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New Jersey Court of Errors and Appeals

~~No. 24, NOVEMBER TERM, 1915.~~

THE STATE OF NEW JERSEY, *ex rel.* ALBERT W. BONYNGE,
Relator-Respondent,
vs.
ADAM FRANK, *et als.*,
Defendants,
and
J. GARFIELD MOSES and RALPH CERRATA,
Defendants-Appellants.

On Quo Warranto.

On Appeal from Supreme Court.

Brief for Appellants.

The relator, by leave of an order of the Supreme Court signed by Justice Swayze, filed his information in the nature of a *quo warranto* (Case p. 2-6) against these appellants and others.

The appellants demurred (Case, p. 7-18) on the same grounds, with one important exception, to be noticed hereafter; the Supreme Court (by Justices Trenchard and Minturn) first sustained the demurrers (Opinion, Case p. 19-21, reported in 90 Atl. 676); but on re-hearing, overruled the demurrers (Case, p. 22, 23). Whereupon judgment of ouster was entered against these appellants (Case, p. 24). The appeals are based on the same grounds (Case, p. 25-38), with the one exception mentioned; and the points are to be understood as applicable to each.

The Information.

The information, in substance, sets forth that West Ridgelawn Cemetery is incorporated under the Act entitled "An Act to authorize the incorporation of rural cemetery associations and regulate cemeteries" (*P. L. 1848, p. 9; Rev. 1877, p. 100; Comp. St., p. 372*), and supplements and amendments thereof; that under the statute the corporation was to be governed by a board of not less than three nor more than *twelve;* that at an annual meeting of the Cemetery on April 25, 1913, certain lot owners and creditors of the Cemetery were present; that Adam Frank, the president, acted as chairman, although, as it alleged, more votes were cast by the lot owners and creditors for one William H. Bonynge as chairman; that Mr. Frank thereupon declared adopted a resolution reducing the number of the trustees from fifteen to nine; that he "arbitrarily" refused to allow the relator and those associated with him, lot owners and creditors, to vote; that he had nominated and declared elected nine trustees; that the board of trustees in fact consisted of *fifteen* members, of whom the terms of only five expired at the time; that relator and his associates thereupon proceeded to elect five men to fill the five vacancies, offering Mr. Frank and his associates the opportunity of voting, which was declined; that the board of nine are exercising the franchises of the office, and that the board of fifteen claim them. Relator is one of the board of fifteen whose term did not expire; and it appears that some of the board of nine are also members of the old board whose terms did not expire (including appellant Moses), while others of the new board are among those whose terms did expire, and still others are entirely new incumbents (including appellant Cerrata). All members of both boards are made respondents.

The demurrers raised certain points respecting the interpretation of the Cemetery Act, and of supplementary and related legislation, as well as certain points relative to pleading in *quo warranto*, which will forthwith appear.

Grounds of Appeal.

1. Because the New Jersey Supreme Court entered judgment of ouster against this defendant whereas the said Supreme Court should have entered judgment in favor of this defendant and against the relator. (Case, p. 25; p. 32).

2. Because the New Jersey Supreme Court overruled the demurrer of this defendant to the information, and entered judgment against this defendant, whereas the said Supreme Court should have sustained the demurrer of this defendant and entered judgment in favor of this defendant against the said relator. (Case, p. 25; p. 32).

3. Because the New Jersey Supreme Court should have sustained the demurrer of this defendant to the information on the ground that the matters contained in said information are not sufficient in law for the said relator to prosecute said information and to call upon this defendant to answer to said State by what warrant he claims to hold the said office of trustee of said West Ridgelawn Cemetery. (Case, p. 25; p. 32).

1. The information is one which cannot be filed by a private relator.

28. The demurrer should have been sustained on the ground that it appears by said information that the existence of the office of six of the members of the board of trustees of said cemetery association is in question. (Case, p. 30; p. 37).

(Cause of demurrer, No. 26; Case, p. 11; p. 17).

29. The demurrer should have been sustained on the ground that it appears that said information is filed at the relation of a private person whereas the same cannot lawfully be filed unless by the Attorney General of the State in his official capacity, for the reason that it appears that the existence of an office or offices is questioned, and put in issue by the said information. (Case, p. 30; p. 37).

(Cause of demurrer, No. 27; Case, p. 11; p. 17).

II. Relator shows no status as a private relator entitling him to file the information.

6. The demurrer should have been sustained on the ground that the information does not allege facts showing that the relator is a trustee of said cemetery association or entitled to such office. (Case, p. 26; p. 33).

(Cause of demurrer, No. 4; Case, p. 7; p. 13).

7. The demurrer should have been sustained on the ground that the information does not allege the number of members constituting the board of trustees of said cemetery association, and it does not appear therefore whether or not the relator is one of the persons named in said information as trustees of said association lawfully entitled to the office of trustee of said association (Case, p. 26; p. 33).

(Cause of demurrer, No. 5; Case, p. 7; p. 13).

8. The demurrer should have been sustained on the ground that the said information does not show the number of members of the board of trustees of said cemetery association and does not therefore show whether the relator is entitled to the office of trustee of said cemetery association. (Case, p. 26; p. 33).

(Cause of demurrer, No. 6; Case, p. 8; p. 14).

9. The demurrer should have been sustained on the ground that no facts are alleged showing how and when and by whom the relator was elected or appointed to the office of trustee of said cemetery association. (Case, p. 26; p. 33).

(Cause of demurrer, No. 7; Case, p. 8; p. 14).

10. The demurrer should have been sustained on the ground that no facts are alleged showing that relator is entitled to the office of trustee of said cemetery association. (Case, p. 27; p. 34).

(Cause of demurrer, No. 8; Case, p. 8; p. 14).

11. The demurrer should have been sustained on the ground that it appears by said information that the board of trustees of said cemetery association lawfully consisted of not more than twelve members and it is alleged in said information that there were fifteen members of said board; but no facts are alleged to show whether or not relator was one of said twelve lawful members. (Case, p. 27; p. 34).

(Cause of demurrer, No. 9, Case, p. 8; p. 14).

12. The demurrer should have been sustained on the ground that it is not alleged that the relator was a lot holder in said association when elected or appointed to the office of trustee thereon. (Case, p. 27; p. 34).

(Cause of demurrer, No. 10; Case, p. 8; p. 14).

13. The demurrer should have been sustained on the ground that it is not alleged when relator was elected or appointed to the office of trustee and it does not appear therefore whether relator's term of office had expired at or before the filing of said information. (Case, p. 27; p. 34).

(Cause of demurrer, No. 11; Case, p. 8; p. 14).

15. The demurrer should have been sustained on the ground that it appears by the said information that the number of members of the said

board of trustees was at said annual meeting, fixed and determined at nine, as the lot holders lawfully might fix and determine the number of said board; and it appears that relator is not a member of the said board as so constituted (Case, p. 27; p. 34).

(Cause of demurrer, No. 13; Case, p. 8; p. 15).

14. The demurrer should have been sustained on the ground that the relator has no right or interest sufficient to entitle him to file said information as no facts are alleged showing that he has a claim to the office of trustee or was legally elected or appointed trustee or was a lot holder at the time of filing the said information. (Case, p. 27; p. 34).

(Cause of demurrer, No. 12; Case, p. 8; p. 14).

III. The appellants appear, from the information, to be lawfully exercising the franchises claimed by them; and, in particular, the information alleges that the term of appellant Moses has not expired.

4. The demurrer should have been sustained on the ground that it appears in and by said information that this defendant is lawfully and rightfully entitled to the office of trustee of the said cemetery association (Case, p. 26; p. 33).

(Cause of demurrer, No. 2; Case, p. 7; p. 13).

5. The demurrer should have been sustained on the ground that no facts are alleged which show that defendant is not entitled to the rights, privileges and franchises of the office of trustee of said cemetery association (Case, p. 26; p. 33).

(Cause of demurrer, No. 3; Case, p. 7; p. 13).

16. The demurrer should have been sustained on the ground that it appears by the said information that the number of members of the said board of trustees was at said annual meeting, fixed and

determined at nine, as the lot holders lawfully might fix and determine the number of said board; and it appears that this defendant is a member of said board as so constituted (Case, p. 28; p. 35).

(Cause of demurrer, No. 14; Case, p. 9; p. 15).

25. The demurrer should have been sustained on the ground that the said election of this defendant and said other eight persons named in said information to the nine offices filled by the meeting conducted by Adam Frank was in all respects conducted and concluded according to law and that this defendant and said other eight persons are lawfully entitled to and possessed of the liberties, privileges and franchises of the office of trustee of said West Ridgelawn Cemetery. (Case, p. 29; p. 36).

(Cause of demurrer, No. 23; Case, p. 10; p. 16).

18. The demurrer should have been sustained on the ground that said election was not unlawful or void because creditors of said cemetery association were denied the right to vote for the election of trustees, as creditors were not entitled to such vote under the statutes of this State regulating cemeteries and cemetery associations incorporated under the "Act to authorize the incorporation of rural cemetery associations and regulate cemeteries," and the revision, supplements, and amendments thereof, and the several other and further statutes of this state regulating such cemetery associations (Case, p. 28; p. 35).

(Cause of demurrer, No. 16; Case, p. 9; p. 15).

19. The demurrer should have been sustained on the ground that it does not appear how the persons alleged to be creditors of said association were or became creditors thereof, and it does not appear whether said creditors held any evidences of the indebtedness of said association or whether

the indebtedness of said association to them was lawfully authorized. (Case, p. 28; p. 35).

(Cause of demurrer, No. 17; Case, p. 9; p. 15).

17. The demurrer should have been sustained on the ground that it does not appear that the number of lot holders voting for said Charles Baer, Chester H. Hoag, John Hinchcliffe, Henry Lohman, Jr., and William P. Aldrich were more in number than the lot owners voting for this defendant and the said Walter L. Frank, Stanley M. Isaacs, William C. Popper, George V. N. Baldwin, Jr., J. Garfield Moses, Adam Frank, Henry L. Ketcham and Robert E. Simon. (Case, p. 28; p. 35).

(Cause of demurrer, No. 15; Case, p. 9; p. 15).

20. The demurrer should have been sustained on the ground that it does not appear that the result of said election would have been different if the votes of the said persons named in said information as representing 17 lots had been received at the said meeting conducted by said Adam Frank. (Case, p. 29; p. 36).

(Cause of demurrer, No. 18; Case, p. 10; p. 16).

22. The demurrer should have been sustained on the ground that it does not appear how said alleged meeting of said alleged lot owners called by said William H. Bonynge was called and whether the same was legally organized and conducted. (Case, p. 29; p. 36).

(Cause of demurrer, No. 20; Case, p. 10; p. 16).

23. The demurrer should have been sustained on the ground that it appears that said alleged meeting of said alleged lot owners called by said William H. Bonynge was not a lawful annual meeting of said cemetery association and the attempted election of trustees thereat was illegal and void. (Case, p. 29; p. 36).

(Cause of demurrer, No. 21; Case, p. 10; p. 16)

IV. Misjoinder of defendants and of causes of action.

26. The demurrer should have been sustained on the ground that there is a misjoinder of defendants in said information. (Case, p. 30; p. 37).

(Cause of demurrer, No. 24; Case, p. 10; p. 16).

27. The demurrer should have been sustained on the ground that the said information joins as defendants persons who claim the office of trustee by different titles, supported by different evidence, and there is, therefore, a misjoinder of defendants and a misjoinder of causes of action. (Case, p. 30; p. 37).

(Cause of demurrer, No. 25; Case, p. 10; p. 17).

30. The demurrer should have been sustained on the ground that the information puts in issue the several claims of different persons to membership in two different boards of trustees and there is therefore a misjoinder of persons and causes of action. (Case, p. 30; p. 37).

(Cause of demurrer, No. 28; Case, p. 11; p. 17).

31. The demurrer should have been sustained on the ground that the information joins the claimants to a board of fifteen and the claimants to a board of nine, having different terms and claiming under different elections. (Case, p. 30; p. 37).

(Cause of demurrer, No. 29; Case, p. 11; p. 17).

Brief of Argument.

1. *The information is one which cannot be filed by a private relator.*

The information tenders the issue as to the existence *de jure* of the office of trustee with respect to six of the alleged total number of fifteen trustees.

Where the existence of an office of a municipal corporation is questioned, it is well settled that

such question cannot be litigated by a private relator, but only by the Attorney General *ex-officio*.

State v. *Seymour*, 69 N. J. L., 606 (Sup. Ct., 1903).

Holloway v. *Dickinson*, 69 N. J. L., 72 (Sup. Ct., 1903).

Gibbs v. *Somers Point*, 49 N. J. L., 515 (Sup. Ct., 1887).

Steelman v. *Vickers*, 51 N. J. L., 180 (Sup. Ct., 1889).

The same rule holds true with respect to a private corporation to the extent at least of an attack upon the existence of the corporation itself.

State v. *Paterson & Hamburg Turnpike Co.*, 21 N. J. L., 9 (Sup. Ct., 1847).

The cemetery is a charitable corporation.

> "'A cemetery for the burial of the dead,' says Justice Gray, in *Close* vs. *Glenwood Cemetery*, 107 U. S., 474, 'if not a strictly charitable use, is in some aspects a public and pious one.' Our courts have taken a similar view (*Newark* v. *Stockton*, 17 Stew., 180; *Toppin* v. *Moriarity*, 14 Dick. 115) and so has the legislature." Per *V. C.* Stevens in *East Ridgelawn Cemetery* v. *Frank*, 77 N. J. Eq., 36.
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> "Notwithstanding the great contrarity of opinion held by the courts of the various states, it seems to be well settled in New Jersey that a trust for the establishment and maintenance of a cemetery or public burying ground is a 'charitable use' within the meaning of that term as it is commonly used." Per *V. C.* Howell in *Bliss* v. *Linden Cemetery Association*, 81 N. J. Eq., 394. [Reversed on another point, Nov. term, 1915]

The latter opinion was on a bill for a receiver of a cemetery organized under the general act. The court directed that the cause stand over that the attorney-general might be made a party and

"be given the right to take charge and control of that portion of the litigation which relates to the public right."

The attorney-general, *ex-officio,* is the proper party to institute proceedings for the determination of any question relative to the use or misuse of the franchises or powers of a charitable corporation.

Mac Kenzie v. *Trustees of Presbytery*, 67 N. J. Eq., 652, 683, 3 L. R. A. (N. S.) 227 (E. & A., 1904).

The charitable corporation is administering a public trust. *Mac Kenzie* v. *Trustees, supra,* at top of page 684.

Trustees of Princeton University v. *Wilson,* 78 N. J. Eq., 1, at page 5 (Chancellor Pitney, 1910).

The reason for the rule of procedure is that the offices of a municipal corporation are the organs, in Chief Justice Beasley's language, of the public institution. By stripping it of the instrumentalities through which its functions are administered, a blow is struck at the existence of the corporation. It is against public policy that such an assault should be open to any private individual. So, for the same reason, the charitable corporation administering a public trust should not be subject to such an attack by any private relator, the result of which may be to deprive it of some of its organs and thus cripple its capacity for public service. Only the attorney-general, as the protector of that indefinite and fluctuating body of persons entitled to the benefit of the public charity, and the representative of the State, to which belongs the prerogative power of enforcing and regulating public charities, should be permitted to set in motion the machinery for such an attack.

That the information cannot be prosecuted by a private relator is ground for demurrer.

Gibbs v. *Somers Point, supra.*

Holloway v. *Dickinson, supra.*

Steelman v. *Vickers, supra.*

II. Relator shows no status as a private relator entitling him to file the information.

(a) In *quo warranto* affecting a municipal office, relator has a standing if he be a citizen or taxpayer, suing—in effect—on behalf of the public, or if he be a claimant to the office. So in the case of a corporation, relator may be a member of the corporation or a claimant of the office. The relator in this case does not prosecute as a lot owner in the cemetery. There is no allegation that he was a lot owner at the time of filing the information or that he sues as such.

The allegation that the relator was a lot owner at the time of the election does not, of course, fix his status at the time of filing the information.

(b) Relator prosecutes as a claimant of the office of trustee. As such, he should properly plead his title as an officer *de jure,* not *de facto.*

Bullock vs. *Biggs,* 78 N. J. L., 63 (Sup. Ct., 1909).

Unless relator's title is shown to be good by his pleading, he has no interest in the proceeding, no standing to compel appellants to plead their titles to office and tender them for the adjudication of the court. This, we think, is the fair effect of *Manahan* vs. *Watts,* 64 N. J. L., 465 (Sup. Ct., 1900), which, in this respect, has not been limited or overruled. The comment on this case in *Anderson* vs. *Myers,* 77 N. J. L., 186 (Sup. Ct., 1908), does not, we think, bear on this point. It is merely a warning against misconstruing the language of *Manahan* vs. *Watts.* That is, the latter opinion must not be considered as depriving the

court of the power to control trial of title to *public* office in the interest of the public. Except as limited in this particular, the opinion in *Manahan* vs. *Watts* (rendered by a very strong court) is entirely in accord with reason and the trend of decisions, notably with the earlier case of *Att'y-Gen'l* vs. *Del. & Bound Bk. R. R. Co.,* 38 N. J. L., 282. (Sup. Ct., 1876).

Manahan v. *Watts* was followed in *Connors* v. *Hillman,* 86 N. J. L., 490 (Sup. Ct., 1914); and, with the qualification noted, in *Dunham* v. *Bright,* 85 N. J. L., 391 (Sup. Ct., 1914).

See also,

Bolton vs. *Good,* 41 N. J. L., 296 (Sup. Ct., 1879);

Day vs. *Lyons,* 70 N. J. L., 114 (Sup. Ct., 1903).

If respondent must plead his title well in his plea, so must relator in his information, if he assumes to put his title in issue under section twelve of the *Quo Warranto* Act. P. L. 1903, p. 375; Comp. Stat., 4210, 4214. (Printed in Appendix). He must, of course, set forth the facts on which he relies to show title in himself in a direct and traversable form.

Relator's title, as alleged, is not good, for the following reasons:

1. He does not set forth the authority for the election under which he claims, the facts leading to the conclusion that it was lawfully held, that he received a majority of the votes cast, that he qualified, and the length of his term.

These are the essential allegations of title to an elective office.

High, Extraordinary Legal Remedies, 524.

15 Cyc. 406.

32 Cyc. 1451, 1452.

2. Relator fails to allege that he was a lot owner when elected. It does not, therefore, appear that he was eligible.

P. L. 1899, p. 324, Comp. St., 391. (Printed in Appendix.)

3. If the meeting of April 25, 1913, was the first meeting of lot owners—it does not appear but that this was so—then relator's term expired automatically at that time.

P. L. 1899, p. 324, Comp. St., 391.

The scheme of the act is that the incorporators of the cemetery choose trustees who are continued until the first meeting of the lot owners, which of course cannot occur until the corporation is organized, doing business and selling lots. Then the lot owners determine the number of trustees and elect an entire board, the temporary organization being swept away.

4. Relator alleges that the number of the board was lawfully fixed at not more than twelve, and that he was one of a board of *fifteen. Non constat* but that he was one of the three who had no standing, *de jure,* as members of the board.

III. The appellants appear, from the information, to be lawfully exercising the franchises claimed by them; and, in particular, the information alleges that the term of appellant Moses has not expired.

If this be shown, it is of course ground for demurrer.

State v. *Board of Health,* 85 N. J. L., 13 (Sup. Ct., 1913).

Civil Service Comm. v. *O'Neill,* 85 N. J. L., 92 (Sup. Ct., 1913); affirmed *per curiam* in 86 N. J. L. 377 (1914).

This is true, notwithstanding the information be filed by leave of court. See discussion under preceding point.

The O'Neill case, above referred to, must have been such a case, for the relator, the commission, was certainly not a claimant under section four.

See also, e. g., prior to the act of 1884, the following case, in which leave must have been obtained.

Van Riper v. *Parsons*, 40 N. J. L., 1 (Sup. Ct., 1878).

Doubtless there are other such cases.

The right to demur on this ground, in any case, necessarily arises under section three.

1. It does not appear from the information with reasonable certainty that the meeting was not the first meeting of lot owners. If it was, the election of a board of nine was proper; and it does not appear that these respondents did not have a majority of the votes of those entitled to the ballot, namely, *lot owners*. The allegation is that the other faction had a plurality by the combined votes of lot owners and *creditors*. This cannot possibly be construed as an averment that the associates of Mr. Bonynge had more votes of lot owners than Mr. Frank and his associates. And it is not sufficient to show that voters were excluded, in an election contest, but the allegation and proof must be that the result would have been different had the excluded votes been counted.

Roche v. *Bruggemann*, 53 N. J. L., 122 (Sup. Ct., 1890).

Downing v. *Potts*, 23 N. J. L., 66, 84. (Sup. Ct., 1851.)

In re St. Lawrence Steamboat Co., 44 N. J. L., 529, (Sup. Ct., 1882.)

McNeely v. *Woodruff*, 13 N. J. L., 352 (Sup. Ct., 1833).

In re Griffing Iron Co., 63 N. J. L., 168 (Sup. Ct., 1899).

Startford v. *Mallory,* 70 N. J. L., 294, 300 (E. & A., 1903).

10 Cyc. 753.

In re Cedar Grove Cemetery Co., 61 N. J. L., 422 (Sup. Ct., 1898).

Cook on Corporations, §620.

The pleading, therefore, raises the issue whether creditors may vote at the election of a cemetery association.

(*a*). *Creditors have no right to vote:*

The only basis for a contention that they have is to be found in the following words in section one of the Act:

> "* * * for the purpose of electing trustees at any meeting after organization of the association, every creditor of such association, in addition to his right to vote by virtue of his owning plats or lots according to section five of this act, shall be entitled to one vote for every four hundred dollars' worth at par value of bonds, stock or other duly authorized evidences of debt he or she may own and hold against such association." (Comp. St., 372). (Printed in Appendix.)

This provision was not found in the act in its original form, but was introduced by amendment of P. L. 1879, p. 260. Section five, prescribing the rights of suffrage of the lot owners, was substantially re-enacted in an amendment of P. L. 1880, p. 265, which possibly might be considered as an implied repealer of the portion of section one referred to.

Section six (Comp. St., 374), of the original act; section two of a supplement of P. L. 1890, p. 100 (Comp. St., 382); section six of an act of

P. L. 1886, p. 409 (Comp. St., 390, plac. 54); act of P. L. 1901, p. 363 (Comp. St., 393, plac. 65); are all statutory provisions inconsistent with the provisions giving creditors the ballot, and show a uniform legislative intention, throughout a period of many years, to make lot owners the *cestuis que trustent* of the cemetery property and, as well, to place in their hands exclusively the power to manage the affairs of the corporation.

By a supplement found in P. L. 1893, p. 387 (Comp. St., 383), the Legislature defined the number of trustees, their terms, classification, the manner of election, and time, and place of holding the election; and gave the ballot to lot owners only. This appears to be a complete provision inconsistent with a claim of right to vote on the part of creditors.

A supplement found in P. L. 1881, p. 273 (Comp. St., 388, plac. 48) to an act of P. L. 1878, p. 256 (Comp. St., 388, plac. 47) also recognized the voting power as vested in the hands of lot owners, and was inconsistent with sections one and five of the original act, and this enactment probably governed the voting rights until the supplement of 1893 was passed.

In 1899 "An Act to Regulate Cemeteries" (P. L. 1899, p. 324; amended by P. L. 1901, p. 64; Comp. St., 391) (printed in appendix) was passed which covered the entire subject matter. This is clearly inconsistent with section one of the original act; it changes the number of trustees, and enlarges their powers; changes their qualifications; changes the place of holding the annual meeting and the time for holding it; the manner of giving notice of the meeting, and the qualifications of proprietors.

If not a repealer of the portion of section one giving creditors the ballot, by reason of incon-

sistency, this act was a repealer by substitution of a new enactment complete in itself and covering every part of the subject matter of the act.

V. C. Stevens evidently considered that this was a repealer in *East Ridgelawn Cemetery* v. *Frank, supra.*

(*b*) *Only a limited class of creditors, if any, are entitled to vote.*

A consideration of the policy of giving creditors the vote will show that it must have been because of the restrictions placed upon their remedies against the cemetery property. This is pointed out by *V. C.* Pitney in *Ransom* v. *Brinkerhoff,* 56 N. J. Eq. 149, 163. It follows that creditors not thus restricted in the use of process for the enforcement of their indebtedness are not contemplated by the act. Thus a judgment lienor or mortgagee whose lien attached prior to the devotion of the lands to cemetery uses would not be entitled to vote. It does not appear that Messrs. Aldrich and Bittles were within the restricted class of creditors.

Moreover, only creditors whose indebtedness is evidenced by bonds, stock or other duly authorized evidences of indebtedness are within the language of section one. This is not alleged.

2. It would seem to be inferable from the information, that the meeting ~~of last April~~ was the first lot owners' meeting. The information sets forth that the cemetery was to be governed by a board of not less than three nor more than twelve. This is referable to section one of the original act, covering the organization of the incorporators' board, and it must be inferred that the board existing was that organized by the incorporators.

3. If it was not the first meeting, relator should have so averred. The form of the statute here is such that it cannot be presumed that it was other than the first, for the members of the old board continued in office for three years only if chosen at a meeting "subsequent to the first."

Relator should negative the exception.

Wheatman v. *Andrews*, 85 N. J. L., 107 (Sup. Ct., 1913).

The use of the word "annual" in the information does not characterize the meeting as one subsequent to the first. It may have been the first annual meeting of the association.

4. Whether or not this was the first meeting. the lot owners were empowered to reduce the number of trustees and fill the board.

Section one of the Act of 1899 provides that the board "shall be elected at the annual meeting of the association, at which time the number of the said board of managers or trustees shall be determined."

Section two of the same act provides that at the annual election there shall be chosen "such number of managers or trustees as may be necessary to fill the board, and at the first election a full board of such number as may be determined shall be elected; the managers or trustees chosen at any election subsequent to the first shall hold their places for three years, and until others shall be chosen to succeed them."

The construction of these provisions, we submit, is this:

At the first meeting, the terms of all members of the incorporators' board cease automatically. At that time the lot owners *must* determine the number and fill the board. At any other meeting, they *may* determine the number to be chosen.

The act affirmatively says that they may determine the number at any annual meeting; it does not expressly limit this power to the first meeting; it does not forbid the increase or reduction of the number at any meeting subsequent to the first. The provisions for filling expired terms, term of service, etc., apply only in case the proprietors make no change in the number. The provision that the trustees chosen at "any election subsequent to the first" shall serve three years speaks merely in complement to the provision for the classification of those chosen at the first election into terms of varying lengths.

The same provision for the determination of the number of trustees at any annual election runs throughout the previous legislation. Section one of the main act contains it; if that section is in force to the extent of giving creditors the right of suffrage, it must be in this respect also. And it is to be noted that the provision in this section that "no trustee shall be deemed out of his office till the term for which he was elected shall have expired" is not to be found in the later act.

Similar words are found in the supplement of 1893.

The information expressly alleges that the demurrant Moses is entitled to office.

This point applies to that appellant only.

It is said that the term of appellant Moses did not expire at the April meeting, 1913. Under the statute, it must run for at least one year thereafter. Relator's pleading therefore shows this appellant to have been lawfully using and exercising the privileges of the office when the information was filed.

It cannot seriously be argued that the result is different because it is also alleged that Adam Frank "arbitrarily and illegally declared" Mr.

Moses to be elected trustee. There is no allegation that the latter had or has resigned from his place in the old board, or that there was a vacancy in his office, or that he was removed therefrom, or that any person has succeeded him in office, or that he claims under the election of last spring. Because he may claim under either of two titles, of which one is admitted to be good by relator, is no reason why he should be compelled to answer a prerogative writ. If, after his term in the old board expires, he assumes to act as a member of the new, *then* will be the time to compel him to answer by what warrant he claims.

Bolton v. *Good,* 41 N. J. L., 296 (Sup. Ct. 1879).

Tillyer v. *Minderman* 70 N. J. L., 512 (Sup Ct. 1904).

Appellant can have but one plea. *State* v. *Roe,* 26 N. J. L., 215 (Sup. Ct., 1857). If he should mistakenly plead the title which he conceives to be better in law, should judgment of ouster be rendered against him? How then can judgment be given against him on this demurrer, ousting him from an office which relator alleges he is entitled to?

The issue is whether he had lawful title to the office when the information was filed, Dec. 2, 1913. *Hammer* v. *Richards,* 44 N. J. L., 667 (E. & A. 1882). Relator expressly alleges that his term did not expire until at least April, 1914.

(c) *Effect of leave of court under Section one.* It is no answer to this contention to say that relator filed his information by leave of the court under section one of the Quo Warranto Act (P. L. 1903, p. 375; Comp. Stat., 4210.—printed in appendix).

At common law the information could be exhibited only by the Attorney General, *ex officio*

(*State* v. *Paterson & Hamburg Turnpike Co., supra*). The statute of 9 Anne, Ch. 20, established the practice of suit on private relation by leave of the court (*Ibid*). Our statute is substantially copied therefrom. It was first adopted in 1795 (Paterson's Laws, 177), under the title, "An act for rendering the proceedings upon informations in the nature of a quo warranto, more speedy and effectual."

Formerly the title of the relator was not, and could not, be inquired into. *Davis* v. *Davis,* 57 N. J. L., 80 (Sup. Ct., 1894); *Manahan* v. *Watts, supra.* A private relator necessarily sued as the representative of the public, since he had no personal interest in the outcome of the proceeding, except in the matter of costs. Leave of court under the statute fixed his status as a prosecutor on behalf of the public. The effect of leave of court was to give him as favorable a status as the attorney-general would have.

Act of May 9, 1884 (P. L. 1884, p. 320; G. S. 2633, plac. 4), now section four of the Revision of 1903, Comp. Stat., 4212, plac. 4 (printed in appendix) permitted a claimant to a *municipal* office to sue without leave of court. This left it still necessary for a claimant to office in a non-municipal corporation to obtain leave of court.

Until the Act of 1894 was passed, therefore, the Attorney-General, *ex officio,* suing without leave of court, the claimant to municipal office, suing without leave of court under section four, and the claimant to non-municipal corporate office, suing by leave of the court, were all on an equality as suitors. Each had the status entitling him to file and prosecute the prerogative writ—and no more.

The Act of February 18, 1894 (P. L. 1894, p. 82; G. S. 2635, plac. 12, now section twelve of the Revision of 1903, Comp. Stat., 4214, plac. 12,

printed in appendix), effected a change in the nature of quo warranto. Ceasing to be merely an inquisition by the sovereign, it became (when prosecuted by claimant to office) a contest as to the better title to office (with the court, on the bench, watching out for the interests of the public.) *Manahan* v. *Watts, supra.* This statute applied to all proceedings in *quo warranto*—not merely those relating to public office. The change in the character of the proceeding affects all claimants to office, municipal or otherwise. It governs all proceedings, whether under section four, or by leave of court under section one. *Dalenz* v. *Fitzsimmons,* 78 N. J. L., 618 (E. & A. 1909).

It will not do, therefore, to appeal to the supposed effect of leave of court under section one. The court, at common law, had no power at all to permit the use of the writ. *State* v. *Paterson and Hamburg Turnpike Co., supra.* The power of the court under the statute exhausts itself upon the mere exercise of its discretion as to whether or no the relator may place on file an information, and prosecute it. *32 Cyc. 1434.* All that is determined is whether it is compatible with public interest and private justice that a private individual should stand in the shoes ~~in~~ of the Attorney-General.

Necessarily the court does not and can not decide whether the information thereafter to be filed by its leave conforms to the rules of pleading, nor any of the questions of law or fact tendered by the information. Leave of court does not render the pleading immune from demurrer on any legal ground.

Informations filed by the Attorney-General, *ex officio,* are subject to demurrer. Section three, Quo Warranto Act, Comp. Stat., 4211. The same is true of informations filed by leave. *Ibid.*

IV. Misjoinder of defendants and of causes of action.

The limitation upon joinder of defendants is stated and applied in *Attorney-General* v. *Thompson*, 83 N. J. L., 57; 83 Atl., 502 (Sup. Ct. 1912).

On motions to quash.

The attorney-general filed an information against the two men, who each claimed to be the secretary of the State Dental Society, another against the two claimants to its presidency, and another respecting its treasurership. Two bodies, each claiming to be the society, had met and attempted to elect officers. Held, that the society in a certain aspect was a public corporation, and that its executive officers are public officers having public functions connected with the government of the State.

> "By the common law, which no statute of this State has abridged in this respect, the attorney-general, *ex-officio*, and on behalf of the State, has power to bring in question by an information in the nature of a *quo warranto* the rights of persons to the respective offices of president, secretary and treasurer of such society. *Attorney-General* v. *Delaware, etc., R. R. Co.*, 9 Vr. 282 * * *
>
> "We think that proper practice does not permit the attorney-general to join two different persons as respondents in one and the same information of this character, except in cases where the rights involved and the proof in support of them are substantially the same. Such was the rule at common law (High Extraordinary Remedies, 3d Ed., p. 661) and these cases apparently do not fall within the exceptions stated.
>
> "But this should not result in quashing the informations. There may be a sever-

ance in each case, without embarrassment, as each sets up separately the facts as to the election of each respondent, and calls upon him to show by what warrant *he* claims the office.

"Upon the filing by the attorney-general of appropriate pleadings, resulting in such severance and in each case the motions to quash are denied."

In *Att'y Gen'l* v. *Cain,* 84 Mich., 223; 47 N. W., 484, 485, it was held on demurrer that a joinder of defendants was improper because "the title of one does not depend on the title of any other."

The opinion of the majority in *State* v. *Gray,* 27 So. Dak., 461; 131 N. W. 800, on demurrer, said:

"In the case at bar we are unable to discover any good reason why (when the office is a joint one) all or two or more holding as joint members of one office may not be joined in the same action, and especially so when the grounds of complaint are so similar as in this case, although they may have been appointed on different days for different lengths of service. The policy of the law is against a multiplicity of suits."

The court cited *State* v. *Kearn,* 17 R. I., 391, 22 Atl. 322, and *People* v. *Cohn,* 7 Utah, 352, 26 Pac. 928. (The Rhode Island case cited was one where the respondents were members of a town council, all elected at the same election.)

Whiting, *J., dissentiente,* said:

"If were true that the defendants had been elected or appointed at one and the same time, and their election or appointment was being attacked upon some ground common to both defendants, and it was, moreover, true that

the defendants were holding offices which commenced at one and the same time with terms expiring at the same time, I believe the rule laid down in the foregoing opinion would be the correct one, and would be supported by all the authorities cited by Justice McCoy. An examination of the decisions cited in the foregoing opinion will show that, where the same hold that two or more defendants can be united in such an action, in each case, the grounds upon which the rights of each to hold office were attacked were identical, all the defendants were holding identically the same office, being members of a board representing one district, elected at one time for identically the same term, and their right to hold office was being attacked by persons who claimed to be themselves chosen for such office. It will thus be seen, as was held in the Utah case and also in the Rhode Island case, that there can be no one defendant against whose title to the office any one of the contestants could lay claim.

"The situation in the case at bar is entirely different." [The two defendants were appointed to membership in the same board, at different times, by the same appointing power, and the issue tendered appeared to be the legal authority of the appointive power.] "It will thus be seen that we have defendants who are members of the same board, but holding offices for different terms and claiming their offices, not by virtue of appointment, but by virtue of appointments held at different times, and when the appointing bodies were not the same." And citing *People* v. *Long,* 32 Colo., 486, 77 Pac. 251; *State* v. *Parker,* 121 N. C., 198, 28 S. E., 297; *Preshaw* v. *Dee,* 6 Utah, 360, 23 Pac. 763.

On rule to show cause for leave to file information against the several burgesses of a borough, held, by Lord Ellenborough, *C. J.*, in *King* v. *Warlow*, 2 M. & S., 75, 105 Eng. Rep. (Reprint) 310 (1813), that the informations should not be consolidated, "for this was not a joint offense."

In reading this case it should be borne in mind that the Statute of Anne, section IV, (9 Anne, c. 20, 1710), contained the same provision for joinder of defendants as in our statute.

See also 32 Cyc., 1446, 1447.

The rule laid down in the Thompson case clearly applies to the case at bar. Aside from the fact that some of the board of nine are also members of the board of fifteen, the two sets of trustees claim, so far as the election ~~of last spring~~ is concerned, under different and adverse votes—the evidence offered in support of the one body does not prove, but disproves the election of the other. And as to the respondents who are members of the board of fifteen holding office under unexpired terms which commenced one or two years prior to April, 1913, of course their claims are rested on entirely different elections, or appointments, as the case may be. The test is whether all respondents make a common claim to office—derive title from a common source, so to speak—and whether the rights of each and all will be proved or disproved by the same evidence; in fine, that there be but one issue between relator and respondents. And this is especially true where the relator is claimant to office, not a representative of the public, *i. e.*, a citizen and tax-payer, or, in the case of a private corporation, a member.

The practice in *quo warranto* permits of no other result. The rigidity of the common law system of pleading has survived in this branch of our procedure in all its fullness. The statute permits the respondent to put in issue relator's title

(though without intimating how the pleadings are to be framed for the purpose, or extending the right to plead several pleas); but where is indicated the method of putting in issue the title of co-respondent? The nature of the proceedings, and the inflexibility of the pleadings, in *quo warranto,* make it impossible.

The issue which, it is clear, is meant to be tendered by this information, is whether the title to office of the board or nine or of the board of fifteen is better. The proceeding should be at the relation of the board of fifteen against the board of nine. By the practice followed, these appellants are deprived of a substantial right, that of pleading defects in the title of their co-defendants. They are denied the opportunity to frame the pleadings under section twelve so as to put at issue the very right to the office.

There would be danger in establishing a precedent favorable to this manner of pleading, in that the proceedings might be controlled by a relator adverse to one, and favorable to the other, set of defendants. Suppose that faction favored by the relator filed a false plea, and the relator confessed judgment? It would be said that the judgment was binding on these appellants, who are parties to the record. But there would not have been any *bona fide* contest over the right to the office. If the members of the board of fifteen are parties as claimants to the office, they ought to have applied for leave to sue as relators, so that these appellants could attack their title. At all events, they are strangers to the issue between these appellants and the relator, and are therefore misjoined.

The defect is not saved by appeal to the provisions of section one, respecting joinder. The rule as to joinder has been established in the face of the same provision in the Statute of 9 Anne. The

statute obviously means joinder within the limitations stated in the Thompson case. Under a proper construction of the statute, the discretion of the court exhausts itself in permitting joinder within those limitations.

The Thompson case is not distinguishable because it was filed without leave of court. The private relator with leave is in precisely the same position as the Attorney-General, *ex-officio*. Nor on the ground that the question came up on motion to quash. Because the defect could be reached in that manner, it does not follow that it could not have been seized upon by demurrer.

The members of the board of fifteen, moreover, are not proper parties to the record, since there is no allegation of user by them.

Misjoinder of defendants is ground for demurrer at common law.

Lehman v. *Hauk,* 42 N. J. L., 206 (Sup. Ct., 1880).

Chitty * 444.

Andrews' Stephens' Pleading (2nd ed.) 61.

But this is more than mere misjoinder of respondents; it is an improper joinder of causes of action, that is, a mingling of inquiries into the several and diverse rights to office not supported by substantially the same proof. This joinder leads not to singleness but multiplicity of issues.

Misjoinder of causes of action is demurrable at common law.

Chitty * 206.

King v. *Morris,* 73 N. J. L., 279. (Sup. Ct., 1905).

Ricardo v. *News Publishing Co.,* 73 N. J. L., 143. (Sup. Ct., 1905).

And see *Gibbs* v. *Somers Point, supra.*

V. *The judgment should be reversed, with costs, the demurrers sustained, and judgment entered for defendants.*

Respectfully submitted,

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Attorneys for Appellants.

WALDRON M. WARD,
Of Counsel.

APPENDIX.

Section one of Cemetery Act, as amended by P. L. 1879; p. 260 (Comp. Stat. 372).

That any number of persons residing in this state, not less than seven, who shall desire to form an association for the purpose of procuring and holding lands to be used exclusively for a cemetery or a place for the burial of the dead, may meet at such time and place as they or a majority of them may agree, and appoint a chairman and secretary by the vote of a majority of the persons present at the meeting, and proceed to form an association by determining on a corporate name by which the association shall be called and known, and the number of trustees to manage the concerns of the association, which number shall not be less than three nor more than twelve, and thereupon may proceed to elect by ballot the number of trustees so determined on; and the chairman and secretary shall immediately after such election divide the trustees by lot into three classes; those of the first class to hold their office one year; those of the second class two years; and those of the third class three years; but the trustees of each class may be re-elected if they shall possess the qualifications hereinafter mentioned; the meeting shall also determine on what day in each year the future annual elections of trustees shall be held; and that any association now existing or that shall hereafter exist, under and by virtue of this act may by ballot change its present number of trustees to any number not exceeding twelve or less than three at any annual meeting, and that the chairman and secretary shall then make out a re-classification according to the requirements of this section of this act, and at the next subsequent election those trustees in the first class

of the re-classification shall be elected, and subsequent elections shall conform to such re-classification, but no trustee shall be deemed out of his office till the term for which he was elected shall have expired, except by death, resignation or removal out of the state, in which last event his trusteeship shall be deemed terminated; and for the purpose of electing trustees at any meeting after organization of the association, every creditor of such association in addition to his right to vote by virtue of his owning plats or lots according to section five of this act, shall be entitled to one vote for every four hundred dollars' worth at par value of bonds, stock or other duly authorized evidence of debt he or she may own and hold against such association.

Act of 1899, as amended by P. L. 1901, p. 64 (Comp. Stat. 391).

1. The care and management of all cemetery associations incorporated by special charter where the actual care or management of the cemetery grounds has been heretofore entrusted by such specially-chartered association to plot-owners or an association of plot-owners thereof, and of all cemetery associations incorporated under any general law, shall be confided to a board of managers or trustees, which board shall consist of not less than three nor more than fifteen managers or trustees who shall be lot-holders and shall be elected at the annual meeting of the association, at which time the number of the said board of managers or trustees shall be determined; and the president and secretary shall, immediately after such election, divide the managers or trustees, by lot, into three classes, those of the first class to hold their office one year, those of the second class two years, and those of the third class three

years, but the managers or trustees of each class may be re-elected if they shall possess the requisite qualification at the time of their re-election; the said board shall have the exclusive superintendence of such association, with full power to appoint, employ and discharge any or all of the officers or agents of said association as they may deem expedient, and to fix the compensation of such officers or agents; *provided, however,* if at the date fixed by the certificate of incorporation for the annual election of the board of managers or trustees, any such association heretofore or hereafter organized shall not have acquired any lands for cemetery purposes, or if having acquired such lands, it shall not have sold any lots or plots therefrom, it shall be lawful to defer the annual election of managers or trustees to the next annual meeting thereafter, and in the meantime the original board of trustees shall continue in office with power to fill any vacancy or vacancies arising by death, resignation, removal or other cause; *and provided further,* that where the board of trustees or managers has been increased to a number greater than that named in the certificate of incorporation, but not greater than the number allowed by law, such increase in the number of said board, and *and* all acts done by such board within the powers allowed by law prior to the conveyance of lots in the cemetery property, are hereby declared to be valid and of full force and effect.

2. The annual election for managers or trustees shall be holden on the day fixed by the charter or certificate of organization, at the principal building of the said cemetery association within their cemetery grounds, or in case there is no such building, at the principal entrance of the said cemetery, at the hour of two o'clock in the after-

noon, unless some other hour or place shall be designated by the managers, directors or trustees, at which election shall be chosen such number of managers or trustees as may be necessary to fill the board, and at the first election a full board of such number as may be determined shall be elected; the managers or trustees chosen at any election subsequent to the first shall hold their places for three years, and until others shall be chosen to succeed them; the election shall be by ballot, and every person of full age, who shall be a proprietor of a lot or plat in the cemetery of the association, or if there be more than one proprietor of any such lot or plat, then such one of the proprietors as the majority of the joint proprietors shall designate to represent such lot or plot, may either in person or by proxy give one vote for each lot or plat; *provided,* that no person shall vote for more than one hundred plats or lots; and the person or persons receiving the largest number of the votes given at such election shall be managers or trustees to succeed those whose term of office expires; and the managers or trustees shall have power to fill any vacancy in their number occurring during the period for which they hold their office; public notice shall be given of the annual election by the existing board of managers, directors or trustees by publication in a newspaper published in the county in which said cemetery is situate and circulating in the neighborhood of the said cemetery at least two weeks prior to the time fixed for the said election, and in the event of the failure of the said board of managers, directors or trustees to give such notice two weeks prior to the time fixed, any three proprietors of lots or plats in said cemetery may give such notice by setting the same up at the principal entrance of the cemetery ten days before the time

fixed for the election, and publishing the same in a newspaper published in the county in which said cemetery is situate and circulating in the neighborhood of the cemetery one week prior to the time fixed for the said election.

3. No proprietor of a lot or plat shall be entitled to vote unless he has been a proprietor of a lot or plat at least twenty days before the time fixed for said election.

Sections one, four, and twelve of the Quo Warranto Act (Comp. Stat., 4210).

1. In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise within this state, it shall be lawful, with the leave of the supreme court or a justice thereof, to exhibit in the supreme court in the name of the attorney-general an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same, who shall be mentioned in such information to be the relator, against such person for usurping, intruding into or unlawfully holding and executing any such office or franchise, and to proceed therein in such a manner as is usual in cases of informations in the nature of a quo warranto; and if it shall appear to the court or justice, that the several rights of divers persons to the same office or franchise may properly be determined on one information, the court or justice may give leave to exhibit one such information against several persons, in order to try their respective rights to such office or franchise.

4. Whenever it is alleged that any person usurps, intrudes into or unlawfully holds or executes any municipal office or franchise within this

state, any citizen of this state, who believes himself lawfully entitled to such office or franchise, may, as relator, file in the office of the clerk of the supreme court an information in the nature of a quo warranto, against such person, for usurping, intruding into or unlawfully holding or executing any such office or franchise, and may proceed therein in such manner as is usual in cases of informations in the nature of a quo warranto, except as is otherwise provided in this act.

12. In all actions of quo warranto, the supreme court may, if the writ, return and pleadings are properly framed for the purpose, determine by its judgment, not only the title of the respondent to the office or franchise in question, but also the title of the relator to the same office or franchise, and shall have power by appropriate process or orders to enforce its said judgment, that the very right to the office or franchise may be determined in the one proceeding.

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, *ex rel.* ALBERT W. BONYNGE,
Relator-Appellee,

v.

ADAM FRANK *et al.*,
Defendants,

and

J. GARFIELD MOSES and RALPH CERRATA,
Defendants-Appellants.

On Quo Warranto.
On Appeal From Supreme Court.

BRIEF OF RESPONDENTS.

Owing to the fact that the appellants herein, who were demurrants to the information filed in the Supreme Court, have assigned thirty-one grounds of appeal and have assumed to argue to some extent at least each one, no attempt will be made herein to follow that brief, but the questions which appear to counsel to be really in issue will be considered.

Statement of the Case.

A suit was brought to determine the rights of persons assuming to act as members of two conflicting Boards of Trustees of West Ridgelawn Cemetery, the corporation being incorporated un-

der the provisions of an Act entitled, "An Act to authorize the incorporation of rural cemetery associations and regulate cemeteries and its supplements and amendments, 1 Compiled Statutes of New Jersey, page 372."

Application was made by the relator, Albert W. Bonynge, a lot owner and a Trustee, for permission to bring a suit in the name of the Attorney General. A rule to show cause was allowed and after argument permission was granted. The order also recited that it appeared to the Court that the rights of the two conflicting Boards might properly be determined in one proceeding and in pursuance of that order an information was filed under the Act relating to informations in the nature of *quo warranto,* Revision of 1903, Section 1, Mott's Practice Act (p. 145). This rule is recited in the information (p. 5), and a copy of it is presented herewith.

Two of the defendants, J. Garfield Moses and Ralph Cerrata demurred. The demurrers are exactly alike.

The information alleges the incorporation of the company; that the annual meeting was held on the 25th day of April, 1913; that the number of Trustees prior to said meeting was fifteen; that the terms of but five members of the Board expired and that there were to be elected successors to only such five individuals. That one of the respondents, Adam Frank, acted as Chairman of the meeting, although more votes had been cast by the lot owners and creditors for William H. Bonynge as Chairman. That there were present at such meeting lot owners named in the information representing seventeen lots and also creditors to the amount of $19,928, which creditors, the information states, the statute provided have a right to vote. That the respondent Frank, who

acted as Chairman of the meeting arbitrarily refused to permit any of the lot owners referred to in the information or the creditors to participate in said meeting and refused to permit them to vote.

That he declared adopted a resolution reducing the number of Trustees from fifteen to nine, refusing to permit any of the persons last referred to to vote upon this resolution. That he then proceeded to nominate nine persons as members of the Board of Trustees although the terms of ten of the members of the Board did not expire. That at the election the respondent, Frank, refused to permit votes to be cast by the said seventeen lot owners or by the creditors although such votes exceeded in amount the votes which were cast for the nine whom he declared elected. That he thereupon declared the nine persons elected as Trustees of West Ridgelawn Cemetery.

That immediately thereafter another meeting of lot owners was called by William H. Bonynge, a lot owner, and that then in the presence of the respondent Frank and of those who had participated in the preceding meeting there was a meeting held and there was elected to succeed the five persons whose terms expired five individuals. That an opportunity was given to the respondent Frank, and those who had participated in the preceding meeting to vote, but they declined and refused in any wise to participate.

The Information then alleges that both of these Boards of Trustees, to wit, the nine who were declared elected by the respondent Frank and his associates and the ten whose terms did not expire, together with the five who had been elected to succeed them at the meeting which followed the alleged illegal meeting presided over by the respondent Frank, claimed to hold the office of

Trustees of West Ridgelawn Cemetery. That the right of the parties to hold the office can properly be determined in one Information as by the rule of the Supreme Court appears. All of the persons assuming to act as members of the Board of Trustees of West Ridgelawn Cemetery are made parties and the purpose of the suit is to settle who are the legal Trustees of the Cemetery.

Two of the respondents, J. Garfield Moses and Ralph Cerrata, who are two of those declared to be elected by the respondent Frank demurred to the Information upon various grounds, twenty-nine as appears by the demurrers.

The case was argued before the Supreme Court and a *per curiam* opinion handed down (19), sustaining the demurrers. This opinion assumed that because one of the points made by the relator in his Information, to wit, that creditors were deprived of the right to vote, being determined adversely to the relator, this resulted in sustaining the demurrers.

Upon application made for rehearing, in which it was pointed out that assuming that creditors had no right to vote this did not result in sustaining the demurrers because the deprivation of the right of the creditors to vote was only one of the grounds upon which the information rested a rehearing was granted. The case was reargued and the result was an opinion *per curiam* overruling the demurrers (22).

From this judgment the appellants appealed.

Argument.

Twenty-nine grounds of demurrer were filed and they may be conveniently subdivided and considered under seven subheads.

I.

The 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th may be considered together.

They set up generally that it does not appear by the Information that the relator is a member of the Board of Trustees or how he became a lot owner. All of these grounds rest upon the erroneous theory that the relator has no standing unless he claims himself to be entitled to the office of Trustee.

The Information is exhibited under the provisions of Section 1 of the act relating to Informations in the nature of a *quo warranto* which permits, with the leave of the Supreme Court, the exhibition of an Information in the name of the Attorney General at the relation of any person desiring to prosecute the same. The relator is a lot owner and it also appears from the Information that he was one of the persons who was represented at the meeting and whose vote was declined and it also appears by allegation in the Information that he was one of the members of the Board of Trustees whose term did not expire.

The distinction where Informations are filed without leave of Court and where with leave of Court is well pointed out in the case of *Davis* v. *Davis*, 57 N. J. L., 80, and although where they are filed without leave of Court objection can be made because of the lack of interest of the party, yet as in the case at bar where a rule to show cause has been allowed and argued and the Court has given leave to file an Information, the question of interest is settled.

II.

The 16th and 17th grounds of demurrer may be considered together.

They state that the meeting presided over by the respondent Frank was not unlawful or void because the creditors of the cemetery association were denied the right to vote for the election of Trustees and because it does not appear how the persons alleged to be creditors became such and it does not appear whether said creditors held any evidence of indebtedness, etc.

Under the Act, "An Act to authorize the incorporation of rural cemetery associations and to regulate cemeteries," 1 Compiled Statutes of New Jersey, 372, Section 1, it is specifically provided "and for the purpose of electing Trustees at any meeting after organization of the association, every creditor of such association in addition to his right to vote by virtue of his owning plats or lots according to Section 5 of this Act shall be entitled to one vote for every four hundred dollars at par value of bonds, stock, or other duly authorized evidence of debt he or she may own and hold against such association."

It is specifically alleged in the information that there were present creditors to the amount of $19,928, who under the statute had the right to cast 49 votes. That these votes were rejected. The information is a pleading which need not set forth the evidence. The allegation that they were creditors who under the statute were entitled to vote is sufficient.

The statute appears to be clear. Section 5, page 374, provides generally for the method of voting and that any lot owner of full age may vote. This has been superseded by Sections 1 and 2 of the Act of 1899, page 324, as amended, P.

L. of 1901 (p. 64), 1 Compiled Statutes, 391, Arbitrary Sections 58 and 59, but the provision in Section 1 of the Act of 1848 as amended in 1879, 1 Compiled Statutes (p. 372), providing that in addition to the rights given under Section 5 superceded by Sections 1 and 2 of the Act of 1899 as above, any creditor of the association should be entitled to one vote for every four hundred dollars' worth, etc., is still in effect or indicated by *Ransom* v. *Brinkerhoff,* 11 Dick., 149, decided in 1897, although Section 5, had theretofore been superseded by Sections 1 and 2 of the Act of 1893 (p. 387), 1 Compiled Statutes (p. 383), Sections 34 and 35.

This point the Supreme Court held against the relator.

None of the acts referred to by the Supreme Court or by counsel, it is insisted, have taken away the right of creditors to vote given by Section 1 of the original Act, Compiled Statutes of New Jersey (p. 372). These supplemental acts contain no provision for the incorporation of cemetery companies and it is only by going back to Section 1 of the original Act that we find a method provided. Section 5 of the original Act specifically provides that election of Trustees should be by lot owners, yet the Legislature by the amendment, not of Section 5, but of Section 1, in 1879, provided that creditors should have the right to vote. That section further provided that the lot owners might at an annual meeting change the number of Trustees, but not the terms of office and specifically that the terms should not be cut short. The acts referred to by counsel are acts which affect Section 5. They do not affect Section 1 except in so far as they specifically so state, to wit, in one instance (see Section 1 of the Amendment of 1899, Compiled Statutes of

New Jersey, 391, Arbitrary Section 58), the number of Trustees might be, instead of twelve, as provided in the original Act, fifteen.

It is insisted that it is not indicated in any of the acts that the Legislature intended to repeal the amendment which it had inserted in Section 1 of the Act of 1848, in 1879. It could not have intended to repeal the provisions for the incorporation of associations for in no other Act has it provided for such incorporation.

The provision that creditors should have a vote contained in the Amended Act of 1848, Section 1, is no more inconsistent with the various supplemental acts than was it inconsistent with the original act, Section 5. The right given to creditors to vote in Section 1 as amended is an additional right. It is only by going back to Section 1 that the right to reduce the number of Trustees can be found. This is specifically so stated by the Supreme Court in its opinion on reargument (p. 23). The power to reduce does not appear in the Act of 1889, Section 1, Compiled Statutes of New Jersey, 391; Arbitrary Section 58. Indeed considering Sections 1 and 2 of this act together it might be insisted that there could not be a reduction in the number of Trustees. Yet I do not think that the power to reduce contained in Section 1 is so inconsistent with what is contained in the Act of 1899 on the same subject matter as to be held repealed by it.

III.

Ground 18 is that it does not appear the result of the election would have been different if the votes of the persons named in said Information as representing seventeen lots had been received at the said meeting conducted by the respondent Frank.

This leaves out of consideration the illegal reduction from 15 to 9 and the illegal termination of the terms of ten members of the Board of Trustees. If the election was illegally conducted and proper votes rejected notwithstanding the fact that there was not present at that time sufficient lot owners to change the result, the fact that these seventeen persons were deprived in the election of their right to vote renders the election void and there will be a judgment of ouster and a new election will have to be ordered.

Downing et al. v. *Potts*, 3 Zab., 67.
In the Matter of the Election of St. Lawrence Steamboat Co., 15 Vr., 529.
In re Election of Cape May Navigation Co., 22 Vr., 78.

The rule on *quo warranto* is exactly the same as the rule on applications under the statute to determine the legality of the election of Directors.

The method provided for by the statute for the investigation of the legality of the election of Directors is but a substitute for *quo warranto*.

It is impossible to determine whether, if the seventeen lot owners who were clearly entitled to vote had been permitted to participate in the election, the result would have been different or not. The lot owners who were permitted to vote were entitled to the benefit of the arguments which might have been made by the lot owners whose votes were excluded and the lot owners whose votes were excluded were entitled to the benefit of such argument as they might make upon the lot owners who were then present. In the case at bar Frank absolutely prevented these seventeen lot owners to in any wise participate in the meeting, refused to hear them, refused to permit them to vote.

The cases which hold that under a summary investigation to determine who are the proper Directors of a corporation the Court will not set aside the election in case the result would not have been different, all rest upon the provisions of the statute which provide that whether the election should be set aside or not is a matter which is in the discretion of the Court.

In the case at bar the Court might have exercised this discretion and have refused to permit the relator to file his Information upon the ground that it did not appear from the moving papers that the result would be changed. The Court, however, granted the permission.

The discretion of the Court, therefore, has been exercised and no application was made to review it under Key *v.* Paul, 32 Vr., 113, or upon motion to quash the Information.

It is insisted, therefore, that by reason of the action of the respondent, Frank, in refusing to permit these seventeen lot owners to participate in any wise in the meeting, resulted in the meeting presided over by him being absolutely illegal and that the meeting presided over by William H. Bonynge at which meeting Frank and his associates were given an opportunity to participate, and vote (but did not exercise it), was really the legal meeting of lot owners of West Ridgelawn Cemetery.

That the action of the Frank meeting in endeavoring to reduce the number of Trustees from fifteen to nine and electing the entire board was illegal is unquestionable.

Section 1 of the Act of 1889, 1 Compiled Statutes of New Jersey, Arbitrary Section 58, page 391, provides that the Board of Trustees shall consist of not less than three nor more than fifteen members. Section 1 of the Act of 1848 as amended

by the Act of 1879, Arbitrary Section 1, 1 Compiled Statutes of New Jersey, page 372, provides that although the number of the members of the Boards of Trustees may be changed yet, "but no Trustee shall be deemed out of his office until the term for which he was elected shall have expired except by death, resignation or removal out of the State, in which case and then his Trusteeship shall be deemed terminated." Section 1 of the Act of 1899, 1 Compiled Statutes, page 391, gives no right to the lot owners to reduce the number of Trustees but specifically provides that after the number of Trustees shall have been fixed they shall be divided into three classes, those of the first class to hold their office one year; those of the second class two years, and those of the third class three years. The only source from which the lot owners can get the right to reduce the number of members of the Board of Trustees is contained in Section 1 of the Act of 1848, 1 Compiled Statutes, page 372, which contains the provision hereinabove referred to.

If as was done in this case, the number of members of the Board of Trustees can be arbitrarily reduced from fifteen to nine at a meeting subsesequent to the first annual meeting and at the same meeting a full Board of Trustees of nine can be elected the provisions of Section 1 of the Act of 1899 providing for the dividing of the Trustees into three classes to hold for different terms is rendered absolutely ineffective, because at any annual meeting the lot owners can arbitrarily fix the number of Trustees at one less or one more (if above three and under fifteen) and then elect a full board.

It is apparent, therefore, that the provisions of Section 1 of the Act of 1899 did not repeal Section 1 of the Act of 1848 providing that the number of Trustees may be reduced, but that those Trustees

whose terms have not expired could not be disturbed.

Either the provision of Section 1 of the Act of 1848 is in effect or it is not. If it is not, then the lot owners had no right to reduce the number of Trustees. If it is, then the lot owners could not reduce the number of Trustees below the number whose terms had not expired.

In either event under the plain provisions of Section 1 of the Act of 1899 the lot owners could not elect a full new Board of Trustees where the terms of ten members of the prior board had not expired.

It is, of course, fundamental that where the terms of offices are fixed by statute and officers have been elected, a corporate body has no right to reduce the term.

Ufert *v.* Voght, 65 N. J. L., 121.
State, Trowbridge *v.* Newark, 46 N. J. L., 140.
State, *ex rel.* Ohrme *v.* Lane, 53 N. J. L., 275.
Hayes *v.* Gloucester, March, 1885, Bird, V. C.

It is insisted, therefore, that the action of the meeting of lot owners presided over by Mr. Frank was utterly illegal; that the fact that seventeen lot owners who, according to the Information were entitled to participate, were denied participation in any way, and the fact that at that meeting attempted to elect a board, where the term of ten of the members had not expired, deprived the meeting of any regularity; and that, therefore, the second meeting of lot owners presided over by Mr. Bonynge, at which meeting the interests represented by Mr. Frank were given an opportunity to

participate, was the legal meeting of lot owners of West Ridgelawn Cemetery.

So far as the point made that it does not appear from the information that the meeting in question was not the first meeting, the Supreme Court has held that it sufficiently appears from the information that it was not the first meeting. A perusal of the information clearly indicates that the meeting was not the first meeting; the meeting referred to is called in the information the "annual meeting," page 3.

It appeared that there had been other meetings of lot owners at which the Board of Trustees had been fixed and Trustees elected. Furthermore again permission was given to file the information after hearing before a Supreme Court Justice upon a rule to show cause on which hearing all of the facts were brought to the attention of the Court.

IV.

The 3rd, 19th, 20th and 21st grounds may be considered together.

They allege generally that it does not appear by the Information that the meeting called by William H. Bonynge was legally organized and conducted; held on a day fixed in the certificate of incorporation or whether it was held at the place required by law and that it appears that the alleged meeting of lot owners called by said William H. Bonynge was not legally organized and conducted and the attempted election of Trustees thereat was illegal and void.

It is alleged in the Information that after the meeting illegally conducted by Frank, he having been elected Chairman against a majority of the votes present and desiring to vote and then having declined to permit lot owners and creditors to

participate in the election, another meeting was immediately held; the lot owners organized by electing William H. Bonynge Chairman; Frank and his associates were permitted to participate; they refused and thereupon there was an election of Trustees to fill the place of those whose terms expired. If the proceedings of the lot owners presided over by Frank were illegal and more votes were cast for the election of Bonynge as Chairman then the proceedings of the meeting of lot owners which was presided over by Bonynge was legal, but whether that be so or not is no concern of the demurrants, Cerrata and Moses, for neither Cerrata nor Moses participated in the second meeting. They were elected at the first meeting and if their election was improper and they have pretended to act as Trustees of West Ridgelawn Cemetery they are usurping the office and even if it be held that the persons elected at the second meeting were also illegally elected, Moses and Cerrata can obtain no comfort from this. The illegality of the election of those declared elected Trustees by the second meeting does not aid in any wise the proceedings of the first meeting.

V.

The 24th, 25th, 28th and 29th grounds may be considered together. They set up generally that because there is joined as parties defendant persons who claim to have been elected by the first meeting and therefore claim to be members of a Board of nine and the hold over members whose terms it is alleged in the Information had not expired, ten, and the five who were elected by the second meeting to succeed the five whose terms expired that there is a misjoinder of parties defendant.

It must be kept in mind that what is in dispute in this matter is who are the Trustees of West Ridgelawn Cemetery. It makes no difference whether the Board be nine or fifteen. The question is who are the persons legally entitled to exercise the franchises of a Trustee in that cemetery.

The rights of all the persons grew out of the same transaction. So far as the pleadings stand there is no question but that prior to the meeting held on the 25th day of April, 1913, the members of the Board of Trustees consisted of fifteen persons; that the term of but five expired; that at this meeting which was presided over by the respondent Frank a motion was put and declared by him passed reducing the members of the Board to nine; that at the same meeting he declared elected nine persons to succeed the entire Board. That at that meeting he declined to accept the votes of lot owners and creditors legally entitled to vote. That immediately thereafter another meeting was held by the lot owners who had been prohibited from voting at the first meeting and successors to the five members of the Board whose term expired were elected. Frank and those associated with him were given an opportunity to participate in the second meeting and they declined to do so; that Frank had not been properly elected Chairman of the first meeting, a majority of the votes of the lot owners being against him.

It is specifically provided by the statute that if it shall appear to the Court or Justice that the several rights of divers persons to the same office or franchise may properly be determined on one Information the Court or Justice may give leave to exhibit such Information against the several persons in order to try their respective rights to such office or franchise.

It is alleged in the Information that all of these persons are assuming to act as Trustees of West Ridgelawn Cemetery and the Justice of the Supreme Court to whom application was made determined that the rights of all the persons could be determined in one Information. The effect of the Court compelling the filing of more than one Information would be merely to promote circuity of action.

The Supreme Court properly held that the case of the Attorney General *v.* Thompson, 83 N. J. L., 73, did not apply. There the information was filed by the Attorney General without leave of Court, and it did not appear that the rights of the respective respondents grew out of a single transaction as in the case at bar. In the case at bar the determination of the issue with respect to all of the respondents depends upon proof of the same facts and if the statute, Section 1 of the Act concerning information in the nature of *quo warranto* is of any force whatever the information may properly be exhibited against all.

The statute specifically gives the Justice to whom application is made for leave to file information the power to determine whether it may be exhibited against more than one and his determination is final unless reviewed under the doctrine of Key *v.* Paul, *supra.* No application was made to review his determination under this case.

And in Attorney General *v.* Thompson, which was on motion to quash, the Court did not quash the Information but on the other hand directed a severance.

Clearly, if the objection is not one which on motion to quash would lead the Court to quash the Information, it is not one upon which the sustaining of a demurrer can be rested

VI.

The 26th and 27th grounds may be considered together.

They set up generally that because of the fact that the number of Trustees was reduced from fifteen to nine and that therefore the existence of the office of six of the members of the Board of Trustees is in question an Information cannot be filed by a private person even with leave of Court.

This point has been made and answered in several cases.

In Sheridan *v.* Lankering, 83 N. J. L., 123, it appears that the question in dispute was whether a board of nine or a board of eight were the proper Board of Education of the City of Hoboken, and the Court citing Bumsted *v.* Henry, 45 Vr., 162, and Hahn *v.* Bedell, 38 Vr., 148, held that a private relator could properly intervene.

In the case at bar the existence of a Board of Trustees of West Ridgelawn Cemetery is not at all questioned. What is questioned is the right of the respective persons made defendants by the Information to seats upon the Board.

VII.

The 1st, 2nd, 3rd, 15th, 22nd, 23rd grounds may be considered together and are generally that no cause of action is set forth in the Information and that it appears from it that the demurrants are legally entitled to the offices they seek to hold and that the Information is uncertain.

The Information alleges that the number of Trustees existing prior to the election were fifteen.

Section 1 of the Act of 1899, 1 Compiled Statutes, Arbitrary Section 58, page 391, provides, "that the Board of Trustees shall consist of not

less than three nor more than fifteen managers or Trustees." The Information also alleges that the terms of but five members of that Board expired; ten held over.

Section 1 of the Act of 1848 as amended, Act of 1879, arbitrary Section 1, 1 Compiled Statutes of New Jersey, page 372, provides that although the number of the members of the Board of Trustees may be changed yet, "but no Trustee shall be deemed out of his office until the term for which he was elected shall have expired except by death, resignation or removal out of the State in which case and event his trusteeship shall be deemed terminated."

Therefore, assuming that the lot owners had the right to change the number of the Board of Trustees from fifteen to nine they could not elect a full board but could only elect successors to those whose terms had expired and in the case at bar could not have done this because there were ten whose terms had not expired and, therefore, the board after having been reduced to nine was full. They could not reduce the board below the number of Trustees whose terms did not expire.

Notwithstanding this plain provision of the statute the lot owners at the meeting presided over by the respondent Frank, who had been elected as alleged by the information against a majority of the votes cast or offered to be cast and who in the conduct of the meeting absolutely refused to accept the votes of either the lot owners or creditors present, reduced the number of Trustees from fifteen to ten and then proceeded to elect an entire board of nine of which board of nine the two demurrants are members.

This certainly sets forth a cause of action against the two demurring respondents, and it is utterly immaterial whether the respondents who were

elected members of the Board of Trustees at the subsequent meeting were legally elected or not. The question so far as the demurrants are concerned is whether *they* were legally elected, this information being exhibited not by a person claiming the office, but under Section 1 of the act concerning *quo warranto* with leave of the Supreme Court.

Counsel seemingly have assumed that the obligation is upon the relator to show either title in himself or title in some other.

Under the 1st section of the act concerning *quo warranto,* the obligation is upon the respondents to show title in themselves. Just as in an action brought by the Attorney General *ex officio.*

State v. *Utter,* 2 Gr., 84.
State v. *Gummersall,* 4 Zab., 529.

That proceedings by *quo warranto* are proper proceedings to settle the right of persons to hold the office of Trustees of a cemetery is settled by *Hawkins* v. *Newell,* 66 Atl., 928.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Appellee.

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Notice of Appeal.

Filed May 7, 1915.

New Jersey Supreme Court.

ALBERT W. BONYNGE, *Relator,* *vs.* ADAM FRANK, *et als., Respondents.*	*On information in nature of quo warranto. Notice of Appeal.*

TAKE NOTICE, that the respondents, Ralph Cerrata and J. Garfield Moses, appeal to the Court of Errors and Appeals from the whole of the judgment entered in above entitled action.

Dated, April 27, 1915.

Respectfully,

PITNEY, HARDIN & SKINNER,
Attorneys of Ralph Cerrata and J. Garfield Moses, Respondents.

To

MERRITT LANE ESQ.,
Attorney of Relator.

Information.

Filed December 2, 1913.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *ex rel.*, ALBERT W. BONYNGE, *Relator,* *vs.* ADAM FRANK, *et als.*, *Respondents.*	*On Quo Warranto. Information.*

ALBERT W. BONYNGE, who sues with the leave of the Supreme Court in the name of Edmund Wilson, Attorney General of the State of New Jersey according to the form of the statute in such case made and provided, gives the said Court here to be informed and understand that under and in pursuance of the laws of the State of New Jersey entitled "An act to authorize the incorporation of rural cemetery associations and regulate cemeteries" P. L. 1848, p. 9, and its supplements and amendments there is incorporated and existing as a body corporate and was upon the days hereinafter mentioned a corporation known as the West Ridgelawn Cemetery; that under and in pursuance with such statute such cemetery was to be governed by a Board of Trustees of not less than three nor more than twelve and it was provided that such trustees should be elected by a vote of the lot owners of such cemetery at their annual meeting and that every creditor of such association in addition to his right to vote by virtue of his owning plots or lots shall be entitled to one vote for every $400

worth at par value of bonds, stock or other duly authorized evidence of debt, he or she may own and hold against said corporation, to which said statute and the amendments and supplements thereto the relator begs leave to refer.

That the annual meeting of the said lot owners of said West Ridgelawn Cemetery was held upon the 25th day of April, 1913, and there was present at such meeting the following lot owners in person or by proxy, to wit:

Charles M. Howe, S. M. Schatzkin, Charles Baer, William Bittles, Chester R. Hoag, Frank Ball, A. J. Volk, 2 lots; John Hinchcliffe, Franklin Rightmire, W. J. McFarlan, Wm. H. Bonynge, A. W. Bonynge, Henry Lohman, 2 lots; Wm. P. Aldrich, Terrence J. McManus, representing in all seventeen lots; that there was also present, William P. Aldrich and William Bittles, who are creditors of West Ridgelawn Cemetery to the amount of $19,-928.00, and that under the statute in such case made and provided they had the right to cast forty-nine votes; that the term of office of but five members of such Board of Trustees, to wit; S. M. Isaacs, R. E. Simon, William C. Popper, Adam Frank and Henry Lohman expired upon said 25th day of April, 1913, so that there was only to be elected successors to such five individuals, that the respondent, Adam Frank, acted as chairman of the meeting, although more votes had been cast by the lot owners and creditors for William H. Bonynge as chairman; that the said Adam Frank thereupon and thereafter and during the continunance of such meeting as was presided over by him arbitrarily refused to permit any of said persons above mentioned, lot owners and creditors of said West Ridgelawn Cemetery to participate in said meeting and refused to permit them to vote; that he proceeded

to declare a resolution adopted reducing the number of trustees from fifteen, the number therefore being fifteen, to nine, refusing to permit any of the persons above mentioned to vote upon such resolution; that he then proceeded to nominate Walter L. Frank, Stanley M. Isaacs, William C. Popper, George V. N. Baldwin, Jr., Ralph Cerrata, Adam Frank, Henry L. Ketcham and J. Garfield Moses and Robert E. Simon as trustees of West Ridgelawn Cemetery, although the terms of office of Charles Harwood, William McFarlan, William H. Bonynge, Anthony J. Volk, William Bittles, Walter L. Frank, Henry L. Ketcham, Leonard Pfeiffer, Jr., J. Garfield Moses and the relator had not and did not expire; that in the election for such Board of Trustees the said Adam Frank refused to permit votes to be cast by the said persons representing said seventeen lots hereinabove referred to and by the creditors hereinabove referred to, although the votes of the persons herein referred to so representing the said seventeen lots and the said creditors exceeded in amount the votes cast for the said Walter L. Frank, Stanley M. Isaacs, William C. Popper, George V. N. Baldwin, Jr., Ralph Cerrata, Adam Frank, Henry L. Ketcham, J. Garfield Moses and Robert E. Simon as Trustees of West Ridgelawn Cemetery; that the said Adam Frank thereupon arbitrarily and illegally declared the said last above mentioned individuals elected Trustees of West Ridgelawn Cemetery; that immediately and thereafter another meeting of lots owners was called by the said William H. Bonynge, a lot owner, whereupon and in the presence of the said Adam Frank and of those who had participated in the preceding meeting there was a meeting held and there was elected to succeed the said S. M. Isaacs, R. E. Simon, Wil-

liam C. Popper, Adam Frank and Henry Lohman, trustees, whose terms expired the following named individuals: Charles Baer, Chester R. Hoag, John Hinchcliffe, Henry Lohman, Jr., and William P. Aldrich; that during such meeting the said Adam Frank and those who had participated in the preceding meeting were present and had the opportunity to vote, but declined, and refused so to do; that the said Adam Frank, Walter L. Frank, Stanley M. Isaacs, Willim C. Popper, George V. N. Baldwin, Jr., Ralph Cerrata, Henry L. Ketcham, Robert E. Simon and J. Garfield Moses have usurped, intruded into and illegally held, used, and exercised and do usurp, intrude into and unlawfully hold and exercise the office of Trustees of West Ridgelawn Cemetery, and the said Charles Baer, Chester R. Hoag, John Hinchcliffe, Henry Lohman, Jr., William P. Aldrich, Charles Harwood, William McFarlan, William H. Bonynge, Anthony J. Volk, William Bittles, Leonard Pfeiffer, Jr., claim to hold the office of Trustees of West Ridgelawn Cemetery, and that the right of the parties to hold the office of Trustee of West Ridgelawn Cemetery can properly be determined in this one information as by the rule of the Supreme Court heretofore made appears; that the acts of the above mentioned respondents are in contempt of the State of New Jersey and to its great damage and prejudice against its sovereignty and dignity;

WHEREUPON, the relator, in the name of the Attorney General, desiring to sue and prosecute in this behalf prays the advice of the Court here in the premises and for due process of law against the said Adam Frank, Walter L. Frank, Stanley M. Isaacs, William C. Popper, George V. N. Baldwin, Jr., Ralph Cerrata, Henry L. Ketcham, Robert E. Simon, J. Garfield Moses, Charles Baer,

Information.

Chester R. Hoag, John Hinchcliffe, Henry Lohman, Jr., William P. Aldrich, Charles Harwood, William McFarlan, Wiliiam H. Bonynge, Anthony J. Volk, William Bittles and Leonard Pfeiffer, Jr., in this behalf be made to answer to the said State by what warrant they claim to hold, use, exercise and enjoy the aforesaid office of Trustee of West Ridgelawn Cemetery and the liberties, privileges and franchises thereof.

MERRITT LANE,
Attorney for the Relator.

Demurrer.

Filed Jan. 17, 1914.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *ex rel.*, ALBERT W. BONYNGE, *Relator,* *vs.* ADAM FRANK, *et als.*, *Respondents.*	*On Quo Warranto. Demurrer.*

The defendant, Ralph Cerrata, demurs to the above information upon the following grounds.

1. Because the matters contained in said information are not sufficient in law for the said relator to prosecute said information and to call upon this defendant to answer to said State by what warrant he claims to hold the said office of trustee of said West Ridgelawn Cemetery.

2. It appears in and by said information that this defendant is lawfully and rightfully entitled to the office of trustee of the said cemetery association.

3. No facts are alleged which show that defendant is not entitled to the rights, privileges and franchises of the office of trustee of said cemetery association.

4. The information does not allege facts showing that the relator is a trustee of said cemetery association or entitled to such office.

5. The information does not allege the number of members constituting the Board of Trustees of said cemetery association and it does not appear therefore whether or not the relator is one of the

persons named in said information as trustees of said association lawfully entitled to the office of trustee of said association.

6. The said information does not show the number of members of the Board of Trustees of said cemetery association.

7. No facts are alleged showing how and when and by whom the relator was elected or appointed to the office of trustee of said cemetery association.

8. No facts are alleged showing that relator is entitled to the office of trustee of said cemetery association.

9. It appears by said information that the Board of Trustees of said cemetery association lawfully consisted of not more than twelve members, and it is alleged in said information that there were fifteen members of said board; but no facts are alleged to show whether or not relator was one of said twelve lawful members.

10. It is not alleged that the relator was a lot holder in said association when elected or appointed to the office of trustee thereon.

11. It is not alleged when relator was elected or appointed to the office of trustee and it does not appear therefore whether relator's term of office had expired at or before the filing of said information.

12. The relator has no right or interest sufficient to entitle him to file said information as no facts are alleged showing that he has a claim to the office of trustee or was legally elected or appointed trustee or was a lot holder at the time of filing the said information.

13. It appears by the said information that the number of members of the said Board of Trustees was at said annual meeting, fixed and determined at nine, as the lot holders lawfully might fix and

determine the number of said board; and it appears that relator is not a member of the said board as so constituted.

14. It appears by the said information that the number of members of the said Board of Trustees was at said annual meeting, fixed and determined at nine, as the lot holders lawfully might fix and determine the number of said board; and it appear that this defendant is a member of said board as so constituted.

15. It does not appear that the number of lot holders voting for said Charles Baer, Chester R. Hoag, John Hinchcliffe, Henry Lohman, Jr., and William P. Aldrich were more in number than the lot owners voting for this defendant and the said Walter L. Frank, Stanley M. Isaacs, William C. Popper, George V. N. Baldwin, Jr., J. Garfield Moses, Adam Frank, Henry L. Ketcham and Robert E. Simon.

16. Said election was not unlawful or void because creditors of said cemetery association were denied the right to vote for the election of trustees, as creditors were not entitled to such vote under the statutes of this State regulating cemeteries and cemetery associations incorporated under the "Act to authorize the incorporation of rural cemetery associations and regulate cemeteries," and the revision, supplements, and amendments thereof, and the several other and further statutes of this state regulating such cemetery associations.

17. It does not appear how the persons alleged to be creditors of said association were or become creditors thereof, and it does not appear whether said creditors held any evidences of the indebtedness of said association or whether the indebtedness of said association to them was lawfully authorized.

18. It does not appear that the result of said election would have been different if the votes of the said persons named in said information as representing 17 lots had been received at the said meeting conducted by said Adam Frank.

19. It does not appear how said annual meeting was called and whether it was held on the day fixed in the certificate of incorporation for the annual meeting of said cemetery association, or whether it was held at the place required by law.

20. It does not appear how said alleged meeting of said alleged lot owners called by said William H. Bonynge was called and whether the same was legally organized and conducted.

21. It appears that said alleged meeting of said alleged lot owners called by said William H. Bonygne was not a lawful annual meeting of said cemetery association and the attempted election of trustees thereat was illegal and void.

22. The said information is uncertain.

23. The said election of this defendant and said other eight persons named in said information, to the nine offices filled by the meeting conducted by Adam Frank was in all respects conducted and concluded according to law and that this defendant and said other eight persons are lawfully entitled to and possessed of the liberties, privileges and franchises of the office of trustee of said West Ridgelawn Cemetery.

24. There is a misjoinder of defendants in said information.

25. The said information joins as defendants persons who claim the office of trustee by different titles, supported by different evidence, and there is, therefore, a misjoinder of defendants and a misjoinder of causes of action.

Demurrer of Ralph Cerrata.

26. It appears by said information that the existence of the office of six of the members of the Board of Trustees of said Cemetery Association is in question.

27. It appears that said information is filed at the relation of a private person whereas the same cannot lawfully be filed unless by the Attorney General of the State in his official capacity, for the reason that it appears that the existence of an office or offices is questioned and put in issue by the said information.

28. The information puts in issue the several claims of different persons to membership in two different boards of trustees and there is therefore a misjoinder of persons and causes of action.

29. The information joins the claimants to a board of fifteen and the claimants to a board of nine, having different terms and claiming under different elections.

WHEREFORE and because of the insufficiency of the said information he prays judgment and that he may be dismissed and discharged by the Court hereof and from the premises charged upon him in form aforesaid.

PITNEY, HARDIN & SKINNER,
Attorneys of Defendant,
Ralph Cerrata.

Demurrer of Ralph Cerrata.

STATE OF NEW YORK
COUNTY OF NEW YORK. } *ss.*

Ralph Cerrata, being duly sworn according to law on his oath says that he is the defendant named in the foregoing demurrer, and that the same is not intended for the purpose of delay but that he verily believes that he has a just and legal defense to the said action and information on the merits of the case.

RALPH CERRATA.

Subscribed and sworn to before me, a Notary Public, duly commissioned and sworn in and for the County of New York, State of New York, as witness my official seal this 15th day of January, A. D. 1914.

WILLIAM F. KEYES,
Notary Public No. 1952,
New York County.

(L.S.)

Demurrer.

Filed Jan. 17, 1914.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *ex rel.*, ALBERT W. BONYNGE, *Relator*, vs. ADAM FRANK, *et als.*, *Respondents.*	*On Quo Warranto. Demurrer.*

The defendant, J. Garfield Moses, demurs to the above information upon the following grounds.

1. Because the matters contained in said information are not sufficient in law for the said relator to prosecute said information and to call upon this defendant to answer to said State by what warrant he claims to hold the said office of trustee of said West Ridgelawn Cemetery.

2. It appears in and by said information that this defendant is lawfully and rightfully entitled to the office of trustee of the said cemetery association.

3. No facts are alleged which show that defendant is not entitled to the rights, privileges and franchises of the office of trustee of said cemetery association.

4. The information does not allege facts showing that the relator is a trustee of said cemetery association or entitled to such office.

5. The information does not allege the number of members constituting the board of trustees of said cemetery association and it does not ap-

pear therefore whether or not the relator is one of the persons named in said information as trustees of said association lawfully entitled to office of trustee of said association.

6. The said information does not show the number of members of the board of trustees of said cemetery association and does not therefore show whether the relator is entitled to the office of trustee of said cemetery association.

7. No facts are alleged showing how and when and by whom the relator was elected or appointed to the office of trustee of said cemetery association.

8. No facts are alleged showing that relator is entitled to the office of trustee of said cemetery association.

9. It appears by said information that the board of trustees of said cemetery association lawfully consisted of not more than twelve members and it is alleged in said information that there were fifteen members of said board; but no facts are alleged to show whether or not relator was one of said twelve lawful members.

10. It is not alleged that the relator was a lot holder in said association when elected or appointed to the office of trustee thereon.

11. It is not alleged when relator was elected or appointed to the office of trustee and it does not appear therefore whether relator's term of office had expired at or before the filing of said information.

12. The relator has not right or interest sufficient to entitle him to file said information as no facts are alleged showing that he has a claim to the office of trustee or was legally elected or appointed trustee or was a lot holder at the time of filing the said information.

13. It appears by the said information that the number of members of the said board of trustees was at said annual meeting, fixed and determined at nine, as the lot holders lawfully might fix and determine the number of said board; and it appears that relator is not a member of the said board as so constituted.

14. It appears by the said information that the number of members of the said board of trustees was at said annual meeting, fixed and determined at nine, as the lot holders lawfully might fix and determine the number of said board; and it appears that this defendant is a member of said board as so constituted.

15. It does not appear that the number of lot holders voting for said Charles Baer, Chester R. Hoag, John Hinchcliffe, Henry Lohman, Jr., and William P. Aldrich were more in number than the lot owners voting for this defendant and said Walter L. Frank, Stanley M. Isaacs, William C. Popper, George V. N. Baldwin, Jr., Ralph Cerrata, Adam Frank, Henry L. Ketcham and Robert E. Simon.

16. Said election was not unlawful or void because creditors of said cemetery association were denied the right to vote for the election of trustees, as creditors were not entitled to such vote under the statutes of this State regulating cemeteries and cemetery associations incorporated under the "Act to authorize the incorporation of rural cemetery associations and regulate cemeteries" and the revision, supplements, and amendments thereof, and the several other and further statutes of this State regulating such cemetery associations.

17. It does not appear how the persons alleged to be creditors of said association were or became creditors thereof, and it does not appear

whether said creditors held any evidences of the indebtedness of said association or whether the indebtedness of said association to them was lawfully authorized.

18. It does not appear that the result of said election would have been different if the votes of the said persons named in said information as representing 17 lots had been received at the said meeting conducted by said Adam Frank.

19. It does not appear how said annual meeting was called and whether it was held on the day fixed in the certificate of incorporation for the annual meeting of said cemetery association, or whether it was held at the place required by law.

20. It does not appear how said alleged meeting of said alleged lot owners called by said William H. Bonygne was called and whether the same was legally organized and conducted.

21. It appears that said alleged meeting of said alleged lot owners called by said William H. Bonynge was not a lawful annual meeting of said cemetery association and the attempted election of trustees thereat was illegal and void.

22. The said information is uncertain.

23. The said election of this defendant and said other eight persons named in said information to the nine offices filled by the meeting conducted by Adam Frank was in all respect conducted and concluded according to law and that this defendant and said other eight persons are lawfully entitled to and possessed of the liberties, privileges and franchises of the office of trustee of said West Ridgelawn Cemetery.

24. There is a misjoinder of defendants in said information.

25. The said information joins as defendants persons who claim the office of trustee by different titles, supported by different evidence, and there is, therefore, a misjoinder of defendants and a misjoinder of causes of action.

26. It appears by said information that the existence of the office of six of the members of that board of trustees of said cemetery is in question.

27. It appears that said information is filed at the relation of a private person whereas the same cannot lawfully be filed unless by the Attorney General of the State in his official capacity, for the reason that it appears that the existence of an office or offices is questioned and put in issue by the said information.

28. The information puts in issue the several claims of different persons to membership in two different boards of trustees and there is therefore a misjoinder of persons and causes of action.

29. The information joins the claimants to a board of fifteen and the claimants to a board of nine, having different terms and claiming under different elections.

WHEREFORE and because of the insufficiency of the said information he prays judgment and that he may be dismissed and discharged by the Court hereof and from the premises charged upon him in form aforesaid.

PITNEY, HARDIN & SKINNER,
Attorneys of Defendant.
J. Garfield Moses.

Demurrer of J. Garfield Moses.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

J. Garfield Moses, being duly sworn according to law on his oath says that he is the defendant named in the foregoing demurrer, and that the same is not intended for the purpose of delay but that he verily believes that he has a just and legal defence to the said action and information on the merits of the case.

J. GARFIELD MOSES.

Subscribed and sworn to before me, a Notary Public, duly commissioned and sworn in and for the County of New York, State of New York, as witness my official seal this 14th day of January, A. D., 1914.

WILLIAM F. KEYES,
Notary Public No. 1952,
New York County.

(L.S.)

Opinion.

Filed April 8, 1914.

NEW JERSEY SUPREME COURT.

February Term, 1914.

THE STATE OF NEW JERSEY, *ex rel.*, ALBERT W. BONYNGE, *Relator,*	*On Quo Warranto.*
vs.	*Demurrers to Information.*
ADAM FRANK, *et als.*, *Respondents.*	

Argued February 18, 1914; Decided April 7, 1914.

Syllabus.

Since the enactment of P. L. 1893, p. 387 (C. S. 383) and of P. L. 1899 p. 324 (C. S. 391), the provision of Section 1 of Act P. L. 1848 p. 9 as amended by P. L. 1879 p. 260 (C. S. p. 372), giving creditors of cemetery associations a right to vote for trustees at the annual meetings, is no longer in force.

Before Justices Trenchard and Minturn.

For the relator, Merritt Lane.

For the demurrants, Pitney, Hardin & Skinner (Waldron M. Ward on the brief).

Per Curiam.

Ralph Cerrata and J. Garfield Moses each separately demur to the information and thereby raise the issue, among others, whether mere creditors are entitled to vote for trustees at the annual meeting of a cemetery association.

Opinion.

The only basis for such a contention is to be found in the following words in Section 1 of the Act P. L. 1848 p. 9, as amended P. L. 1879 p. 260:

"* * * for the purpose of electing trustees at any meeting after organization of the association, every creditor of such association, in addition to his right to vote by virtue of his owning plots or lots according to section five of this act, shall be entitled to one vote for every four hundred dollars worth at par value of bonds, stock or other duly authorized evidence of debt he or she may own and hold against such association." (Comp. St. 372).

This provision was not found in the act in its original form, but was introduced by amendment of P. L. 1879, p. 260.

By a supplement found in P. L. 1893, p. 387 (C. S. 383), the Legislature defined the number of trustees, their terms, classification, the manner of election, and time, and place of holding the election; and gave the ballot to lot owners only. This appears to be a complete provision inconsistent with a claim of right to vote on the part of creditors. The act provides that all acts or parts of acts inconsistent therewith are repealed.

In 1899 "An Act to Regulate Cemeteries" (P. L. 1899, p. 324; C. S. 391) was passed which covered the entire subject matter. This is clearly inconsitent with Section 1 of the original act. It changes the number of trustees and enlarges their powers; changes their qualifications; changes the place of holding the annual meeting and the time for holding it; regulates the manner of giving notice of the meeting. It gives the ballot to proprietors of lots only and settles the qualifications of proprietors. It also provides that all acts or parts of acts inconsistent therewith are repealed.

Opinion.

This act is not only inconsistent with that portion of Section 1 giving creditors the right to vote, but is a substitution of a new enactment complete in itself and covering every part of the subject matter.

Our conclusion is that the provision giving creditors the right to vote at such annual meeting, is no longer in force.

This view of the matter was suggested by Vice Chancellor Stevens in East Ridgelawn Cemetery Co. *vs.* Frank, 7 Buch. 40.

Both demurrers will be sustained with costs.

Opinion on Re-Argument.

Filed Nov. 16, 1914.

NEW JERSEY SUPREME COURT.

June Term, 1914.

THE STATE OF NEW JERSEY, *ex rel.*, ALBERT W. BONYNGE, *Relator*,

vs.

ADAM FRANK, *et als.*, *Respondents.*

Submitted July 2, 1914; Decided November 16, 1914.

On Quo Warranto. Re-argument of demurrer to informations.

Before Justices Trenchard and Minturn.

For the relator, Merritt Lane.

For the demurrants, Pitney, Hardin & Skinner (Waldron M. Ward on the brief).

Per Curiam.

We have re-examined this case in the light of the contention that our holding that mere creditors are not entitled to vote does not necessarily result in sustaining the demurrers.

Our attention is called to the fact that the information avers that Frank (who presided) arbitrarily refused to allow any of the 17 lot owners to participate in the meeting or to vote and proceeded to declare a resolution adopted reducing number of trustees from 15 to 9, and that the term of 5 only had expired.

Regardless of the fact that there is no averment that the 17 votes refused would have changed the result with respect to the adoption of the reducing resolution or with respect to the subsequent

election, we think that such averments set up a reduction of the board and an election of a board in pursuance thereof not warranted by law.

It sufficiently appears from the information that the meeting in question was not the first meeting. It avers that the number of trustees was 15 and that the term of only 5 expired. Now if the power to reduce the number of trustees existed it must be that found in Section 1 of the Act of 1848 (C. S. p. 372) for it is not found elsewhere. Assuming, without deciding, that the power thus conferred survived notwithstanding the implied repeal of some of the provisions of that section, yet even thereunder the terms of those whose terms had not expired could not be disturbed.

We think that there is no merit in the contention of the demurrants that they appear by the information to be lawfully exercising the franchises claimed by them. With respect to Cerrata that contention clearly is without merit. With respect to Moses it will be observed that the order of the Justice of the Supreme Court granting leave to exhibit this information in the name of the Attorney General recited that it appeared "that the several rights of the divers persons to the same office or franchise may be determined upon one information." Since this leave is not granted as a matter of course, but in the exercise of a sound discretion, we think that on this record the information will be deemed legally sufficient to raise and determine the question which of these contending boards is the lawful board.

We think also that the fact that such leave was granted by a Justice of the Supreme Court, is sufficient to distinguish this case from Attorney General *vs.* Thompson, 83 N. J. L. 57. That was a motion to quash.

The demurrer will be overruled, with costs.

Judgment.

Judgment.

Entered April 12, 1915.

This case was heard before our Supreme Court at the June Term, 1914, and judgment of ouster was ordered on the demurrers to information filed by the said defendants, Ralph Cerrata and J. Garfield Moses.

WHEREUPON, it is adjudged that judgment of ouster be entered against the said defendants, Ralph Cerrata and J. Garfield Moses, and in favor of the said relator, Albert W. Bonynge, and it is further adjudged that said relator, Albert W. Bonynge, do recover against the said defendants, Ralph Cerrata and J. Garfield Moses, the sum of twenty-eight dollars costs.

Costs $28.00.

Judgment entered April 12, 1915.

WM. S. GUMMERE,
C. J.

I, Wililam C. Gebhardt, clerk of the Supreme Court of the State of New Jersey, do certify that that foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twentieth day of April, A. D., nineteen hundred and fifteen.

WM. C. GEBHARDT,
Clerk.

(L. S.)

Grounds of Appeal.

Filed June 5, 1915.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALBERT W. BONYNGE, *Relator-Appellee,* *vs.* ADAM FRANK, *et als.*, *Respondents.* and J. GARFIELD MOSES, *Respondent-Appellant.*	*On Appeal from Supreme Court.* *Grounds of Appeal.*

The appellant states the following grounds of appeal.

1. Because the New Jersey Supreme Court entered judgment of ouster against this defendant whereas the said Supreme Court should have entered judgment in favor of this defendant and against the relator.

2. Because the New Jersey Supreme Court overruled the demurrer of this defendant to the information, and entered judgment against this defendant, whereas the said Supreme Court should have sustained the demurrer of this defendant and entered judgment in favor of this defendant against the said relator.

3. Because the New Jersey Supreme Court should have sustained the demurrer of this defendant to the information on the ground that the matters contained in said information are not

sufficient in law for the said relator to prosecute said information and to call upon this defendant to answer to said State by what warrant he claims to hold the said office of trustee of said West Ridgelawn Cemetery.

4. The demurrer should have been sustained on the ground that it appears in and by said information that this defendant is lawfully and rightfully entitled to the office of trustee of the said cemetery association.

5. The demurrer should have been sustained on the ground that no facts are alleged which show that defendant is not entitled to the rights, privileges and franchises of the office of trustee of said cemetery association.

6. The demurrer should have been sustained on the ground that the information does not allege facts showing that the relator is a trustee of said cemetery association or entitled to such office.

7. The demurrer should have been sustained on the ground that the information does not allege the number of members constituting the board of trustees of said cemetery association and it does not appear therefore whether or not the relator is one of the persons named in said information as trustee of said association lawfully entitled to the office of trustee of said association.

8. The demurrer should have been sustained on the ground that the said information does not show the number of members of the board of trustees of said cemetery association and does not therefore show whether the relator is entitled to the office of trustee of said cemetery association.

9. The demurrer should have been sustained on the ground that no facts are alleged showing how and when and by whom the relator was

elected or appointed to the office of trustee of said cemetery association.

10. The demurrer should have been sustained on the ground that no facts are alleged showing that relator is entitled to the office of trustee of said cemetery association.

11. The demurrer should have been sustained on the ground that it appears by said information that the board of trustees of said cemetery association lawfully consisted of not more than twelve members and it is alleged in said information that there was fifteen members of said board; but no facts are alleged to show whether or not relator was one of said twelve lawful members.

12. The demurrer should have been sustained on the ground that it is not alleged that the relator was a lot holder in said association when elected or appointed to the office of trustee thereon.

13. The demurrer should have been sustained on the ground that it is not alleged when relator was elected or appointed to the office of trustee and it does not appear therefore whether relator's term of office had expired at or before the filing of said information.

14. The demurrer should have been sustained on the ground that the relator has no right or interest sufficient to entitle him to file said information as no facts are alleged showing that he has a claim to the office of trustee or was legally elected or appointed trustee or was a lot holder at the time of filing the said information.

15. The demurrer should have been sustained on the ground that it appears by the said information that the number of members of the said board of trustees was at said annual meeting, fixed and determined at nine, as the lot holders lawfully might fix and determine the number of said board;

and it appears that relator is not a member of the said board as so constituted.

16. The demurrer should have been sustained on the ground that it appears by the said information that the number of members of the said board of trustees was at said annual meeting, fixed and determined at nine, as the lot holders lawfully might fix and determine the number of said board; and it appear that this defendant is a member of said board as so constituted.

17. The demurrer should have been sustained on the ground that it does not appear that the number of lot holders voting for said Charles Baer, Chester H. Hoag, John Hinchliffe, Henry Lohman, Jr., and William P. Aldrich were more in number than the lot owners voting for this defendant and the said Walter L. Frank, Stanley M. Isaacs, William C. Popper, George V. N. Baldwin, Jr., Ralph Cerrata, Adam Frank, Henry L. Ketcham and Robert E. Simon.

18. The demurrer should have been sustained on the ground that said election was not unlawful or void because creditors of said cemetery association were denied the right to vote for the election of trustees, as creditors were not entitled to such vote under the statutes of this State regulaing cemeteries and cemetery association incorporated under the "Act to authorize the incorporation of rural cemetery associations and regulate cemeteries," and the revision, supplements, and amendments thereof, and the several other and further statutes of this State regulating such cemetery association.

19. The demurrer should have been sustained on the ground that it does not appear how the persons alleged to be creditors of said association were or became creditors thereof, and it does not

appear whether said creditors held any evidences of the indebtedness of said association or whether the indebtedness of said association to them was lawfully authorized.

20. The demurrer should have been sustained on the ground that it does not appear that the result of said election would have been different if the votes of the said persons named in said information as representing 17 lots had been received at the said meeting conducted by said Adam Frank.

21. The demurrer should have been sustained on the ground that it does not appear how said annual meeting was called and whether it was held on the day fixed in the certificate of incorporation for the annual meeting of said cemetery association, or whether it was held at the place required by law.

22. The demurrer should have been sustained on the ground that it does not appear how said alleged meeting of said alleged lot owners called by said William H. Bonynge was called and whether the same was legally organized and conducted.

23. The demurrer should have been sustained on the ground that it appears that said alleged meeting of said alleged lot owners called by said William H. Bonynge was not a lawful annual meeting of said cemetery association and the attempted election of trustees thereat was illegal and void.

24. The demurrer should have been sustained on the ground that the said information is uncertain.

25. The demurrer should have been sustained on the ground that the said election of this defendant and said other eight persons named in said

information to the nine offices filled by the meeting conducted by Adam Frank was in all respects conducted and concluded according to law and that this defendant and said other eight persons are lawfully entitled to and possessed of the liberties, privileges and franchises of the office of trustee of said West Ridgelawn Cemetery.

26. The demurrer should have been sustained on the ground that there is a misjoinder of defendants in said information.

27. The demurrer should have been sustained on the ground that the said information joins as defendants persons who claim the office of trustee by different titles, supported by different evidence, and there is, therefore, a misjoinder of defendants and a misjoinder of causes of action.

28. The demurrer should have been sustained on the ground that it appears by said information that the existence of the office of six of the members of the board of trustes of said cemetery association is in question.

29. The demurrer should have been sustained on the ground that it appears that said information is filed at the relation of a private person whereas the same cannot lawfully be filed unless by the Attorney General of the State in his official capacity, for the reason that it appears that the existence of an office or offices is questioned and put in issue by the said information.

30. The demurrer should have been sustained on the ground that the information puts in issue the several claims of different persons to membership in two different boards of trustees and there is therefore a misjoinder of persons and causes of action.

31. The demurrer should have been sustained on the ground that the information joins the claim-

ants to a board of fifteen and the claimants to a board of nine, having different terms and claiming under different elections.

PITNEY, HARDIN & SKINNER.
Attorneys of Appellant.

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Grounds of Appeal.

Filed June 5, 1915.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALBERT W. BONYNGE,
Relator-Appellee,

vs.

ADAM FRANK, *et als.*,
Respondents,

and

RALPH CERRATA,
Respondent-Appellant.

On Appeal from Supreme Court.

Grounds of Appeal.

The appellant states the following grounds of appeal.

1. Because the New Jersey Supreme Court entered judgment of ouster against this defendant whereas the said Supreme Court should have entered judgment in favor of this defendant and against the relator.

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3. Because the New Jersey Supreme Court should have sustained the demurrer of this defendant to the information on the ground that the matters contained in said information are not

sufficient in law for the said relator to prosecute said information and to call upon this defendant to answer to said State by what warrant he claims to hold the said office of trustee of said West Ridgelawn Cemetery.

4. The demurrer should have been sustained on the ground that it appears in and by said information that this defendant is lawfully and rightfully entitled to the office of trustee of the said cemetery association.

5. The demurrer should have been sustained on the ground that no facts are alleged which show that defendant is not entitled to the rights, privileges and franchises of the office of trustee of said cemetery association.

6. The demurrer should have been sustained on the ground that the information does not allege facts showing that the relator is a trustee of said cemetery association or entitled to such office.

7. The demurrer should have been sustained on the ground that the information does not allege the number of members constituting the board of trustees of said cemetery association, and it does not appear therefore whether or not the relator is one of the persons named in said information as trustees of said association lawfully entitled to the office of trustee of said association.

8. The demurrer should have been sustained on the ground that the said information does not show the number of members of the board of trustees of said cemetery association and does not therefore show whether the relator is entitled to the office of truustee of said cemetery associaion.

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PITNEY, HARDIN & SKINNER,
Attorneys of Appellant.

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