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New Jersey Supreme Court

CHARLES H. KERN,

Prosecutor,

vs.

THE TOWNSHIP OF PALMYRA, IN THE COUNTY OF BURLINGTON, ALBERT N. STEWART, CLERK OF SAID TOWNSHIP, AND THE COUNTY BOARD OF CANVASSERS OF THE COUNTY OF BURLINGTON,

Respondents.

WRIT OF CERTIORARI.

10

(Filed December 19, 1918.)

NEW JERSEY, *ss.*—The State of New Jersey to the Township of Palmyra, in the County of Burlington, Albert N. Stewart, Clerk of said Township, and the County Board of Canvassers of the County of Burlington, greeting:

[L. S.]

We being willing, for certain reasons, to be certified of a certain order and resolution, proceedings and determination made and given by the Township Committee of the Township of Palmyra, in the County of Burlington, declaring as sufficient a petition filed with the Clerk of said Township, under Chapter 2 of the Laws of 1918, for an election to determine whether or

20

New Jersey State Library

not the sale of intoxicating liquor as a beverage in said Township should be prohibited, and directing the Clerk of the County of Burlington to place on the ballot to be used at the general election in said Township the appropriate form of question, together with the order, proceedings and determination declaring the result of said election:

We command you that the aforesaid order, resolution, proceedings and determination, made and given by the 10 Township Committee of the Township of Palmyra, in the County of Burlngton, declaring as sufficient the aforesaid petition; and directing the placing of the appropriate form of question on the ballot as aforesaid, together with the transcript of all the proceedings, testimony and exhibits, including the petition for election and the registry lists of the said Township for the General Election of the year 1918, and all notices given and proceedings taken by the said Albert N. Stewart, Clerk of said Township, and all other papers and documents 20 pertaining thereto, and all orders, proceedings and determinations declaring the result of the said election to determine the aforesaid question, and all things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature, at Trenton, on the nineteenth day of December instant, 1918, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done.

30 Witness, William S. Gummere, Chief Justice of our Supreme Court, at Trenton aforesaid, this twelfth day of December, nineteen hundred and eighteen.

ENOCH L. JOHNSON,
Clerk.

HARRY HEHER,
Attorney.

This writ is allowed. Let it be sealed. December 12, 1918.

SAMUEL KALISCH,
J. S. C.

NEW JERSEY SUPREME COURT.

CHARLES H. KERN, *Prosecutor,* *vs.* TOWNSHIP OF PALMYRA, COUNTY OF BURLINGTON ET AL., *Respondents.*	On Certiorari.

RETURN OF TOWNSHIP COMMITTEE AND TOWNSHIP CLERK. 10

In obedience to the command in this writ, directed to the Township of Palmyra, in the County of Burlington, and to the Clerk of said Township, we, said Township and said Clerk within mentioned, do hereby certify and send to the Honorable The Justices of the Supreme Court within mentioned: (1) The petition filed with the said Clerk for the election in said writ mentioned; (2) notices of the meeting, posted and published and 20 sent to the Township Committee; (3) the minutes of the hearing, determination and order for election; (4) notices of election; (5) election returns, showing total registered vote, total number of votes cast and total votes, yes and no, whereof mention is within made, and all things touching the same as fully as before us they remain, as by certain schedules hereto annexed more fully appears.

In testimony whereof the said chairman of the Township Committee of Palmyra Township, in the County 30 of Burlington, and the Clerk of said Township, have hereunto set their hands, and caused the seal of said Township to be affixed this 18th day of December, 1918.

JOHN M. DAVIES,
Chairman of Township Committee of Township of Palmyra, in the County of Burlington.

[L. S.]

ALBERT N. STEWART,
Clerk of said Township.

A PETITION

For an Election to Determine Whether or Not the Sale of Intoxicating Liquor as a Beverage in the Township of Palmyra, New Jersey, Shall be Prohibited.

(Filed October 9, 1914.)

10 *To the Township Committee of the Township of Palmyra, in the County of Burlington, in the State of New Jersey:*

We, the undersigned, respectfully represent that we are legal voters of the Township of Palmyra, in the County of Burlington, in the State of New Jersey, and that we hereby request you to order an election under the provisions of Chapter Two of the Laws of one thousand nine hundred and eighteen (1918), to determine whether or not the sale of intoxicating liquor as a beverage in the Township of Palmyra, New Jersey, shall be
20 prohibited.

Name.	*Residence.*	*Date of Signing.*
Thomas S. Branson,	315 Morgan Ave.,	Aug. 19, 1918.
Warren R. Miller,	513 Garfield Ave.,	Aug. 22, 1918

(Said two names being the first two names of subscribers hereto, the total number of said subscribers being 169.)

---

30 NOTICE PUBLISHED IN PALMYRA WEEKLY NEWS OF SEPTEMBER 20, 1918.

Notice is hereby given that a meeting of the Township Committee of the Township of Palmyra will be held on Tuesday evening, September 24, 1918, at eight o'clock, at the rooms of Independence Fire Company, for the purpose of inspecting the petition for an election

to determine whether or not the sale of intoxicating liquor as a beverage in the Township of Palmyra, shall be prohibited, and hear objections on same.

Dated September 18, 1918.

ALBERT N. STEWART,
Township Clerk.

MINUTES OF TOWNSHIP COMMITTEE MEETING. 10

3.—MINUTES OF THE HEARING, DETERMINATION AND ORDER FOR ELECTION.

PALMYRA, N. J., September 24, 1918.

A special meeting of the Township Committee was held on this date for the purpose of inspecting the petition for an election to determine whether or not the sale of intoxicating liquor as a beverage in the Township 20 of Palmyra shall be prohibited, and to hear objections on same. The clerk presented the petition, and explained to those present what constituted a legal status of the petition, after having been examined by several persons present, representing the saloon interests, and the Committee finding it to be correct, Mr. Hill made the following motion, which was passed unanimously: That in consideration of the petition, signed by 30 per cent. of the voters of the Township at the last General Election, requesting the Committee to order an election 30 under the provisions of Chapter 2, Laws of 1918, to determine whether or not the sale of intoxicating liquors as a beverage in the Township of Palmyra shall be prohibited, said petition having been properly executed by circulators, and attested to by George N. Wimer, Notary Public, and there being no legal objections to the executing of the said petition, that the same being found efficient, the Clerk is hereby authorized to place the

question upon the ballot to be voted upon at the General Election to be held on Tuesday, November 5th, 1918, this without prejudice of any individual member of the Township Committee.

NOTICE PUBLISHED IN PALMYRA WEEKLY NEWS OF OCT. 18, OCT. 25 AND NOV. 1,
10 1918.

"Shall the sale of intoxicating liquors as a beverage in the Township of Palmyra be prohibited?"

ALBERT N. STEWART,
Clerk of the Township of Palmyra.

---

20 RESULT OF ELECTION FOR QUESTION

SHALL THE SALE OF INTOXICATING LIQUORS AS A BEVERAGE IN THE TOWNSHIP OF PALMYRA BE PROHIBITED?

1st Dist.	*2d Dist.*	*3d Dist.*
Vote Cast—199.	Vote Cast—161	Vote Cast—236
No—63	No—110	No—84
Yes—129	Yes—36	Yes—139

Recapitulation—Yes, 304
30 No, 257.

47 majority in favor of question
Attest:

ALBERT N. STEWART,
Township Clerk.

NEW JERSEY SUPREME COURT.

CHARLES H. KERN, *Prosecutor,* *vs.* THE TOWNSHIP OF PALMYRA, IN THE COUNTY OF BURLINGTON, ALBERT N. STEWART, CLERK OF SAID TOWNSHIP, AND THE COUNTY BOARD OF CANVASSERS OF THE COUNTY OF BURLINGTON, *Respondents.*	On Writ of Certiorari.

10

RETURN OF BURLINGTON COUNTY BOARD OF CANVASSERS.

(*Filed December 20, 1918.*)

20

To the Honorable the Justices of the Supreme Court of Judicature of New Jersey:

In obedience to the command of this writ, directed to the Burlington County Board of Canvassers, ordering it to make return of all orders, proceedings and determinations declaring the result of an election lately held in the Township of Palmyra, Burlington County, New Jersey, under Chapter 2 of the Laws of 1918, to determine whether or not the sale of intoxicating liquor as beverage in said Township should be prohibited, and to have the same before the Justices of the Supreme Court, at Trenton, on the nineteenth day of December, instant, we do respectfully show:

30

	1st District.	*2d.*	*3d.*
Whole number of names on Registry List,	272	262	341

Whole number of names on Poll Book,	199	161	236
Whole number of ballots rejected,	1	3	3
"Shall the sale of intoxicating liquor be prohibited?"			
Yes,	129	36	139
No,	63	110	84

Total—Yes, 304.

Total—No, 257.

10 Total number of soldiers and sailors' ballots received which were designated as from Palmyra Township—Seven (7).

Local option soldiers and sailors' ballots—

Yes, ... 3

No, ... 4

Grand Total—Yes, 307; No, 261. Majority in favor of prohibiting the sale of intoxicating liquor, forty-six (46).

BURLINGTON COUNTY BOARD OF CANVASSERS,

20 [SEAL.] By HENRY H. SAVAGE,

Secretary.

Attest:

HARRY L. KNIGHT,

Clerk.

NEW JERSEY SUPREME COURT.

CHARLES H. KERN,
Prosecutor,
vs.
THE TOWNSHIP OF PALMYRA, IN THE COUNTY OF BURLINGTON, ALBERT N. STEWART, CLERK OF SAID TOWNSHIP, AND THE COUNTY BOARD OF CANVASSERS OF THE COUNTY OF BURLINGTON,
Respondents.

On Certiorari.

10

RULE STAYING RESULT OF ELECTION.

(Filed December 16, 1918.)

A writ of certiorari having been allowed in the above-entitled cause, to review a certain order, resolution, pro- 20 ceedings and determination made and given by the Township Committee of the Township of Palmyra, in the County of Burlington, declaring as sufficient a petition filed with the Clerk of said Township, under Chapter 2 of the Laws of 1918, for an election to determine whether or not the sale of intoxicating liquor as a beverage in said Township should be prohibited, and directing the Clerk of the County of Burlington to place on the ballot to be used at the general election in said Township the appropriate form of question, together with 30 the order, proceedings and determination declaring the result of said election; and application having been made by the prosecutor for an order staying the result of said election, and argument having been made by Harry Heher, Attorney for the Prosecutor, and A. J. Beckenbach, Attorney for the Respondent, the Township of Palmyra, and Albert N. Stewart, Clerk of said Township:

It is on the twelfth day of December, nineteen hundred and eighteen, ordered that until the further order of the Court in the premises, the result of the election held on November 5, 1918, in the Township of Palmyra, in the County of Burlington aforesaid, under Chapter 2 of the Laws of 1918, to determine whether the sale of intoxicating liquor as a beverage in the said Township of Palmyra should be prohibited, be and the same is hereby stayed.

10 Let the above rule be entered on the minutes.

On motion of

SAMUEL KALISCH,
J. S. C.

HARRY HEHER,
Attorney of Prosecutor.

NEW JERSEY SUPREME COURT.

20

CHARLES H. KERN,
Prosecutor,
vs.
TOWNSHIP OF PALMYRA, IN THE COUNTY OF BURLINGTON, ET AL.,
Defendants.

REQUEST FOR INTERVENTION.

30

(Filed January 22, 1919.)

In accordance with the statute, the undersigned hereby requests that V. CLAUDE PALMER and GEORGE S. HOBART be permitted to intervene in the above action on such terms as the court or judge may permit.

A. HARRY RUDDUCK.

STATE OF NEW JERSEY, }
COUNTY OF BURLINGTON, } *ss.*

A. Harry Rudduck, being duly sworn according to law, on his oath says that he is a taxpayer and resident of the Township of Palmyra, in the County of Burlington, and that he has signed the above Request for Intervention.

A. HARRY RUDDUCK.

Subscribed and sworn to at Mount Holly, N. J., this 13th day of January, 1919, before me. 10

GEORGE N. WIMER,
[SEAL.] *Notary Public.*

NEW JERSEY SUPREME COURT.

CHARLES H. KERN,
Prosecutor, 20
vs.
TOWNSHIP OF PALMYRA, IN THE COUNTY OF BURLINGTON, ET AL.,
Defendants.

ORDER PERMITTING INTERVENTION.

(*Filed January 22, 1919.*)

30

On application of A. Harry Rudduck, a taxpayer and resident of the Township of Palmyra, in the County of Burlington, ordered that said A. Harry Rudduck, by his attorneys, be permitted to intervene in the above action on behalf of the defendant municipality, and to assist in the defense of the same.

SAMUEL KALISCH,
J. S. C.

Rule entered in the above this 22d day of January, 1919, on motion of

GEO. S. HOBART,
Attorney of said Rudduck.

NEW JERSEY SUPREME COURT.

10

CHARLES H. KERN,
Prosecutor,
vs.
TOWNSHIP OF PALMYRA, IN THE COUNTY OF BURLINGTON, ET AL.,
Defendants.

RULE FOR DEPOSITIONS.

20

(*Filed January 22, 1919.*)

On application of A. Harry Rudduck, intervenor in the above case,

Ordered that the parties have leave to take affidavits on two days' notice.

SAMUEL KALISCH,
J. S. C.

Rule entered in the above this 22d day of January,

30 1919, on motion of

GEO. S. HOBART,
Attorney of said Rudduck.

NEW JERSEY SUPREME COURT.

CHARLES H. KERN,
Prosecutor,
vs.
THE TOWNSHIP OF PALMYRA, IN THE COUNTY OF BURLINGTON, ALBERT N. STEWART, CLERK OF SAID TOWNSHIP, AND THE COUNTY BOARD OF CANVASSERS OF THE COUNTY OF BURLINGTON,
Respondents.

On Writ of Certiorari.

10

TESTIMONY.

(*Filed February 7, 1919.*)

Testimony, etc., taken in the above stated cause, by consent, before me, Frederick W. Gnichtel, a Supreme Court Commissioner, this 23d day of January, 1919, at 2:30 o'clock in the afternoon, at my office, Rooms 512–513 Broad Street Bank Building, Trenton, N. J. 20

Appearances: HARRY HEHER, ESQ., for Prosecutor; V. CLAUDE PALMER, ESQ., for Respondents; ARNOLD J. BECKENBACH, ESQ., for Township of Palmyra.

It is stipulated and agreed by the attorneys for the respective parties that the following facts be considered in the determination of the issue raised in this cause, to have the same force and effect as if legally proved by competent witnesses, and in addition and supplemental to the evidence hereinafter taken in this cause: 30

1. That the Secretary of State of New Jersey did not, within sixty days prior to the general election held in the Township of Palmyra, in the County of Burlington, on November 5, 1918, or at any other time, ascertain either from the Adjutant General of New Jersey, or from the Adjutant General or other proper authority

of the United States, the names and post-office addresses of every qualified elector of New Jersey in active service in the military force of this State, or of the United States, or the names and post-office addresses of the qualified electors of the Township of Palmyra aforesaid, in such active service.

2. That the Secretary of State of New Jersey did not, at least twenty days prior to said general election, or at any other time, forward by mail or otherwise, to 10 each person in such active service qualified to vote in the said Township of Palmyra, a blank ballot, conveniently prepared, so that such person might vote for any candidate at such election, or on any question to be submitted to the voters at such election.

3. That the Secretary of State of New Jersey did not, at least twenty days prior to said general election, or at any other time, forward either to the County Clerk of Burlington County, or to the Township Clerk of the Township of Palmyra, the names and post-20 office addresses of the qualified electors in the military forces of this State, or of the United States, residing within the limits of the Township of Palmyra aforesaid.

4. That neither the Clerk of the County of Burlington, or the Clerk of the Township of Palmyra, forwarded to any of such qualified electors in the military service as aforesaid, residing within the limits of the Township of Palmyra aforesaid, by mail or otherwise, a printed or written list of the names of the candidates, whose names would appear on the ballots for such elec-30 tion, together with the names of the nominations or office for which such person was a candidate.

5. That the Secretary of State of New Jersey did not send, with or without a ballot, to the qualified electors of the Township of Palmyra aforesaid, in such active military service, either a printed copy of Chapter 150 of the Laws of 1918, or printed directions for voting and transmitting a ballot as required by said act, and did not send to each of said qualified electors two

envelopes, the outer one addressed to said Secretary of State, and prepared as directed by Section 6 of Chapter 150 of the Laws of 1918.

6. That neither the Secretary of State of New Jersey, nor the Clerk of the County of Burlington, or the Township Clerk of the Township of Palmyra aforesaid, did send, with or without a ballot, to the qualified electors of the Township of Palmyra aforesaid, in such active military service, a notice of the questions to be submitted to the voters of the Township of Palmyra aforesaid, 10
under Chapter 2 of the Laws of 1918.

7. That the Secretary of State of New Jersey did appoint and send agents, with ballots, to the camps or places containing military units, set forth in the annexed statement, and marked "Agent," who did mail ballots to the camps or places containing military units set forth in the annexed statement and marked "Mail," which ballots in bulk were addressed to the commanding officer of said camp or military unit for the purpose of distribution among the qualified electors of New Jersey 20
in such camps or military units.

8. That nothing whatever was done to carry out the provisions of Chapter 150, of the Laws of 1918, by either the Secretary of State of New Jersey, the Clerk of the County of Burlington or the Clerk of the Township of Palmyra, or any other authority, or by anyone else, except as herein set forth.

9. That on November 5, 1918, and for sixty days prior thereto, there were at least 196 male residents of the Township of Palmyra, in the County of Burlington 30
aforesaid, in the military service of the United States and absent from said Township of Palmyra; and that of this number at least 150 were qualified electors of said township, and entitled to vote at the general election held thereon on the day last above mentioned, and at least 67 were in camps loc in the United State

10. That the total registered vote of the Township of Palmyra at the general election of 1918 was 875, of which 596 ballots were cast, with an additional 7 bal-

lots rejected. That at the said election, held on November 5, 1918, in the Township of Palmyra, on the question submitted under Chapter 2 of the Laws of 1918, to determine whether or not the sale of intoxicating liquor as a beverage in said township should be prohibited, 304 ballots were cast in favor of prohibition in said township, and 257 ballots were cast against such prohibition, a majority in favor of prohibition of 47; that there were forwarded to the Secretary of State of
10 New Jersey, and by him transmitted to the Clerk of the County of Burlington, 7 ballots cast by electors of said township, in the military service of the United States, under the provisions of Chapter 150 of the Laws of 1918, of which three are recorded in favor of prohibition in said township, and four against such prohibition, a grand total in favor of prohibition, and 261 against such prohibition, and a net majority in favor of prohibition of 46.

20 *Albert N. Stewart,* being duly sworn according to law, on his oath testifies as follows:

Direct examination, by Mr. Palmer.

Q. You live at Palmyra, Burlington County, New Jersey, Mr. Stewart?

A. Yes.

Q. You are the township clerk of the Township of Palmyra?

A. I am.

Q. (Witness shown paper) I show you a notice pub-
30 lished in the Palmyra News, of a meeting called for September 24th, 1918, for the purpose of inspecting a petition for an election to determine whether or not the sale of intoxicating liquor as a beverage in the Township of Palmyra shall be prohibited, and I ask you if the notices you posted in the Township of Palmyra were exact copies of that notice as it appears in the newspaper?

A. Identical, yes, sir.

Q. That notice was posted by you on what date?

A. On September 18, 1918.

Q. That notice was posted in how many places in the Township of Palmyra?

A. Five public places.

Q. Did you also mail a copy of that notice, five days before the date of the meeting, to each of the members of the Township Committee of the Township of Palmyra?

A. I posted the five notices on the 18th, and mailed them in the post office the same day. 10

Q. To all three members?

A. Yes, to the three members.

Q. On what date was the petition for an election, as returned with this writ, filed with you?

A. On September 14, 1918.

Q. For what date did you call a meeting of the Township Committee?

A. September 24, 1918.

Q. On what date of the publication of the Palmyra Weekly News was this notice published? 20

A. Date of September 20th.

Q. Were you present at the meeting of the Township Committee on September 24, 1918, when this petition was considered by the Committee?

A. I was.

Q. Was Mr. Charles H. Kern present at that meeting?

A. Mr. Kern came in a little late, but before we adjourned. 30

Q. Was Mr. Kern there when the Township Committee was considering the petition as to its sufficiency?

A. To the best of my knowledge and belief that motion of Mr. Hill was made when Mr. Kern was present.

Q. You mean the motion as appears in your minutes of that meeting?

A. Yes, sir.

Q. Did Mr. Kern offer any objection as to the regularity of the petition, in any particular whatever?

A. No.

Q. Did he examine the petition?

A. Yes, sir.

Cross-examination, by Mr. Heher.

Q. Mr. Stewart are you sure this was filed with you on September 14th?

10 A. Yes.

Q. You didn't mark any filing date on it?

A. No; it was already on there; and not expecting any complications, I didn't pay any attention as to that.

Q. (Witness shown paper) Is this the filing date that you refer to? Is that your handwriting?

A. No, that is not my handwriting.

Q. Was this paper containing these words "Petition filed 9/14/18 with the Township Clerk"; was that attached to the petitions filed with you?

20 A: Yes.

Q. Was it on the 14th of September that they handed it to you?

A. It was the 14th of September—that was the last date that they handed it to me. It had been handed to me prior to that, the same petition, I think on the 12th I had it in my possession; he wanted to know if he could take it away again, and as I recall it now, I said to him that he would have a couple more days, and that is how the change is made on that date.

30 Q. Was this paper attached to the petition handed to you the first time?

A. Yes.

Q. With this date on it?

A. No, not the 14th the first time.

Q. Do you remember why it was handed back to them?

A. I don't remember whether it was because he wanted to get some more signatures, or what it was;

but he asked if he had time to take the petition away again, and I said "Yes, you have a couple of days more, the time limit." It was brought back, and we changed it to the 14th. That was the date it was filed with me finally.

Q. What do you mean by "time limit"?

A. The number of days between the filing of the petition and the meeting.

Q. Mr. Stewart, did you yourself post the notices referred to? 10

A. Yes, personally.

Q. In how many places?

A. Five.

Q. Are you sure as to the date you posted them?

A. Positively.

Q. What date was it?

A. The notice was posted on the 18th of September.

Q. In how many places?

A. Five.

Q. You did that in each instance yourself? 20

A. Yes.

Q. Did you have anyone else post any for you?

A. Nobody else.

Q. Your publication of the notice was in the Palmyra Weekly News issued on September 20th?

A. Yes.

Q. Is that a weekly newspaper?

A. Yes, published on Friday of each week.

Q. Have you any other newspapers published and circulating in the Township of Palmyra? 30

A. None published in Palmyra; there may be other papers circulating in the Township, but none published in Palmyra. There is one published, I think, in Riverton; but we don't advertise in any but the Palmyra News.

Q. Is that a weekly newspaper?

A. I think it comes out on Friday of each week.

Q. That paper would be issued on September 20th, too?

A. Yes.

Q. Issued on the same day of the week?

A. Yes.

Q. There are some daily newspapers in the county?

A. Yes, in the county.

Q. Will you name them?

A. I can't tell you just the exact names; Burlington Enterprise.

Q. That is a daily newspaper published and circulating in the County of Burlington?

10

A. That is the only one I know of.

Q. Are there any other weekly newspapers of the county circulating in Palmyra?

A. There are some Mount Holly papers, but I don't see them; the Mount Holly Herald and News.

Q. Isn't the Mounty Holly Mirror circulating there?

A. I can't answer; there may be some subscribers, but I don't see the papers.

Q. This petition, then, was given to you two or three days before the 14th?

20

A. To the best of my recollection, it was was brought to me two or three days before, yes, sir.

Q. And it was taken away for what purpose?

A. I don't know; Mr. Rudduck asked me if he had time, and I said yes, it gave us until the 14th, and that day he brought it back.

Q. You had a meeting of the Township Committee on the 24th?

A. Yes.

30

Q. Who was Mr. Rudduck?

A. One of the circulators of the petition.

Q. A. Harry Rudduck?

A. Yes.

Q. This newspaper, the Palmyra Weekly News, is issued on Friday of each week?

A. Yes, sir.

Q. These Mount Holly papers are issued on other days of the week?

A. I couldn't say what days they are published on.

Q. Don't they circulate in that community?

A. I don't believe there are many subscribers; I can't say there is any.

Q. This meeting held on the 24th of September—you say Mr. Kern came in there a short time before you adjourned?

A. Yes.

Q. What time did you adjourn?

A. I couldn't say. 10

Q. About when; how long did the meeting last?

A. I should judge until ten o'clock.

Q. Shortly before ten?

A. Yes, or shortly after; not much later.

Q. Are you sure it was that night?

A. Yes.

Q. Did you make a note of it?

A. As it is before you there, on the minutes.

Q. There is nothing in these minutes to show he was present.

A. No, nothing to show Mr. Kern was present. I mentioned the representatives of the saloon keepers present. 20

Q. You are not sure he was there when Mr. Hill put this motion?

A. Well, I wouldn't like to say that I am; to the best of my knowledge and belief, he was present when the motion was made.

Q. That is only a surmise on your part?

A. To the best of my knowledge and belief, he was present when the motion was made. 30

Q. You talk about the best of your knowledge; you either know or you don't know; which is it?

A. The petition was examined by Mr. Kern after he came in, by direction of the Township Chairman, and I think Mr. Kern was present when the motion was made.

Q. You think; you don't know?

A. Well, no.

Re-direct examination, by Mr. Palmer.

Q. You say that Mr. Kern was asked by the Chairman of the Committee to examine the petition?

A. Yes.

Q. Did he examine it?

A. Yes, sir.

Q. Did he make any objection to it?

A. No.

Q. Did he say anything about it at all?

10 A. No, didn't make any comments on it.

Q. That was before the meeting had actually adjourned?

A. Yes.

Re-cross examination, by Mr. Heher.

Q. You don't mean to say the Chairman asked him to examine the petition?

A. On account of his coming in late, he said, "Mr. Kern, the rest of the people have examined the peti-
20 tion; if you wish to look at it," and he threw it on the pool table.

Q. That was all that was said?

A. Yes; he took it and examined it.

Q. Were the three members of the Township Committee there then?

A. Yes.

Q. Sure of that?

A. Yes.

Q. Did Mr. Kern leave before the meeting ad-
30 journed?

A. I can't say.

Q. Was this motion by Mr. Hill made before or after he said to Mr. Kern "There is the petition, examine it"?

A. I can't say.

John M. Davies, being duly sworn according to law, on his oath testifies as follows:

Direct examination, by Mr. Palmer.

Q. Where do you live, Mr. Davies?

A. Palmyra.

Q. Are you a member of the Township Committee of the Township of Palmyra?

A. Yes.

Q. Were you present at a special meeting of the Township Committee held on September 24, 1918, for the purpose of inspecting the petition to determine whether the sale of intoxicating liquor as a beverage in said township should be prohibited? 10

A. I was.

Q. Was Mr. Kern there that evening?

A. Yes.

Q. Did Mr. Kern examine the petition?

A. He did.

Q. Was he there before the motion was passed by the Township Committee?

A. He was there before it was passed.

Q. He was?

A. Yes.

Q. Did Mr. Kern offer any objections to the petition? 20

A. No.

Cross-examination, by Mr. Heher.

Q. How long had you been in session that evening?

A. Two hours, I guess.

Q. Mr. Kern came in at the very last of it?

A. Not the very last.

Q. Mr. Stewart says about ten minutes before you adjourned; I am asking you about when, as to time; ten minutes before? 30

A. Fully ten minutes before we adjourned.

Q. Did you say he was there when Mr. Hill made the motion?

A. I am like Mr. Stewart on that; I can't say positively. He was there, I think, when the motion was made.

Q. Mr. Kern didn't stay long after that?

A. I couldn't say how long he stayed.

Q. Did you ask him to examine the petition, or did he examine it himself?

A. I asked him to examine it.

Q. You said, "There is the petition, look it over"; nothing else said?

A. I said, "Charlie, here is the petition; examine it yourself."

10 Q. Were all the members of the committee present at that moment?

A. Yes.

Re-direct examination, by Mr. Palmer.

Q. Was Mr. John Blum present at that meeting of September 24th?

A. Yes.

Q. Was he present during the entire meeting?

A. No, Mr. Blum went out early, I think I can safely say, before the motion was really put; it was 20 held up on account of a disturbance, and we had it re-read, and we adjourned immediately after it was passed.

Q. Now, Mr. Kern was present at the time of the adjournment of the meeting?

A. I couldn't say.

Q. Was Mr. Blum present?

A. No.

Q. Did Mr. Blum offer any objection to this petition?

A. No, sir.

30 *Albert N. Stewart,* being recalled, testifies as follows: Direct examination, by Mr. Palmer.

Q. Mr. Stewart, was Mr. John Blum present at this meeting of September 24th?

A. Yes.

Q. Did he examine the petition?

A. Yes.

Q. Did he offer any objection to it?

A. No.

Cross-examination, by Mr. Heher.

Q. Mr. Stewart, was there any testimony taken at the meeting of the Township Committee on September 24th as to the number of legal ballots cast at the last preceding general election?

A. No.

Q. Was there any testimony whatever taken by the Township Committee as to the number of legal votes?

A. It was left with the Clerk to examine as to the number of signers on there, and as to the legality of the petition; and the Township Committee trusted to the Clerk to examine the petition. 10

Q. And the Township Committee took no evidence, and made no inspection of its own?

A. No, not respecting the number of signers; I took the evidence myself.

Q. Did you post the notice of the general election?

A. Yes.

Q. In how many places?

A. Five public places. 20

Q. How long before the election were they posted?

A. The date is on my affidavit there; October 17th, to the best of my knowledge.

Q. Did these notices specify that at that election, to be held November 5, 1918, this question under Chapter 2 of the Laws of 1918 would be submitted?

A. That was the notice published along with the election notices.

It is hereby agreed between counsel that the following is a true copy of the notices posted, as testified to by the Township Clerk of the Township of Palmyra, and published in the Palmyra Weekly News: 30

"NOTICE."

Notice is hereby given that a meeting of the Township Committee of the Township of Palmyra will be held on Tuesday evening, Septem-

ber 24th, 1918, at eight o'clock, at the rooms of the Independence Fire Company, for the purpose of inspecting the petition for an election, to determine whether or not the sale of intoxicating liquor as a beverage in the Township of Palmyra shall be prohibited, and hear objections on same.

Dated, September 18, 1918.

ALBERT N. STEWART,
Township Clerk.

10

Charles H. Kern, being duly sworn according to law, on his oath testifies as follows:

Direct examination, by Mr. Heher.

Q. Mr. Kern, you are the prosecutor in this cause?

A. Yes.

Q. You reside in the Township of Palmyra?

A. Yes.

Q. And you own and conduct a hotel and tavern in
20 that township?

A. Yes.

Q. How long have you been there?

A. I have been there 19 years the 10th of this coming month, February.

Q. You have been continuously in the hotel business, and had an inn and tavern keeper's license?

A. Yes.

Q. Did you see in the Palmyra Weekly News the notice of a meeting to be held on the 24th of September,
30 1918, of the Township Committee?

A. No, sir, I didn't see the notice.

Q. Did you see any of the posted notices?

A. No.

Q. Did you go to any of the meetings of the Township Committee?

A. When I went up to their place there I thought it was just an observation—

Mr. Palmer—Objected to.

A. Yes, I was there.

Q. Do you remember the date?

A. No, I do not.

Q. Will you tell us why you went there?

A. I was told by somebody that the petition was there, so that anyone could look at it; of course on the strength of that I went there to look at this petition.

Q. Someone told you the petition was there, and could be examined?

A. Yes.

Q. And you went immediately up to the rooms? 10

A. Yes.

Q. Did you know there was to be any meeting there that evening for the purpose of passing on this petition?

A. No.

Q. How long were you in the room?

A. Possibly about half an hour.

Q. Did Mr. Davies ask you to examine the petition?

A. Mr. Davies put it on the pool table and said, "Look at that." 20

Q. Did you look at it?

A. Yes.

Q. Was there anything else said to you?

A. No.

Q. Anyone tell you that it was a meeting to pass upon this petition?

A. No.

Q. Did you know a meeting was being held to pass on the legality of that petition?

A. No. 30

Q. Did you hear Mr. Hill, or any other member of the Township Committee, make a motion that the petition be declared sufficient, and that the question be submitted to the voters at the next general election?

A. No.

Q. Did you leave before the meeting adjourned?

A. I certainly did; I was only there about half an hour, as I said before.

Q. Did you leave the meeting after examining the petition, or did you wait?

A. Just a short time.

Q. Was Mr. Blum there?

A. He had been there previous; he was there about two minutes while I was there; two or five minutes; he left shortly after I got there; it might have been five minutes.

Q. Was there any announcement made by anyone
10 that the meeting was for the purpose of passing upon the legality of this petition?

A. No.

Q. Did you hear anyone make that announcement?

A. No.

Q. Did you know they were meeting there for that purpose?

A. No; I didn't know there was going to be a meeting.

20 Cross-examination, by Mr. Palmer.

Q. You knew there was to be a meeting of the Township Committee that night, didn't you?

A. No.

Q. Why did you go there?

A. To examine the petition; I was told it was there for anybody to examine.

Q. You knew about that before that day, didn't you?

A. No.

Q. It wasn't just that evening you discovered that?

30 A. I knew that the petition could be examined there by anyone.

Q. How long before the meeting did you know that? It wasn't the day of the meeting that you first knew of it?

A. I don't suppose it was.

Q. You knew, in other words, for at least one or two days prior to the date of this meeting that such a meeting was to be held?

A. I didn't know there was going to be a meeting.

Q. You knew it was to be considered at that time, didn't you?

A. I understood this petition was there.

Q. What do you mean by "there"?

A. At the Fire House.

Q. That is the regular meeting place of the Township Committee?

A. Yes.

Q. The Township Committee are not there all the time; only when they are holding meetings; you know they are not there all the time, don't you? 10

A. No.

Q. And they would not be there unless they were holding a meeting, would they? So that you knew they were holding a meeting, didn't you?

A. No.

Q. Why did you go there?

A. To see the petition.

Q. Did you suppose the petition was just lying there in the room for anybody to go and look at it whenever they wanted to? You knew the Township Committee would be there, didn't you? 20

A. No, not holding a meeting.

Q. You knew they were going to be there that night?

A. I couldn't say I knew the committee was going to be there. I didn't know they were going to hold a meeting there.

Q. You found all the Township Committee there?

A. Yes.

Q. The Clerk was there?

A. Yes. 30

Q. When you went in, they handed you the petition?

A. Yes.

Q. And told you to examine it?

A. Yes.

Q. You were there for half an hour?

A. All told.

Q. What took place during that half hour? Any discussion by the members of the Township Committee as to the matters contained in that petition?

A. Oh, they had it between themselves, pro and con.

Q. About what?

A. I really don't know.

Q. You were there for half an hour?

A. Yes.

Q. You heard what was said?

A. Yes.

Q. They were discussing this local option subject?

A. Yes.

10 Q. This petition?

A. Yes.

Q. Whether it was sufficient or not?

A. Yes.

Q. The meeting was in session when you were there?

A. Yes.

Q. You left before it adjourned?

A. Yes.

Q. And while you were there they were discussing this petition for an election?

20 A. Yes.

Q. You knew what the subject of their discussion was?

A. Not all of it.

Q. You knew that was the subject of it, didn't you?

A. Yes, when I got there.

Q. You heard them talking about it?

A. Yes.

Q. You don't remember what was said?

A. No.

30 Q. You knew that this matter of an election was under consideration, and being discussed by them?

A. At that time.

Q. While you were there?

A. Yes.

Re-direct examination, by Mr. Heher.

Q. Did you hear anything said about an election that night?

A. No, not about an election.

Q. Didn't you hear anything said about an election that night?

A. No, not to my knowledge.

Q. What did you mean, then, when you said in your answer to Mr. Palmer's question, that you did?

A. Oh, they were speaking of elections, understand, but I didn't seem to get interested enough in the matter as to know whether it was an election on this matter or not. 10

Q. Did you know when you were there, that night,, that they were then holding a meeting for the purpose of passing upon the legality or sufficiency of this petition? And to determine whether or not an election should be ordered?

A. Not when I went there.

Q. After you got there?

A. Yes, sir.

Q. What was said by anyone there that led you to believe that that was the subject of the meeting? 20

A. Simply because, when I saw the petition you know, and they went on with their business, I knew it was about this matter, about having an election for it.

Q. Did you know they were holding a meeting for the purpose of passing upon the sufficiency of that petition, that night?

A. After I got there, yes, sir.

Q. Were you there when they passed the resolution?

A. No, I don't think I was.

30

Joseph Schaeffer, being duly sworn, according to law, on his oath testifies as follows:

Direct examination, by Mr. Heher.

Q. You are a resident of Palmyra?

A. Yes.

Q. How long have you been a resident of Palmyra?

A. About twenty years.

Q. You have a license to sell intoxicating liquors in that township?

A. Yes.

Q. How long have you held such a license?

A. About twenty years.

Q. When does it expire?

A. The one I now hold expires in May next.

Q. You are a voter of that township, and voted at the last general election?

A. Yes.

Q. And voted on the question as to whether or not 10 the sale of intoxicating liquors as a beverage should be prohibited in the Township of Palmyra?

A. Yes, sir.

Q. Did you know that a meeting was to be held by the Township Committee of the Township of Palmyra on the night of September 24th?

Mr. Palmer—Objected to for the reason that this man is not a party to this proceeding, and even though he may have a license in Palmyra Township, what knowledge he had or did not 20 have of this proceeding is entirely immaterial and incompetent, so far as this issue is concerned.

Mr. Heher—I take this opportunity, Mr. Palmer, to say that I intend on Saturday morning to apply to the Supreme Court for leave to have Mr. Schaeffer intervene as one of the prosecutors in this proceeding; and it is partly for that reason that I am taking his testimony.

A. No, sir.

30 Q. Did you see in the issue of the Palmyra Weekly News of September 20th, 1918, a notice that a meeting would be held by the Township Committee on the night of September 24th, to pass upon the legality of the petition filed under Chapter 2 of the Laws of 1918?

Mr. Palmer—Objected to for the same reason given before; and it is understood that my objection shall apply to all this line of questions.

A. No, sir.

Q. Did you attend the meeting of the committee on that night?

A. No.

Q. Did you know at any time prior to that meeting that it was to be held for the purpose of passing upon the legality of the petition filed with the Clerk, under Chapter 2 of the Laws of 1918?

A. No.

Q. Did you see any of the notices of this meeting posted in that township? To be held on the 24th of September? 10

A. No.

Cross-examination, by Mr. Palmer.

Q. Did you know that a petition for the local option election was being circulated in Palmyra Township?

A. No.

Q. You didn't know that? Where is your place of business?

A. Right on Cinnaminson Avenue. 20

Q. Wasn't the matter ever discussed by you with anyone else—the matter of this local option election?

A. Oh, people were going around talking about it, but it didn't bother me.

Q. It didn't bother you; you thought that your license was secure, regardless of that?

A. No.

Q. Why didn't it bother you then?

A. I just said, "If it comes, it comes, that is all."

Q. You were not sufficiently interested to pay any attention to it? Not interested in your license enough to pay any attention to it? 30

A. I thought "Well, if I lose it, I lose it, and that's all there is to it."

Q. You were not sufficiently interested in your place to pay any attention to the matter?

A. Well, I had an interest in my place of course.

Q. But you were not sufficiently interested in your place as to pay any attention as to whether an election was going to be held or not?

A. I didn't go to the township meeting, or anything else; I wasn't going to pay any attention to it.

Q. And prior to the meeting you were not going to pay any attention to it; if the petition went through, all right?

A. I told the people we must knock it out.

10 Q. Yes; then you knew this petition was being circulated? For the purpose of an election?

A. I didn't know it; I heard the people talking about it.

Q. You knew there was to be an election?

A. Yes.

Q. You knew when it was to be held?

A. Yes, regular election day.

Q. When did you know that?

A. On the day of election.

20 Q. You didn't know it until the 4th day of November?

A. I knew it was going to be held when I went there to the polls, November 4th.

Q. Do you mean to say that you didn't know before the 4th day of November that there was to be an election on that question?

A. I knowed a few days before, yes.

Q. You knew it some time before, didn't you?

A. A few days.

30 Q. How long before; a month?

A. It might have been a week or two.

Q. This petition was circulating in August, wasn't it?

A. I don't know.

Q. You knew it was before the Township Committee in September?

A. I don't know; I didn't pay that much attention to it.

Q. You knew about it?

A. Yes, I knew about it.

Q. You knew an election was to be held; and you knew the Township Committee had to order that election, didn't you?

A. I didn't know anything about what they had to order; I knew they were going to vote on election day.

Q. You did know about it before the Township Committee held this meeting in September, didn't you?

A. I didn't know when they had the meeting.

Q. You knew it before the Township Committee had the meeting? 10

A. I couldn't tell you that.

Q. You knew it was being discussed; talked about in your bar-room, wasn't it?

A. We don't have no bar-room.

Q. You don't have any bar-room? What do you have?

A. Nothing but a bottling place.

Q. Oh, you have a wholesale license then?

A. Yes. 20

Q. What about your inn and tavern keeper's license?

A. I ain't got no inn or tavern keeper's license.

Q. You said so on your direct testimony, didn't you?

A. No, I didn't say so.

Q. You have a wholesale liquor license?

A. Yes.

Re-direct examination, by Mr. Heher.

Q. You say you knew an election was to be held on November 5th?

A. Yes, a general election. 30

Q. You learned that some time before?

A. A week or two, maybe.

Q. Did you know any time before September 24, 1918, that the Township Committee was to meet to pass upon this petition, as to its legality or sufficiency?

A. No, sir.

Q. When did you learn of that?

A. I can't tell you.

Q. Afterward?

A. Yes.

Q. How long?

A. Two or three days afterward.

Q. That it had been held?

A. Had been held, or something.

Re-cross examination, by Mr. Palmer.

Q. If you learned it two or three days after the meet-
10 ing, did you make any effort to find out what had taken place?

A. No.

Q. Just let it slide?

A. I told the people we would have to vote against it.

Q. But so far as making any effort to examine the legality of this proceeding, you made no effort whatever?

A. No.

20 By Mr. Heher—It is agreed that the notice given today of the application on Saturday, before the Supreme Court, to have Mr. Schaeffer intervene as one of the prosecutors of this writ; or in the event that that motion is not granted, that a writ be allowed in his name, to review the order and proceedings on the writ secured by Mr. Kern, and that I am to rely upon the testimony given by Mr. Schaeffer.

I hereby certify that the foregoing testimony was taken by C. V. Wharton, a competent person selected by me to take stenographically and reproduce in type-
30 writing the evidence given in the above-stated cause; that said testimony was taken in my immediate presence and hearing and at the examination, and I believe accurately states the said evidence; that said testimony was taken by consent of counsel, and the signatures of the witnesses thereto waived.

F. W. Gnichtel,
Supreme Court Commissioner.

The following is a list of the Military and Naval Camps in this country visited by agents, etc., appointed by the Secretary of State, and also all the Camps covered by mail:

Camp	
Artillery Training Camp, Louisville, Ky.,	Agent.
Princeton Aviation School, Princeton, N. J.,	Agent.
Recruiting Camp, Syracuse, N. Y.,	Agent.
State College, Pa.,	Agent.
Brown University, Providence, R. I.,	Mail.
Ft. Thomas, Kentucky,	Agent.
Camp Sheridan, Montgomery, Ala.,	Agent.
Lafayette College, Easton, Pa.,	Agent.
Camp Forest, Lytle, Ga.,	Mail.
University of Pennsylvania, Philadelphia, Pa.,	Agent.
Rutgers College, New Brunswick, N. J.,	Mail.
Camp Dick, Texas,	Agent.
Stevens Institute, Hoboken, N. J.	Agent.
Lehigh University, Bethlehem, Pa.,	Mail.
League Island, Philadelphia, Pa.,	Mail.
Dickinson College, Carlisle, Pa.,	Agent.
New London, Conn.,	Mail.
Drexel Institute, Philadelphia, Pa.,	Agent.
Fort Slocum, N. Y.,	Agent.
Camp Taylor, Louisville, Ky.,	Agent.

	Ft. Ethan Allen, Vermont,	Mail.
	Camp Dix,	
	Wrightstown, N. J.,	Agents.
	Marine Corps Training Station,	
	Quantico, Va.,	Mail.
	Marine Corps Training Station,	
	Fort Royal, S. C.,	Mail.
	Fort Hamilton, N. J.,	Mail.
	Great Lakes Training Station,	
10	Great Lakes, Ill.,	Mail.
	Camp Jackson,	
	Columbia, S. C.,	Agent.
	Camp Kearny, Calif.,	Mail.
	Navy Training Station,	
	Charleston, S. C.,	Mail.
	Navy Training Station,	
	Norfolk, Va.,	Mail.
	Navy Training Station,	
	Hampton Roads, Va.,	Mail.
20	Camp Devens,	
	Ayer, Mass.,	Agent.
	Reed Hospital,	
	Washington, D. C.,	Mail.
	Camp Gordon,	
	Atlanta, Ga.,	Agent.
	Naval Station,	
	Portsmouth, N. H.,	Mail.
	Camp Johnston,	
	Jacksonville, Fla.,	Agent.
30	Naval Station,	
	Newport, R. I.,	Agent.
	Camp Upton,	
	Yaphank, L. I.,	Agent.
	Fort Leavenworth, Kansas,	Mail.
	Camp Hancock,	
	Augusta, Ga.,	Mail.
	Camp Huston, Texas,	Agent.
	Camp Harrison,	
	Indianapolis, Ind.,	Mail.

Kelley Field, Texas,	Agent.
Camp Meade,	
Annapolis, Md.,	Agent.
Camp Funston,	
Fort Riley, Kansas,	Mail.
Camp Lewis,	
American Lake, Washington,	Mail.
Camp Lee,	
Petersburg, Va.,	Agent.
Washington Barracks,	Mail. 10
Fort Howard, Maryland,	Mail.
Fort Meyer, Virginia,	Mail.
Governor's Island, New York,	Mail.
Fort Jay, New York,	Mail.
Camp Crane,	
Allentown, Pa.,	Mail.
Camp Vail,	
Little Silver, N. J.,	Agent.
Camp Raritan,	
Bonhamton, N. J.,	Agent. 20
Wissahickon Barracks, New Jersey,	Agent.
Port Newark,	Agent.
Camp Merritt,	
Tenafly, N. J.,	Agent.
Camp Greenleaf, Georgia,	Agent.
Camp McArthur,	
Waco, Texas,	Mail.
Park Aviation Field,	
Memphis, Tenn.,	Mail.
Fort Washington, Maryland,	Mail. 30
Camp Oglethorpe, Georgia,	Agent.
Camp Greene,	
Charlotte, N. C.,	Agent.
Photo School,	
Rochester, N. Y.,	Mail.
Balloon School,	
Fort Omaha, Nebraska,	Mail.
Camp Wadsworth,	
Spartansburg, S. C.,	Agent.

Camp	Service
Balloon School,	
Macon, Ga.,	Mail.
University of Illinois,	
Urbana, Ill.,	Mail.
State University of Texas,	
Austin, Texas,	Mail.
State University of Ohio,	
Columbus, Ohio,	Mail.
Massachusetts School of Technology,	
Boston, Mass.,	Mail.
Georgia School of Technology,	
Atlanta, Ga.,	Mail.
Fort Wood,	
Bedloe Island, N. Y.,	Mail.
Aviation School,	
Rantoul, Ill.,	Mail.
Fort Monroe, Virginia,	Mail.
Camp Custer,	
Battle Creek, Mich.,	Mail.
Signal Corps,	
College of New York City, N. Y.,	Mail.
Camp Hill,	
Newport News, Va.,	Mail.
Ordnance Department,	
Washington, D. C.,	Mail.
Camp Humphreys,	
Acotink, Va.,	Agent.
Camp Lewis,	
American Lake, Washington,	Mail.
Pelham Bay, New York,	Agent.
Fort Mott, New Jersey,	Agent.
Camp McClellan,	
Anniston, Ala.,	Agent.
Camp Sherman,	
Chillicothe, Ohio,	Mail.
Camp Taylor,	
Louisville, Ky.,	Mail.
Camp Grant,	
Rockford, Ill.,	Mail.

Camp	
Camp Pike, Little Rock, Ark.,	Mail.
Camp Dodge, Des Moines, Iowa,	Mail.
Camp Travis, Houston, Texas,	Agent.
Camp Sevier, Greenville, S. C.,	Mail.
Camp Wheeler, Macon, Ga.,	Mail.
Camp Logan, Houston, Texas,	Agent.
Camp Cody, Deming, New Mexico,	Mail.
Camp Doniphan, Fort Sill, Okla.,	Mail.
Camp Bowie, Fort Worth, Texas,	Agent.
Camp Shelby, Hattiesburg, Miss.,	Mail.
Camp Beauregard, Alexandria, La.,	Mail.
Camp Fremont, Palo Alto, Calif.,	Mail.
Fort Moultrie, Charleston, S. C.,	Mail.
Picatinny Arsenal, Dover, N. J.,	Mail.
Camp Meigs, Washington, D. C.,	Mails.
Flying Schools, Mineola, L. I.,	Mail.
Columbia University, New York City,	Mail.
Fort Wadsworth, Staten Island, N. Y.,	Mail.
Camp Perry, Ohio,	Mail.
Fort du Pont, Delaware,	Agent.

Soldiers' (or Sailors') Vote. Instructions for Voting.

The ballot must be prepared by the person intending to vote the same and should be placed in the inner envelope (plain), which envelope shall then be sealed and placed in the outer envelope marked "Secretary of State, Trenton, N. J." The voter must write upon the back of said outer envelope, in the space left therefor, the name of the military organization to which he be-
10 longs, and his home address at which he is entitled to vote, giving street number, municipality, and county, and also state thereon the date of the preparation of the ballot, beneath which statement he shall sign his name. This envelope must then be deposited with the officer designated by the Commanding Officer of the force with which such person is operating, to receive such ballots. Such officer so designated aforesaid, shall endorse upon said envelope his name and rank and the time when such ballot was received and such envelope
20 shall, with other like envelopes which shall have been deposited with such officer, be forwarded by him to the Secretary of State, Trenton, N. J.

In preparing the ballot, the voter may use a lead pencil, ink or pasters and will indicate his choice by making an × or + at the left of the name of the candidate for whom he desires to vote. It is impossible for the Secretary of State to furnish the names of candidates for municipal offices, but a blank space for this purpose has been reserved upon the ballot. If the voter
30 has any information which will give him the names of the candidates for municipal offices, he may indicate his choice by writing the title of the office and the candidate therefor in the space reserved for this purpose. Any voter resident of a municipality which is to vote upon the Local Option question may register his vote upon said question by marking an × in the space provided therefor at the foot of the ballot.

Thomas F. Martin,
Secretary of State.

The following is a List of Candidates for United States Senate, Members of Congress, State Senate, General Assembly and County Offices:

BURLINGTON COUNTY.

United States Senator (Vote for One)
(To fill vacancy caused by death of William Hughes)

- ☐ DAVID BAIRD — Republican.
- ☐ GRAFTON E. DAY — National Prohibition. 10
- ☐ CHARLES O'CONNOR HENNESSY — Democrat.

United States Senator (Vote for One)
(Full term beginning March 4, 1919)

- ☐ GRAFTON E. DAY — National Prohibition.
- ☐ WALTER E. EDGE — Republican.
- ☐ GEORGE M. LAMONTE — Democrat.
- ☐ JAMES M. REILLY — Socialist.
- ☐ WILLIAM J. WALLACE — Single Tax Party. 20

Candidates for Congress (Vote for One)

- ☐ ISAAC BACHARACH — Republican.
- ☐ JOHN T. FRENCH — Democrat.
- ☐ LEVI B. SHARP — Prohibition.

State Senate (Vote for One)

- ☐ HAROLD B. WELLS — Republican.
- ☐ JAMES J. CARR — Socialist.
- ☐ CHARLES H. ELLIS — National Prohibition. 30

Members of Assembly (Vote for One)

- ☐ EMMOR ROBERTS — Republican.
- ☐ RALPH W. HAINES — Democrat.
- ☐ ALFRED COX — Socialist.
- ☐ SAMUEL G. SHAW — National Prohibition.

Coroner (Vote for Two)

☐ GEORGE J. LECONEY Republican.
☐ ISAAC J. CLIVER Republican.
☐ W. O. THORNTON Socialist.

"Shall the sale of intoxicating liquor as a beverage in.................... in the County of............................ be prohibited?"	YES	
	No	

10

INSTRUCTIONS TO VOTERS.

To vote in favor of the prohibition of the sale of intoxicating liquor as a beverage make an X mark in the square at the right of and opposite the word "Yes."

To vote against the prohibition of the sale of intoxicating liquor as a beverage make an X mark in the square at the right of and opposite the word "No."

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STATE OF NEW JERSEY,
DEPARTMENT OF STATE.

The following municipalities of this State have given notice of intention to vote upon the Local Option question:

Atlantic County

Somers' Point
Absecon City
30 Hammonton

Bergen County

Allendale Borough
East Rutherford Borough
Franklin Township
Hillsdale Township
Hohokus Borough
New Barbadoes Township
Ramsey Borough
Ridgewood Township
Riverside Borough
Westwood Borough
Rutherford Borough

Burlington County

Burlington City
Evesham Township
Florence Township
Northampton Township
Palmyra Township

Camden County

Camden City
Merchantville Borough
Clementon Township
Pensauken Township
Waterford Township
Collingswood

Cape May County

Upper Township

Cumberland County

Greenwich Township

Essex County

Belleville Township

Hunterdon County

Readington Township
Alexandria Township
West Amwell Township
Union Township
Clinton Township
Delaware Township
Raritan Township
Stockton Borough
High Bridge Borough
Califon Borough

Mercer County

Hopewell Borough
Hightstown Borough
Princeton Borough
Hamilton Township
Washington Township
Ewing Township
Trenton, City of

Middlesex County

Borough of Milltown
Township of E. Brunswick

Monmouth County

Eatontown Township
Millstone Township
Howell Township

Morris County

Township of Morristown
Township of Hanover
Township of Chester
Township of Washington
Borough of Butler
Borough of Madison
Borough of Netcong

Passaic County

Borough of Bloomingdale

Salem County

Township of Pittsgrove

Somerset County

Bedminster Township
Bernards Township
North Plainfield Township
Hillsborough Township
Branchburg Township

Sussex County

Borough of Andover
Borough of Branchville
Borough of Ogdensburg
Borough of Stanhope
Borough of Sussex
Township of Fredon
Township of Green
Township of Lafayette
Township of Montague
Township of Sandyston
Township of Stillwater
Township of Wantage
Township of Vernon
Town of Newton

Union County

City of Summit

Warren County

Phillipsburg (Town)
Washington (Borough)
Hackettstown, Town of
Mansfield, Township of
White, Township of
Allamuchy Township

THOMAS F. MARTIN,
Secretary of State.

October 1, 1918.

NEW JERSEY SUPREME COURT.

CHARLES H. KERN, *Prosecutor*, *vs.* THE TOWNSHIP OF PALMYRA, IN THE COUNTY OF BURLINGTON, ET ALS., *Respondents.*	On Certiorari.

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REASONS.

(*Filed December 30, 1918.*)

The said Prosecutor, by Harry Heher, his attorney, comes and prays that the proceedings taken and order, resolution or determination made by the Township Committee of the Township of Palmyra, in the County of Burlington, declaring as sufficient the petition filed with the Clerk of said Township, under Chapter 2 of the Laws of 1918, for an election under the provisions of said act, and directing the Clerk of the County of Burlington to place on the ballot to be used at the general election of 1918 in said Township, the appropriate form of question, together with the proceedings and determination of the County Board of Canvassers of the County of Burlington, declaring the result of said election, may be set aside, reversed and for nothing holden, for the following reasons:

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1. Because Chapter 2 of the Laws of 1918, approved January 29, 1918, under which the said proceedings were had, and the said order or resolution made and election had, is unconstitutional and void, in that it violates the provisions of the Constitution of New Jersey which vests legislative power in a Senate and General Assembly.

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2. Because the aforesaid act of the Legislature is unconstitutional and void, in that it attempts to confer upon a minority of the legal voters in the municipalities

to which it applies the right or power of calling a special election for the purpose of determining whether or not the sale of intoxicating liquor as a beverage shall be prohibited in said municipalities.

3 Because the aforesaid act of the Legislature is unconstitutional and void, in that it attempts to confer upon the governing bodies of municipalities to which it applies the right or power of calling a special election for the aforesaid purpose, and fixing a time therefor
10 upon the petition of a minority of the legal voters of such municipality.

4. Because the aforesaid act of the Legislature is unconstitutional and void, in that it is violative of the provisions of the Constitution of this State which forbids the passage by the Legislature of any local or special law regulating the internal affairs of towns and counties.

5. Because the aforesaid act of the Legislature is unconstitutional and void, in that it unlawfully provides
20 that the terms of said act shall not apply to particular municipalities therein referred to.

6. Because the aforesaid act of the Legislature is unconstitutional and void, in that it violates the Fourteenth Amendment of the Constitution of the United States, prohibiting any State from denying to any person within its jurisdiction the equal protection of the laws, in granting to the petitioners, where the action of the governmental body is adverse to the petition, the right to a summary review of the action of the said
30 governing body by the Supreme Court, or a Justice thereof, and denies to the opponents of the petition such right of review, where the action taken is in favor of the petition.

7. Because the aforesaid act is unconstitutional and void, in that the objects of the act are not expressed in the title thereof.

8. Because the aforesaid act is in divers other respects unconstitutional and void.

9. Because the Township Committee of the said Township of Palmyra, in the County of Burlington, lacked jurisdiction to hear the application and to determine the legality of said petition, and to make or adopt the aforesaid order or resolution declaring the petition sufficient and directing the placing of the appropriate form of question on the ballot, for the reason that a certified copy of the written notice setting a time and place for the meeting of said Township Committee to hear said application and determine the legality of the 10 petition, prepared by the Township Clerk, was not published at least five days before the date fixed for the aforesaid meeting of said Township Committee.

10. Because the proceedings taken by the said Township Committee of the Township of Palmyra upon the said petition, and the election held in said Township by virtue thereof, were without authority in law, and null and void and of no effect, for the reason that a certified copy of the said written notice setting a time and place for the meeting of the Township Committee 20 to hear the application and determine the legality of said petition, was not published as required by the act at least five days before the date fixed for the aforesaid meeting of the Township Committee.

11. Because the said Township Committee of the Township of Palmyra lacked jurisdiction to hear the application and to determine the legality of the said petition for election, and to make or adopt the aforesaid order or resolution declaring the petition sufficient, and directing the placing of the appropriate form of 30 question on the ballot, for the reason that certified copies of the written notice setting a time and place for the meeting of said Township Committee, to hear the application and determine the legality of said petition, were not posted, at least five days before the date fixed for said meeting, in not less than five conspicuous public places in the Township of Palmyra.

12. Because the Township Committee of the said Township of Palmyra lacked jurisdiction to hear the

application and to determine the legality of the said petition, and to make or adopt the aforesaid order or resolution declaring the petition sufficient, and directing the placing of the appropriate form of question upon the ballot, for the reason that the notice given by the Clerk of said Township, fixing a time and place for the meeting of the Township Committee, to hear the application and determine the legality of said petition, did not specify that a petition had been filed under the pro-
10 visions of Chapter 2 of the Laws of 1918, or the act under which the petition was filed and the proceedings to be had.

13. Because the proceedings taken by the said Township Committee of the Township of Palmyra upon the said petition, and the election held in said Township by virtue thereof, were without authority in law, and null and void and of no effect, for the reasons hereinbefore set forth in the eleventh and twelfth paragraphs.

20 14. Because the said Township Committee lacked jurisdiction to make or adopt the aforesaid order or resolution declaring the petition sufficient and directing the placing of the appropriate form of question on the ballot, for the reason that there was no legal evidence before the said Township Committee to prove or establish the number of legal ballots cast in the Township of Palmyra, in the County of Burlington, at the last preceding election at which members of the General Assembly were elected.

30 15. Because the said Township Committee of the Township of Palmyra lacked jurisdiction to make or adopt the aforesaid order or resolution declaring the petition sufficient and directing the placing of the appropriate form of question on the ballot, for the reason that the petition was not signed by legal voters of the said Township in number more than twenty per centum of the number of legal ballots cast in said municipality at the last preceding election at which members of the General Assembly were elected.

16. Because there was no legal evidence before said Township Committee that the said petition was signed by legal voters of the said Township in number more than twenty per centum of the number of legal ballots cast in said municipality at the last preceding election at which members of the General Assembly were elected.

17. Because the Secretary of State of New Jersey did not, within sixty days prior to the General Election of 1918, or at any other time, ascertain from either the Adjutant-General of New Jersey or from the Adjutant- 10 General or other proper authority of the United States, the names and post-office addresses of every qualified elector of this State in active military service in the military forces of the United States, or the names and post-office addresses of the qualified electors of the said Township of Palmyra, in the County of Burlington, in such active military service.

18. Because the Secretary of State of New Jersey did not, at least twenty days prior to said General Election, or at any other time, forward by mail or otherwise 20 to each person in such active service, as aforesaid, a blank ballot, conveniently prepared so that such person might vote for any candidates at such election, or on any question to be submitted to the voters at such election.

19. Because the Secretary of State of New Jersey did not, at least twenty days prior to said General Election, or at any other time, forward to either the County Clerk of Burlington County or the Township Clerk of the Township of Palmyra, the names and addresses of 30 the qualified electors in the military forces of the United States, residing within the limits of the Township of Palmyra, in the County of Burlington, aforesaid.

20. Because neither the Clerk of the County of Burlington or the Clerk of the Township of Palmyra, forwarded to each of such qualified electors in the military service as aforesaid, residing within the limits of the Township of Palmyra aforesaid, by mail or otherwise, a printed or written list of the names of the candidates

whose names would appear on the ballots for such election, together with the names of the nomination or office for which such person was a candidate.

21. Because the Secretary of State of New Jersey did not send, with or without a ballot, to the qualified electors of the Township of Palmyra, in the County of Burlington aforesaid, in such active military service, or the qualified electors of this State in such service, either a printed copy of Chapter 150 of the Laws of 1918, or
10 printed directions for voting and transmitting a ballot as required by said act, and did not send also to each of said qualified electors two envelopes prepared in the manner directed by Section 6 of the aforesaid act.

22. Because neither the Secretary of State of New Jersey, the Clerk of the County of Burlington or the Clerk of the Township of Palmyra did anything to carry out the provisions of Chapter 150 of the Laws of 1918.

23. Because the said proceedings and the election
20 held by virtue thereof are in divers other respects irregular, illegal, oppressive and unjust to the prosecutor in certiorari.

HARRY HEHER,
Attorney of Prosecutor.

Due and legal service of the within reasons is hereby acknowledged this 28th day of December, A. D. 1918.

ARNOLD J. BECKENBACH,
Attorney of Township of Palmyra, in the County of Burlington.

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Opinion of Supreme Court.

(Filed March 4, 1919.)

NEW JERSEY SUPREME COURT.

Feb. Term, 1919.

KERN *vs.* PALMYRA.	*Certiorari.*

For the prosecutor, Harry Heher.

For the defendant, Geo. S. Hobart and V. Claude Palmer.

Per Curiam:

This is a local option case; among the grounds advanced for setting aside the election is the failure to comply with the soldiers' vote act. We have first considered this at some length in *Scheible* v. *Hightstown,* opinion filed herewith, and for the reasons given in that opinion the election under review, so far as it relates to the local option vote, will be set aside but without costs.

Other reasons are assigned, such as failure to advertise the council meeting properly, considered by us in the Bullock case—and failure of the township committee to examine the petition and signatures themselves. See *L. V. R. R. Co.* v. *Jersey City,* 81 N. J. Law, 290. As to these it is claimed prosecutor is barred by assent and laches. It is unnecessary to go into either question as the soldier vote matter is controlling and the previous conduct of prosecutor cannot be invoked against that.

Rule Setting Aside Election.

This cause having been duly argued at the February Term, 1919, of this Court, by Harry Heher, attorney for the prosecutor, and George S. Hobart and V. Claude Palmer, attorneys for
10 the respondents; and the Court having inspected the transcript and proceedigs of the Township Committee of the Township of Palmyra, in the County of Burlington, and the determination and proceedings of the County Board of Canvassers of the County of Burlington. declaring the result of the election held on November 5, 1918, in the said Township of Palmyra, in the County of Burlington, under the provisions of Chapter 2 of the Laws of 1918, to determine
20 whether the sale of intoxicating liquor as a beverage in the said Township should be prohibited, all returned with the writ of certiorari in this cause; and the Court having duly considered the same, together with the reasons filed, and having heard the arguments of counsel thereon;

It is hereby ordered that the proceedings brought up for review in this cause, and the said election held on November 5, 1918, in said
30 Township of Palmyra, in the County of Burlington, under the provisions of Chapter 2 of the Laws of 1918, to determine whether the sale of intoxicating liquor as a beverage in the said Township of Palmyra, in the County of Burlington, should be prohibited, together with all proceedings and determinations declaring the

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result of said election, be reversed, set aside, annulled, made void, and for nothing holden.

Entered March 7, 1919,

On motion of

HARRY HEHER,
Attorney of Prosecutor. 10

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Opinion of Supreme Court.

(Hightstown).

(Filed March 4, 1919.)

NEW JERSEY SUPREME COURT.

10 November Term, 1918.

JOHN G. SCHEIBLE, *Prosecutor,* *vs.* BOROUGH OF HIGHTSTOWN, *et al., Respondents.*	*On Certiorari.*

20 Submitted February 10, 1919; decided March , 1919.

Before Justices Parker and Minturn.

For the prosecutor, Harry Heher.

For the respondents, Aaron V. Dawes, James Hammond and George S. Hobart.

The opinion of the Court was delivered by

PARKER, *J.:*

30 The writ attacks the validity of a popular vote taken at the last general election on the question whether the sale of liquor should be prohibited thereafter in the borough of Hightstown. The principal question in the case and the only question requiring specific examination for the purpose of a decision, is that relating to the casting of the soldier and sailor vote. We have already had occasion to deal with this subject in the group of cases recently decided under the title of *Miller* v. *Montclair,* at the present

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term. In those cases, however, the election was called for a special day and is known to the statute as a special election. We sustained the finding of the Chief Justice and other justices sitting simply as a summary court under the statute, that the several elections must be set aside because of failure to comply with the requirements of the soldier vote act, P. L. 1918, Chap. 150, but expressed no view with relation to the soldier vote at a local option referendum held at the same time and voted on the same ticket with the general election. Individual justices had intimated a distinction, as in the opinions of Mr. Justice Kalisch, in the Holman case, 104 Atl. 212, and the Lamb case, 105 Atl. 448, the result in which we upheld a few days ago. For the first time, we think, this question relating to a local option ballot voted on the day of general election is squarely presented as a necessary ground of decision. It comes up in such election whenever held, is a special one and the doctrine of the Brown case does not apply. 22 L. R. A. New Series 483. The legislature might as well have designed some other day, as the second Tuesday of December, for the referendum election in cases where the petition is signed by less than 30 per cent. of the voters. It seems quite clear that such an election would be special. The fact that the day of general election is designated, was no doubt due to considerations of expense and convenience; whether there should be a vote at all on the day designated, depends as we have said, on the action of citizens of which other citizens are not bound to take notice, as well as of the lawmaking body.

Concluding then, as we do, that the requirements of the soldier vote law apply substantially

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to the same extent to vote on local option taken at a general election, as to a special election thereon, we take up the claim that there was no substantial compliance with them, and find it is well founded. It appears that ballots were not mailed to the several voters, nor were copies of 10 the law nor voting instructions; as we understand the facts, the Secretary of State sent special agents to some of the camps, and a bundle of ballots and other papers by mail to the commanding officers of other camps, hoping that the ballots in some way would reach those for whom they were intended. That the plan was not authorized by the act is perfectly plain. That it failed of its purpose is indicated by the fact that a comparatively insignificant number of 20 ballots came back. No doubt the Secretary of State did the best he could, but this was not enough. Evidently he could not obtain the individual names and addresses from an overburdened War Department and in the face of rules denying information. But the names were no doubt ascertainable in the borough; most of them at all events; and the military addresses in care of the respective organizations were or should have been procurable. If the referendum 30 was of a paramount importance it justified a special effort to get the ballots and voting information to the soldiers and sailors; and no special effort of the kind intimated seems to have been made.

The counter argument that the general election for local officers and members of the legislature must also be considered vitiated, does not appeal to us. The distinction and reason for it, are forcibly pointed out in the deliverance of the Chief Justice sitting in the Montclair case. 40

His remarks are too long to quote here, but the point is that the overturning of a governmental election as distinguished from what he significantly calls a sociological one, is a matter to which other considerations of grave public consequence apply, particularly the importance of having officers to carry on public affairs. The special question now under consideration has no such features. Whether the saloons shall close today, or await another election at which all shall have their chance to vote, is a matter concerning the general public welfare, like the abolition of a smoke nuisance for example, but not striking at the administration of government in any direct way, as in the other case. On the whole, our conclusion is that the referendum was vitiated by the totally inadequate provision for securing the absentee vote.

Laches is urged. The election occurred early in November. The writ was allowed in January. If prosecutor had applied immediately after election, allocatur might well have been denied on the ground that the soldier vote might turn the result the other way. The law allowed 30 days to count that vote; so the delay was something over a month. We are unwilling to say that prosecutor should be barred on this account. We think however that no costs should be allowed to either party.

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Notice and Grounds of Appeal.

(Filed April 23, 1919.)

To Harry Heher, Esq.,
Attorney of Prosecutor.

10 Take Notice that the defendants appeal to the New Jersey Court of Errors and Appeals from that part of the judgment entered in this cause which sets aside the election under review insofar as it relates to the local option vote, on the following grounds:

1. The Supreme Court erred in setting aside the election under review insofar as it relates to the local option vote, whereas said Court should have sustained the said election and
20 should have dismissed the writ of certiorari herein.

2. The Supreme Court erred in holding that the election under review was invalidated by the alleged irregularities with reference to the Soldier Vote Act, and in not holding that the said election was not thereby invalidated.

3. The Supreme Court erred in holding that the prosecutor (now the respondent herein)
30 was not barred of his right to prosecute the writ of certiorari herein by reason of his laches and in not holding that he was thereby barred.

ARNOLD J. BECKENBACH,
Attorney for Defendants-Appellants.

GEORGE S. HOBART,
V. CLAUDE PALMER,
Attorneys for Intervenors.

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MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

CHARLES H. KERN, *Prosecutor-Respondent,* *vs.* THE TOWNSHIP OF PALMYRA, IN THE COUNTY OF BURLINGTON ET AL., *Defendants-Appellants.*	On Appeal from Supreme Court.

Brief of Harry Heher for Prosecutor-Respondent.

At the General Election held in the Township of Palmyra on November 5th, 1918, there was submitted to the voters, under Chapter 2 of the Laws of 1918, a proposition to prohibit the sale of intoxicating liquor as a beverage in the township.

The total registered vote in the township for that election was 875. 596 ballots were cast at the election, and an additional 7 were rejected. 561 ballots were cast on the prohibition referendum, of which 304 were cast in favor of prohibition, and 257 against. Seven ballots cast by electors in the military service were trans-

mitted by the Secretary of State, of which three were recorded in favor of prohibition, and four against, making a net majority of 46 in favor of prohibition. (Case, pp. 7-8, 15-16.)

The writ of certiorari allowed in the Supreme Court brought up for review the validity of the election and the proceedings in which the order for election was made.

The first eight reasons involve the constitutionality of the act under which these proceedings were had, and these will be considered under the head of Point 1. They were all advanced in the Supreme Court, but not discussed in the opinion, apparently because they had been raised and decided shortly before in *Michaelson* v. *Wall Township* (not yet reported), and *Smith* v. *Township of Middle,* 105 *Atl. Rep.* 877.

Even though it may be unnecessary to decide these constitutional questions in the disposition of the case at bar, we believe that all concerned will appreciate a determination of each of these questions in this court. We, therefore, respectfully request that each of these reasons be considered, and the validity of the law determined.

The remaining reasons relate to the validity of the proceedings for the submission of this proposition, and the election itself as to this particular question.

The Supreme Court, in a per curiam opinion, set aside the election on the authority of *Scheible* v. *Hightstown,* 106 *Atl.* 25, because the provisions of Chapter 150 of the Laws of 1918 (Soldiers' and Sailors' Voting Act) were not observed. No opinion was expressed as to the remaining reasons urged in the attack upon the election.

These reasons will be discussed in their order.

POINT I.

Summarized, the reasons which the prosecutor, Kern, assigned in attacking the validity of this law are, first, that the object thereof is not expressed in the title; second, that it violates the article of the constitution forbidding the passage by the Legislature of any local or special law regulating the internal affairs of towns and counties; third, that it also contravenes the provision which vests legislative power in a Senate and General Assembly; and, fourth, that the act grants to the petitioners for an election the right to a summary review of the action of the governing body to whom the petition is presented, by the Supreme Court or a justice thereof, and denies to the opponents of the petition such right of review. This latter point is abandoned, and will not be argued. The other reasons will be separately discussed in the above order.

A.

THE OBJECT OF THE ACT IS NOT EXPRESSED IN THE TITLE.

The title expresses the object of the act to be "An act to *prohibit* the sale, or offer, or exposure for sale, or *furnishing or otherwise dealing* in intoxicating liquor as a beverage *and the granting of licenses therefor* in *any* town, township, village, borough, city or other municipality (not a county) in this State where the legal voters thereof shall decide by a majority vote in favor of such prohibition or the continuance thereof."

Section 1 of the act declares as follows:

> "The word '*furnishing*' shall include every provision of intoxicating liquors, as defined in this act, except that which results from a sale as defined in this act; provided, however, that it shall *not include the gratuitous service of intoxicating liquor by any person in his place of*

personal residence to any bona fide guest, nor the use of wine in any church or place of worship in accordance with established rites of service."

Section 20 of the act provides that "Any person who, individually, or by agent, servant or employee, shall, directly or indirectly, sell, offer or expose for sale, furnish, or otherwise deal in any intoxicating liquor within the limits of any municipality in which the majority of votes cast at such election shall have been in favor of prohibiting the sale of intoxicating liquor as a beverage, *except as herein provided,* shall be guilty of a misdemeanor," and Section 29 provides that "Nothing contained in this act shall in any manner affect the right of any manufacturer of intoxicating liquor whose manufactory is located in a municipality wherein the sale of intoxicating liquor as a beverage is prohibited, to sell, deliver or furnish his product in wholesale quantities to *any person or persons outside the limits of said municipality."*

It is clear that this act does not prohibit the sale of or "furnishing or otherwise dealing in" intoxicating liquor "as a beverage" in municipalities deciding by a majority vote in favor "of such prohibition," but in a large sense "regulates" the sale of liquor in those communities. The purpose of the act seems to be to prohibit the retail traffic in liquor in the communities adopting its provisions, and to permit outside manufacturers of intoxicating liquor to sell at *wholesale* to any person or persons in those municipalities, and the gratuitous service of liquor to guests by any person in his home.

The provision of Section 29 permitting the manufacturer of liquor to "sell, deliver or furnish" his product in *wholesale* quantities to any person or persons outside the limits of said municipality, should be construed with reference to the context. Section 20 qualifies the provision prohibiting the sale, furnishing or dealing in intoxicating liquor within the limits of any

municipality adopting the provisions of the act, with the words "except as herein provided," and Section 1 permits the use and service of intoxicating liquors to guests in the homes of citizens of any municipality adopting its provisions.

It seems clear, therefore, giving full effect to the word "wholesale," that this provision in Section 29 was intended to permit manufacturers of liquor to *sell, deliver or furnish* their product in "dry" municipalities.

It was the intention of the framers of this act that municipalities voting in favor of "prohibition" should not be "bone dry," and this intention is unequivocally expressed in the act.

Any construction which limits the right of such manufacturer to sell in *wholesale* quantities in outside municipalities which have not voted in favor of prohibition under the act, renders this provision meaningless. This act is not framed in terms to prohibit the *manufacture,* but merely the *sale,* of liquor, and the prohibition is confined to the limits of municipalities which have voted against the sale of liquor.

Sales in wholesale and retail quantities in communities in which prohibition is not adopted by a majority vote could not be affected by the terms of the act.

In *State* v. *Fay,* 44 *N. J. L.* 474, Justice Dixon, speaking for the Supreme Court, said:

> "In the charter now before us, the power expressly granted is the power to *prohibit* the sale. This is not equivalent to nor does it fairly embrace a power to *regulate.* The exercise of the latter power provides for the continuance of the traffic under prescribed rules; the former power is to be wielded only for its suppression. As was said in *Schwuchow* v. *Chicago,* 68 *Ill.* 444: 'To suppress must mean to prevent and not to license or sanction the act to be suppressed. It would be a confusion of terms to say that a thing is suppressed when it is protected, licensed or encouraged.'

> "For intrinsically, regulation and prohibition range in different spheres; *no sale which is prohibited is regulated, and none regulated is prohibited.*"

In *Paul* v. *Gloucester Co.*, 50 *N. J. L.* 586, the Court of Errors and Appeals, in passing upon the local option law then in force, cited the above case with approval. The title of that act was "An act to regulate the sale of intoxicating and brewed liquors." Justice Van Syckel said:

> "Mr. Justice Dixon, in *State* v. *Fay*, 15 *Vroom* 477, tersely states the true view in this way: 'Intrinsically, regulation and prohibition range in different spheres. No sale which is prohibited is regulated, and none regulated is prohibited.'
>
> "If, therefore, the law under review *prohibits the entire traffic in case of an adverse vote, there could be no hesitation in pronouncing it a violation of the constitutional mandate.*"

The Court then shows that the act does not prohibit the sale of intoxicating or brewed liquors in a community adopting its provisions, but only relates to sales for which a license was required.

The Court, after experiencing some difficulty in determining the intention of the draftsmen, construed the act to mean that total prohibition was not intended, but only the sale of liquor in such quantities as there must, under the laws then existing, be a license to sell. That being so, the title of the act properly expressed its object to be the "regulation" of the sale of intoxicating liquors.

> "The act before us will certainly bear the construction I have given it, and in case of doubt that interpretation must be adopted which will uphold the law.
>
> "Assuming that the extreme effect of this legislation is to forbid the sale by small measure,

in my judgment it must be regarded as a law regulating the sale of intoxicating and brewed liquors. It regulates the sale by prohibiting it in small quantities.

"Every license law is, to some extent, a prohibitory law; it prohibits the sale by all persons who have no license. * * *

"The regulation becomes more or less stringent as you increase or diminish the extent to which it operates to prevent sales, but it reaches the point of *prohibition and ceases to be regulation only when it wholly inhibits the traffic.* Unless this view is accepted, we cannot stop short of maintaining that every law which prohibits any portion of the traffic is a prohibitory law. This would give to the word 'regulate' no substantial significance."

Assuming that Section 29 be construed to permit the sale of liquor by manufacturers only in outside communities which have not adopted the provisions of the act, the title is nevertheless defective in this regard.

It is stated to be an act to prohibit the sale or furnishing or otherwise dealing in intoxicating liquor "as a beverage," and the granting of licenses therefor in any town, etc.

The words "as a beverage" followed by "and the granting of licenses therefor" plainly indicate an intent to prohibit the sales of liquor for the purpose of a beverage, as distinguished from sales in wholesale quantities, for which a license to sell is not required by law. Under the statute liquor may be sold in quantities of more than five gallons without a license.

Yet under Section 20, any person who shall, directly or indirectly, "sell, offer or expose for sale, furnish or otherwise deal in intoxicating liquor, within the limits of any municipality in which the majority of votes cast at such election shall have been in favor of prohibiting the sale of intoxicating liquor as a beverage," is guilty of a misdemeanor.

Under this latter section, a wholesale dealer in a municipality which had voted in favor of prohibition under the act, who sold in quantities of more than five gallons in the conduct of his business, would be guilty of a misdemeanor. Nothing can be found in the title of the act to indicate legislation of this sweeping character.

The body of the act absolutely prohibits the sale or furnishing of liquor, with the exception of service to guests in private residences, while the title indicates only prohibition of the sale of liquor "as a beverage."

In a similar aspect the title is defective. It not only prohibits the sale, but also the "furnishing or otherwise dealing" in intoxicating liquor as a beverage.

As pointed out above, Section 1 defines the word "furnishing" to include "every provision of intoxicating liquors," except that which results from a sale as defined by the act, but expressly excludes the "gratuitous service of intoxicating liquor by any person in his place of personal residence to any bona fide guest."

te v. Fulker, 207
26, and other
es, hereinafter
d, are in point.

While the title of the act expresses its object to be the absolute prohibition of the sale, furnishing or otherwise dealing in intoxicating liquor, the act itself qualifies this express prohibition against furnishing or otherwise dealing in liquor by permitting the furnishing or service of intoxicants to guests in private residences.

In still another respect the title is defective. It expresses the object of the act to be the prohibition of sales of liquor in "*any* town, township, borough, city or other municipality (not a county)" where the legal voters decide by a majority vote in favor of prohibition, while Section 19 provides that nothing in the act "shall affect, amend or repeal any other law which now prohibits within the limits of any municipality, or any portion thereof, either the sale, or offer, or exposure for sale, or furnishing or otherwise dealing in intoxicating liquor, or the keeping of a place where intoxicating liquor is sold, furnished or otherwise dealt in."

A reading of the title will not disclose that the act excludes from its operation municipalities where the sale of liquor is prohibited by law.

This clearly makes the act unconstitutional.

In the case of *Beverly* v. *Waln*, 57 *N. J. L.* 143, the title of the act reviewed was "An act relating to the cost of improving sidewalks in the cities of this State." The act itself only applied to cities of the third class.

The Court of Errors and Appeals held this act to be unconstitutional, and in an opinion by Justice Reed said:

> "Without looking further, we think the title of the act does not comply with the constitutional requirement that it shall express the object of the law.
>
> "The title states that the object is to legislate for the cities of the State as a class. The act excludes from its operation all of these cities except those within the third class.
>
> "No one, on reading the title, could reasonably understand that the body of the act was to have so limited an effect."
>
> See also *Coutieri* v. *New Brunswick*, 44 *N. J. L.* 58.

In the case of *Johnson* v. *Asbury Park*, 60 *N. J. L.* 432, the Court of Errors and Appeals, in discussing the opinion of Justice Reed in the case of *Beverly* v. *Waln*, said:

> "It was not held nor was it intended to hold that an act legislating respecting some objects fairly included within the title, will be invalidated because it does not include all such object except where the title, *expressly or by necessary implication, evinces an intent to legislate as to all of them.*"

The case of *State* v. *Steelman*, 66 *N. J. L.* 518, involved the validity of an act entitled as follows: "An act to protect the planting and cultivating of oysters in the tidewaters of this State."

The Eighth Section of the act provided that this provision should not apply to the waters or bottoms of Delaware Bay and Morris River Cove. The act was attacked on the ground that the object was not expressed in the title.

In his opinion for the Supreme Court, Mr. Justice Gummere, after discussing *Beverly* v. *Waln* and *Johnson* v. *Asbury Park*, said:

> "Tested by this rule, then, the question to be determined is whether or not the Legislature, by the title of the act of 1894, has evinced an intent to legislate with relation to the planting and cultivating of oysters in all the tidewaters of the State.
>
> "In *Beverly* v. *Waln* the use of the words 'in the cities of this State' was considered to indicate a design to legislate with respect to *all* cities. Accepting this as a necessary deduction to be drawn from the use of the words quoted, the words 'in the tidewaters of this State' must be considered as equally indicative of an intent to legislate with respect to *all* the tidewaters of the State; and the exclusion, in the body of the statute, of the waters or bottoms of Delaware Bay and Maurice River Cove from its operation makes the object of the law other than that which is expressed in its title, and hence violative of the constitutional provision which is invoked."

In *Kennedy* v. *Belmar*, 61 *N. J. L.* 20, it was held that the title "An act relating to boroughs" did not mean a purpose to legislate for *all* boroughs.

The title of the act now before the Court clearly evinces an intent to legislate as to all municipalities with the exception of counties.

Justice Garrison, in *Griffith* v. *Trenton*, 76 *N. J. L.* 23, tersely stated the purpose of the title in the following language:

> "It is not enough that it *embraces* the legislative purpose—it must *express* it."

See, also, *Ryno* v. *State,* 58 *N. J. L.* 238.

See *Wilson* v. *Smith,* 81 *N. J. L.* 132; *Patterson* v. *Close,* 82 *N. J. L.* 160, *affirmed* 84 *N. J. L.* 319.

There are several laws prohibiting the sale of intoxicating liquors in certain sections of this State. Chapter 24 of the Laws of 1880 (*P. L.* 1880, *p.* 392), and Chapter 26 of the Laws of 1896 (*P. L.* 1896, *p.* 53), are examples.

See 1 *Comp. Stat.* 1438, *Sec.* 2861; 3 *Comp. Stat.* 3190, *Sec.* 59; 4 *Comp. Stat.* 4960, *Sec.* 19.

P. L. 1907, p. 188-24

Charters of other municipalities either prohibit the sale of liquor, or give the governing bodies power to enforce prohibition within the corporate limits.

It may be contended by the defenders of this measure that there was no necessity for indicating in the title the exclusion of municipalities where the sale of liquor was prohibited, because prohibition then existed in those communities, and the act was intended to apply only to municipalities where the sale of liquor was permitted.

That being so, there would exist no necessity for expressly excluding the municipalities in question from the operation of the act.

It will be observed, however, that the act also provides that municipalities declaring for prohibition by a majority vote may, at any time after two years from the adoption of the prohibition features of the act, decide in favor of the sale of intoxicating liquor by submitting the question to the voters at a special or general election in accordance with the provisions of the act.

The purpose of the clause excluding from the operation of the act municipalities where prohibition existed by law, was to make it impossible for the voters of these communities to declare in favor of the sale of liquor under the act now before the Court.

It being necessary, for the purpose of carrying out the legislative intent, to expressly exclude from the operation of the act the municipalities in question, it

necessarily follows that the title should indicate in some manner this important exception.

It therefore clearly appears that the title is radically defective. There is nothing in the title to indicate that the voters of a municipality deciding in favor of prohibition may, after two years from such action, have the question again submitted to them at a special or general election, and by a majority vote declare in favor of the sale of liquor, and there is nothing in the title to indicate that municipalities where the sale of liquor was prohibited by law at the time of the passage of this act are expressly excluded from the operation of the act, and prevented from taking advantage of the provisions of the law, which, by the terms of its title, applies to all municipalities.

In *State* v. *Fulks, 207 Mo.* 26, 105 *S. W.* 733, the Supreme Court of Missouri set aside the Local Option Law because the title did not clearly express the object of the act.

The defendant had been convicted of a violation of the act by the giving away of liquor in a local option district.

The title of the act was as follows:

> "An act to provide for the preventing of the evils of intemperance by local option in any county in this State, and cities of 2,500 inhabitants or more, by submitting the question of prohibiting the sale of intoxicating liquors to the qualified voters of such county or city, to provide penalties for its violation, and for other purposes."

The constitutional inhibition is similar to ours, and the Court held that it should be reasonably construed. The act prohibited the giving away of liquors.

After discussing the authorities from several of the jurisdictions of this country, the Court said:

> "Tested by these decisions, can it be said that the title to the Local Option Act of 1887 was

leveled at, or intended to embrace, a gift by a private individual, who was not, or ever had been, a dealer in, or sold, intoxicating liquors, of a drink to one of his friends as a mere act of friendship or hospitality, without any reward or hope of reward therefor? Or, to state it differently, is the title of an act that prohibits the sale of intoxicants any notice that in the body of the act there will be found a provision constituting a gift which had hitherto been a perfectly lawful act a misdemeanor? In our opinion, such a construction of the act brings it squarely in conflict with the fundamental law found in Section 28, Article 4, supra; and such seems to be the consensus of opinion by the courts in our sister States.

"In *People* v. *Beadle,* 60 *Mich.* 22, 26 *N. W.* 800, it was unanimously ruled by the Supreme Court of that State, which had a constitutional provision in all respects like Section 28 of Article 4 of our Constitution, that, under an act entitled 'An act to regulate the sale of spirituous, malt, brewed, fermented and vinous liquors; to prohibit the sale of such liquors to minors, to intoxicated persons and to persons in the habit of getting intoxicated; to provide a remedy against persons selling liquors to husbands or children in certain cases; and to repeal all acts or parts of acts inconsistent herewith,' a section of the said act which provided 'any person who, by false pretense, shall obtain any spirituous, malt, brewed, fermented or vinous liquors, or who shall be drunk or intoxicated in any hotel, tavern, inn or place of public business, or in any assemblage of people, collected together in any place for any purpose, or in any street, alley, lane, highway, railway or street car, or in any other public place, shall, on conviction thereof,

be punished,' etc., was clearly repugnant to the constitutional provision above quoted; and that by no reasonable construction could the purpose of this section be said to be embraced within the title of the act. The punishment of a person for being drunk, without reference to where he obtained the means of intoxication, could have no possible connection with the object of the act as set forth in its title. * * *

"But we do hold that the title of the Local Option Act of 1887 clearly indicates that it was the purpose of the Legislature to prohibit the sale, directly and indirectly, of intoxicating liquors in those counties which should adopt the said law, and that this purpose is indicated in the body of the act itself; * * * but it was never intended to cover the mere gift of a drink if liquor by a private person who is in no sense a dealer in liquors, to one of his friends as a mere act of courtesy or hospitality; and, *if the act should be construed to embrace such a gift as the evidence disclosed in this case, it clearly would be repugnant to the constitution of this State, in that the act itself, as well as the great body of the act, express no such purpose.*"

In *Com. v. Doll*, 6 *Pa. Co. Ct.* 49, cited in the above opinion, a similar question confronted the courts of Pennsylvania. The law construed was entitled "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors or any admixtures thereof."

The 17th section of the act provided "That it shall not be lawful for any person with or without license to furnish by gift to any person any spirituous, fermented or brewed liquors on Sunday."

Under that section Doll was indicted. The facts appear that he had no license for the sale of intoxicating liquors, and did not deal therein. On Sunday, August

19th, 1888, the prosecuting witness went to the private residence of the defendant upon business of his own, and while there the defendant gave the prosecuting witness a drink of whiskey, which he drank in the house. He paid nothing for the liquor, nor was any payment expected or demanded. The Court said, speaking of paragraph 17:

"This sweeping language extends to all persons within the commonwealth whether or not they may be engaged in the sale of intoxicating liquors, makes it a criminal offense for any citizen in his own home to give to a friend, or even a member of his own family, a glass of wine or beer on the first day of the week. If this provision be constitutional, we have nothing to do with its policy—that is a matter for the Legislature, not for the courts; but we are bound to consider objections urged on constitutional grounds.

"When the Act of 1887 was passed there were two classes of people in the commonwealth, viz.: *those engaged in the sale of liquor and those who were not. The title of the act was plain notice to the former class that they would be affected thereby, but it contains nothing to warn one who belonged to the latter class that his conduct would be in anywise restrained or regulated. He was not put upon inquiry as to the contents of the act*, and therefore may justly claim the constitutional protection against a provision which is aimed not only at sellers, but also at those who do not sell.

"To hold otherwise would be to sanction a misleading title, which, by clear limitation, applies only to those who sell, and to declare that it includes, also, those who do not sell."

It will be well to note that at the time of the passage of our Local Option Law there were two classes of

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dealers—those who sold at retail and at wholesale (one quart to five gallons) for which a license was required, and those who sold in quantities greater than five gallons, for which no license was required.

The title of the act plainly indicates an intention to legislate as to the former, but there is nothing to indicate that any of its provisions would apply to the latter class.

In *State* v. *Davis*, 130 *Ala.* 148, 30 *So.* 344, it was held that a statute which contained within the body a section intended to prevent the giving away or otherwise disposing of certain liquors, while, according to its title, it was intended to prohibit only the sale of those liquors, was void as contravening the constitutional provisions, in so far as it undertook to prohibit the giving away or other disposition other than by sale.

See *Holley* v. *State*, 14 *Tex. App.* 505.

It is therefore respectfully submitted that for the several reasons above discussed, the title is fatally defective.

B.

THE ACT IS A LOCAL OR SPECIAL LAW, REGULATING THE INTERNAL AFFAIRS OF TOWNS AND COUNTIES.

This measure is in contravention of paragraph 11, Section VII, Article IV, of the Constitution, forbidding the Legislature to pass private, local or special laws regulating the internal affairs of towns and counties.

The act is special or local in that it contains a proviso in effect exempting from its operation municipalities in which the sale of liquor was prohibited at the time of its passage. It seems to me there can be no fundamental basis for this classification, and in that event, under the decisions of our courts, the act runs counter to the Constitution, and must, therefore, fail.

> "The rules thoroughly settled in this State for distinguishing between general and special laws under our constitution are that in order to be general the law must embrace an entire class of

objects; that, if it deals with municipalities, they must either compose what by common consent is regarded as a class, such as all cities or all townships, or they must differ from other municipalities in some peculiar characteristic to which the law relates and which is important enough to afford a reasonable ground for the legislation intended. *If the statute excludes from its purview a single member of a class thus defined, it becomes special.*"

Tetrault v. *Orange*, 55 *N. J. L.* 101.

The rule is succinctly stated by Mr. Justice Garrison in *Budd* v. *Hancock*, 66 *N. J. L.* 133, in the following language:

"A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. *The test of a special law is the appropriateness of its provisions to the objects that it excludes.*"

See *Dickinson* v. *Freeholders*, 71 *N. J. L.* 589.

This act declares a public policy and is of general concern. It deals with a matter of local government, and applies to cities of all classes, except those in which prohibition existed. The importance of this exception is realized when it is considered that the municipalities deciding in favor of prohibition under this act have the privilege of resuming the licensed sale of liquor within their limits at any time after two years, by invoking the provisions of the act, which provide for an election for that purpose.

In *State* v. *Price*, 71 *N. J. L.* 249, Mr. Justice Pitney said:

"The above paragraph of the constitution deals with the municipalities not as territorial divisions but as governmental entities. An act

that deals with matters of municipal government, or affects the municipalities in their governmental capacity, regulates their internal affairs within the meaning of the prohibition."

The "local option" law now under consideration both *confers* and *withdraws* powers of local government.

In *State* v. *Corson,* 67 *N. J. L.* 178, the act under consideration applied to the tidewaters of the Delaware bay and Maurice river cove, and it was held that it was not special, and did not regulate internal affairs, "for it deals exclusively with property rights of the State, in which every citizen has an interest." In his opinion, discussing this question, Mr. Justice Gummere said:

> "A statute is not special or local merely because it authorizes or prohibits the doing of a thing in a certain locality. It is, notwithstanding this fact, a general law, if it applies to all the citizens of the State and deals with a matter of general concern. * * * Although it deals with the lands of the State under tidewater only in certain localities, the matters which it regulates are of general, not local, concern. *The lands themselves belong to the people of the State, not to the citizens of the counties where they are located.*"

There can be no sound reason on principle for exempting from the operation of this law municipalities in which prohibition existed. It would seem to me that an act of this character, expressing a public policy which should be applicable alike to all communities of the State, would run counter to the constitutional provision if any one of the well-defined classes based upon population should be excepted from its operation, following the rule laid down in the case of *Wanser* v. *Hoos,* 60 *N. J. L.* 482, where the act consolidating the spring and the fall elections was declared invalid because it applied only to first-class cities. There is cer-

tainly no peculiar reason justifying the exception of municipalities where prohibition existed by law. This classification has no foundation on principle.

> "The question to be determined concerning the law now under review, therefore, is whether, since it does not relate to all cities, it affects a class of cities constituted upon this principle—*whether the basis of classification is some peculiar feature to which the provisions of the law are naturally related.*
>
> " * * * Now, I am unable to see any natural connection between the number of people in a city and its rights to fund its floating debt."

In the case of *Wanser* v. *Hoos, supra,* the Court of Errors and Appeals, in discussing the test to be applied, said:

> "The test of the generality of a law adopted is that it shall embrace all and exclude none whose conditions and wants render such legislation equally appropriate to them as a class. * * * The question whether any particular statute is local or special must be determined not upon its compliance with a legislative classification, but upon whether, having regard to the character of the legislation and the limitation upon it contained in the act, that statute is or is not a general law as defined by the courts.
>
> " * * * Indeed, it may be said with great force that no classification for the purpose of regulating the sale of intoxicating liquors is so eminently appropriate as a classification on the basis of population.
>
> " * * * The issue presented by this record is whether, having regard to the subject-matter of this legislation, cities having a population exceeding one hundred thousand have, by reason of population, characteristics distinguishing them from cities with a population of less

> than one hundred thousand which would make such legislation appropriate to the former class of cities and inappropriate to cities having a less population."

In the case of *Hoos* v. *O'Donnell,* 60 *N. J. L.* 39, which was followed by the Court of Errors and Appeals in the case of *Wanser* v. *Hoos,* Mr. Justice Garrison said:

> "This being beyond question both the purpose and effect of the law, it is in its essence a declaration of public policy, and I believe I shall not err in saying that a legislative policy, with respect to the influences to which the voters of a State shall be subjected or from which they shall be guarded in the act of suffrage, cannot, under the organic law construed by our courts, be limited to a special class selected upon a purely numerical basis."

In *Paul* v. *Gloucester,* 50 *N. J. L.* 609, the Court of Errors and Appeals said:

> "The inhibition in the constitution is not intended to secure uniformity in the exercise of delegated police powers, but to forbid the passing of a law vesting in one town or county a power of local government not granted to another. *If one town or county was excepted from the operation of this law, it would be special and local. Under it one county or town has neither greater or less power than every other, nor does such power differ in any respect.*"

The act before the Court for consideration in the above case was the old "local option" law. In answer to the contention that the act was special or local, because the act would take effect in one town and not in another, depending upon the will of the voters, Justice Van Syckel held that *the provisions of the act applied to all municipalities,* and it was, therefore, general. *If, however, any municipality was excepted, the act would be special.*

See *Delaware River Trans. Co.* v. *Trenton,* 86 *N. J. L.* 48. *Affirmed* 86 *N. J. L.* 679.

Sawter v. *Kearney,* 83 *N. J. L.* 625.

Sheridan v. *Lankering,* 83 *N. J. L.* 123.

There are several laws prohibiting the sale of intoxicating liquors in certain sections of the State, Chapter 24 of the Laws of 1880 (P. L. 1880, p. 392), and Chapter 26 of the Laws of 1896 (P. L. 1896, p. 53) are examples.

See 1 *Comp. Stat.* 1438, *Sec.* 2861; P.L. 1907, p. 188-246;
3 *Comp. Stat.* 3190, *Sec.* 59;
4 *Comp. Stat.* 4960, *Sec.* 19.

Charters of certain other towns either prohibit the sale of liquor, or give the governing bodies power to enforce prohibition within the limits of the town.

Assuming the constitutionality of this legislation prohibiting the sale of intoxicating liquor in certain municipalities, their exception from the operation of the act now before the Court cannot be justified on constitutional grounds.

In *Haynes* v. *Cape May,* 52 *N. J. L.* 182, the Court of Errors and Appeals declared the law on this question in the following language:

> "This general statute was enacted in obedience to the mandate of the constitution (Art. IV, Section 7, Paragraph 11), that the Legislature shall pass general laws regulating the internal affairs of towns and counties, and, according to its terms, it prescribes a law for all cities in the State. In order to give effect to the manifest design of this constitutional provision, general statutes passed in pursuance thereof should be deemed to repeal all inconsistent rules in special charters, whether an express repealer be stated or not; for if this force be not ascribed to them, *the generality of the statutes will be defeated by their being confined to narrower limits than an entire class, and thus, by*

judicial interpretation, the statutes will become unconstitutional. Closson v. *Trenton*, 19 *Vr.* 438; 20 *Id.* 482; *Bowyer* v. *Camden*, 21 *Id.* 87."

See *Smith* v. *Hightstown*, 71 *N. J. L.* 276, 536.

There being no substantial reason for differentiating the municipalities where prohibition existed from all the other municipal bodies in the State, the act is special or local, and must fail.

C.

The Act Contains an Unconstitutional Delegation of Legislative Power.

Section 5 of the act provides that if the governing body of the municipality shall find that the petition was signed by legal voters not less in number than twenty per centum nor more than thirty per centum of the number of legal ballots cast at the last general election, the question shall be submitted at the ensuing general election. Section 6 provides that if the governing body shall find that the petition was signed by legal voters in number more than thirty per centum of the legal ballots cast at the last general election, an order shall forthwith be made by the governing body for a special election to determine the question, which election shall be fixed for a day not less than thirty nor more than sixty days from the date of the order. The same section provides that no special election shall be held between July 1 and December 1 of any year.

The vice of this legislation is that it confers upon a small percentage of the voters of any municipality of this State the power of determining whether this question, involving a public policy declared by the Legislature, *shall be submitted to the voters at a special or general election.*

The purpose of the Legislature in providing that this question may be decided at either a special or general

election is readily apparent. It was intended to meet local conditions. For various reasons a special election in the individual municipalities would be more advantageous to the petitioners than a general election, and vice versa. A special election would permit a decision of the issue without the complications and confusions which naturally result when there are other issues, national and State, to be determined, and when national and State officers are to be selected by the voters.

Then, again, in individual municipalities the "local option" issue might not only be overshadowed by the political battles waged at the general election, but it might be seriously affected, one way or the other, by the cross-currents emanating from an important political contest, or the manipulation and dealing usually attending controversies between the great political parties. On the other hand, it might be more advantageous from the standpoint of the petitioners, depending on local conditions, to have the question submitted at a general election.

The difficulty with the legislation before us is that it *confers upon a small percentage of the voters the privilege of power of determining, under the special circumstances, whether the question should be submitted at a general or special election.* If ten per centum of the voters can determine this important question, why not give the power to one per centum, or to a half-dozen voters of the municipality?

In the case of *Rutter* v. *Patterson,* 73 *N. J. L.* 467, the act under consideration provided that whenever in any city of the second class, fifty per centum or more of the Board of Aldermen, Common Council or other governing body should petition the mayor that in their opinion a change of ward lines in said city was necessary, it should be the duty of the mayor to appoint three residents of the city commissioners for the purpose. In passing upon this act, Mr. Justice Pitney said:

"If the act were to be construed as meaning

that this petition may proceed from certain individuals happening to constitute one-half or more of the membership of the board of aldermen—acting, however, in respect of the petition, not as members of the board, not as voicing the sentiment of the board in session, nor even as expressing the opinion of the signers formed after hearing the views of their brethren in the board —it would, I think, result that under the decisions in this State the statute must be declared void as amounting to an unconstitutional delegation of legislative power to private citizens."

See, also, *Gilhooley* v. *Elizabeth*, 66 *N. J. L.* 484.

In *Attorney-General* v. *McGuinness*, 78 *N. J. L.* 346, involving the validity of the Civil Service Act, it was held that the Legislature may impose its will as law upon municipalities, but, if some other will is to intervene, it must be that of the people who are to be governed by that municipal law, and not an alien will, even though it be that of the governing body of such municipality for the time being. The will of the people, to establish the validity of such statutes, must be expressed at the polls.

In this instance the Legislature has attempted to give to a small minority of the voters a power which it cannot exercise itself—*that of submitting this question at a general election in some municipalities and a special election in others.* In *Hoos* v. *O'Donnell*, 60 *N. J. L.* 35, and *Wanser* v. *Hoos*, 60 *N. J. L.* 482, it was held that an act consolidating the spring and fall elections in cities of the first class was special and local in violation of the Constitution. The Court denied the right of the Legislature to provide spring elections for some classes of cities to the exclusion of others.

These opinions contain an interesting discussion of the advantages and disadvantages attending special and general elections. Mr. Justice Garrison, in *Hoos* v. *O'Donnell*, said:

"This being beyond question both the purpose and effect of the law, it is in its essence a declaration of public policy, and I believe I shall not err in saying that a legislative policy, with respect to the influences to which the voters of a State shall be subjected or from which they shall be guarded in the act of suffrage, cannot under the organic law construed by our courts, be limited to a special class selected upon a purely numerical basis."

If the people of any municipality have a right, under any circumstances, *to pass upon the wisdom of submitting the question at a general election or calling a special election for the purpose,* it certainly can only be *expressed by the act of the majority, not by a minority of the voters,* whether it be thirty per centum, ten per centum or a half dozen.

In this respect, therefore, the act is bad, because a delegation of legislative power vested by the Constitution in the Senate and General Assembly.

Furthermore, in so far as elections are concerned, this legislation in effect permits voters to *separate municipalities into two classes,* those in which the issue shall be decided at a general election, and those invoking a special election for the purpose.

This is unquestionably a fatal delegation of power. On the other hand, if it should be held a proper delegation under the circumstances, the act then contravenes the provision of the Constitution forbidding the Legislature to enact special or local laws regulating the internal affairs of towns and counties. The Court of Errors and Appeals, in *Wanser* v. *Hoos, supra,* has held that even the Legislature is powerless to enact laws providing for elections which do not apply to cities of all classes.

It is, therefore, submitted that the act in these respects amounts to an unconstitutional delegation of legislative power to private citizens and is, therefore, void.

POINT II.

The Statutory Notice of the Meeting of the Governing Body to Determine the Legality of the Petition was not given by Publication.

The meeting of the Township Committee at which the petition for election was considered was held on September 24th, 1918. The petition was marked filed as of the 14th, although the clerk received it on the 12th. (Case, p. 18, lines 10-40.) On the 18th the clerk posted notices of a meeting to be held on the 24th, and the only published notice was contained in the Palmyra Weekly News issued and dated on the 20th. There was an available daily newspaper, but it was not used. (Case, p. 20, line 5, etc.)

The publication of the notice was not made "at least five days before the date fixed for such meeting."

> "In the absence of statute, the rule for computing time for the publication of an advertisement is not to reckon the first and last days inclusive, but to include one and exclude the other."
>
> 29 Cyc. 1122, *with citations.*

This is the rule in New Jersey.

> *Pedrick* v. *Shaw,* 2 *N. J. L.* 54;
> *Bray* v. *Drake,* 8 *N. J. L.* 303;
> *Day* v. *Hall,* 12 *N. J. L.* 203;
> *Ackerson* v. *North Bergen,* 39 *N. J. L.* 694;
> *Stroud* v. *Consumers' Water Co.,* 56 *N. J. L.* 422.

The act plainly requires posting and publication of the notice at least five days before the meeting of the governing body. The language of the act is as follows:

> "Certified copies of the notice for the hearing on such petition shall, *at least five days before the date fixed for such meeting,* be posted by the clerk of such municipality in not less than five

conspicuous places in such municipality, and a copy of said notice shall *also* be published by said clerk at least once in a newspaper published in such municipality, or if none be therein published, then in a newspaper published in the county wherein such municipality is located, and circulating in such municipality."

P. L. 1918, *p.* 16.

In *Cooper* v. *Frelinghuysen Township, supra,* Mr. Justice Parker, in construing this clause directing notice, said:

"On this point the language of the act is a trifle obscure, but we think the plain legislative intent was that there should be five days' notice by advertisement as well as by posting. In opposition to this, it is urged that where there are weekly papers this requirement, if enforced, might compel the insertion of the advertisement in a second issue of the paper preceding the meeting. There seems, however, to be no hardship in this, and, at most, it would require publication in an issue appearing eleven days before such meeting. We do not think that the intention of the Legislature would be fulfilled by publishing an advertisement in a newspaper appearing, for example, on the day before the election. We think, on the contrary, that the Legislature intended five days' notice to be given to all citizens who might chance to read on the bulletin where it was posted, or by a newspaper likely to come into their houses."

The meaning of this clause requiring notice is quite certain, and can hardly be the subject of reasonable controversy. It provides two methods of giving notice—posting and publishing. Of the two the latter would therefore, be the most effective. To serve the purpose of a notice, the posting and publication must take place at a reasonable period of time before the meeting.

Bearing in mind that the purpose of this provision is to afford notice to those concerned, a construction should be given the language to effectuate that purpose. The Legislature, by appropriate punctuation, has clearly shown an intention to make the phrase, "at least five days before the date fixed for such meeting," applicable to both posting and publishing.

Assuming there is a doubt as to the meaning of this clause, a reasonable construction should be given the language; that is, one which will carry out its apparent purpose—the giving of notice. A construction that the five-day period does not apply to publication will defeat the very purpose of the provision, for publication in a newspaper issued the day before the meeting is not notice at all. Notice necessarily means that those concerned will have sufficient time, after the giving of notice, to make preparations to protect their interests at the hearing.

Statutes regulating the general subject of notice are always to be construed, as respects the computation of time, most liberally in favor of the party who is to be affected by the notice.

> *Hill* v. *Faison,* 27 *Tex.* 428.
>
> "By the construction of a statute is meant the process of ascertaining its true meaning and application. For this purpose resort may be had not only to the language and arrangement of the statute, but also to the intention of the Legislature, the object to be secured, etc."
>
> 36 *Cyc.* 1102.

In *People* v. *Lacombe,* 99 *N. Y.* 43, 1 *N. E.* 599, it was said:

> "It is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute."

It is a fundamental rule of construction that the spirit or reason of the law will prevail over its letter. In applying this rule the meaning of general terms may be restrained by the spirit or reason of the statute, and general language may be construed to admit exceptions.

> " 'It is an established rule in the exposition of statutes,' says Chancellor Kent, 'that the intention of the Legislature is to be derived from a view of the whole, and of every part of the statute, taken and compared together. The real intention, when ascertained, will prevail over the literal sense of terms. * * * When words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion.' "

Morris Canal and Banking Co. v. *Central Railroad Co.*, 16 *N. J. Eq.* 428.

This is one of the cardinal rules of construction frequently invoked in New Jersey. Where one interpretation of a statute leads to a result obviously subversive of its object, and the language employed permits a construction which will effectuate such object, the latter construction will be adopted.

Moore v. *Johnson*, 85 *N. J. L.* 40.

> "If the object of the Legislature in any enactment, or restriction, can be plainly gathered from the act, the true rule of construing any phrases that will admit of two meanings is to adopt such meaning as will effect the object to be attained, and nothing further."

Doughty v. *Somerville and Easton Railroad Co.*, 21 *N. J. L.* 442.

See, also, *Smith* v. *Tucker*, 17 *N. J. L.* 82;
Lloyd v. *Urison*, 2 *N. J. L.* 212;
Randolph v. *Larned*, 27 *N. J. Eq.* 557;

In re Murphy, 23 *N. J. L.* 180;
State, McLorinan, Pros., v. *Overseers of the Poor*, 49 *N. J. L.* 614.

While punctuation will not be permitted to control the plain meaning of a statute, it is entirely proper, in cases of doubt, to employ punctuation as an aid in the construction and interpretation of the act.

Howard Savings Inst. v. *Newark*, 63 *N. J. L.* 69.

The character of the hearing to be held and the statutory requirements as to the contents of the notice illustrate its vital importance.

The governing body is invested with the power of determining the sufficiency of the petition, after an inspection of the petition and the hearing of any evidence that may be submitted. (*P. L.* 1918, *Sec.* 4-5, *p.* 17; *Sec.* 6, *p.* 18; *and Sec.* 10, *p.* 23.) The hearing is necessarily judicial in character.

Section 2 (*P. L.* 1918, *p.* 16,) provides as follows:

> "The notice, in addition to fixing the time for such meeting, shall state that at such time the governing body shall consider said application and hear any objections as to the legality of such petition. Such petition shall be a public record and shall be open for inspection by any person interested."

Section 3 (*P. L.* 1918, *p.* 17,) provides, among other things, that any municipal clerk who shall wilfully neglect or refuse to post and publish said notice as required by said act shall be guilty of a misdemeanor.

It is a fundamental rule that where a statute requires notice to be given, but does not specify the length of time, it will be construed to mean a reasonable time.

29 *Cyc.* 1118.
See *Burden* v. *Stein*, 25 *Ala.* 455;
People v *Frost*, 32 *Ill. App.* 242.

A statute will be given the construction that appears most reasonable and best suited to accomplish its object.

Appeal of Farnum, 107 *Me.* 488, 78 *Atl.* 901.

A construction which will defeat the evident purpose of a statute will not be adopted.

> *Greenough* v. *Police Commissioners,* 29 *R. I.* 410, 71 *Atl.* 806.

> "In determining whether a proviso is confined to the paragraph to which it is attached it is permissible for the Court to consider the entire act, the object to be accomplished, whether the context requires the proviso to be so restricted, and whether the intention of the Legislature that it shall have a wider application is clearly deducible from the enactment."

> *Fouracre* v. *White,* 102 *Atl.* 186 (*Dela.*), at pp. 201-2.

In the *Merrill Case,* 102 *Atl.* 400, *at p.* 405, Chancellor Walker, after discussing some of the cases on construction of statutes, applied the rule laid down in *Morris Canal and Banking Co.* v. *Central R. R. Co., supra:*

> "It is an established rule in the exposition of statutes that the intention of the Legislature is to be derived from a view of the whole and of every part of the statute, taken and compared together. The real intention, when ascertained, will prevail over the literal sense of terms. When words are not explicit, the intention is to be collected from the context and the occasion and necessity of the law and from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion."

The meaning of the language used by the Legislature is hardly controversial. The word "also" in the clause providing for publication relates to the posting, and means "in like manner," "as well," "further," or "besides." Giving this ordinary sense to the word "also," the phrase prescribing the time applies to publication as well as posting. The words "at least once" do not relate to the time of publication, but are merely intended to prescribe the number of publications.

However, assuming, for the sake of argument, that this language is obscure in its meaning, and that a reasonable doubt arises as to the intent of the Legislature, it should be construed with reference to the object intended to be accomplished, and that construction should be applied which appears most reasonable and best calculated or suited to accomplish that object. The clear reason and spirit of the clause should govern. A construction which will permit the publication to be made the day before the hearing will defeat the very object of the provision.

The argument advanced by the appellant that the construction here contended for will present some practical difficulties is not well founded. Section 2 directs the clerk to call a meeting of the governing body upon the filing of the petition, and provides that "the time fixed for such meeting shall be not less than eight, nor more than twelve days, exclusive of Sundays, from the date of the filing of such petition with the clerk." The appellant insists that "the clerk has the legal right to adopt the minimum period," and that occasions may arise of municipalities having only weekly newspapers, where no publication can be had at least five days before the hearing. This clause giving the clerk discretion in fixing a time, with a minimum of eight days, and a maximum of twelve days, exclusive of Sundays, making fourteen days in all, was undoubtedly intended to make the provisions as to notice workable.

No case can arise in a municipality having only a weekly newspaper where publication cannot be had at least five days before the hearing, unless the clerk arbitrarily fixes the earliest day. The discretion vested in the clerk is to fix a suitable time, bearing in mind always the directions as to notice.

It is, therefore, respectfully submitted that the statutory notice must be published as well as posted at least five days before the hearing.

POINT III.

THE FAILURE TO GIVE THE STATUTORY NOTICE BY PUBLICATION WAS A JURISDICTIONAL DEFECT WHICH VITIATED THE ELECTION.

The pronouncement of Mr. Justice Parker, in *Michaelson* v. *Wall Township* (combined in the opinion with *Cooper* v. *Frelinghuysen Township, supra*), aptly states the reasons in support of this point. He said:

> "The giving of this notice is important because the hearing upon the petition is made a public hearing, and the counsel is required to hear any objections that may be made to the petition, and also any evidence that may be submitted at the hearing whether or not the said petition is sufficient. Section 4. Also by Section 10 it is provided that at the hearing on the petition such governing body shall keep a record of the hearing and the testimony presented, and the petitioners and their opponents may be represented in person or by attorney, and shall have the right to have copies of all the papers and proceedings and a transcript of the testimony, and the right to present evidence and to cross-examine witnesses. Hence, it is obvious that the hearing is judicial, or, at least, quasi-judicial, and, according to the well-known rule, the statutory procedure should be strictly followed, especially as relates to the giving to persons interested, proper notice and an opportunity to be heard."

In *Middleton* v. *Robbins*, 54 *N. J. L.* 566, this Court passed upon this identical question.

In that case a petition had been filed with the law judge of the county, praying for an election to determine whether the minimum license fee should be $5,000. The notice of the hearing on the petition did not state the amount of the license fee to be considered by the voters. It was objected that this omission made the

notice fatally defective. Mr. Justice Reed, in upholding this contention, said:

> "The design of the statute obviously is that the notice shall contain a full disclosure of the contents of the petition. It should be so full that no resort need be had to the petition itself to ascertain its contents or its object. Now, the most important feature of the proceeding is the amount of the fee which is fixed upon by the petitioner, as the subject upon which the electors shall be called upon to exercise their will. A notice which fails to state a fact of such prime importance cannot be regarded as a compliance of the legislative requirements. *This essential condition precedent to a legal order for an election, being absent, the judge had no jurisdiction to make the order.*"

When the judicial character of the hearing is considered in the light of the provisions of this act, especially Sections 4 and 10, the importance of this notice cannot be over emphasized.

Section 3 (*P. L.* 1918, *p.* 17,) provides, among other things, that any municipal clerk who shall wilfully neglect or refuse to post and publish said notice as required by said act, shall be guilty of a misdemeanor.

In the words of Justice Reed, in *Middleton* v. *Robbins, supra,* "the effect of such defect would be that an order was made which, if those entitled to be heard had been heard, might not have been made." It, therefore, follows that the statutory requirements as to notice must be strictly observed, and a failure in that respect is fatal.

> See *State* v. *Shreve,* 15 *N. J. L.* 57; *State* v. *Williamstown Co..* 24 *N. J. L.* 547.

The actual submission of this question to the voters at the general election cannot serve to give vitality to a proceeding which, by reason of a jurisdictional defect, was a nullity.

An election could not be ordered until the statutory hearing was held. The governing body had no juris-

diction to hold a hearing or to make a determination until the statutory requirements as to notice had been complied with.

The observations of Mr. Justice Swayze in *Pierson* v. *Cody,* 84 *N. J. L., at page* 58, are here pertinent. In discussing the effect of an election held without lawful authority, he said:

> "The difficulty, of course, is that an election must be held under authority of law in order to bind the voters who either take no part at all or fail to vote upon the particular question submitted. If it is an election held in pursuance of law, voters are properly held bound to vote or submit to the action of those who do. *Bott* v. *Secretary of State,* 33 Vroom 107; *S. C.,* 34 *Id.* 289. If, however, the proceedings are *without authority of law, no voter is bound to take notice thereof, and he cannot be held to have assented by implication* to the acts of those of his fellow citizens, who chose to place upon their ballots an affirmative vote. The difficulty is well illustrated by a case like the present, where the affirmative vote was only a little more than one-third of the ballots cast, and did not suffice to carry the election unless the voters who did not vote at all on the question are to be held bound by the result."

In the case at bar approximately 172 registered voters did not participate in the general election held that day, while of those who did vote at the election 35 did not vote on the question submitted.

It will be observed that Justice Swayze was speaking of a special question submitted to the voters at a general election.

It is elementary that the directions of a statute as to the proceedings to be taken on a petition of this character are mandatory, and disregard of them will invalidate the election.

23 *Cyc.* 97.

"And where a statute provides for the calling of a special local election to vote upon a proposition to determine some question * * * upon the presentation

of a petition to a designated officer or authority, the presentation of such a petition is a condition precedent to holding an election; and it must be signed by the number of qualified persons prescribed by the statute, otherwise the election will be void."

15 *Cyc.* 319, *with citations.*

While the prosecutor of the writ attended the Township Committee meeting held on September 24th, he did not know until he arrived there that the committee intended to take any action with reference to the petition. He was told by someone that day that the petition could be seen at the Township Committee rooms, and he went there that evening for the purpose. (Case, p. 27, lines 1-20; p. 28, lines 20-40.) He had no knowledge that a meeting was to be held that evening to consider the petition. (Case, p. 29, lines 18-30.) The committee was in session when he arrived. (Case, p. 29, lines 20-40.)

His presence there that evening cannot serve to give vitality to a proceeding void for lack of jurisdiction.

Joseph Schaeffer, another license holder in the township, testified that he had no notice of the meeting and did not hear of the meeting until after it had been held. (Case, pp. 31-36.) A motion was made in the Supreme Court to admit Mr. Schaeffer as one of the parties to the writ, but at the oral argument the Court did not seem to think that the prosecutor's presence at the hearing estopped him from contesting the election.

It is, therefore, respectfully insisted that this defect being fundamental, the entire proceedings are a nullity and should be set aside.

POINT IV.

There was No Basis for Determination that Petition was Sufficient and that an Election Should Be Ordered.

This point involves the fourteenth and sixteenth reasons.

There was nothing before the Township Committee to establish the number of legal ballots cast in Palmyra Township at the last preceding election for members of the General Assembly, nor that the petition was signed by legal voters of the township in number more than twenty per cent. of the number of legal ballots cast at the previous election for members of Assembly.

Section 5 of the act provides that the petition shall be deemed sufficient, and the election ordered, only in the event that the "governing body shall find that such petition was signed by legal voters not less in number than twenty per cent. nor more than thirty per cent. of the number of legal ballots cast in said municipality at the last preceding election at which members of the General Assembly were elected."

No testimony was taken to establish these facts. On the contrary, the proofs here taken show that the Township Committee did not even inspect the petition. The Clerk testified as follows (p. 25, line 1, etc.):

> Q. Mr. Stewart, was there any testimony taken at the meeting of the Township Committee on September 24th as to the number of legal ballots cast at the last preceding election?
>
> A. No.
>
> Q. Was there any testimony whatever taken by the Township Committee as to the number of legal votes?
>
> A. It was left with the Clerk to examine as to the number of signers on there and as to the legality of the petition; and the Township Committee trusted to the Clerk to examine the petition.
>
> Q. And the Township Committee took no evidence and made no inspection of its own?
>
> A. No, not respecting the number of signers; I took the evidence myself.

Clearly, the Township Committee did not discharge its statutory duty. There was nothing before it justifying the determination made. The Clerk examined the petition, and "took the evidence." He made the de-

termination. The action of the governing body in determining the petition sufficient had nothing to support it.

Section 10 provides that "in determining the sufficiency of the petition, such petition shall be deemed to be prima facie sufficient if it contains the required per centum of signers thereto."

This presumption extends only to the *qualifications* of the signers, and only arises "if it contains the *required per centum* of signers thereto."

In other words, the governing body must have proper evidence to base a finding that the petition contains the required number of signers before any presumption arises or any determination can be made.

See *State* v. *Shreve,* 15 *N. J. L.* 57.

State v. *Williamstown,* 24 *N. J. L.* 547.

It was impossible for the governing body to make a proper finding that the petition was sufficient, and it is equally impossible for this Court to determine now that the petition was, in point of fact, sufficient.

The act does not provide that the petition, as filed, shall be prima facie sufficient, but there is the qualification that the presumption shall arise only if it contains the required number of signatures. This can only be determined by the governing body upon proper evidence.

In *Lehigh Valley R. R. Co.* v. *Jersey City,* 81 *N. J. L.* 290, a similar situation confronted the Supreme Court. Mr. Justice Parker, speaking for the Court, said, at p. 295:

> "But important facts shown by the evidence are that the commissioners gave no particular attention to the making up of the assessment, but left it entirely to their clerk, one Brown, and that Brown in effect apportioned the whole cost of the sewer according to area or frontage, and on the principle that so long as the assessment did not exceed the value of the lot, it was a proper assessment. * * * It is plain that not

only was the assessment made upon a wrong principle, but that the commissioners gave no attention to their duties and left the whole matter to the clerk—a practice properly condemned in such cases as *State, Mann, prosecutor,* v *Jersey City,* 4 *Zat.* 662; *State, Townsend* v. *Jersey City,* 2 *Dutcher* 444; *State, Ogden, prosecutor,* v. *Hudson City,* 5 *Id.* 104, 111, *and State, Zabriskie, prosecutor,* v. *Hudson City, Id.* 115."

In this respect, therefore, the proceedings are without warrant in law and should be set aside.

POINT V.

THE PROVISIONS OF THE SOLDIERS' AND SAILORS' VOTING ACT WERE NOT OBSERVED, AND THE ELECTION WAS THEREBY A NULLITY.

The stipulated facts show that the directions of this act, Chapter 150 of the Laws of 1918, were not observed, but there is nothing in the record of this case, or of *Bullock* v. *Northampton Township* argued at this term, to sustain the contention of the appellant that it was impossible to comply with the directions of that act.

The Secretary of State did send agents, with ballots, to some of the camps, and mailed ballots to the commanding officers of other camps. There is, however, nothing to show that the ballots reached the electors in the service, at those particular camps, or that any effort was made to deliver them.

This substitute plan is not recognized or sanctioned by the statute, and fell far short of the comprehensive scheme of the act requiring the mailing of a ballot to every elector in the service, together with a copy of the act itself, or printed directions for voting and transmitting a ballot.

At least 150 qualified electors of this township were in the military service, of which at least 67 were located

in the United States, and of these only 7 voted. (Case. pp. 15-16.)

Argument is hardly needed to demonstrate the utter inadequacy of the plan adopted by the Secretary of State. No ballots were mailed to these electors. The act directs the Secretary of State to "forward by mail or otherwise to *each person* in such active service" a ballot, &c., together with a copy of the act or printed directions for voting.

It contemplates the placing of a ballot in the hands of each man in the service, and if the mail is not used it must be shown that a ballot was actually "forwarded" in some manner to "each person" in the service.

This could not be established. The sending of agents with ballots to certain camps, a method not sanctioned by the statute except as to men in foreign countries, means nothing unless they actually delivered a ballot to each New Jersey soldier in those camps. The mailing of ballots in bulk to commanding officers of other camps was futile to carry out the purpose of the statute. Furthermore, a large number of men in the army and navy were not located at the camps to which agents were sent or ballots mailed to commanding officers.

In order to carry out the directions of the act, it was necessary to secure the addresses of all the electors in the service, and this the Secretary of State did not do. Those in charge of the "Dry" campaign in Palmyra Township made no effort to comply with the law.

While the Secretary of State might have found it a most burdensome task to send a ballot to every New Jersey elector in the service, no reasonable excuse can be advanced for the failure to mail ballots to the electors of Palmyra Township. Those in charge of the "Dry" campaign could have arranged to do so by furnishing the addresses, but possibly they thought the number of disfranchised electors would not be sufficient to change the result.

Whether the provisions of this statute are mandatory or directory makes no material difference. To carry

out the provisions of Article II, Paragraph 1, of the State Constitution, securing to electors in the military service the right to vote, the Legislature designed this act to afford every elector in the service an opportunity to vote, and the failure to comply with its provisions in this particular instance deprived the service men of this right, and the act was nullified.

In the case at bar the number of electors in the service who did not vote is more than sufficient to change the result of the election, and they were, therefore, deprived of their right to a voice in the determination of this important question.

That the provisions of this act are mandatory, however, seems clear. It is quite evident that the Legislature intended them to be mandatory, as the manifest purpose of the act is to afford to men in the service every possible opportunity to vote, and thereby secure to them their constitutional rights. The provisions of the Federal and State Constitutions guarantee the right to vote.

In *State* v. *Superior Court,* 71 *Wash.* 484, 128 *Pac.* 1054, the following test is given:

> "Reference is then made to *McCrary on Elections, Par.* 225, for the proper test in determining whether the omission of any particular requirement not made mandatory by the express language of the election statute shall render the election void, and this test is said to be that the requirements of the statute are to be held mandatory if they do, and directory if they do not *affect the actual merits of the election.* These authorities are almost conclusive against the validity of this election, without notice of any character."

Chief Justice Gummere, in his opinion in the Montclair, Caldwell, and other special election cases, said:

> "On the one side it is said that the Soldiers' Act of 1918 is mandatory, and on the other side

> it is merely directory. It does not seem to be important which it is. The fundamental question is whether by its provisions it affords the members of a class of electors an opportunity to vote on *these abstract propositions* and protection in the exercise of their rights as electors."

It is fundamental that an election cannot be sustained where a large body of the electors have been disfranchised, through no fault of their own, and the number is sufficient to change the result of the election. These disfranchised electors were absent in the performance of the highest and noblest duty of citizenship. Our Constitution guarantees their right to vote while so engaged; and in discharge of its duty in the premises the Legislature enacted a measure to secure that right to every elector in the service.

Chief Justice Gummere, in the Montclair, Caldwell, and other special election cases (not reported), tersely stated the reason for voiding the election when the provisions of this voting act were not carried out. He said:

> "They were arbitrarily deprived of what I conceive to be a fundamental right, and that being so, and the number of disfranchised voters being so large that the result of the election might have been changed if they had been afforded an opportunity to and had voted, I think that the election is void."

In the *Holman Case,* 104 *Atl. Rep.* 212, Mr. Justice Kalisch took a similar view. In discussing the alleged impracticability of carrying out the terms of the act, he said:

> "There is, however, testimony to the effect that the office of the Secretary of State was advised by the department of the Adjutant-General of this State that it was impossible for the latter to furnish any list of names and military addresses of the soldiers and sailors of the State

of New Jersey. But I think it is wholly unimportant whether or not the failure of the Secretary of State or of the Adjutant-General to comply with the provisions of the statute was due to their willfulness or neglect, or of either of them, or because of the impracticability of carrying the statutory behests into execution, so long as it appears that the qualified electors were deprived of their right to vote at the election and were sufficient in number to have changed the result, if they had been afforded an opportunity to cast their votes and had voted against prohibition."

In *Coggeshall* v. *DesMoines,* 138 *Iowa* 730, 117 *N. W.* 309, where women were entitled to vote upon a proposition to be submitted at an election, and at such election the votes of women were refused not on grounds of disqualification peculiar to the individual women who offered to vote, but as members of a class, it was held that the election was void, it appearing that more qualified women voters resided in the voting district than were necessary to overcome the majority given on the election, *although the number of votes actually rejected would not have changed the result.* In arriving at this conclusion, the Court said:

> "Had the election officers gone no farther than refuse the votes of the women which were actually tendered, the result could not be disturbed, for in that event enough were not rejected to have changed the result. But the refusal was not based upon disqualification peculiar to the individuals, but as members of a class. The evidence shows conclusively that the denial was directed to all women as such, and for this reason the election cannot be sustained as valid. * * * The distinction must be kept in mind between depriving an individual of the ballot because of some disqualification peculiar to him-

self, and the denial thereof to an entire class of voters. In the former, when not fraudulently done, but through error in judgment, there is no remedy. * * * But it is not so where a body of voters is denied the privilege as a class, when numerous enough to have changed the result. The denial is then in the nature of oppression, and operates to defeat the very purpose of the election; that is, of ascertaining the choice or sentiment of the electorate."

In *Renner* v. *Bennett,* 21 *Ohio St.* 431, where the votes of the inmates of an asylum were not accepted through an error of judgment upon the part of the election officials, it was held that the election was a nullity, the legal votes rejected being in excess of the majority given at the election.

In *Barry* v. *Lauck,* 5 *Coldw.* 588, where lawful voters were disfranchised by not being given proper notice of an election, by not having judges appointed to hold the election, and by refusal of appointees to act, the Court, in holding that the election was void, said that it must be kept in mind that *the object to be attained by the election was the ascertaining of the will of the community;* that whatever tended to prevent a fair exercise of the electoral franchise was a matter of substance, and that the practical disfranchisement of entire communities was such a substantial and material failure of the electoral franchise as to render the election a nullity.

See *Newcum* v. *Kirtley,* 13 *B. Mon.* 515;
In re Johnson, 40 *U. C. Q. B.* 297;
Woodward v. *Sarsons, L. R.* 10 *C. P.* 733.

In *McDowell* v. *Massachusetts & S. C. Co.,* 96 *N. C.* 514, 2 *S. E.* 351, it was held that failure to afford persons entitled to become qualified voters an opportunity to register, whether purposely or by accident, would render the election void where such denial would materially affect the result.

See *Pradat* v. *Ramsey,* 47 *Miss.* 24.

In *Zeiler* v. *Chapman*, 54 *Mo.* 502, the contest was over the office of Treasurer. Due to the neglect of the proper officials, a large number of voters were not given an opportunity to register. On election day, however, they all attended and were permitted to vote. The Court held that the ballots of the non-registered voters could not be counted; that the refusal to comply with the law on the part of the officers of registration rendered the entire election void. The Court said:

> "There was really no election, as the officers appointed to supervise the registration failed or refused to perform their duty. It was never intended, we presume, to place it in the power of the registering officers to defeat the will of the electors by refusing or failing to perform the duties imposed on them by law. This would be an outrage on the principle of popular election which the law concedes. The only effect of no registration in a case such as this, where no registration is possible, is to render the election a nullity."

Reference should also be had to the opinion of Mr. Justice Bergen in the Roselle special election case.

No rational distinction can be made between special and general elections in so far as the submission of this question is concerned. Even though submitted at a general election, it is, nevertheless, a special question.

In answer to the contention that upon his decision the validity of general elections would depend, the Chief Justice said, in the Montclair case, that this subject was "sociological" rather than "governmental" in its character, and that the "structure and machinery of the government will remain absolutely unaffected by the decision of this question" of whether liquor can be purchased in the territorial limits of the municipality. In conclusion, he said:

> "I have said as much as I have upon that subject because I want counsel to understand

> that I do not think that the determination of the question before me has any bearing upon the validity of the elections held for the purpose of *determining who shall or who shall not be the representatives of the people in carrying on the people's government.*"

Bearing this distinction in mind, the same reasons justifying the setting aside of a special election should prevail when the question is submitted at a general election. And there are no dangerous possibilities in this doctrine.

Even when submitted at a general election, this question has all the characteristics of one submitted at a special election. In every sense it is special.

The appellant insists, relying upon the opinions of Mr. Justice Kalisch in this case, 105 *Atl.* 448, and in the *Holman Case, supra*, that there is a clear distinction between a special and a general election, in the observance of this voting act, on the theory that the voters have knowledge, or are presumed to have, of the time when a general election is to be held. This is quite true. They also have knowledge, or are presumed to have, of the offices to be filled at that election. For these reasons, and the additional one that a contrary doctrine might destroy a municipal or State government, it has been the rule that general elections should not be disturbed.

Public policy could not permit a contrary rule.

But these reasons do not apply to the submission at a general election of a question "sociological" and not "governmental" in character. This question may be submitted at a special or general election, at the option of a minority of the voters, an intervening agency.

This presumption, however, can extend no further. The voters cannot have knowledge, and no presumption of knowledge can arise, unless legal notice is given, that at a general election this special question, under Chapter 2 of the Laws of 1918, is to be submitted, for the sufficient reason that the act does not direct the submission of the question at a particular general election.

It may be submitted at a special election, at a general election, or not at all, depending upon the will of a minority of the voters.

This is particularly true of the men absent in the military service, who did not know, and could not be presumed to know, unless the provisions of Chapter 150 were carried out, that this important question was to be submitted to the voters.

When it is remembered that the proposition submitted might possibly be based upon the provisions of the regulatory measure known as Chapter 3 of the Laws of 1918, there is found an additional reason for giving the notice and opportunity to vote afforded by mailing a ballot to each voter as required by the act.

The doctrine of constructive notice cannot help the appellant, and the reason is well stated by Mr. Justice Parker in his opinion in *Scheible* v. *Hightstown, supra*. He said:

> "On the first branch of the inquiry the result we reach is that substantial compliance is a requisite to the validity of the vote even at a general election. The act itself makes no distinction in its mandate. By its express language it applies to general, special and primary elections. And, as we observed in the Miller case, the act disregards the doctrine of constructive notice even to some extent as to its own existence as a law, by requiring transmission to the soldier of a copy of the act, or printed directions how to cast a ballot thereunder, official or unofficial."

The electors in the service having had no notice of the submission of this special question, and no opportunity to vote thereon, the election in this respect, that is, as to this special question, should be set aside for the same reasons justifying the nullifying of special election. And this does not affect the validity of the election in other respects.

In *Brown* v. *Street Lighting District No.* 1, 70 *N. J. L.* 762, Justice Pitney collected and discussed the elec-

tion cases in New Jersey and elsewhere, and laid down the following rule:

> "The rule to be derived from a review of the authorities is that, where the time, place and *purpose* of an election are fixed by public law, all voters must take notice thereof, and such an election, if held, is not invalid because no special notice was given nor proclamation made; certainly not, if it appear that there has been a fair expression of the will of the voters."

The time, place and purpose being fixed by public law, the electors are bound to take notice of the same, and therefore derive notice from the statute itself, inasmuch as they are presumed to know the law. But this rule only extends to the "purposes" fixed by public law. As to other questions submitted the election is *special.*

In *People* v. *Thompson, 67 Cal.* 627, this question arose. The Court said:

> "Notice to the electors lies at the foundation of any popular system of government. It has sometimes been held that the existence of a law fixing the time of an election, and the offices to be filled, is of itself notice. It may be conceded that when a term of office is to expire at a certain date after a general election (no other election to intervene), the electors take notice the office is to be filled at such general election. Some decisions have gone so far.
>
> "But it is well settled that when a vacancy has occurred by reason of death or resignation, the voters are not bound to take notice of such vacancy, and the casting of votes for a candidate or candidates to fill the vacancy does not constitute an election. The facts of the present case bring it within the principle of the decisions which hold that, in cases of special elections to fill a vacancy, a proclamation is necessary. *even although the special election be held at the same time as a general election.* The principle is that

a notice by proclamation is necessary whenever the *voters are not bound by law to take notice of the time of the election, and of the officers then to be chosen.*"

See *Beal* v. *Norton*, 18 *Ind.* 346.

In *Wilson* v. *Brown*, 109 *Ky*. 229; 58 *S. W.* 595, the general rule is stated to be as follows:

"Where by the express provisions of the statute the election is to be held after proclamation or notice, announcing the time or the place, or both, and where no such proclamation has been made or notice given, the election is void. But where both the time and place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty. *The right to hold the election in such a case is derived from the law, and not from the notice.*"

In *Secourd* v. *Foutch*, 44 *Mich.* 89; 6 *N. W.* 110, it was said:

"It is a necessary safeguard to popular elections that the people be informed what offices they are to vote for. They may be expected to know what elections are to be made at the regular general elections; and, as to those in ordinary cases, it might be dangerous to allow a failure to give notice to avoid the election. But there can be no such knowledge assumed concerning vacancies in office; and without some distinct and public notice of some sort, such an election could hardly fail to be capable of the worst kind of fraud and trickery.

"As to such matters, the statutes concerning general elections are only permissive, and declare that vacancies *may* be filled—not that they *shall* be."

See *People* v. *Hartwell,* 12 *Mich.* 508; *People* v. *Witherell,* 14 *Mich.* 48.

It has been held that where it is contemplated by a statute that a proposition *may* be submitted at *either a general or special election,* the fact that, for convenience, it is submitted at the former, does not alter its character as a special election, and therefore a majority only of the votes cast on the *special question,* although less than those cast for officials, is sufficient.

22 *L. R. A.* (*N. S.*) 483.

See *South Bend* v. *Lewis,* 138 *Ind.* 512; 37 *N. E.* 986.

State ex rel. Douglas County v. *Cornell,* 53 *Neb.* 556; 39 *L. R. A.* 513; 74 *N. W.* 59.

State ex rel. Crocker v. *Echols,* 41 *Kan.* 1; 20 *Pac.* 523.

Territory ex rel. McGuire v. *Logan County High School,* 13 *Okla.* 605; 76 *Pac.* 165.

Walker v. *Oswald,* 68 *Md.* 146; 11 *Atl.* 711.

When it is provided that a special proposition shall be ratified by a majority of the votes cast at an election to be held at a designated general election, the statute clearly refers to an election separate and distinct from the regular election, although held the same day, and therefore a majority of the votes cast at such election, although less than those cast at the general election, is sufficient to adopt the special proposition.

Jones v. *Com.,* 104 *Ky.* 468; 47 *S. W.* 328.

In *State* v. *Superior Court,* 71 *Wash.* 484; 128 *Pac.* 1054, the election was held to be special, although held with the general election.

In *People* v. *Porter,* 6 *Cal.* 26, it was held that an election to fill a vacancy occasioned by the death or resignation of an officer is a special election, and that the provisions of the laws of that State requiring such elections to be held at the same time and place with general elections did not change their character. The Court said:

"It is essential to the proper exercise of the elective franchise that the voters should be informed of the offices in which vacancies have occurred, before each general election, in order that they may select fit and proper persons to perform the duties of such offices.

"The law gives notice of those offices which are vacant by reason of the expiration of the term of the incumbent. The law also provides that the Governor of the State shall by proclamation give notice of such vacancies occasioned by death, resignation or removal from office; and without this notice elections to fill such vacancies are invalid."

See *People* v. *Weller,* 11 *Cal.* 49.

People v. *Martin,* 12 *Cal.* 409.

The rule to be derived from all these authorities is that notice is unecessary where the special election is directed by statute to be held at the same time and place for holding the general election, for the statute itself gives such notice; but where a special question is submitted at a general election, and the time of the submission of such question is not fixed by statute for that particular general election, but the time of submission depends upon the action of a body of the voters or officials acting for them, notice must be given.

And in this case notice would necessarily have to be given to all the voters—not only the resident voters but those absent in the military service, in accordance with the provisions of Chapter 150.

There is no public statute which declares the purpose of any particular general election to be the determination of the question submitted under Chapter 2. This question may be submitted at a special election, or not at all, depending upon the intervening agency provided by the act for setting its machinery in motion.

There is, therefore, no statute which gave notice to the electors of Northampton Township that his question would be submitted at the General Election of 1918.

So that a question under either Chapter 2 or Chapter 3 is purely a *special* question when submitted, and its submission at a general election does not alter its character.

The well-known rules applicable to general elections spring from the fact that its time, place and *purpose* are fixed by law, and that the statute itself gives notice. It is illogical and unreasonable to apply those rules to voters absent from home in the military service in so far as this special question is concerned.

The Legislature has directed the forwarding of ballots and the giving of notice, and did not see fit to make any provision for cases where these directions were not strictly carried out.

No serious harm can result in setting aside this election. Another can be called immediately, and an opportunity afforded the men in the service to vote. They are entitled to vote in the determination of this important sociological question, and the Legislature saw fit to guarantee them this fundamental right.

POINT VI.

The Prosecutor was not in Laches in Seeking His Remedy.

The writ of certiorari was tested on December 12th, 1918. No determination of the result of this election could have been made until thirty days after the election. (*P. L.* 1918, *p.* 437.) The Board of Canvassers had thirty days within which to canvass and count the ballots received from electors in the service.

As Justice Parker said in *Scheible* v. *Hightstown, supra,* if the prosecutor had applied immediately after the election, the allocatur might well have been denied on the ground that the soldier vote might turn the result the other way.

The argument advanced against laches under Point IV in the brief filed in *Bullock* v. *Northampton Town-*

ship, argued at this term, is applicable here, and reference to the same is respectfully asked.

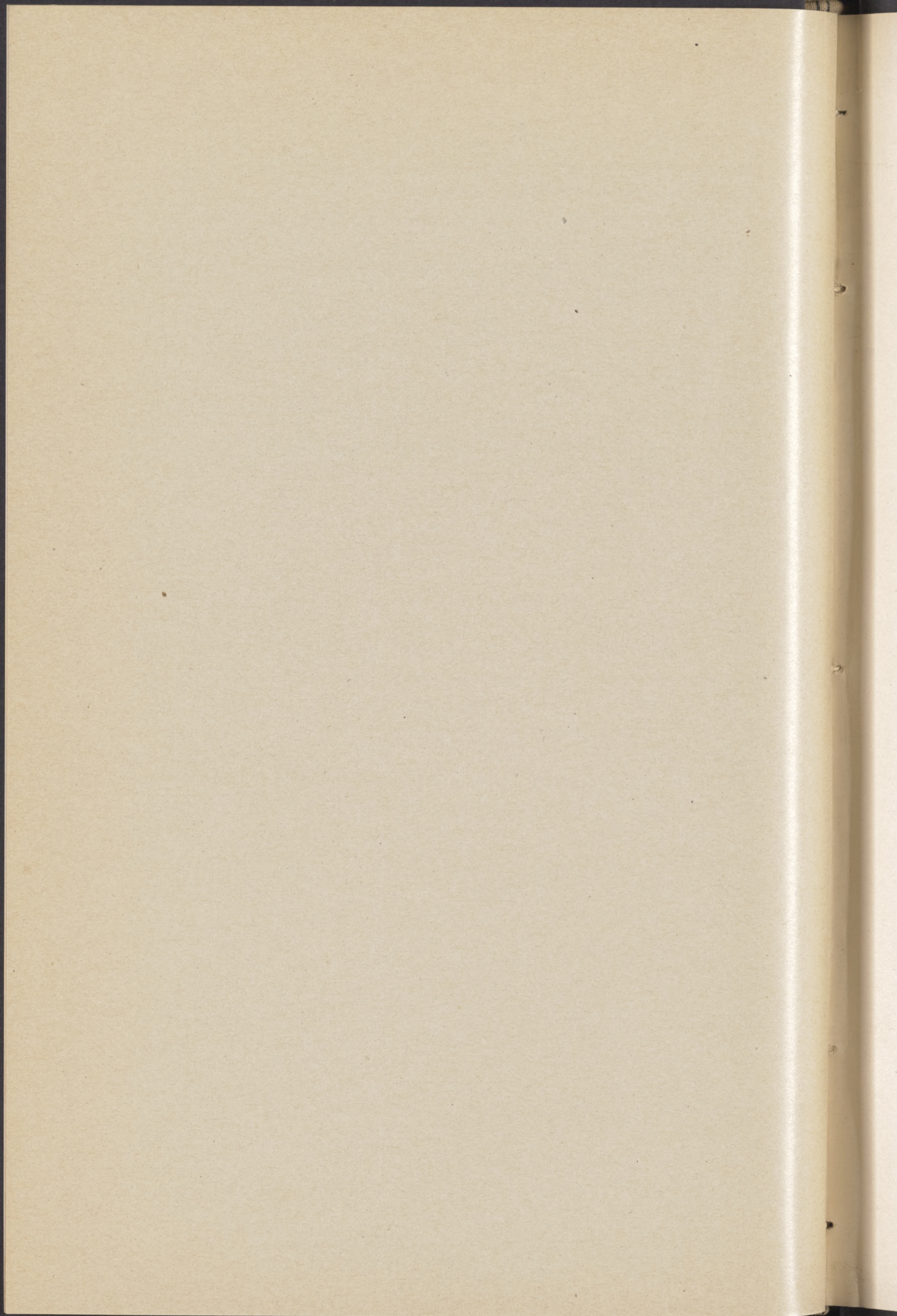
The doctrine of laches is not applicable to the case at bar. It is equitable in character, and mere lapse of time is not a bar to relief when the rights of the parties have not been prejudicially affected by the delay, the rights of innocent third persons will not be prejudicially affected, and nothing has occurred to create an equitable estoppel against the moving party.

In *Sturr* v. *Elmer,* 75 *N. J. L.* 443, Mr. Justice Trenchard refused to entertain the contention of laches because it did not appear that the delay which intervened between the time when the prosecutor as a vigilant taxpayer ought to have known that the action in question had been taken, and the time when he applied for his writ of certiorari, had resulted in any detriment to the borough.

Long delay has been excused in many of the cases where the rights of the parties had not been prejudicially affected. In New Jersey this defence has been successfully interposed principally in those cases where during the delay the rights of the parties have changed, such as the expenditure of money on municipal contracts.

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

HARRY HEHER,
Attorney and of Counsel with
Prosecutor-Respondent.



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New Jersey Court of Errors and Appeals

CHARLES H. KERN, *Prosecutor-Respondent*, *vs.* THE TOWNSHIP OF PALMYRA, in the County of Burlington, *et als.*, *Defendants-Appellants.*	*On Appeal from Supreme Court.*

BRIEF IN FAVOR OF DEFENDANTS-APPELLANTS.

(1)

Statement of the Case.

On November 5, 1918, an election was held in the Township of Palmyra, in the County of Burlington, under the provisions of Chapter 2, Laws of 1918, to determine whether or not the sale of intoxicating liquor as a beverage in said municipality should be prohibited. At said election the total vote cast in favor of prohibition was 304, and the total vote cast against such prohibition was 257—being a "dry" majority of 47. Thereafter seven ballots were received from men in the military service, of which three were recorded in favor of prohibition and four against, thus making a net "dry" majority of 46.

The statute under which this election was held provides in section 25 thereof, for a summary method of review by means of a petition filed with one of the Justices of the Supreme Court. For some unexplained reason the prosecutor of the writ of certiorari (now the respondent) neglected to take advantage of this summary procedure and on December 12, 1918—some five weeks after the election—he sought and obtained a writ of certiorari to set aside the same.

After the allowance of the writ an order was made by one of the Justices of the Supreme Court permitting a taxpayer and resident of the township to intervene and assist in the defense. Certain facts which did not appear on the face of the return of the writ were shown by depositions and the case was heard at the February Term, 1919, of the Supreme Court. Various reasons were assigned by the prosecutor why the election should

be declared invalid, but the only one the Supreme Court found it necessary to consider was the alleged failure to comply with the Soldier Vote Act (Chap. 150, Laws of 1918). On the authority of the case of *Scheible* v. *Hightstown,* wherein the opinion was filed simultaneously with the opinion herein, the Supreme Court, for the reasons given in that case, set aside the election so far as the same related to the local option vote; and judgment was thereupon entered accordingly. The present appeal is taken from such judgment.

In the Reasons which were filed by the prosecutor in the Supreme Court, various other grounds of invalidity were urged in addition to those arising by reason of the alleged failure to comply with the Soldier Vote Act. We assume that this court on appeal will consider all of such Reasons and will therefore deal with all of them.

(2)

Grounds of Appeal.

1. The Supreme Court erred in setting aside the election under review insofar as it relates to the local option vote, whereas said court should have sustained the said election and should have dismissed the writ of certiorari herein.

2. The Supreme Court erred in holding that the election under review was invalidated by the alleged irregularities with reference to the Soldier Vote Act, and in not holding that the said election was not thereby invalidated.

3. The Supreme Court erred in holding that the prosecutor (now the respondent herein) was not barred of his right to prosecute the writ of certiorari herein by reason of his laches and in not holding that he was therefore barred.

(3)

Brief of the Argument.

I.

The Local Option Act is constitutional.

In the Reasons filed by the prosecutor an attack is made upon the constitutionality of the Local Option Act on various grounds therein specified. See Reasons 1 to 8, pp. 47 and 48. All of

these Reasons were considered and disposed of adversely to the prosecutor by the Supreme Court in the cases of *Robson* v. *Blairstown* (opinion filed November Term, 1918, not yet reported) and *Smith* v. *Township of Middle* (opinion filed February Term, 1919, reported in 105 Atl., p. 877). A separate brief in support of the constitutionality of the statute has been prepared and will be filed as part of the argument of the appellants herein, and the Court is respectfully referred to such separate brief for a discussion of the constitutional questions raised by the prosecutor's Reasons.

Assuming that this Court agrees with the Supreme Court on the question of the constitutionality of the statute, then there are certain further questions relative to the construction of said statute which are involved in the present case and these other questions will now be discussed.

II.

The notice of the meeting of the governing body was published as required by law.

The return of the municipal clerk recites that he certifies, among other things, notices of the meeting "posted and published and sent to the Township Committee" (p. 3, l. 20). The notice which is attached to the return is that a meeting of the committee will be held on Tuesday, September 24th, at 8 P. M., at the place therein indicated for the purpose of inspecting the petition and hearing objections. The deposition of the clerk shows that this notice was *posted* in five public places on September 18th and was mailed the same day to the members of the Township Committee (pp. 16, 17). At the meeting held on September 24th it appears from the return of the clerk, as well as from his testimony, that the petition was examined by several persons (including some "representing the saloon interests") and the committee found the petition to be correct and a resolution was passed reciting that the petition had been properly executed and attested and that the same was found "efficient" and thereupon the clerk was authorized to place the question upon the ballot to be voted upon at the general election of November 5th (pp. 5, 6).

Although the Reasons allege, among other things, that there was no legal evidence before the Township Committee that the

petition was signed by the required percentage of legal voters, we assume that these Reasons are not seriously pressed in view of the above findings as they appear in the official return of the clerk. While it may be that no *formal* evidence was taken before the committee to determine whether the same was signed by the required percentage of voters, the burden to show that it was not so signed would, we submit, be upon the prosecutor, and as no evidence whatever has been taken to show that it was not so signed, the return of the clerk must be taken as conclusive on this point. The clerk in his deposition said that the committee left it to him to examine the petition and that he "took the evidence" himself; the depositions also show that none of those who were present at the meeting made any objection to the petition on the ground of an insufficient number of signatures (pp. 22, 25).

The only matter of substance which need be considered on this phase of the case is the claim that the notice of the hearing of the committee was not *published* as required by law, that is, it was not published at least five days before the date fixed for the meeting of the committee.

It appears from the return and from the depositions that the notice was published in the issue of "The Weekly News" of September 20th—the meeting being called for September 24th at 8 o'clock P. M. The publication was therefore a few hours short of five days, and the question is therefore presented as to whether under these circumstances the will of the people of this municipality on this question must be set aside, at the suit of a prosecutor who was himself present at the meeting and who was well aware of the purpose thereof.

It appears from the depositions that the petition for the election was filed with the municipal clerk on September 14th; it was originally left with him two days prior to that date but the clerk at the request of the one of the petitioners handed it back for the purpose of obtaining further signatures, and it was finally and officially filed with the clerk on September 14th.

The only paper published in Palmyra is "The Weekly News"; and hence under the provision of Section 2 of the Local Option Act the notice *was required to be published in that paper and none other* (p. 19, l. 30).

This paper was published on Friday of each week. Hence, *the earliest issue in which the notice could have been published*

(the petition having been officially filed on September 14th) was the issue of September 20th; and it was imperative that the notice be published in that paper as it was the only one which was published in the municipality. Even if the petition be considered as on file on September 12th, it would have been impossible to get the notice in the issue of September 13th.

Under Section 2 it was the duty of the clerk to fix a date for the meeting not less than eight nor more than twelve days (exclusive of Sundays) from the date of the filing of the petition; he therefore had the right to fix the meeting for September 24th—which was ten days from the date of the filing of the petition—or nine days, exclusive of Sunday, September 15th.

This case therefore squarely presents the question of whether the Local Option Law must be construed to require a publication of the notice of the meeting of the governing body when it appears that the newspaper wherein such notice is required to be published is not issued five days in advance of the date fixed for the meeting. Under such circumstances what shall be done? The clerk certainly has the right to fix the date of the meeting at the minimum period prescribed by the statute; he is bound to publish the notice in a newspaper which is published in the municipality, if there is any such newspaper —as there was in this case. He published the notice in the issue of the paper immediately following the date of the filing of the petition. If it be urged that this argument merely points out a defect in the law, the remedy for which rests with the Legislature, the answer is that the discussion of this point is not for the purpose of showing any defect in the law but for the purpose of indicating to the Court that the intent of the Legislature in requiring that the notice of the meeting be published *once* in advance of the date of the meeting of the committee was to have such publication a reasonable time in advance of the meeting,—or, put it another way, as soon as practicable after the petition was filed; and that the Legislature did *not* intend that the *publication* as well as the posting must be at least five days in advance of the date fixed for the meeting. It must be presumed that the Legislature intended to pass a law that was workable and practicable; and the law is both workable and practicable if we refrain from reading into it a provision which, we submit, the Legislature intentionally omitted—no doubt for the very purpose of avoiding such a situation as has arisen in this case. If a con-

struction of the law leads to an impossible or absurd condition, it may fairly be said that such construction is not to be followed unless absolutely required by the very terms of the statute; and there is nothing in this statute which requires any such construction, as there is nothing whatever therein which expressly requires publication as well as posting to be made five days before the meeting of the governing body.

This matter has been further discussed in the brief presented to this Court in the case of *Bullock* v. *Township of Northampton,* and as that brief will be before the Court this term, it seems unnecessary to repeat the argument therein at length; and we therefore call attention to the discussion under Point I in said brief. We beg leave to call attention to the fact that in that brief we suggested a theoretical case where it would be impossible to comply with the law, if the clerk selected the minimum period for the fixing of the date of the meeting; *and in the present case we have exactly such a situation,* as the evidence shows that as there was only one paper published in the municipality—and as that was published on a Friday—and as the petition was filed on a Saturday, the only issue in which the notice could have been published was an issue which was published only four days before the date fixed for the meeting.

It should further be observed that the prosecutor of the writ in this case has not been harmed by the failure to make publication for a period of five days, as his own testimony shows that he was present at the meeting of the Township Committee at which the election was ordered, and he knew that such meeting was held for the purpose of passing upon the legality of the petition for the election. (Pages 16, 17; 26 to 31.)

But even if the statute be construed to require *publication* as well as posting for a period of five days prior to the meeting of the governing body of the municipaliy, *the record of this case shows that there was a substantial compliance with the statute in that respect.* The date of the publication was September 20; the meeting was called for 8 o'clock P. M. on September 24. If we begin to count the time from 12:01 A. M. of September 20, it will be seen that the publication was only four *hours* short of a full period of five days. Thus from 12:01 A. M. of September 20 to 11:59 P. M. of the same date would be one day; and from 12:01 A. M. of September 21 to 11:59 P. M. of the same date would be two days and likewise on the 22nd, 23rd and 24th to 8 P. M. There were therefore five complete periods of daylight

during which any interested citizen had an opportunity to read the notice in the paper; and the only persons who might have failed to receive notice of the meeting would have been those who did not read the newspaper until some time after 8 P. M. of September 24.

In this respect the case is similar to that of *Rose* v. *The Borough of Andover,* in which an opinion was filed by Justice Minturn on May 21, 1919, where the same point was raised. In that case the record shows that the meeting of the borough council was called for Monday evening, August 12, 1918, and the only published notice of such meeting was in the issue of the New Jersey Herald, dated Thursday, August 8th. The proof was that the paper was in fact printed on Wednesday and some copies thereof were delivered to subscribers in the municipality on Wednesday evening. Justice Minturn overruled the claim that the publication was not for the period of five days on two grounds; first, that the delivery of the paper on Wednesday, August 7 (although dated August 8) was a publication; and, second, that even if it was not, nevertheless there were five complete days before the meeting of the borough council on Wednesday evening. We quote from his opinion as follows:

> "So far as publication of the notice of the borough meeting is concerned, I find that there was a substantial compliance with the act. The 'N. J. Herald' edition was published for that week on Wednesday, and was sent to Andover on that evening. Its reaching Andover on that evening was a delivery and a publication. It then went into circulation, and became a publication within the meaning and spirit of the law, requiring a five day publication. If the statutory time be counted to begin with Thursday morning, we still have five complete business days within which the paper might be perused by the citizens of Andover before the borough meeting on Wednesday night. To reach any other result we must divide the first and last days into fractions, and the well settled rule of law is that in such a computation, fractions of a day shall not be noticed. 4 Kent's Com. 95."

In the present case there is no proof that the newspaper was in fact put in circulation prior to the date of September 20, which date appears on the face of the newspaper as the date of its issue; but it does appear that the meeting was called for eight o'clock on the evening of September 24th, and therefore there were five complete days within which the paper might be read prior to the meeting of the governing body—a situation which is exactly the same as in the Andover case.

III.

The irregularities, if any, with reference to the Soldier Vote Act, should not invalidate the election.

The facts with regard to the efforts of the Secretary of State to give the voters in the military service an opportunity to vote are set forth in a stipulation which is attached to the depositions, together with a copy of the official ballot and the instructions to voters (including the names of the municipalities wherein a referendum was to be held), and the list of the camps to which the ballots and instructions were sent. (Pages 13-17; pages 37-47.)

The facts in this respect are the same as the facts that appear by stipulation and deposition in the case of *Bullock* v. *Northampton Township*. As the brief in that case will be before this Court at the present term, it is unnecessary to repeat the arguments therein set forth on this subject. We may summarize the same as follows:

> (a) Even if there was a failure to comply strictly with the provisions of the Soldier Vote Act, such failure should not operate to invalidate this election, for one or more reasons set forth in the several cases of Miller *v.* Montclair and others, as urged in the brief filed in such cases and summarized in the brief in the Bullock Case.
>
> (b) Even if the failure to comply strictly with the Soldier Vote Act should be held to invalidate a *special* election, such decision should not be extended to include elections which are held on the same date as the general election, for the reasons pointed out by Justice Kalisch in the case of Re Holman, 104 Atl., 212, and re-stated by him, sitting as a summary tribunal in the Bullock case.
>
> (c) The admitted facts show that there was a substantial compliance with the Soldier Vote Act.

The arguments in support of these points are set forth at length under Point IV. of the brief filed in the Bullock case and we beg leave to call attention to same without repeating them in this brief.

IV.

The prosecutor is in laches

For some unexplained reason, no steps were taken by this prosecutor to contest the election by the summary review provided in Section 25 of the statute. After the election was decided

adversely to his interests, he then, under date of December 12, 1918, obtained his writ of certiorari, with stay. He gives no explanation of the delay.

The election which he seeks to review was ordered by the Township Committee at a meeting held on September 24, 1918. He made no complaint of matters of procedure and made no objection of any kind to the election until December 12—a period of over eleven weeks, or nearly three months.

So far as relates to the alleged defect in the notice of the meeting, he could easily have ascertained that fact at or before the time of the meeting on September 24. He decided, however, to take his chances of the result, notwithstanding the fact that he was actually present at the meeting at which the election was ordered and spent some time in examining the petition in order to determine whether it was sufficient. (Pages 17, 18; pages 26-31.) After the election was held, on November 5, 1918, he again delayed for a period of five weeks.

Even if he had not been present at the meeting of the Township Committee, and even if he had not known at that time that the committee was considering a petition for a local option election, neither this prosecutor nor any voter has suffered any harm by the failure to publish notice of the meeting for five days.

Suppose that all the voters had actual personal notice five days or more before the date of the meeting of the Township Committee that on said date the committee would meet to consider the petition and to hear any objections as to the legality thereof. Suppose all the voters had attended at the meeting and suppose they had all objected to the election; what possible difference could such attendance and such objection have made in the action of the committee ordering the election? The only matter that can be considered at the meeting of the governing body is whether or not the petition is legal. If it is legal, the governing body is bound to order the election—and that, too, within a limited time. Section 5 provides:

> "The governing body shall determine the sufficiency of the petition within ten days after the time fixed for the hearing."

If the governing body refuses to make any determination or to make the determination within the time fixed by the statute, or if it makes an erroneous determination, then proceedings may be taken either by summary review (as provided in Section 9) or by mandamus to compel the governing body to take

the appropriate action. In this case the minutes show that the committee determined that the petition was "efficient" in accordance with Chapter 2, Laws of 1918; and neither the contestant or anyone else has ever objected to such determination or made any suggestion that the petition was insufficient or illegal. In the absence of some evidence to show that the action of the governing body in this respect was erroneous, we urge that this contestant is not now in a position to find fault with the procedure leading up to the determination, *as there is nothing whatever to show that the determination was in any respect erroneous.* Hence, if this contestant had been present at the meeting or if all of his friends or all the voters of the municipality had been present, the Township Committee were nevertheless bound to take the very action which they did take, and hence neither the contestant nor any other voter has been harmed by the failure to publish notice of the meeting five days before the date fixed therefor, even if the statute be construed to require publication for such period.

The case in this respect is very similar to the recent decision of Justice Minturn in the case of *Tittman* v. *Township of Hillsborough* (filed May 21, 1919), wherein the prosecutor of a writ of certiorari to review a local option election made the objection among others, that notice of the meeting of the governing body had not been published, as required by the statute. The writ was dismissed on the ground of laches. We quote from the opinion:

> "It is urged that notice of the proposed meeting of the township committee was not published or posted, as required by the act. The testimony shows it was posted in seven instead of in five places. Of that the prosecutor cannot complain.
>
> The notice was published twice instead of once in a local newspaper, but the publication in both instances was less than five days before a township meeting. This defect would ordinarily invalidate the election, as was held in Cooper *v.* Frelinghuysen, and Bullock *v.* Northampton Township. In the present instance, however, the delay of the prosecutor in acting upon the knowledge he possessed of the legal informality he now alleges, was so gross and inexcusable as to be tantamount to laches. He was present at the initial township meeting held at his own house on September 14th, and heard the petition discussed and passed upon; he even read the petition at that time and while the committee were in session he remained silent as to this legal requirement. After the election he closed his

hotel on December 5th and still presumably with knowledge of this informality, remained inactive until December 28th, when this writ was applied for, a period of over three months having elapsed during the interim.

In the case of Lindabury *v.* Clinton Township, we said in a case where but two months were allowed to expire, 'The act under review contemplates a summary disposition of the legal questions which may eventuate from this legislation, and the doctrine of laches in such a situation applies to him who would be legally served, upon a question of formal procedure and particularly where the public interests are concerned.' Citing McKevitt *v.* Hoboken, 45 L., 488.

The facts in this case present no reason why the rule of laches thus declared, should be relaxed in the case at bar, and the writ will therefore be dismissed, with costs."

So in the present case, the contestant—with knowledge of the meeting of the Township Committee—waited for over *three months* before making any objection to the notice of the meeting of the Township Committee.

The prosecutor, having waited so long before instituting proceedings to review the election, should be held, in a case involving the rights of the general public, to be in laches with respect not only to the point as to the publication of notice of the meeting, but also with respect to all the other points which he has urged, and judgment should therefore be entered dismissing the writ of certiorari.

There was a full and fair expression of the popular will on the question submitted at the election. The total registered vote was 875, and the total number of ballots cast was 596, not including 7 rejected ballots. Of the 596 valid vallots, 568 were voted on the referendum—thus indicating the great popular interest therein. We therefore respectfully urge that the Court should hesitate to disturb the result—especially when the only party complaining thereof was present at the meeting at which the election was ordered and took no steps to make any objection to the procedure until nearly three months after such order, and made no objection to the *result* of the election until over two months after the election was held.

As was said by Justice Trenchard in his recent opinion sustaining the election in the Township of Clinton (referring to an alleged defect in the notice of the election):

"So, in this present case, even if the general election law requires notice of the Local Option referendum at a general elcction to be published, the failure to do so does

not invalidate the result of the election when it appears that there has been a full and fair expression of the popular will, and I think that fact appears from the number of voters who voted upon the question presented."

V.

For these reasons the judgment of the Supreme Court setting aside the election should be reversed, the writ of certiorari should be dismissed and the election should be sustained.

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New Jersey Court of Errors and Appeals

Charles H. Kern, *Prosecutor-Respondent,* *vs.* Township of Palmyra, in the County of Burlington, *et als.,* *Defendants-Appellants.*	

Supplemental Brief in Favor of Defendants-Appellants in Support of the Constitutionality of the Local Option Law of the State of New Jersey. (Chap. 2, p. 14, Laws of 1918.)

Statement of the Case.

The defendants have appealed from a judgment of the Supreme Court sustaining a writ of certiorari sued out by the prosecutor (now the respondent) to review a local option election held in the Township of Palmyra in November, 1918, under Chapter 2, Laws of 1918.

The prosecutor of the writ filed a number of Reasons why the election should be set aside. These may be summarized as follows:

(a) Because Chapter 2, Laws of 1918, is unconstitutional.

(b) Because the governing body of the township was without jurisdiction to order the election, for the reason that the notice of the meeting of the Township Committee was not published, as required by law.

(c) Because the Secretary of State did not comply with Chapter 150, Laws of 1918 (commonly known as the Soldier Vote Act).

On behalf of the defendants, a separate brief has been filed on the questions of procedure wherein the defendants argue that the notice of the meeting of the governing body was published as required by law, and that the irregularities, if any, with reference to the Soldier Vote Act, should not invalidate the election. The defendants further argue in said brief that the prosecutor

was in laches in applying for a review of the result of the election.

If this Court holds that the prosecutor was in laches, that will dispose of the case without reference to any other points and will result in a reversal of the judgment of the Supreme Court. But if this Court should hold that the prosecutor was not in laches it will of course then be necessary to consider the questions of procedure; if it is held that the procedure was irregular with respect to either the publication of the notice of the meeting of the governing body or with respect to the soldier vote, such ruling would dispose of the case and result in an affirmance of the Supreme Court without consideration of the constitutional questions. If, however, this Court should sustain the argument of the appellants that the procedure was not irregular in either of said respects, it will then become necessary to decide the constitutional questions, for the reason that if the statute under which the election was held should be found to be invalid, the result of such conclusion would be to affirm the judgment of the Supreme Court setting aside the election, even if all the other questions should be found in favor of the appellants.

The various constitutional points which are raised by the prosecutor's Reasons have all been considered by the Supreme Court and have been decided adversely to the prosecutor in two cases.

The question first arose in three cases which were argued jointly and which appear in the files of the Court under the titles of *Michaelson* v. *Township of Wall; Cooper* v. *Township of Frelinghuysen;* and *Robson* v. *Township of Blairstown.* A joint opinion was filed by the Supreme Court on November 7, 1918, but same is not yet reported. In that opinion the Supreme Court decided that the special election held in the Township of Wall was invalid by reason of the failure of the clerk to public or to post notice of the meeting of the governing body as required by the statute. In the Frelinghuysen case the writ of certiorari was allowed before the election was held, with a state of the election; and the proceedings were set aside by reason of failure to comply with the statute with regard to the publication of the notice of the meeting of the governing body. The decision on this point is the subject of discussion in the separate brief filed herein.

But in the Blairstown case the Supreme Court overruled all objections on the matter of procedure for the election and there-

fore found it necessary in that case to consider and to decide various constitutional objections.

The second case wherein the constitutionality of the statute has been considered is *Smith* v. *Township of Middle,* reported in 105 Atlantic 877, wherein the Court discharged a rule to show cause why a writ of certiorari should not issue.

In the case of Wall, Frelinghuysen and Blairstown, a separate brief was filed in support of the constitutionality of the statute; and as this brief discusses the various questions at some length, we refer the Court to said brief and in this brief will merely call the attention of the Court to the various points that were urged in the Supreme Court and the answer to same as found in said brief, and also as found in the opinions of the Supreme Court sustaining the constitutionality of the statute.

I.

The title of the statute sufficiently expresses its object.

(Reason 7, p. 48, of State of Case.)

A full discussion of this question will be found under Point I, pages 6-22, of brief in Supreme Court. There is little that can be added to same except to quote from the opinion of the Supreme Court. That Court disposed of this objection as follows:

> "Objection to the constitutionality of the act is made upon several grounds. The first of these to be noticed is that the title of the act is broader than its body and that this invalidates it under the constitutional provision requiring that every law shall have but one object and that shall be expressed in its title.
>
> The title of the act is as follows: 'An Act to Prohibit the Sale, or Offer, or Exposure for Sale, or Furnishing or Otherwise Dealing in Intoxicating Liquor as a beverage and the Granting of Licenses therefor in any Town, Township, Village, Borough, City or other Municipality (not a County) in this State where the Legal Voters thereof shall Decide by a Majority Vote in Favor of such Prohibition or the Continuance thereof.' The argument made is that this title is equivalent to a statement that the act is to apply in all municipalities of the various classes named, that that in the body of the act at Section 19 there is a saving clause providing that nothing in the act shall affect, amend, or repeal any other law which now prohibits within the limits of any municipality, or any portion thereof, either the sale, or offer, or the exposure for sale, or furnishing or otherwise dealing in intoxicating liquor, or

the keeping of a place where intoxicating liquor is sold, furnished or otherwise dealt in (page 30). And it is further argued that this exception which is apparently intended to prevent the act taking effect in such places, for example, as Asbury Park, vitiates the whole act because the title fails to indicate that certain municipalities forming a distinct class are to be excepted; and the case of Beverly *v.* Waln, 57 N. J. L. 143, is relied on. That case has been somewhat misunderstood and seems to have required some later explanation on the part of the Court of Errors and Appeals, which in the later decision of Johnson *v.* Asbury Park, 60 N. J. L. 428, pointed out on page 431 that the act held bad in Beverly *v.* Waln was so held on the sole ground that its title was manifestly false and deceptive in indicating that legislation was intended with regard to all cities in the state, whereas the body of the act dealt with only cities of the third class, and the Court went on to say: 'It was not held nor was it intended to hold that an act legislating respecting some objects fairly included within the title will be invalidated because it does not include all such objects except where the title necessarily or by implication evinces an intent to legislate as to all of them.' We consider that the title in this respect is sufficient.

Second, it is urged that the title is misleading because it indicates an intention to prohibit the sale, etc., of intoxicating liquor when the intention is really to regulate such sale. The argument rests on the ground that because the act is made by Section 29 inapplicable to any manufacturer of intoxicating liquor whose manufactory is located in a municipality wherein the sale of intoxicating liquor as a beverage is prohibited so far as respects his right to sell, deal or furnish his product in wholesale quantities to any person or persons outside the limits of said municipality, this feature makes it properly an act to regulate the sale and not an act to prohibit the same. But we fail to see the substantial merit of the point. Taken generally, the act is unquestionably an act to prohibit the sale or offer or exposure for sale or furnishing or otherwise dealing in intoxicating liquor as a beverage in any of the municipalities classified in the act, and it seems to be a far cry to say that it is turned into a mere regulative act because the rights of parties manufacturing liquor within those municipalities, but selling, dealing, or furnishing their product in wholesale quantities to persons outside the limits are preserved by way of this saving clause. We think there is nothing in this objection."

In addition to the cases cited in our Supreme Court brief and in the opinion of the Supreme Court on the question of title, we refer to the following recent cases:

McMahon v. *Riker*, 104 Atl., 289;

Crucible Steel Co. v. *Polack Tyre Co.*, 104 Atl., 324;

Gillard v. *Insurance Company*, 104 Atl., 707;

Schmitt v. *F. W. Cook Brewing Co.*, 120 N. E., 19 (Indiana).

II.

The provisions in the statute for submitting to the voters of the several municipalities of the State the question of prohibiting the sale of intoxicating liquor as a beverage are constitutional.

(Reasons 1, 2 and 3, page 47, of State of Case.)

It was urged by the prosecutor that the statute is invalid in that it delegates legislative power. This claim is discussed under Point II, pages 22-44, of the Supreme Court brief, wherein numerous decisions are cited from thirty-three other states which sustained similar statutes in such states. It is perhaps superfluous to consider such decisions in view of the decision of this Court in the case of *Paul* v. *Gloucester*, 50 N. J. L., 585—which, we submit, settles the question, so far as this State is concerned. The Supreme Court disposed of this point in the following language:

> "(d). As conferring an unconstitutional delegation of legislative power. The only argument made is that in addition to the no license feature that was considered in the leading case of Paul *v.* Gloucester, 50 N. J. L., 585, the present act provides that if the election result favorably to prohibition, not only shall a license thereafter not be granted, but by Section 20 any person thereafter selling, exposing for sale, etc., shall be guilty of a misdemeanor, and on a second conviction, shall be guilty of a high misdemeanor; and that, in the language of counsel's brief, 'the effect of this important distinction in the act is to enable the people of a community to usurp legislative functions and repeal existing license laws and criminal statutes.' We see no force in this argument. Plainly the Legislature might have enacted absolute prohibition and could properly have inserted in such enactment a provision that anyone selling liquor within the state should be guilty of a high misdemeanor, or the Legislature instead of tak-

> ing the responsibility itself of enacting state-wide prohibition, might have left the matter to the voters of the state, as was done in the case of the jury law, and in such case we think that the insertion of a penalty in the referendum act would have been clearly legitimate. The only difference between that case and the present one is that the adoption of the act, instead of being general, is to be localized, and this was precisely the point dealt with in Paul *v.* Gloucester. What the Legislature has now said is that in municipalities where prohibition is adopted by popular vote, certain penalties shall be visited upon the sale of liquor. This is not a delegation to municipalities of the right to prescribe the punishment for crimes, but is a delegation of the right to prescribe prohibition; and when prohibition has been adopted, the penalty for its violation is fixed by the Legislature itself."

This same constitutional objection was urged from another angle, in the case of *Smith* v. *Middle Township,* 105 Atl., 877, wherein it was claimed by the prosecutor that the statute was void because it attempted to confer upon a minority of the legal voters of the municipality the right or power of calling a special election, and because it attempted to confer upon the governing body of the municipality the right or power of calling such special election, upon the petition of a minority of the legal voters.

The same questions are raised by Reasons 2 and 3 in the present case. (See pages 47 and 48.) The complete answer to this argument is found in the opinion of the Supreme Court in the MiddleTownship case, and we quote same, as follows:

> "Apart from questions already decided by us in the recent case of Michelsohn *v.* Wall Township, N. J. L. 105 Atl., and now decided adversely to prosecutor on the authority of that case, the only point now raised that need be specially noticed is the further constitutional one, that the local option act, P. L. 1918, Chap. 2, purports to confer an unconstitutional delegation of legislative power, by placing it within the power of ten per cent. of the voters of the municipal unit, to require a special election on the question of prohibition instead of leaving the determination of this question to the vote at the next general election. The argument seems to be that conceding the propriety in a constitutional sense of submitting the question at a general election, if twenty per cent. of the voters sign the petition, this is as far as the legislature can go, and when it provides that if thirty per cent. or more sign, the election shall be special, it goes too far, by delegating power unconstitutionally, and also by creating

an unconstitutional classification of municipalities, *i. e.*, those in which a special election is held, and those in which the general election suffices.

On the first branch of the argument the cases of Rutten *v.* Paterson, 73 N. J. L., 467, and Gilhooley *v.* Elizabeth, 66 N. J. L., 484, are relied on. Neither is in point. What was condemned in those decisions was not the calling of a popular election to determine whether ward lines should be changed, upon the application of a small minority of citizens, but the attempt to empower such a minority actually to effect the change by a mere petition making it mandatory on certain officials to proceed. In the case at bar, a substantial minority can call for an election on the question of prohibition, at which all citizens are entitled to vote thereon. This is of course the timeworn and standard method of referendum. It is that laid down in the Civil Service Act (P. L. 1908, p. 235; C. S. 3795, 3806) by a petition of 500 voters in the first and second class counties and cities, 250 voters in third class counties and cities and five per cent. of the electorate in all other municipalities; and this plan was approved in Booth *v.* McGuinness, 78 N. J. L., 346. In this act the legislature seems to have thought it sufficient to have the matter decided at a general election. When the Walsh Act was passed the legislature considered the referendum when ordered, important enough to be voted at a special election in all cases (P. L. 1911, pp. 462, 481; P. L. 1915, p. 12); and this on the petition of twenty per cent. of the voters. In neither case has the constitutionality of the provision been successfully attacked. In Paul *v.* Gloucester, 50 N. J. L., 585, the act examined was Chapter 110 of the Laws of 1888 (P. L., p. 142) and this provided that on the petition of ten per cent. of the voters of the county, there should be a hearing before the judges of the Circuit Court, as to the sufficiency of the petition, very much like the council hearing provided under the act now being considered; and this was upheld by the Court of Errors and Appeals.

We have pointed out the Civil Service Act on the one hand and the Walsh Act on the other as indicating that it is the legislature and not the petitioners, which determines the question of general or special election. What it has said is this: If at least twenty per cent. petition, there shall be a referendum election; we think if as many as thirty per cent. petition, the election should be special, because the evident sentiment in favor of prohibition is strong enough to justify early action; but if less than thirty per cent. petition, we see no reason of putting the municipality to that expense. A similar argument, which we undertook to answer in Michelsohn *v.* Wall, *supra*, was that the legislature had delegated to citizens the power of imposing greatly increased punishment for violation

of the liquor law, because that law if adopted carried those increased penalties. The answer was that the penalties were incidental to the act, like the penalties for violation of the Civil Service Act.

As to the claim that there is created an unconstitutional classification of municipalities, we can see no substance in it. The act lays down a uniform working rule for all municipalities of every statutory class, providing for a vote by referendum at the general election on compliance with certain conditions, and a vote at a special election on compliance with others. The distinction is based on a thoroughly rational general ground, which is the apparent strength of popular sentiment in each several community; precisely the same ground as that determinative of the question of election or no election. If this creates classes of municipalities, and we think it does not, they are at least entirely legitimate and rational classes and in no sense illusory.

The allocatur will be denied.

III.

The statute is not rendered unconstitutional by reason of the provision that it should not apply to municipalities where the sale of liquor is now prohibited.

(Reasons 4 and 5, page 48.)

It is further claimed that the statute is invalid because of the provision in Section 19 thereof to the effect that nothing in the statute should affect any other law which "now prohibits" the sale of liquor within the limits of any municipality or any portion thereof. This objection is discussed under Point III, pages 44-65, of Supreme Court brief. The views of the Supreme Court thereon were as follows:

"The next point urged against the constitutionality of the act is that it is a special act regulating the internal affairs of towns and counties because of the exception already adverted to and occurring in Section 19, of municipalities where prohibition is already in force. To this we think there are two answers. The first answer is that so far as appears there are no towns where prohibition is in force except under acts relating to churches, or camp meetings, or state institutions and the adjoining territory. The statutes cited are P. L. 1880, p. 392, which relates to camp meetings; P. L. 1896, p. 53, also relating to camp meetings; C. S. 4960, Section 19, relating to the epileptic village, and C. S. 3190, Section 59, relating to the State Asylum for the Insane. As respects all these, the case of

Sexton *v.* Asbury Park, 76 N. J. L., 102, seems to be adequate authority for saying that they are a legitimate class of municipalities or territory for constitutional purposes. There is one other act cited, P. L. 1907, p. 188, 246, C. S. 1438, which is a charter act concerning cities of the second class under twenty thousand inhabitants, but it is not made to appear that any city has been organized thereunder, and if not, the exception in Section 19 of the act under consideration does not apply."

It may be added that there is no claim in the present case that the Township of Palmyra is a municipality wherein the sale of liquor is "now" prohibited, or rather, was prohibited at the time of this election; and hence the constitutionality of Section 19 of the statute need not be considered in the present case, as it is no concern of the prosecutor herein whether other municipalities are given the right under the statute to vote for or against the sale of liquor.

IV.

There is no unlawful discrimination in the method prescribed in the statute for the review of the determination of the governing body of the municipality as to the sufficiency of the petition.

(Reason 6, page 48.)

This objection refers to Section 9 of the statute. It is discussed under Point VIII, pages 82-92, of Supreme Court brief, and was overruled by the Supreme Court as follows:

> "The third attack upon the constitutionality of the act is that it is in violation of the Fourteenth Amendment of the Federal Constitution, and this on four grounds: * * *
>
> (b) In providing a summary review of the proceedings on the application of a voter only in cases when the governing body of a municipality determine that the petition for a referendum election is insufficient and not in cases wherein the determination is to the contrary. As to this, it is sufficient to say that no such case is before us, and that this is likewise a feature of the act which could be safely exscinded if unconstitutional, without impairment of the legislative scheme."

V.

Other Constitutional Objections.

We believe that the objections discussed in Points I, II, III and IV hereof cover all that are specifically raised by the Reasons filed in the present case. There is, however, a general Reason (No. 8) to the effect that the statute is in divers other respects unconstitutional and void. If it be deemed necessary to discuss any other objections, then we ask the Court's attention to various other points that were raised in the Blairstown case and which were overruled by the Supreme Court in its opinion therein, as follows:

(a) *The statute does not make any illegal discrimination with respect to the date of the expiration of licenses in municipalities where the voters shall have decided in favor of the prohibition of the sale of liquor.*

This is discussed under Point XI, pages 96-98, of the Supreme Court brief. The Supreme Court said:

"(a) That there is a discrimination in Section 24 between licenses issued before and licenses issued after the passage of the act with respect to the time for which such licenses shall respectively continue after the adoption of the law. We think there is nothing in this; and that, on the contrary, a failure to make the distinction might have jeopardized the validity of the act on the very ground now urged; for licensees who were licensed before the act was passed stand in a much more meritorious position than those licensed after the adoption of the act with knowledge of its provisions and of the liability of having their licenses taken away thereunder. Such licensees accepted their licenses with full notice of the situation and necessarily more or less at their peril."

(b) *The statute does not contravene the provisions of either the Federal or the State Constitutions by limiting the right of petition.*

This is discussed under Point IX, pages 93-94, of the Supreme Court brief. The Supreme Court said:

"(c) In that the right of petitioning for an election is limited to those persons that voted at the last election in the municipality. This is a mere question of putting the machinery of the statute in motion and of selecting a class of citizens who should appropriately be vested with that right. Counsel do not seem to suggest any better method, whether the right of signing the petition should be conferred upon all citizens, whether sane or insane,

infants or what not. If the act had said freeholders instead of those voting at the last election, there could be no doubt of the propriety of designating that class and we fail entirely to see any impropriety in fixing upon the voters of a former election as petitioners. We think that, in fact, this is the usual course as prescribed by other important legislation of similar character, for example, the commission government act of 1911, P. L., p. 462, Section 18, which provides that the election to determine whether commission government shall be adopted shall be called by the city clerk upon the request or petition in writing of twenty per centum of the legal voters voting at the last general election. The objection seems to us to be trivial."

(c) *The statute provides a method for the governing body of the municipality to determine the number of legal ballots cast therein at the last preceding election, at which members of the General Assembly were elected; the statute also provides a method for the governing body to determine whether the petition by which the proceedings for an election are initiated is signed by the required percentage of qualified voters. The determination of the governing body on both of these subjects is presumptively correct and must be taken as conclusive, in the absence of evidence to show that such determination was erroneous.*

This is discussed under Point VII, pages 75-82, of Supreme Court brief. The Supreme Court said:

"The last point raised against the validity of the act is that it states no method of ascertaining the number of legal ballots cast at the last general election for members of the Assembly, which ascertainment is of course necessary in order to enable the governing body to decide whether a sufficient number of names has been signed to the petition, but if this is a valid objection to the act, it would be likewise a sufficient objection to the commission government act (see P. L. 1911, p. 481) and, we doubt not, numerous acts of similar character. In the litigation relating to the adoption of commission government in Jersey City, we think it was held at *nisi prius*, that the normal way to ascertain the number of voters at the preceding election was to count the ballots remaining in the ballot boxes. In that case the former ballots seem to have been lost or destroyed, and it was necessary for the Legislature to intervene, P. L. 1913, Second Special Session, page 916. At all events, it seems trivial to argue that a legislative enactment should fail because in dealing with a fact reasonably capable of ascertainment such as the number of legal votes cast at a last preceding election, the Legisla-

ture has omitted to point out the precise method for ascertaining and counting those votes."

(d) *The provision in the statute forbidding the addition or withdrawel of signatures after the filing thereof does not render the act unconstitutional."*

(See Point IV, pages 65-68, of Supreme Court brief.)

(e) *The fact that the operation of the statute may not be uniform throughout the State does not render it unconstitutional.*

(See Point V, pages 69-71, of Supreme Court brief.)

(f) *The limitation of the application of the statute to the prohibition of the sale of intoxicating liquor for use as a beverage does not render the statute unconstitutional.*

(See Point VI, pages 71-74, of Supreme Court brief.)

The last three points, to wit, d, e and f, were not discussed in the opinion of the Supreme Court, presumably because at the argument before said Court they were not seriously urged, or because the said Court did not deem them worthy of serious consideration; and they are merely mentioned in this brief because they were discussed in our Supreme Court brief and it seems appropriate to refer to same, so that this Court may have before it a reference to all of the points discussed in such brief.

VI.

For the above reasons, we submit that the Local Option Act of 1918 is in all respects constitutional and valid.

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