Court erred and was mistaken in their inference, as set forth in the opinion and judgment, that nothing had been done by the prosecutor pursuant to the modified order of August 21, 1929, when it was in pursuance of said order of August 21, 1929 that this matter came properly before the Court and in a manner fully according to the rules of said Supreme Court.

5. That the learned Court wrongfully refused to vacate the order of dismissal of July 3, 1929, and arbitrarily denied the application of the prosecutor for a writ of certiorari upon a reading and consideration of the State of the Case alone, when the said Court had, on call, marked the argument to be submitted on briefs, which said briefs were filed within the time limited by the rules of the Supreme Court and thus became a part of the record, setting forth for the information and notice of said Court that the prosecutor's attorney had failed to appear on account of death in his family.

ROBERT QUEEN,
Attorney of Prosecutor.

Dated April 11, 1930.

A true copy of the foregoing Notice of Appeal was served upon the Attorney General of the State of New Jersey, representing The Board of Embalmers and Funeral Directors of the State of New Jersey, on Monday, the fourteenth day of April, A. D., 1930, by handing same to Theodore Backes, Esq., Assistant Attorney General.

ROBERT QUEEN,
Attorney of Prosecutor.

COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

In Certiorari.
Reasons for Reversal.

The judgment and decision of the New Jersey Supreme Court is illegal, erroneous and arbitrary for the following reasons:

1. That the said Supreme Court was mistaken and erred in its findings, as expressed in the judgment and opinion, that there was any necessity for the taking of depositions in said cause since only questions of law were raised in said cause.

2. That the learned Court erred and was mistaken in the finding, as set forth in the opinion, that nothing had been done in the prosecution of said cause from February 15, 1929 to July 3, 1929.

3. That the rule to dismiss the original rule to show cause was wrongfully and arbitrarily taken and entered in said Court, which had full notice and knowledge that the prosecutor's attorney was prevented from being present on the return day of his motion on account of death in his family.

4. That the learned Court erred and was mistaken in its inference, as set forth in the opinion, that nothing had been done by the prosecutor pursuant to the modified order of August 21, 1929, when it was in pursuance of said order of August 21st, that this matter came properly before the Court and in a manner according to the rules of said Supreme Court.

5. That the learned Supreme Court wrongfully refused to vacate the order of dismissal of July 3, 1929, and arbitrarily denied the application of the prosecutor for a writ of certiorari upon a reading and consideration of the State of the Case alone, when the said Court had, on call, marked the argument to be submitted on briefs, which said briefs were filed within the time limited by the rules of the said Supreme Court and thus became a part of the record, setting forth for the information and notice of said Court that the prosecutor's attorney had failed to appear on account of death in his family.

6. That no notice that the Attorney General would move the said Supreme Court for a rule to dismiss as of July 3, 1929, was ever given or served upon the prosecutor or his attorney, as provided for in the rules of the said Supreme Court.

7. That the State Board of Embalmers and Funeral Directors arbitrarily and without warrant of law, revoked the license of the prosecutor, as said Board, in its complaint, did not specify or set up one matter of fact to acquaint the prosecutor with what he was charged, or in what manner the prosecutor had violated the rules and regulations of said Board.

8. That the said Supreme Court refused to consider the charges made by the prosecutor against the State Board of Embalmers, in the following other particulars:

(a) That there was no specification as to date, time and place in what manner the prosecutor had violated the rules and regulations of the said Board;

(b) That the complaint filed by the said Board did not state a cause of action against the prosecutor; that it contained mere conclusions of law;

(c) That the said Board could not lawfully take testimony in a matter when the complaint upon which it was founded set forth no facts to be established.

ROBERT QUEEN,
Attorney of Prosecutor-Appellant.

COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

On Application for Writ of Certiorari.
Appeal from Dismissal of Rule to Show Cause.
Prosecutor's Brief.

STATEMENT OF THE CASE

This matter comes up on appeal from the judgment and decision of the Supreme Court dismissing a rule to show cause why a writ of certiorari should not issue to review the action of the The Board of Embalmers and Funeral Directors in revoking the license of the prosecutor therein.

The facts are that the license of the prosecutor, James Lewis Johnson, to engage in the business of funeral director and embalmer, was revoked on January 15, 1929, and on January 18, 1929, an application was made to the Supreme Court for a writ of cetiorari upon an affidavit (See Page 2 of State of Case) and a rule to show cause issued by the late Mr. Justice Katzenbach, which was returnable on the 25th of January. On the return date no one from the Attorney General's Office appeared and by telephonic arrangement the argument was set down for the 30th of January, and no one again appearing for the At-

torney General, Mr. Justice Katzenbach granted an order of continuance to February 15th, and in the same order issued a restraint against the said revocation. Upon said return day the said Justice was sick and unable to hear the argument, which condition continued until March 13th, 1929, when said Justice died. In the meantime the Attorney General then in office came to the end of his term and Attorney General Stevens took charge, during all of which time and for several weeks prosecutor's attorney could get no word as to who would represent the new Attorney General in this cause until Mr. Robert Peacock was appointed.

At the first opportunity prosecutor's attorney, upon consultation with Mr. Peacock and Justice Lloyd, who had been then lately appointed on the circuit including Camden County, the first available date for the hearing of this argument was June 17th, 1929, and on May 29, prosecutor's attorney served notice of argument on the Attorney General (See Page 9 of State of Case).

Early on the morning of June 17th, prosecutor's attorney received a telephone message that his mother had died in the City of Newark, and endeavored to advise Mr. Peacock over the phone at his home in Mount Holly, but was informed that Mr. Peacock had spent the week-end in Atlantic City and would be going to Camden from that point. A Camden lawyer was asked to call at the Camden Court House and apprize Justice Lloyd and Mr. Peacock of the death of Mr. Queen's mother, but he later said he could not locate either of them. But before the order of July 3, 1929, (See Rule to Dismiss on Page 9 of State of Case), was issued, prosecutor's attorney had written letters to both gentlemen, and had also called at the Attorney General's Office, advising them of the unfortunate circumstances.

Upon further calling the attention of Justice Lloyd to the circumstances, the said Justice allowed a modified order (See Page 10 of State of Case) giving the prosecutor a right to apply to the Supreme Court which order was granted on August 21, 1929.

Pursuant to said modified order Notice of Argument was served on the Attorney General (See Pages 11 and 12, State of Case) on September 5th, 1929, and the case listed as No. 218 on the Supreme Court calendar at the October Term, 1929, before Part II. The State of the Case was filed within time and when called prosecutor's attorney answered "Ready." Upon request of the Attorney General the cause was later set down to be considered on briefs. On October 11, 1929, and within the time limited by the rules of the Supreme Court, prosecutor's attorney filed five copies of his brief with the Clerk of the Supreme Court and served two copies thereof on the Attorney General. In said brief was mentioned the sudden death of the attorney's mother on the 17th of June.

On March 13th, 1930, notwithstanding the above stated facts, and through an evident mistake as to the record and the proceedings taken by the prosecutor, the said Supreme Court dismissed the rule in the language set forth in the opinion set forth on Page 14 of State of Case.

From the final rule of dismissal, Page 13, and said opinion, the prosecutor appeals.

ROBERT QUEEN,
Attorney of Prosecutor-Appellant.

COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

JAMES LEWIS JOHNSON,
Prosecutor-Appellant,
vs.
THE BOARD OF EMBALMERS AND FUNERAL DIRECTORS OF THE STATE OF NEW JERSEY,
Respondent-Appellee.

On Appeal from Dissmisal of Rule to Show Cause.
Argument.

The Court is now referred to the Reasons offered by prosecutor for the reversal of the Supreme Court, Page 17 of State of Case.

1. The first reason is:

That the said Supreme Court was mistaken and erred in its findings, as expressed in the judgment and opinion, that there was any necessity for the taking of depositions in said cause since only questions of law were raised in said cause.

The Supreme Court's decision (Page 14 of State of Case) says that "no depositions were ever taken etc." The only questions involved were as to whether or not the complaint originally made against the prosecutor (See affidavit on Page 3 of State of Case) was sufficient in law upon which to base a finding by the Board of Embalmers revoking prosecutor's license. No matter of fact was involved, therefore no depositions were required.

2. The second reason is:

That the learned (Supreme) Court erred and

was mistaken in the finding, as set forth in the opinion, that nothing had been done in the prosecution of said cause from February 15, 1929 to July 3, 1929.

In arriving at the above finding the said Supreme Court had failed to consider that the Justice who originally allowed the rule to show cause had died, that the Attorney General who had started to defend the action had passed out of office and that the first time that anyone from the Attorney General's Office had ever appeared in this cause was the 17th day of June, upon which date Mr. Queen's mother had suddenly died. These facts were set forth in the prosecutor's brief which this appellant contends became a part of the record when a cause is set down for consideration on briefs.

3. The third reason advanced is:

That the rule to dismiss the original rule to show cause was wrongfully and arbitrarily taken and entered in said Court, which had full notice and knowledge that the prosecutor's attorney was prevented from being present on the return day of his motion on account of death in his family.

Since it was on account of a letter setting forth that prosecutor's attorney had had death in his family that Mr. Justice Lloyd allowed that modified order of August 21, 1929 (See Page 10 of State of Case), and the said Justice sat with Justices Trenchard and Case in considering this matter in the Supreme Court, and the briefs upon which the cause was submitted to the Court recited the fact of the sudden death of the attorney's mother on the return day of the motion, the Supreme Court had knowledge of this fact and should have been governed by the precepts of Christianity and custom in all civilized countries. The appel-

lant contends that the brief should have been read and considered.

4. Reason No. 4 is:

That the learned Court erred and was mistaken in its inference, as set forth in the opinion, that nothing had been done by the prosecutor pursuant to the modified order of August 21, 1929, when it was in pursuance of said order of August 21st, that this matter came properly before the Court and in a manner according to the rules of said Supreme Court.

This cause was properly prepared for argument, regularly noticed and set down on the calendar of the October Term of the Supreme Court and given No. 218 on the list in Part II. Upon call it was marked "Ready" and later set down for submission on briefs, which briefs were filed within time. Yet the Supreme Court found as follows, see Opinion, Page 14:

"However, on August 21, 1929, on motion of the prosecutor, such Justice granted prosecutor leave to apply to this Court at this term for a vacation of such dismissal. NOTHING SEEMS TO HAVE BEEN DONE IN PURSUANCE OF SUCH LEAVE GRANTED."

5. The fifth reason is:

That the learned Supreme Court wrongfully refused to vacate the order of dismissal of July 3, 1929, and arbitrarily denied the application of the prosecutor for a writ of certiorari upon a reading and consideration of the State of the Case alone, when the said Court had, on call, marked the argument to be submitted on briefs, which said briefs were filed within the time limited by the rules of the said Supreme Court and thus became a part of the record, setting forth for the information and notice of said Court

that the prosecutor's attorney had failed to appear on account of death in his family.

This reason is self-explanatory, involving the question as to whether or not the brief upon which a cause is submitted is as much a part of the record as the State of the Case. The Court said in its opinion:

"The state of the case laid before us does not disclose or even suggest that there was any impropriety in such action of dismissal."

The said brief, if it had been read, would have disclosed this extraneous matter which could not by law or practice be set down in the State of the Case, but which would have been urged upon oral argument.

6. Reason No. 6 is:

That no notice that the Attorney General would move the said Supreme Court for a rule to dismiss as of July 3, 1929, was ever given or served upon the prosecutor or his attorney, as provided for in the rules of said Supreme Court.

In its opinion the Supreme Court said in part, "the plain implication is that such action (of dismissal) was right." No written notice is shown by this record to have been given the prosecutor that a motion to dismiss for lack of prosecution would be made, but prosecutor's attorney was informed in the Attorney General's Office that in spite of death in his family his failure to appear on that date, would result in the original rule being dismissed, which information was given prior to the said 3rd of July.

7. Reason No. 7 is:

That the State Board of Embalmers and Funeral Directors arbitrarily and without warrant of law, revoked the license of the prosecutor, as said Board, in its complaint, did not specify or set up one matter of fact to acquaint the prose-

cutor with what he was charged, or in what manner the prosecutor had violated the rules and regulations of said Board.

This reason goes to the merits of the original cause. The original complaint against the prosecutor (See affidavit on Page 3 of State of Case, minus surplus verbiage, is as follows:)

"John A. Carroll being duly sworn according to law on his oath says that he is informed and believes that one James Lewis Johnson, of the City of Camden, County of Camden, and State of New Jersey, a funeral director etc., * * * did, during the month of March, A. D. 1928, violate the provisions of Rule 37 of the Board of Embalmers and Funeral Directors of the State of New Jersey, adopted July 1, 1927 in pursuance of the provisions of said act, which rule reads as follows:

'Every funeral director or embalmer shall adopt all proper means to safeguard the public health and shall perform no unnecessary act which shall tend to effect the dignity of death,' and did violate the provisions of subdivision (e) of Section 14 of said act in that he was guilty of unethical and unprofessional conduct."

The verdict, as per resolution in said State of Case, Page 6, was as follows, in part:

"Therefore, be it resolved that the said Board * * * finds and adjudges the said James Lewis Johnson guilty of unethical and unprofessional conduct as charged in said complaint etc."

The law on this point seems to be well and pointedly stated in 21 Cyc., pge. 105, in the language following:

"Every petition should set forth the facts on which it is based plainly, fully, and distinctly, and with such certainty that the same may be understood by defendant, who is to answer them,

the jury, who are to ascertain the truth, and the court, who is to give judgment."

McKelvey on Evidence, pge. 15:

"The court must be acquainted with all the facts making up the combination upon which the plaintiff claims that he is entitled to have some principle of law applied in his favor."

8. Reason No. 8 is subdivided into three heads, the first of which is (a) That there was no specification as to date, time and place in what manner the prosecutor had violated the rules and regulations of the said Board.

An examination of the complaint fails to show any date, time or place, bringing it within the rule laid down by Chief Justice Gummere in the case of Ondycke v. Easton &c. R. Co., 68 N. J. L. 12, 52 Atl. 243:

"At common law it is held necessary to state in the declaration or complaint a time when every material traversable fact happened generally, a similar rule has been applied under the codes and practice acts."

* * *"the other counts of the declaration are each of them defective, because they, neither of them, lay a day when the wrongful act complained of was done. Althongh a precise day is not material, yet it is necessary to lay some day etc."

Under subdivision (b) of Reason No. 8:

That the complaint filed by the Board did not state a cause of action against the prosecutor; that it contained mere conclusions of law;

The appellant contends that said complaint contains no element of fact whatsoever. It is laid down in Bank of U. S. v. Smith, 11 Wheat (U.S.) 171:

"The basic rule is that the pleading must contain every element of fact necessary to bring it within the rule of substantive law upon which the pleader relies. When a declaration fails to do this it shows no cause of action."

"Facts only are to be stated, and not mere argument or inferences, or matter of law." 1 Chitty Pleading, pp. 213.

The appellant contends, in conclusion, that by custom in all Christian countries, by the ethics of the bar in all civilized nations, no advantage should be taken of the absence of a lawyer from court which is occasioned by death in his family; and upon the merits of his cause as set forth in this brief and the State of the Case, the ruling of the Supreme Court should be reversed.

ROBERT QUEEN
Attorney of Prosecutor-Appellant.