

NOTICE OF APPEAL.

New Jersey Supreme Court

CHARLES O. PERRY and JOSEPH  
 A. REID,  
*Prosecutors-Appellees,*  
 vs.  
 THE BOROUGH OF DEAL,  
*Defendant-Appellant.*

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*Notice of Appeal*

To Messrs. Durand, Ivins & Carton, and Walter  
 Taylor, Attorneys for Prosecutors:

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PLEASE TO TAKE NOTICE that the Borough of Deal,  
 Defendant in the above entitled cause, appeals to  
 the Court of Errors and Appeals in the last resort  
 in all causes from the whole of the judgment en-  
 tered in this cause.

WILLIAM A. STEVENS,  
*Attorney for Defendant.*

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Endorsed:

Service acknowledged,  
 February 15th, 1927.  
 DURAND, IVINS & CARTON  
 and WALTER TAYLOR,  
*Attorneys for Prosecutors.*

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NOTICE OF ARGUMENT

NEW JERSEY COURT OF ERRORS AND APPEALS

10 CHARLES O. PERRY and JOSEPH A. REID,  
*Prosecutors-Appellees,*  
*vs.*  
 THE BOROUGH OF DEAL,  
*Defendant-Appellant.* } **Notice of Argument**

*To Messrs. Durand, Ivins & Carton, and Walter Taylor, Attorneys for Prosecutors-Appellees:*

20 PLEASE TO TAKE NOTICE that the argument of the appeal in the above entitled cause will be moved before the New Jersey Court of Errors and Appeals at the State House, in the City of Trenton, on Tuesday, the 17th day of May, 1927, at eleven o'clock in the forenoon of that day, or as soon thereafter as the Court can attend to the same.

30 WILLIAM A. STEVENS,  
*Attorney for Defendant-Appellant.*

Sat below:  
JUSTICES PARKER, BLACK and CAMPBELL.

Endorsed:  
 Service acknowledged,  
 February 15th, 1927.  
 DURAND, IVINS & CARTON  
 and WALTER TAYLOR,  
 40 *Attorneys of Prosecutors-Appellees.*

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS

CHARLES O. PERRY and JOSEPH A. REID,  
*Prosecutors-Appellees,*  
*vs.*  
 THE BOROUGH OF DEAL,  
*Defendant-Appellant.* } **Grounds of Appeal**

*To Messrs. Durand, Ivins & Carton, and Walter Taylor, Attorneys for Prosecutors-Appellees:*

The appellant states the following grounds of appeal: 20

1. Because the Supreme Court erred in sustaining the writ of certiorari and ordering set aside the ordinance and proceedings under review.

2. Because the Supreme Court refused to dismiss the writ of certiorari allowed in this cause. 30

3. Because the Supreme Court held that the ordinance under review did not authorize an improvement.

4. Because the Supreme Court erred in holding that under the provisions of the ordinance under review no indebtedness was incurred or expenditure of public funds provided for. 40

5. Because the Supreme Court erred in its conclusion that Section 24, Article 37, of the Home Rule Act, has no reference to and is not directed at the class of ordinance under review, and that therefore, the referendum provisions of the Walsh Act were operative and controlling.

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WILLIAM A. STEVENS,  
*Attorney for Defendant-Appellant.*

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WRIT OF CERTIORARI.

NEW JERSEY, TO WIT:—

(L. S.) THE STATE OF NEW JERSEY:  
To the Borough of Deal: GREETING:

We being willing, for certain reasons, appearing by the affidavits of CHARLES O. PERRY and JOSEPH A. REID, filed in this cause, to be certified of a certain Ordinance passed by the Board of Commissioners of the Borough of Deal in the State of New Jersey on the Fourth day of March, 1926, entitled "An Ordinance annexing a portion of Ocean Township to the Boro of Deal";

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We do command you, that the aforesaid Ordinance passed by the Board of Commissioners of the Borough of Deal, on the Fourth day of March, 1926, with the records of the meetings of the said Board of Commissioners at which said Ordinance was introduced and passed, together with all things touching and concerning the passing, approving and enacting of said Ordinance, and all resolutions, actions and doings of the said Board of Commissioners of the Borough of Deal done and taken in connection with the passage of the same, together with the petitions of the prosecutors and other voters of the Borough of Deal filed with the Borough Clerk of the Borough of Deal protesting against said Ordinance, as fully and entirely as before you there remain, to our Justices of the Supreme Court of Judicature, at Trenton, on the 22nd day of April, instant, you certify and send, together with this Writ, and that therein may be done what of right and according to the laws and Constitution of this State ought to be done.

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*Writ of Certiorari.*

Witness, WILLIAM S. GUMMERE, Esquire, Chief Justice of our Supreme Court at Trenton, this 12th day of April, 1926.

EDWARD J. KELLEHER,  
*Clerk.*

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DURAND, IVINS & CARTON,  
*Attorneys for Prosecutors.*

This Writ is allowed; let it be sealed upon conditions that case be submitted at May Term, 1926, and writ shall not operate as a stay as to Report of Commissioners.

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(Signed) FRANK T. KATZENBACH,  
*J. S. C.*

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RETURN TO WRIT OF CERTIORARI.

*To the Honorable, Justices of the Supreme Court of Judicature of New Jersey:—*

I, CLEM CONOVER, Clerk of the Borough of Deal, in the County of Monmouth and State of New Jersey, in obedience to the command of the Writ hereto annexed, directed to said Borough, do hereby certify and send to you, said Justices the Ordinance passed by the Board of Commissioners of the Borough of Deal on the fourth day of March, 1926, entitled, "An Ordinance annexing a portion of Ocean Township to the Boro of Deal," together with the records of the meetings of said Board of Commissioners at which said Ordinance was introduced and passed, together with all things touching and concerning the passing, approving and enacting of said Ordinance, and all resolutions, actions and doings of said Board of Commissioners of the Borough of Deal done and taken in connection with the passage of the same, together with the petitions of the prosecutors and other voters of the Borough of Deal filed with me as Borough Clerk of the Borough of Deal protesting against said Ordinance as appears by the Schedule hereunder written.

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IN WITNESS WHEREOF, I have hereunto set my hand and seal of said Borough, this 22nd day of April, Nineteen Hundred and Twenty-six.

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(Seal)

CLEM CONOVER,  
*Borough Clerk.*

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*Return to Writ of Certiorari.*

(Schedules Attached)

## ORDINANCE

10 *An Ordinance Annexing a Portion of Ocean Township to the Borough of Deal.*

20 A petition, in writing, having been duly presented to the Board of Commissioners of the Borough of Deal, pursuant to Article 6, of Chapter 152 of the Laws of 1917, seeking annexation to the Borough of Deal of lands lying and being in the Township of Ocean at the northwest boundary line of the Borough of Deal, as now incorporated, by at least sixty per centum of the legal voters residing in said territory desired to be annexed, said petition having been duly verified and having attached thereto the oath of the Assessor of the Township of Ocean setting forth the assessed value of the real estate contained within such boundaries for the preceding year and the amount of real estate assessed to the persons whose names are signed to such petition, and having also attached thereto a certified copy of a resolution of the Township Committee of the Township of Ocean in which said lands are located consenting to such annexation, reference to which said petition, proofs, etc., now on file in the office of the Clerk of the Borough of Deal, may more fully and at large appear.

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The Board of Commissioners of the Borough of Deal do ordain:

40 Section 1. All that certain territory now a part of the Township of Ocean, County of

*Return to Writ of Certiorari.*

Monmouth and State of New Jersey, located within the blocks known as 21, 13 and 22, on page 9 of the Assessment Map of the Township of Ocean, beginning at a point formed by the intersection of the easterly line of the right of way of the New York & Long Branch Railroad with the middle of Norwood Avenue and from said point running (1) southerly along the middle of Norwood Avenue to a point where the same crosses Poplar Brook; thence (2) westerly along the middle of poplar Brook as the same now runs to a point where the same is intersected by the easterly line of the said New York & Long Branch Railroad; thence (3) along said easterly line of the said New York & Long Branch Railroad in a northerly direction and curving in an easterly direction to the point or place of beginning, and including and intended to include all that portion of Norwood Avenue, Jerome Avenue, Pearl Street and Morgan Avenue within the confines of the territory above described and now located within the Township of Ocean, and Lot 16 in Block 21. Lots 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 in Block 13 and Lots 1 to 16, both inclusive, in Block 22, as the same are now laid out on the Assessment Map of the Township of Ocean, be and the same are hereby annexed to and made a part of the Borough of Deal upon the adoption and publication of this ordinance, according to law.

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Section 2. Upon the passage and publication of this ordinance, the Board shall cause such other and further proceedings to be taken to effect a settlement of accounts of property and

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*Return to Writ of Certiorari.*

debts as between the Township and the Borough as shall be required by law.

Introduced February 11th, 1926.

10 Published and on file three weeks.

Passed March 4th, 1926.

Signed: AARON J. BACH,  
T. H. BERINGER, JR.  
S. H. RHODES

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STIPULATION OF FACTS.

James D. Carton, of Durand, Ivins and Carton, and Walter Taylor, of counsel with the Prosecutors, and William A. Stevens, counsel for the defendant, hereby stipulate and agree upon the following facts:

On Thursday, March 4, 1926, an ordinance entitled, "An Ordinance annexing a portion of Ocean Township to the Borough of Deal," was passed by the Commissioners of the Borough of Deal, under provisions of Article VI, Chapter 152 of the laws of 1917.

On March 13, 1926, a petition signed by voters of the Borough of Deal, equal in number to at least fifteen per centum of the entire vote cast at the last preceding general municipal election, protesting against the passage of the ordinance was presented to the Board of Commissioners of the Borough of Deal, requesting that, in case the ordinance on reconsideration by the Commissioners of the Borough of Deal should not be entirely repealed, the said ordinance be submitted for adoption or rejection to a vote of the electors of said Borough, in accordance with the so-called "Walsh Act," Sec. 17, Laws 1911, p. 462, as amended by Laws of 1913, p. 323.

No action has been taken on said petition by the Borough Clerk of Deal, except that said Borough Clerk called at the home of the Prosecutor, Charles O. Perry, leaving a copy of an opinion by the Borough Solicitor which advised that the petition was unsound and could not be given legal recognition as a basis for the issuance of a certificate of sufficiency. The Board of Commissioners of the Borough of Deal have not reconsidered said ordinance or submitted same to the electors of the Borough of Deal nor made any provision for so doing, but on the contrary proceeded to put the ordinance in operation.

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OPINION OF THE COURT.

NEW JERSEY SUPREME COURT

No. 299, May Term, 1926.

10	CHARLES O. PERRY and JOSEPH A. REID, <i>Prosecutors-Appellees,</i>  <i>vs.</i> THE BOROUGH OF DEAL, <i>Defendant-Appellant.</i>	} <i>On Certiorari</i>
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20 Before Justices Parker, Black and Campbell.  
 For Prosecutors: Durand, Ivins and Carton and  
 Walter Taylor.  
 For Respondent: William A. Stevens.  
 The opinion of the Court was delivered by:  
 CAMPBELL, J.

This writ brings up for review an ordinance, and the proceedings upon the adoption thereof, annexing to the Borough of Deal a portion of Ocean Township, in the County of Monmouth.

30 Within ten days from the date of passage of the ordinance a petition, for referendum election complying with Section 17 of the Walsh Act, as amended (P. L. 1913, p. 323), was presented and disregarded by the borough council, because it is claimed, the only referendum that could be required with respect to such an ordinance is provided for under Section 24, Article 37 of the Home Rule Act (P. L. 1917, p. 461).

40 This is the only question before us.  
 The sole right and authority to annex the territory in question is derived from the Home Rule Act, P. L. 1917, p. 319, Article 6.

*Opinion of the Court.*

The referendum under that act is provided for in Section 24, Article 37, as follows: "Any ordinance authorizing any improvement or the incurring of any indebtedness, excepting for current expenses, shall become operative ten days after the publication thereof after its final passage unless within said ten days a protest or protests against making such improvement or the incurring of such indebtedness shall be filed \* \* \* signed by taxpayers representing ten per centum in amount of the assessed valuation of such municipality \* \* \*."

Section 17 of the Walsh Act (Amendment P. L. 1913, p. 323) provides that, "no ordinance passed by the board of commissioners \* \* \* shall go into effect before ten days from the time of its final passage; and if during said ten days a petition signed by electors of the city equal in number to at least fifteen per centum of the entire vote cast at the last preceding general municipal election, protesting against the passage of such ordinance be presented \* \* \* the same shall thereupon be suspended from going into operation and it shall be the duty of the board of commissioners to reconsider such ordinance, and if the same is not entirely repealed, the board of commissioners shall submit the ordinance \* \* \* to the vote of the electors of the city \* \* \*."

It must be conceded, as held in *Wethling vs. Orange*, 94 N. J. L. 36, that section 24 of Article 37 of the Home Rule Act, supra, "Covers in detail the subject matter of the operation, suspension and referendum to the voters, of ordinances of the class with which it deals and is inconsistent with the repugnant to Section 17 and 16b of the Walsh Act covering the same subject matter; and that the former superseded or repealed the latter pro tanto

*Opinion of the Court.*

was decided in this court in Bayonne vs. Garvin, 41 N. J. L. J. 269."

10 Our inquiry must therefore be directed to Section 24 of Article 37 of the Home Rule Act so that we may ascertain whether or not that section by its terms covers the class of ordinance now before us, because if it does then it operates in exclusion of the referendum provisions of the Walsh Act and the action of the borough council was proper, while if not then the provisions of the Walsh Act were applicable and the proceedings under review were improper.

20 Section 24, Article 37, Home Rule Act, supra, is directed only at "any ordinance authorizing any improvement or the incurring of any indebtedness excepting for current expenses \* \* \*."

The ordinance in question does not authorize any improvement. No where in the Act is the annexation of territory referred to or in any manner designated as an improvement.

Is it an ordinance "incurring" \* \* \* "Any indebtedness"? This presents some difficulty but we think must be answered in the negative.

30 By its express terms no indebtedness is "incurred" or expenditure of public funds provided for and it can become an enactment of that character only if we can say that by the annexation of this territory the Borough of Deal will be assuming a liability. There is no proof before us that in the adjustment of the finances as between the Borough of Deal and the Township of Ocean as provided for by statute the result would be the assuming of an indebtedness by the borough. But if that were shown we are of the opinion that the "incurring of any indebtedness" has no reference to such an indebtedness or situation.  
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*Opinion of the Court.*

Our conclusion is therefore that Section 24, Article 37, Home Rule Act, supra, has no reference to and is not directed at the class of ordinance before us and that therefore the referendum provisions of the Walsh Act are operative and controlling.

The ordinance and proceedings under review are therefore set aside, with costs. 10

Filed, Jan. 18, 1927.

EDWARD J. KELLEHER,  
*Clerk.*

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JUDGMENT SUSTAINING WRIT.  
NEW JERSEY SUPREME COURT

No. 299, May Term, 1926.

10	CHARLES O. PERRY and JOSEPH A. REID, <i>Prosecutors-Appellees,</i>  <i>vs.</i> THE BOROUGH OF DEAL, <i>Defendant-Appellant.</i>	} <i>On Certiorari</i>
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20 The Court having inspected the transcript and proceedings taken by the defendant, The Borough of Deal, returned with the Writ of Certiorari in this cause, the reasons for reversing same, and heard the argument of counsel thereon, and having duly considered the same, do order that the ordinance and proceedings under review be set aside, made void and for nothing holden, with costs to prosecutors.

Dated, January 25th, 1927.

30	FRANK T. LLOYD, <i>J. S. C.</i>
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On motion of  
 DURAND, IVINS & CARTON,  
*Attorneys for Prosecutors.*

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New Jersey Court of Errors  
and Appeals

CHARLES O. PERRY and JOSEPH A. REID, <i>Prosecutors-Appellees,</i>  <i>vs.</i> THE BOROUGH OF DEAL, <i>Defendant-Appellant.</i>	} <i>On Appeal</i> <i>On Certiorari</i>
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**BRIEF FOR DEFENDANT-APPELLANT**

**STATEMENT OF THE CASE.**

The Writ of Certiorari in this case brought to the Supreme Court an ordinance of the Borough of Deal entitled "An Ordinance Annexing a Portion of Ocean Township to the Borough of Deal," and the proceedings had, done and taken in connection with the passage of the same.

The Borough of Deal is a municipality governed by a Board of Commissioners. On March 4, 1926, it did regularly adopt the aforesaid ordinance. Such action is authorized by and was so taken in conformity with the provisions of Article VI of an act of the Legislature entitled "An Act Concerning Municipalities," approved March 27, 1917, generally known as "The Home Rule Act," (P. L. 1917, page 319, at pages 327-331).

The Prosecutors in Certiorari challenged the validity of said ordinance, alleging that before it became operative and effective it should have been sub-

mitted to a vote of the electors of the Borough of Deal, at an election, either general or special, to be called for that purpose, prior to the holding of which election, the ordinance should have been suspended.

The Prosecutors based their contention upon the supposed authority of Sections 16 (b) and 17 of an act entitled "An Act to amend the title and body of an Act entitled 'An Act relating to, regulating and providing for the government of cities, towns, boroughs and other municipalities within this State,' approved April twenty-fifth, one thousand nine hundred and eleven, so as to define the municipalities to which the act applies as cities, towns, townships, boroughs, villages and municipalities governed by Boards of Commissioners or Improvement Commissions, and further to amend said act generally." (P. L. 1911, page 462, and P. L. 1912, page 643). This act is generally known as the "Commission Government Act."

It was insisted on behalf of the Borough of Deal that the referendum provisions of the "Commission Government Act," upon which the prosecutors rely, were superseded and repealed by paragraph 24 of Section XXXVII of the "Home Rule Act" in so far as the former dealt with the subject matter covered by the latter, namely, the operation, suspension and referendum to the voters of ordinances.

Justice Campbell, delivering the opinion for the Supreme Court, said:

"Within ten days from the date of passage of the ordinance a petition, for referendum election complying with Section 17 of the Walsh Act, as amended (P. L. 1913, p. 323), was presented and disregarded by the borough council, because it is claimed, the only referendum that could be required with respect to such an ordi-

nance is provided for under Section 24, Article 37 of the Home Rule Act (P. L. 1917, p. 461).

"This is the only question before us.

"The sole right and authority to annex the territory in question is derived from the Home Rule Act, P. L. 1917, p. 319, Article 6.

"Our inquiry must therefore be directed to Section 24 of Article 37 of the Home Rule Act so that we may ascertain whether or not that section by its terms covers the class of ordinance now before us, because if it does then it operates in exclusion of the referendum provisions of the Walsh Act and the action of the borough council was proper, while if not then the provisions of the Walsh Act were applicable and the proceedings under review were improper.

"Section 24, Article 37, Home Rule Act, supra, is directed only at 'any ordinance authorizing any improvement or the incurring of any indebtedness excepting for current expenses \* \* \*.'

"The ordinance in question does not authorize any improvement. Nowhere in the act is the annexation of territory referred to or in any manner designated as an improvement.

"Is it an ordinance 'incurring' \* \* \* 'any indebtedness'? This presents some difficulty but we think must be answered in the negative.

"By its express terms no indebtedness is 'incurred' or expenditure of public funds provided for and it can become an enactment of that character only if we can say that by the annexation of this territory the Borough of Deal will be assuming a liability. There is no proof before us that in the adjustment of the finances as between the Borough of Deal and the Township of Ocean as provided for by statute the

result would be the assuming of an indebtedness by the borough. But if that were shown we are of the opinion that the 'incurring of any indebtedness' has no reference to such an indebtedness or situation.

"Our conclusion is therefore that Section 24, Article 37, Home Rule Act, supra, has no reference to and is not directed at the class of ordinance before us and that therefore the referendum provisions of the Walsh Act are operative and controlling.

"The ordinance and proceedings under review are therefore set aside, with costs."

#### ARGUMENT.

##### POINT I.

**The Supreme Court erred in its conclusion that Section 24, Article 37, of the Home Rule Act has no reference to and is not directed at the class of ordinance under review, and that, therefore, the referendum provisions of the Walsh Act were operative and controlling.**

At the outset it will be noted that all proceedings had in connection with the introduction and passage of said ordinance were taken pursuant to the provisions of the "Home Rule Act" of 1917, a subsequent enactment to the statute upon which the prosecutors rely.

The "Home Rule Act" of 1917 is in itself a complete piece of legislation. It authorizes such annexation. It provides the machinery therefor and details the procedure to be followed in connection

therewith, to the end that the annexation so authorized and decided upon shall be valid and effectual.

Section 24 of the said "Home Rule Act" provides for the submission of any such ordinance to the electors at any general or special election, and covers, in detail, the matter of the operation and suspension of ordinances and referendums to be had thereon, in the same manner and to the same extent as was authorized by the old "Commission Government Act" of 1911 for ordinances contemplated by the Commission Government statute.

It is insisted on behalf of the Borough of Deal that the referendum provisions of the "Commission Government Act," upon which the prosecutors rely, were superseded and repealed by Section 24 of the "Home Rule Act" in so far as the former dealt with the subject matter covered by the latter, namely, the operation, suspension and referendum to the voters of ordinances.

This was the view taken by the Supreme Court in the case of WETHLING, PROSECUTOR, AGAINST THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE, 94 N. J. L., p. 36. It was there contended, as in this case it is insisted by the prosecutors, that the ordinance did not take effect because the petition signed by fifteen per centum of the electors protesting against the passage of the ordinance was presented to the Board of Commissioners within ten days after its passage. The Court said:

"It is true that the city had adopted the so-called Walsh Act (Pamph. L. 1911, p. 462; 1st Sup. Comp. Stat., p. 1087), and no doubt such petition was presented under the supposed authority of Sections 17 and 16 (b) of that act (1st Sup. Comp. Stat., pp. 1112, 1113), the pertinent parts of which are as follows:

"Sec. 17. NO ORDINANCE \* \* \* except when otherwise required by the general laws of the State or by the provisions of this act except an ordinance for the immediate preservation of the public peace, health or safety, \* \* \* SHALL GO INTO EFFECT BEFORE TEN DAYS FROM THE TIME OF ITS FINAL PASSAGE; AND IF DURING SAID TEN DAYS A PETITION SIGNED BY ELECTORS OF THE CITY EQUAL IN NUMBER TO AT LEAST FIFTEEN PER CENTUM OF THE ENTIRE VOTE CAST AT THE LAST PRECEDING GENERAL MUNICIPAL ELECTION, PROTESTING AGAINST THE PASSAGE OF SUCH ORDINANCE, BE PRESENTED TO THE BOARD OF COMMISSIONERS, THE SAME SHALL THEREUPON BE SUSPENDED FROM GOING INTO OPERATION, and it shall be the duty of the Board of Commissioners to RECONSIDER SUCH ORDINANCE; AND IF THE SAME IS NOT ENTIRELY REPEALED, the Board of Commissioners shall submit the ordinance, as is provided by sub-section b of section sixteen of this act, to the vote of the electors of the city, either at the general election or at a special municipal election to be called for that purpose; and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof.

"Sec. 16 (b). Forthwith, after the clerk shall attach to the petition accompanying such ordinance his certificate of sufficiency, the Board of Commissioners shall call a special election, unless a general municipal election is fixed within ninety days thereafter, and at such

special or general municipal election, if one is so fixed, such ordinance shall be submitted without alteration to the vote of the electors of the city.'

"But those sections of the Walsh Act in so far as they relate to the operation, suspension, and referendum to the voters, of ordinances authorizing any improvement or the incurring of any indebtedness, have been superseded or repealed by section 24 of article 37 of the so-called Home Rule Act (Pamph. L. 1917, p. 461), the pertinent part of which is as follows:

"Sec. 24. Any ordinance AUTHORIZING ANY IMPROVEMENT OR THE INCURRING OF ANY INDEBTEDNESS, EXCEPTING FOR CURRENT EXPENSES, shall become operative ten days after the publication thereof after its final passage, unless within said ten days a protest or protests against making such improvement or the incurring of such indebtedness shall be filed in the office of the clerk of such municipality SIGNED BY TAXPAYERS REPRESENTING TEN PER CENTUM IN AMOUNT OF THE ASSESSED VALUATION OF SUCH MUNICIPALITY, WHOSE NAMES APPEAR ON THE LAST PRECEDING ASSESSMENT ROLL THEREOF, IN WHICH CASE SUCH ORDINANCE SHALL REMAIN INOPERATIVE UNTIL A PROPOSITION FOR THE RATIFICATION THEREOF SHALL BE ADOPTED AT AN ELECTION TO BE HELD FOR THAT PURPOSE BY A MAJORITY OF THE QUALIFIED VOTERS OF SUCH MUNICIPALITY VOTING ON SUCH PROPOSITION. The certificate of the clerk of the municipality filed in his office as to the filing or sufficiency

of any protest or protests shall be conclusive for the purpose of this section \* \* \* Any proposition submitted to the voters of any municipality under the provisions of this act shall be voted upon at the next general election held in the municipality at least thirty days after the filing of the protest or protests herein provided for, unless the governing body thereof shall call a special election therefor.'

"It will be seen that this section of the Home Rule Act covers in detail the subject matter of the operation, suspension, and referendum to the voters, of ordinances of the class with which it deals and is inconsistent with and repugnant to sections 17 and 16 (b) of the Walsh Act covering the same subject matter; and that the former superseded or repealed the latter pro tanto was decided by this court in *Bayonne v. Garven*, 41 N. J. L., J. 269."

In *BAYONNE v. GARVEN*, 41 N. J. L., J. 269, the court in construing the "Home Rule Act," pointing out that it had superseded the provisions of the "Commission Government Act," said:

"The Act of 1917, the Home Rule Act, provides that when any ordinance is proposed to be passed, INVOLVING THE EXPENDITURE OF PUBLIC MONEY, that the Commission, upon the request in writing of at least ten per cent. of the owners of property within the municipality shall submit to the voters the question whether the ordinance shall be adopted or not. We find nothing in this case to suggest that this provision was invoked or attempted to be applied. What was done, was to follow the provisions of the Walsh Act, which authorized a referendum in certain cases

upon the petition of fifteen per cent. or some other percentage of the voters petitioning therefor. But that question also was before the Supreme Court in the mandamus proceeding, and they stated that the Home Rule Act, under this provision, had superseded the Walsh Act; and that decision we consider ourselves bound to accept, unless it was manifestly erroneous; and we do not find it to be manifestly erroneous, but we think the decision was sound, and therefore gladly follow it."

## POINT II.

**The Supreme Court erred in sustaining the Writ of Certiorari and ordering set aside the ordinance and proceedings under review, for that the ordinance did not authorize an improvement.**

**THE ORDINANCE UNDER REVIEW IS ONE AUTHORIZING AN IMPROVEMENT UNDER THE STATUTE.**

The word IMPROVEMENT, in its ordinary and commonly accepted sense, means

Advancement of anything from good to better: profitable use or application of anything: that by which the value of anything, especially property, is advanced: *pl.* betterments.

WEBSTER'S DICTIONARY.

The word IMPROVEMENT, as used in Article XXXVII, Section 24, is a relative term, and its meaning must be ascertained from the context and the subject matter dealt with in the Home Rule Act.

Article XX of the Home Rule Act of 1917 specifically defines local improvements and directs in what manner they shall be undertaken. It further authorizes the carrying out of general improvements. The definition of a local improvement is specific. The statute, Cumulative Supplement to Compiled Statutes, Vol. 2, p. 2194, and P. L. 1917, p. 370, defines a local improvement as:

“A local improvement is one, the cost of which, or a portion thereof, may be assessed upon lands in the vicinity thereof benefited thereby.”

The statute nowhere undertakes to define a general improvement. It authorizes general improvements, leaving to the municipality, within the scope of the statute, the doing of those things authorized by the act. Article VI of the act authorizes the annexation of territory by ordinance as was done in the present case. That such annexation is an improvement cannot well be questioned. The territory of the Borough of Deal is thereby increased, additional ratables found, property acquired, population increased, and additional advantages gained.

POINT III.

**The Supreme Court erred in sustaining the Writ of Certiorari and ordering set aside the ordinance and proceedings under review, in holding that under the provisions of the ordinance no indebtedness was incurred or expenditure of public funds provided for.**

THE ORDINANCE UNDER REVIEW IS ONE INCURRING AN INDEBTEDNESS IN NO MANNER CONTEMPLATED AND PROVIDED FOR IN THE FISCAL BUDGET OF APPROPRIATIONS OF THE BOROUGH OF DEAL, AND THE AMOUNT THAT SHALL BE FOUND TO BE DUE TO THE TOWNSHIP OF OCEAN UPON THE COMING IN OF THE COMMISSIONERS' REPORT IN THE MANNER PROVIDED BY THE STATUTE, CANNOT BE CHARGED TO AND PAID FROM CURRENT FUNDS.

Article VI of the Home Rule Act, substantially following the legislative methods employed in former statutes (P. L. 1891, p. 456, 3 Comp. St. 3457; P. L. 1895, p. 417, 3 Comp. St. 3461; P. L. 1897, p. 104, 1 Comp. St. 596), affords a plan whereby land lying and being in one municipality may be annexed to and become part of another municipality to which such land is contiguous: The procedure is clearly defined and outlined. When resorted to and its procedure followed, it establishes the rights and privileges of the citizens in the annexed territory as well as to subject them to the obligations of the municipality they have become a part: It provides that the municipality to which such territory shall be annexed shall be liable to pay a proper proportion or share of the bonded and other indebtedness of the municipality of which such annexed territory formerly formed a part, to be ascertained by a

joint committee to be appointed by the municipalities who shall proceed to state an account of all the property, real and personal, all debts, dues and demands, all judgments, recognizances and claims, and all liens, actions and rights of actions belonging to the municipality of which the said annexed territory formerly formed a part, and to state the fair value of the same to the said municipality, and also to state an account, in like manner, of all the debts outstanding of the said municipality, and the proper proportion or share of which should be borne and paid by the municipality to which such territory shall have been annexed, and the methods in and times at which payment thereof should be made, AND FOR THE FINAL PAYMENT THEREOF THE FAITH OF THE SAID MUNICIPALITY SHALL STAND PLEDGED; AND IT SHALL MAKE SUCH PAYMENTS IN THE MANNER AND AT THE TIMES SET FORTH IN SAID REPORT.

It too, continues in office for the balance of their terms the officers resident within the territory annexed, and obligates the municipalities to which said territory is annexed, to the payment of their salaries.

THE BOARD OF COMMISSIONERS OF THE BOROUGH OF DEAL FULLY APPRECIATING THE OBLIGATION IT WAS COMMITTING THE BOROUGH TO BECOME LIABLE FOR, provided in Section 2 of the ordinance under review as follows:

"Section 2. Upon the passage and publication of this ordinance, the Board shall cause such other and further proceedings to be taken to effect a settlement of accounts of property and debts as between the Township and Borough as shall be required by law."

Prosecutors contend that the obligation so incurred is but an incident to the main object of the statute and ordinance passed pursuant to its provisions, but respondent respectfully submits, there can be no valid distinction between this ordinance and any other ordinance authorizing, for example, the acquiring of lands for municipal purposes, the paving of a street, the erection of a sewage disposal plant or any other public improvement, the method of financing of which, and the appropriation of the funds being likewise found necessary to be incorporated in the improvement ordinance as a necessary incident to the making of the improvement determined upon. Ordinances of the character under review, passed pursuant to the legislative scheme found in Article VI of the Home Rule Act, contemplate and involve the expenditure by the municipalities resorting thereto of public money, the incurring of indebtedness of a character outside and beyond the usual current obligations incident to the usual routine, fiscal business, and chargeable to current expense accounts anticipated and set up when the budget of appropriations was adopted.

Article XXXVII, Section 24, of the Home Rule Act affords TAXPAYERS an opportunity to suspend the taking effect of any ordinance authorizing any improvement or the incurring of any indebtedness, excepting for current expenses, upon the filing of a petition of protest against making of such improvement or the incurring of such indebtedness.

Whether such ordinance be of a character designated as a "local improvement" or a "general improvement," it would seem, both are within the statute, and subject to the referendum scheme found in said Article XXXVII, Section 24. The undoubted purpose of the Legislature was, when paragraph 24 is considered, to permit an election upon any improvement ordinance, or ordinance incurring an in-

debtedness excepting for current expenses, so long as the improvement ordinance, or ordinance incurring an indebtedness excepting for current expenses was the doing of any of the things plainly contemplated by the Home Rule Act.

Article VI of the Home Rule Act thus setting up a complete scheme of procedure applicable to all municipalities of the State, a legislative policy of delegation of authority of far-reaching possibilities, and resort to this procedure by municipalities in the matter of annexation of territory being had, it may be readily conceived that it would necessarily involve the incurring by annexing municipalities of large sums of money in making due settlement with municipalities from whom territory has been taken, proceedings incurring for the annexing municipalities indebtedness such as is subject to the referendum procedure found in Article XXXVII, Section 24, applicable in all municipalities of the State. TO HOLD OTHERWISE WOULD BE TANTAMOUNT TO SAYING THAT IN ALL THE MUNICIPALITIES OF THE STATE OTHER THAN THOSE OPERATING UNDER THE "COMMISSION GOVERNMENT ACT," THE PASSAGE OF THE ORDINANCE BY THE GOVERNING BODY IN THE MANNER PROVIDED IN ARTICLE VI OF THE "HOME RULE ACT" IS FINAL, AND SUBJECT TO NO REFERENDUM, BUT THAT, UNDER THE PROVISIONS OF THE "COMMISSION GOVERNMENT ACT," A REFERENDUM MAY IN MUNICIPALITIES OPERATING THEREUNDER, BE HAD UNDER SECTIONS 17 AND 16 (b). That, in a word, was the contention of the prosecutors of this writ: that in a word is the effect of the Supreme Court's decision: such determination, it is respectfully submitted, is not sound.

### CONCLUSION.

It is respectfully submitted that the judgment of the Supreme Court should be reversed, and a judgment entered affirming the ordinance and proceedings of the Borough of Deal.

May Term, 1927.

Respectfully submitted,

WILLIAM A. STEVENS,  
*Attorney for and of Counsel  
with Defendant-Appellant.*

NEW JERSEY COURT OF ERRORS AND APPEALS

CHARLES O. PERRY, and JOSEPH A. REID, Prosecutors-Appellees, vs. THE BOROUGH OF DEAL, Defendant-Appellant.	On Appeal. On Certiorari.	10
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Brief of Prosecutors-Appellees.

STATEMENT. 20

The Commissioners of the Borough of Deal passed an ordinance annexing to the Borough a portion of the Township of Ocean. This was done under the provisions of Article VI, Chapter 152 of the laws of 1917 (Home Rule Act).

Within ten days after the passage of said ordinance a petition was presented to the Commissioners, signed by electors constituting more than fifteen per centum of the entire vote cast at the last preceding general municipal election, protesting against the passage of the ordinance. This was done in accordance with the provisions of Section 17 of the Commission Government Act (Walsh Act) as amended by P. L. 1913 p. 323. 30

The Prosecutors claim that by reason of said petition the annexation ordinance could not go into operation until it was submitted to a vote of the electors, as provided in said Act.

The Borough of Deal, the Defendant-Appellant, claims that the petition should have been filed under Section 24 40

of Article XXXVII of the Municipal Corporation Act, (P. L. 1917, p. 461) (Home Rule Act), which latter Act, the Borough alleges, repeals or supersedes the Walsh Act.

### ARGUMENT

10 The Borough of Deal claims that the Home Rule Act is a "complete piece of legislation." However, the Act clearly indicates in several instances that it was intended to supplement other acts, not wholly to repeal or supersede them. For instance, Section 2, Article I provides: "No provision of this Act shall be construed to transfer from any officer, board or body in any municipality any power or authority which he or it may now have. In case any additional power is conferred," etc. Section 25, Article XXXVII provides: "All municipalities in this state shall have the same officers, boards and bodies after the passage of this act as heretofore; and nothing herein contained shall be held to change in any manner the officary of any municipality, nor to alter the structure of the government now existing therein." These are clear indications that the act was intended to supplement, not to supersede other acts.

20 It is not disputed that the provision of the Walsh Act for a referendum was superseded or repealed by Sec. 24, Article XXXVII of the Home Rule Act as to ordinances authorizing any improvement (2) or the incurring of any indebtedness, excepting for current expenses; but the Prosecutors contend that the annexation ordinance is not within either of these two classes.

30 That the Home Rule Act did not amend the method of holding a referendum on all classes of ordinance is clearly shown in *Wethling vs. Orange*, 94 N. J. L. 36, in which the Supreme Court held: "But these sections of the Walsh Act insofar as they relate to the operation, suspension and referendum to the voters, of ordinances authorizing any improvement or the incurring of any indebtedness, have

been superseded or repealed by Section 24 of Article 37 of the so-called Home Rule Act," (p. 38). This case related to an ordinance for a street improvement. On page 39, the Supreme Court, in the same case, says: "It will be seen that this section of the Home Rule Act covers in detail the subject-matter of the operation, suspension and referendum to the voters, of ordinances of the class with which it deals, and is inconsistent with and repugnant to Sections 17 and 16 (b) of the Walsh Act covering the same subject-matter; and that the former superseded or repealed the latter *pro tanto* was decided by this court in *Bayonne vs. Garven*, 41 N. J. L. J. 269." The *Bayonne* case related to a municipal water contract and the appropriating of money therefor and does not apply the Home Rule Act to a referendum on any ordinances except the classes mentioned specifically in the act.

### II

20 The Prosecutors claim that the Ordinance under review is not one authorizing an improvement under the statute.

30 Article XX of the Home Rule Act, (amended L. 1924, p. 433) specifies a number of "improvements" that may be made as "local improvements" and defines "local improvement" as one, the cost of which may be assessed upon lands in the vicinity thereof benefited thereby. The same section, in the next to the last paragraph, provides that the above-mentioned works may be done as a "general improvement to be paid for by general taxation," which defines the term "general improvement," within the meaning of the act. Annexing territory is not included in Article XX which is entitled "Improvements." It is provided for in a different article specifically entitled "Annexation of Territory." (Article VI). This indicates clearly that the Legislature did not consider the annexing of territory as either a local or general improvement within the meaning of the act.

The annexing of territory does not come within the definition of "Improvement." Enlargement is not necessarily improvement. An addition may be of such a class as to be a detriment.

### III

The Prosecutors claim that the Ordinance under review is not one authorizing the incurring of indebtedness, within the meaning of the statute.

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It is true that the ordinance provides for a settlement of accounts as between the Township and the Borough and the Borough claims that because it may be obliged to assume and pay bonded or other indebtedness of the Township of Ocean, the ordinance for the annexing of territory was in reality an ordinance for the incurring of indebtedness.

The statute obviously refers to the **object** of the ordinance, not to something merely incidental. Cyc. defines the word "object" as "the end aimed at; the thing sought to be accomplished; the aim or purpose; the thing sought to be attained." (29 Cyc. 1306).

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The object of the ordinance in question was to annex territory to the Borough. Incidentally indebtedness might be incurred. This is true of practically all ordinances. But the **object** of the ordinance, the thing sought to be accomplished or attained, was the annexing of additional territory.

The charter of the City of New Brunswick required the publication of all ordinances involving an expenditure of money. An ordinance fixing the term of the city surveyor was objected to because it was not published. It is improbable that the services of the surveyors were gratuitous but the Court held that it was unnecessary to publish the ordinance. *Schneider vs. Atkinson*, 86 N. J. L. 392.

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If the Township of Ocean has any indebtedness the Borough of Deal, after annexion, becomes liable for its proper proportion and would therefore incur that indebtedness. (Laws 1917, Section 5, Article VI, Chapter 152). However, the annexed territory and the residents thereof,

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become subject to all the laws, ordinances, regulations and obligations of the annexing municipality. (Sections 2 and 4 same Act). "Debts of a municipality contracted before an addition, become a burden upon the added territory as well as upon the original territory, unless it is otherwise provided by statute." 28 Cyc. 222.

An examination of the accounts of the two municipalities might show that the financial obligations assumed by the annexed territory were greater than those assumed by the annexing municipality, which would mean that the annexing municipality, instead of incurring additional indebtedness by the annexation, would in reality lighten the existing indebtedness by sharing it with additional territory.

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Until there was a settlement of accounts of property and debts as between the Township and the Borough, as provided in the ordinance, it would be impossible to know whether or not the Borough incurred indebtedness by the annexation; and certainly it was not the intention of the Legislature that when the settlement of accounts showed an incidental incurring of indebtedness by the annexation, the referendum must be under the Home Rule Act and when the settlement of accounts showed that there was no incurring of indebtedness the referendum should be under the Walsh Act.

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The purchase of voting machines has been held to be an extraordinary, not current, expenditure. (28 Cyc. 1534, N. 45). An ordinance, therefore, for the purchase of voting machines would of necessity incur an indebtedness and is therefore within the class designated in the statute in question. This is also true of ordinances authorizing the purchase of lands for municipal purposes, the paving of a street or the erection of a sewage disposal plant.

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In *Wethling vs. Orange* 94 N. J. L. 36 and *Bayonne vs. Garvin*, 41 N. J. L. J. 269, the express **object** of the ordinances in question was to appropriate money, the one for street improvement and the other for a municipal water contract. They **necessarily** incurred indebtedness. The

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incurring of indebtedness was not merely a possible incident.

The Borough complains that the construction which Prosecutors (and the Supreme Court in its opinion in this case) place upon Section 24 of Article XXXVII of the Home Rule Act would limit the right of referendum in some cases to municipalities operating under the Commission Government Act and claims that this is not sound.

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The rights of referendum, initiative and recall are comparatively modern. They are among the distinctive features of Commission Government. The Legislature, by passing the Walsh Act made it possible for any municipality in the state (except counties and school-districts) to enjoy the benefit of the referendum by adopting Commission Government, a referendum obligatory if petitioned for by a prescribed number of legal voters.

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The Home Rule Act was passed after the Walsh Act had been in effect for several years. Article X of the Home Rule Act, as amended by the laws of 1925, page 392, prescribed the procedure for the passage of ordinances, "every ordinance." The referendum on the petition of taxpayers, prescribed by Section 24 of Article XXXVII of the Home Rule Act, is expressly limited by its terms to two classes of ordinance. Had the Legislature intended this referendum to supply to all ordinances authorized by the act, or to supersede the general referendum provided for in the Walsh Act, it would have stated that it applied to all ordinances, instead of being limited to certain classes of ordinance. If such a limitation is unsound that is the fault of the Legislature.

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**CONCLUSION.**

All the points discussed by the Appellant in its brief were argued before the Supreme Court and by that Court were considered and disposed of, as appears by its opinion, page 14 of the printed case.

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

Respectfully submitted,

WALTER TAYLOR,  
DURAND, IVINS & CARTON,

Attorneys for and of Counsel  
with Prosecutors-Appellees.

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