

New Jersey Court of Errors and Appeals

WALTON SHERMAN AND
FRANK M. BAXTER,

Prosecutors-Appellants,

VS.

CITY OF LONG BRANCH,

Defendant-Respondent.

*On Appeal from
Supreme Court*

On Certiorari

*No. 102 D
May Term 1931*

RESPONDENT'S BRIEF.

GENERAL STATEMENT.

This is on appeal from a judgment of the Supreme Court upholding an ordinance of the City of Long Branch providing for the opening and constructing of a new highway in said City.

Two writs of certiorari were allowed, without argument, to test not only the validity of the ordinance now under consideration, but also to test the validity of a finance ordinance; the Supreme Court holding that the finance ordinance was faulty because no supplemental debt statement had been filed by the finance officer "prior to the passage of an ordinance or resolution authorizing notes or bonds under this act," (Opinion, p. 94), although prosecutors did not show that a debt statement had not been filed "prior" to the passage of the finance ordinance, (S. C., p. 40, ls. 28-30, p. 50 and p. 53). Nor did they show that the debt limit of the City of Long Branch would be exceeded even if the finance ordinance had been adopted under the Pierson Act.

Appellants' counsel has so interwoven the two cases that it seems expedient to present the brief in practically the same form that it was presented in the Supreme Court.

The ordinance in question was introduced on December 17, 1929, "given its first reading, passed, laid over until December 31, 1929, and ordered published in its entirety." (S. C., p. 29, ls. 20-30). On December 31, 1929, the ordinance was taken up on its second reading, read and proof of publication submitted. An opportunity was extended to anyone present desiring to be heard on the ordinance. (S. C.,

p. 31, ls. 29-30). On the Roll Call the ordinance was given a third reading, passed by a four to one vote, and ordered published in its entirety. (S. C., p. 32, ls. 10-30). It was so published in the Long Branch Daily Record on January 3, 1930. (S. C., 4D, also p. 47, ls. 10-30). In short, it was passed in strict conformity with the Home Rule Act as amended by Chapter 287, P. L. 1929, p. 674. These facts are indisputable.

STATEMENT OF FACTS.

Long Branch adopted as its charter "AN ACT RELATING TO, REGULATING AND PROVIDING FOR THE GOVERNMENT OF CITIES," being Chapter 168, P. L. 1903. For the purpose of argument it is conceded that Long Branch is the only city that has adopted this act as its charter.

On March 12, 1912, Long Branch adopted the Walsh Act (Chap. 221 of the Laws of 1911).

In 1929 a supplement to the 1903 Act was passed and is found under Chap. 171, P. L. 1929, p. 319. For convenience sake as well as for the purpose of here pointing out that the title of the 1929 supplement to the charter act is identically the same as the 1903 Act, the Supplement is here quoted verbatim:

CHAPTER 171.

"A Supplement to an Act entitled 'An Act relating to, regulating and providing for the government of cities,' approved April eighth, one thousand nine hundred and three.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Any city now or hereafter governed by the provisions of the act to which this act is a supplement, in addition to the powers by said act conferred, shall have the power to manage, regulate and control its finances and property, real and personal; to borrow money, and negotiate temporary loans in anticipation of taxes and other revenues, and to authorize, provide and pay for public improvements, including the acquiring, laying out, widening, straightening, improving, constructing, reconstructing and maintaining streets and highways, and to issue bonds, notes or other evidences of debt in payment thereof, which said bonds, notes and

other evidences of debt may be refunded or repaid in whole or in part from benefit assessments, levied on property in such city, benefited thereby, which said bonds, notes or other evidences of debt, so issued, for the purposes of this act, shall not be included as part of the debt statement, or computed in the net debt of the municipality, or in any wise be subject to the provisions of an act entitled 'An act to authorize and regulate the issuance of bonds and other obligations and the incurring of indebtedness by county, city, borough, village, town, township, or any municipality governed by an improvement commission,' approved March twenty-second, one thousand nine hundred and sixteen, and the acts amendatory thereof and supplemental thereto.

2. This act shall take effect immediately. Approved April 23, 1929."

After the final publication of the ordinances on January 3, 1930, the Highway Construction Ordinance became effective on January 13, 1930; the Bond Issue Ordinance remained inoperative until twenty days after its final publication, as required by Sect. 3 of Chap. 252, P. L. 1916, which would make it become effective after the 23rd of January, 1930. However, on January 17, 1930, or four days after the time limited by Sect. 24 of Art. 37 of the Home Rule Act, prosecutors signed their moving affidavits to procure both writs.

Admittedly the prosecutors are tax-payers of the City of Long Branch, but according to their own testimony and the testimony of Commissioner Bennett, they are not tax-payers "whose lands may be affected by such ordinance or any assessment which may be made in pursuance thereof" as contemplated by Chap. 287, P. L. 1929, p. 674. Baxter admits that his property at 434 Broadway, Long Branch, is "from three-quarters of a mile to a mile" from the

proposed construction or boulevard (S.ofC. p.7, lines 29-33). Sherman property is about "1,000 to 1,500 feet" away (S.ofC.p.22, lines 25-30). Commissioner Bennett states, without contradiction, that the property of prosecutors "are located at too great a distance from the proposed improvement" to be likely to be especially benefitted thereby or damaged (S.of C.p.73, lines 18-29). Moreover, prosecutor, Baxter admits that he read his moving petition "in the paper" in "the Record," "I read it in the paper" (S. ofC.p.7, lines 38-40). And although his moving affidavit states that, "I have read the foregoing petition and the affidavit of Mr. Sherman annexed thereto and the same are true to the best of my knowledge, information and belief," yet the testimony shows that he did not read Sherman's affidavit and did not know its contents, but that he read the petition in the "Record" (S.of C.p.13, lines 8-23). Nor did prosecutors know the contents of their petition or affidavits until after an attorney at Long Branch had prepared the petition and affidavits (S.ofC.p. 13). Indeed, according to the testimony of Baxter (S.ofC.p.13, lines 25-26), his affidavit was not prepared at the time it was signed! Nor did either know what the net debt of the City of Long Branch was at the time they signed their affidavits and when closely questioned about it, refused to answer (S.of C.p. 15-16; p.22, lines 1-20).

Prosecutors advance six reasons why the so called Highway Construction Ordinance should be declared invalid, and eleven reasons why the so called Bond Issue Ordinance should be so declared. Nevertheless, but six points are argued; thus defendant assumes that the other points are abandoned. Before discussing these points, however, it is proper to call the court's attention particularly to the two following points:

P O I N T S .

POINT I.

THE PROSECUTORS ARE NOT ENTITLED TO WRITS OR TO QUESTION ORDINANCES.

Before arguing this point it seems proper to state that, since the case of *Jordan vs. Dumont*, 6 A. R. 1889, may suggest itself to the court, Mr. Justice Bodine will doubtless recall that owing to pressure of other business he preferred to have the case heard by the court en banc instead of sitting as a single justice; hence the writs were granted after defendant's counsel had presented only this and the following point, without the merits of the case being heard.

It seems to be a well settled principle of law that certiorari will not lie in favor of private prosecutors to review a municipal ordinance, unless it appears that such prosecutors have a personal or property interest which will be specially affected in an injurious manner by the action complained of; and unless the person who applies for the writ shows that he will suffer a special injury beyond that which shall affect him in common with the remainder of the public. This doctrine is clearly elucidated by Chief Justice Gummere, speaking for the Court of Errors and Appeals, in the case of *Tallon vs. Hoboken*, 60 L. 212, since followed in the case of *Ford vs. Mayor and Council of Bayonne*, 87 L. 298, and *Union Towel Supply Co. vs. Jersey City et al.*, 99 L. 54.

A glance at the return as well as the evidence taken in the case clearly demonstrates that neither prosecutor can possibly suffer any alleged injury greater than could be suffered by the general public, if the ordinances in question were to become effective, or beyond that which can affect either of them in common with the remainder of the public. The uncontradicted testimony of Commissioner of

Finance, Bennett, shows that the properties owned by the prosecutors are too remote from the proposed improvement to be likely to be especially benefitted or damaged. Admittedly, Baxter's property is "anywhere from three-quarters of a mile to a mile" from the proposed improvement, and Sherman's from "1,000 to 1,500 feet" distant therefrom. Nor do the prosecutors even claim that they may be specially injured or damaged by the carrying out of the projects. It will take a reading of but a few lines of the testimony of both prosecutors to convincingly show not only that neither can be specially injured by the proposed project, but that they are acting merely as puppets for some unseen person or persons. This is not what our courts demand in granting a writ of certiorari. They demand that prosecutors be inspired by a common purpose. To use the words of Mr. Justice Black in the case of *McCarthy vs. Boulevard Commissioners of Hudson County*, 91 L. 137, at p. 143,

"Proceedings to review municipal action under such prerogative writ are not personal actions in which the prosecutors may upon sharp grounds insist upon a personal right. Rather is the prosecutor to be regarded, if not as *amicus curiae*, as a friend of the public. The court and the prosecutor who hold this attitude towards the public are in contemplation of law inspired by a common purpose, to the accomplishment of which there must come a time when the court should determine the public rights, represented in the prosecutor, upon grounds that substantially affect them, and not upon sharp questions and verbal criticisms, which under the guise of protecting the public from a figmentary injury, inflict upon it one that is both actual and serious."

Where by their actions, or where in the evidence is it shown that prosecutors have acted with inspira-

tion, or have been inspired by a common purpose, unless the term common is used to connote "below the ordinary standards?" Upon a perusal of their testimony, we find that instead of inspiring actions upon their part, they are apparently muzzled, or, to use the street parlance, acting the part of mere "dummies." Moreover, it is apparent from their answers, or refusal to answer, that the prosecutor, Baxter, was so indifferent about what he did for the purpose of obtaining the writs of certiorari in question that his affidavit was not even prepared at the time it was signed! Clearly, the evidence shows that the statement in his moving affidavit was not true.

Nowhere is there a fact in this case from which it can be gleaned that the prosecutors can possibly be affected differently than in common with other tax-payers by the ordinances in question. Certainly, as the admitted and uncontradicted evidence shows, their "liability is too contingent and remote to give the prosecutors a standing in court" (State, Kean, Pros., vs. Bronson, et al., 35 L. 468, at p. 470).

It should be added that defendant feels that this point should not be left without calling the court's attention to the case of Moore vs. Ewing, et al., 1 L. 146, where the court says, speaking of how affidavits should be drawn,

"Each witness should be examined as to the facts which have come under his cognizance, and he should tell them in his own way, not merely to swear to what has been sworn by another."

Recently, our Chancellor used this case in severe criticism of an attorney who drew such affidavits, and refused to countenance them in any respect. In this case, it is apparent, that the prosecutor, Baxter, signed this moving affidavit not only without any

knowledge of its contents, but even before they were drawn up. He was asked (S.ofC., pgs. 8, 9 and 13) :

“Q. Were you sent for to sign it (the moving affidavit) or did you go there and state the contents that you wanted inserted?

MR. CARPENTER: Objected to as immaterial.

MR. EDWARDS: I think it is quite material under the Court's decision.

A. Well, we told them about what we wanted to do and they drew it up for us.

Q. You told whom what you wanted to do?

A. The lawyers.

Q. I ask you again, is your recollection good or bad or indifferent?

A. I said that I didn't think I read Mr. Sherman's.

Q. Then why do you say in your affidavit that 'I have read the foregoing petition and the affidavit of Mr. Sherman annexed thereto?' You are mistaken, aren't you?

A. I don't recall whether both of those were together when I signed it or not. That is my signature there. All that was done when I was sent for to sign the affidavit.

Q. He read the affidavit?

A. He read it over.

Q. It was prepared at the time you signed it?

A. No, it was not prepared then.”

For these reasons it is urged that the writs should be dismissed.

POINT II.

THE PROSECUTORS ARE GUILTY OF LACHES AND ARE PRECLUDED, BY REASON OF THE STATUTE OF LIMITATIONS, FROM QUESTIONING THE PROCEDURE TAKEN BY THE BOARD OF COMMISSIONERS OF THE CITY OF LONG BRANCH IN PASSING THE HIGHWAY CONSTRUCTION ORDINANCE KNOWN AS SUIT NUMBER ONE.

This ordinance under discussion was introduced on December 17, 1929 (S.ofC.p.41, line 22). It was finally passed and adopted December 31, 1929. After its final passage and adoption it was duly advertised in the Long Branch Daily Record on January 3, 1930, as required by the Walsh Act (P. L. 1911, p. 462) as superseded by Sect. 24 of Art.37 of the Home Rule Act (supra) (S.ofC.p.4D, lines 30-40; p.47, lines 10-20).

The Home Rule Act requires that,

“Any ordinance authorizing any improvement or the incurring of any indebtedness except for current expenses shall become operative ten days after the publication thereof after its final passage, unless within said ten days a protest or protests against making such improvement or the incurring of such indebtedness shall be filed in the office of the clerk in such municipality, signed by the tax-payers representing ten per centum in amount of the assessed valuation of such municipality, whose names appear on the last assessment roll thereof, in which case such ordinance shall remain inoperative until a proposition for the ratification thereof shall be adopted at an election to be held for that purpose by a majority of the qualified voters of such municipality voting on such proposition.”

No such protests by any tax-payers or by either of the prosecutors were ever made.

Mr. Justice Trenchard, speaking for the Supreme Court in the case of *Wethling vs. Orange*, 94 L. 36, says that,

“The Walsh Act (P. L. 1911, p. 462) was superseded or repealed by the last above quoted Sect. 24 of Art. 37 of the Home Rule Act, in so far as the former dealt with the subject matter covered by the latter.”

This being true, the prosecutors had ten days after the 3rd day of January, 1930, within which to act in the premises as set forth in Sect. 24 of Art. 37 of the Home Rule Act. They took no action, however, until January 17, 1930, or four days after the time limited by Sect. 24, within which to take action therein set forth. Their failure so to do precludes them from questioning the procedure taken by the Board of Commissioners in the adoption of the ordinance in question, for it is a well settled principle of law that statutes creating inferior bodies clothed with quasi judicial powers, or promulgating methods of procedure, carry a limit within which action must be taken to secure a review by the courts. For example, the so-called Pierson Act, which governs the finances of municipalities, permits an attack on an ordinance authorizing the issuance of bonds within twenty days after publication of notice of adoption (P. L. 1916, p. 525). The Home Rule Act limits the time for attacking ordinances to ten days after the publication for a notice of adoption (P. L. 1917, p. 345). The act authorizing a Board of Adjustment in municipalities limits the time for review to thirty days, and so on.

Granted that writs of certiorari may not be denied where such other remedy is concurrent with that of certiorari, or cumulative thereto, yet it is a well settled principle that courts are reluctant to grant the

writ where, as here, the inferior body has, in all respects, complied with the statute in passing the ordinance in question.

In the cases of *Hoboken vs. Morris*, 16 L. 526, *Trapagen vs. Township of Hoboken*, 39 L., at p. 236, and *Hendey vs. Ackerman*, 103 L. 305, it will be observed that the court can and will, of course, exercise the superintendence of all such ordinances, as that under discussion, whether or not the legislature attempts to preclude them from so doing; but where, as here, the inferior body had the power to pass the ordinance in question, and kept completely within that power, then the court will not exercise its prerogative.

For these reasons, and since the prosecutors, like any other citizen or tax-payer of the city, had a healthy, adequate and complete remedy to stay the ordinance in question, but having failed to take advantage of that remedy within the time allotted by the statute, it is respectfully urged that they should not now be permitted to seek to invoke the aid of this court by an extraordinary writ and thus put the city under double disadvantage.

POINT III.

CHAPTER 171 OF THE LAWS OF 1929 IS NOT A PRIVATE, LOCAL OR SPECIAL LAW RELATING TO THE LAYING OUT AND OPENING OF A ROAD OR HIGHWAY; NEITHER DOES IT REGULATE THE INTERNAL AFFAIRS OF THE CITY OF LONG BRANCH, NOR EMBRACE MORE THAN ONE OBJECT THAT IS NOT EXPRESSED IN ITS TITLE.

Considering these propositions in their inverse order, it will, of course, be conceded that Art. IV, Sect. VII, Par. 4 of the Constitution provides that

"every law shall embrace but one object and that object shall be expressed in its title;" but admittedly, Chap. 171 of the Laws of 1929 is a supplement to an act entitled "AN ACT RELATING TO, REGULATING AND PROVIDING FOR THE GOVERNMENT OF CITIES," approved April 8, 1903, and, therefore,

"The title of an act professing to be an amendment or supplement of an existing law is sufficient if it refers with certainty to the law amended."

This is not only the doctrine followed in our United States Court (See. A.&E.Ency., p. 592), but in practically all of the states of the Union, including New Jersey (*Rahway Sav. Inst. vs. Rahway*, 53 L. 48, at p. 51, *Schmalz vs. Woolley*, 56 E. 649).

In the *Rahway* case (*supra*), Mr. Justice Magie, speaking for our Supreme Court, says that,

"But defendant's contention is, that the supplement has failed to effect the legislative purpose because obnoxious to another constitutional prohibition then in force and requiring the title of an act to express its object. The argument is, that the object of this act was to repeal and alter the original act, and that such object was not expressed in the title 'supplement.'

The constitutional clause in question does not compel the means or method of attaining the legislative object to be set out in the title, but will be satisfied if the title fairly indicates the general object. *Bunsted v. Govern*, 18 Vroom 368; S. C., Id. 612. The ordinary meaning of the word 'supplement' doubtless is 'a supplying by addition of what is wanting.' A glance at our legislation from the time of the adoption of the constitutional provision will show that the word has constantly been used in a sense

so broad as to possibly justify a claim that it has acquired thereby a special meaning broader than the ordinary one. But for the purposes of this case it is sufficient to say, that the ordinary meaning of the word will, under our construction of this clause, cover every species of amendatory legislation which goes to complete the legislative scheme.

The supplement before us is of this character. The legislature, by the original act, might have required the scheme for a water supply to be put in operation without the assent of the voters. It had power to do the like at any time after the passage of the original act. Legislation removing the restraint on the operation of the act and making its provisions operative is additional legislation. Though it repealed the provision containing the restraint, its force was to put the act in operation, and the title 'supplement' fairly gave notice of a properly characterized legislation which thus completed the legislative design. This conclusion accords with that arrived at when a similar objection was made to a 'Supplement to the act concerning taxes,' upon which this court held that such a title was sufficient to support parts of the act repealing prior inconsistent laws. *New Brunswick vs. Williamson*, 15 *Vroom* 165; *S. C.* 17 *Id.* 204."

Again, Chief Justice Magie, speaking for the Court of Errors and Appeals, in the case of *Newark vs. Mount Pleasant Cemetery Co.*, 58 *L.*, at p. 171, says that,

"The evil intended to be guarded against was not the inclusion in one act of more than a single matter, but the inclusion therein of matters not properly related among themselves. So by its obvious construction this constitutional pro-

vision justifies and permits legislation by one statute, looking toward a single general object, although it contains and enacts various and multiform matters, if those matters are properly related to each other and tend to effectuate the general object."

Nor is the title of an act supposed to be "a table of contents or an index that the statute enacts" (*Gattuse vs. Baker*, 80 L. 520). It is not to be examined as an independent enactment, but is to be considered in connection with, and as part of, the statute upon which it is engrafted; and if it does not operate to render the statute, in its altered form, unconstitutional, it is valid legislation (*McMahon vs. Riker*, 92 L. 1). Moreover, the object of a law while it must be single, yet its product may be as diverse as the object required. "The former must be expressed in the title; the latter need not be" (See *State-Katzenbach vs. Mayor, et al.*, 102 L. 227).

In the case of *Boniewsky vs. Polish Home*, 103 L. at p. 332, Chancellor Walker, speaking for the Court of Errors and Appeals, cites the *Gattuso* case (*supra*) with approval, and says,

"The meaning of the constitutional provision in that regard is, that the leading subject of a statute should be fairly expressed in its title."

And, in his usual terse fashion, Chief Justice Gummere, speaking for the Supreme Court, in the case of *Quigley vs. Lehigh Railroad Co. of New Jersey*, 80 L. 486, says, among other things,

"It is not necessary that the particular cases to which the act is entitled to apply should be set out in the title. The constitutional provision only requires that the title of the statute shall express its object in a general way, so as to be intelligible to the ordinary reader, not that it

shall be an index or abstract of the contents thereof." Continuing, he says, "An act concerning the government of certain cities in this state and constituting a municipal board, etc., was upheld by the Court of Errors and Appeals as being constitutional, notwithstanding the fact that the title did not disclose what cities were affected by the legislation and an examination of the body of the act was required in order to obtain that knowledge."

Therefore, since it is settled that an existing law "is sufficient if it refers with certainty to the law amended," and since the 1929 Act refers with such certainty to the 1903 Act, that it quotes the title of the act verbatim, how can it be said that the supplement to the 1903 Act "does not embrace one object and that object is not expressed in the title?" To so hold would be not only illogical, but absurd, in view of the fact that even prosecutors admit that Chap. 168 of the P. L. of 1903 is a general act (See Prosecutor's Brief, p. 23).

That the 1929 Supplement does not regulate or attempt to regulate the internal affairs of the City of Long Branch, or any other city that may have heretofore or may hereafter adopt the 1903 Act, goes almost without saying. It cannot be successfully denied that the 1903 Act is a general act "relating to, regulating and providing for the government of cities;" the prosecutors admit it. Nor may it be successfully contended that our constitutional classification is counties, cities, boroughs, towns, townships and villages. Any law, therefore, which applies to any one of these classes is a general law. The Act of 1903 applies generally to all cities, although its provisions remain inoperative in any case until adopted by the people. These acts do not exclude nor do they attempt to exclude from their operation any municipality within their class.

In the case of Wanser vs. Hoos, 80 L. 482, at p. 544, Mr. Justice Depue says that,

“Legislation appropriate to a proper class of municipalities is valid, though not extended to other classes to which it may be equally appropriate.

This rule results from the reasoning and decisions in several cases, among them State v. Borough of Clayton, *supra*, followed and approved by this court in Road Commissioners v. Harrington Township, 26 Vroom 327.

No one has stated this rule more clearly and comprehensively than the learned judge who speaks for this court in the present case. In the case of Johnson v. Asbury Park, 29 Vroom 604, he says (at pp. 607, 608): ‘An examination of the many statutes relating to cities of the several classes, towns, townships and boroughs *will disclose diversities in the power granted to these several municipal bodies* which, if tried by the criterion proposed by counsel in this case, viz., that no reason can be given for granting certain special powers to one class of municipalities and withholding them from other classes, would operate disastrously upon the system of municipal government in force in this state. The division of municipalities into cities, towns, townships and boroughs being a classification permitted by the constitution for the purpose of local government, the powers to be conferred upon these bodies severally which pertain to the ordinary functions of local government must rest in legislative discretion.’” (*Italics mine*)

Again he says, at p. 525, that,

“The test of the generality of a law adopted is that it shall embrace all and exclude none

whose conditions or wants render such legislation equally appropriate to them as a class.

The constitutional prescription relates to the regulation of the internal affairs of towns, etc., without regard to population, and it applies as well to the lesser as to the greater municipalities in this state."

But even though the supplement in question may regulate the internal affairs of the City of Long Branch and exclude from its operation other acts, it would not, for that reason, render the act special so as to bring it within the constitutional inhibition of special legislation, where, as here, the act relates to the machinery of government (*McDonald vs. Hudson County Freeholder*, 98 L. 386), where Mr. Justice Kalisch, speaking for our Supreme Court, so tersely sets forth this doctrine. In this opinion, Justice Kalisch says that,

"In view of the numerous and uniform decisions of the courts of this state on the subject, namely, where an act relates to the machinery of government, the fact that it may regulate the internal affairs of certain counties, cities or other municipalities, and exclude from its operation others, does not render such act special so as to bring it within the constitutional inhibition of special legislation * * *

The fallacy of the contention of counsel of defendant is the result of confounding the object of an act with the incidents necessary to effectuate that object. The object of the statute is to regulate elections. The incidents necessary to carry out the object may require different methods in different municipalities * * *. Therefore, where a necessity arises to add to the machinery of government, additional machinery in certain localities for the purpose of attaining * * *, it would be a

disastrous blow to the maintenance of free and good government if the sovereign power of the state was powerless to supply such means, without burdening other localities which were not in need of it, with the expense of such machinery."

Justice Kalisch then refers to the case of Freeholders vs. Hudson-Clark, 65 L. 271, where our Court of Errors and Appeals holds that,

"Legislation which classifies municipalities in the matter of their structure, machinery or powers, on a basis of population, where population has reasonable relation to the necessities of the municipalities so classified as contradistinguished from others not similarly circumstanced, is good."

Since it is apparent from a casual reading of the 1929 Supplement that it relates only to the machinery of the law, and not to the internal affairs of the class of municipalities that have or may hereafter adopt the 1903 Act, it cannot be said with any degree of reasoning that the act is private, local or special in character.

POINT IV.

THE SUPPLEMENT TO THE 1903 ACT IS NOT SPECIAL OR LOCAL IN CHARACTER.

Merely because the defendant is the only city that has adopted the 1903 Act, or merely because the supplement in question excepts another general law from its operation, does not make the act private, local or special in character. In the case of Road Commissioners vs. Harrington Township, 55 L. 327, the syllabus reads:

“A law framed in general terms is not specialized by the fact that it excepts another general law from its operation.”

In that case, Mr. Justice Van Syckel, speaking for the Court of Errors and Appeals, says,

“It must be equally competent for the Legislature to except this class from the operation of a general law, such as that of 1891, without rendering that act special. A general law cannot be deemed special because it does not sweep away other general laws,”

a fortiori, may it be said, that a general law that does sweep away another general law cannot be declared to be special. What constitutional inhibition could possibly be invoked to hinder the legislature in the first instance from giving all municipalities of the class in question the power to operate its machinery without considering the Pierson Act if the Pierson Act were then on the statute books? Counsel for prosecutors state that if the Pierson Act excepted Long Branch, or cities which have adopted the provisions of Chapter 168, P. L. 1903, from its operation, there would be no sound reasoning for excluding such cities operating under any one certain charter. In substantiation of this point he quotes from the case of Board of Tenement House, etc., vs. Mittleman (104 N. J. L. 486). But it is insisted that the 1903 Act and supplement exclude no municipality from their operation; they are general in their terms and exclude none. Moreover, in the Board of Tenement House Supervision vs. Mittleman (*supra*), Mr. Justice Katzenbach quotes with approval from the case of Central Railroad Co. vs. State Board of Assessors, 48 L. 1, where Chief Justice Beasley says,

“This discrimination between general and special statutes, as applied to a subject-matter

of this kind, is not a new thing to this court. It has long been a recognized doctrine with us, forming the basis of many decisions. When the case of *Parsons v. Van Riper* was first before the court, the matter was carefully considered. The inquiry in that instance was with respect to the effect of that provision of the amended constitution which forbids the legislature to pass private, local or special laws regulating the internal affairs of towns or counties, and the distinction, in view of that provision, between general and special legislation, was expressed in these words: 'Interdicted local and special laws are those that rest on a false or deficient classification. *Their vice is that they do not embrace all of the class to which they are naturally related; they create preferences and establish inequalities; they apply to persons, things or places possessed of certain qualities or situations, and exclude from their effect other persons, things or places that are not dissimilar in these respects.'*" (*Italics mine*)

These cases are in complete accord with what was said in the case of *Wanser vs. Hoos* (*supra*), where the Court of Errors and Appeals declares that,

"Legislation appropriate to a proper class of municipalities is valid, though not extended to other classes to which it may be equally appropriate."

See particularly *Lohan vs. Thompson*, 88 L., p. 40, where Mr. Justice Swayze says that:

"All that the constitution requires is general laws, and, as has already been decided, legislation which removes differences between the governmental powers of different municipalities is constitutional, *although it affect one municipality only.* (*Italics mine.*)

The 1929 Supplement does not, therefore, come within the constitutional interdict relied upon by prosecutors. See also in this connection *Booth v. McGinnis* (78 L. 346; *Paul v. Gloucester Co.*, 50 L. 585; *Cleveland vs. Jersey City*, 52 L. 188; *Norris vs. Hoagland*, 62 L. 51; *Warren v. Hudson County*, 52 L. 398).

POINT V.

WHETHER OR NOT THE ORDINANCES IN QUESTION ARE REPUGNANT TO SECT. 73 OF THE ACT OF 1903, AS AMENDED BY CHAP. 103, P. L. 1907, CANNOT AND DOES NOT AFFECT THE HIGHWAY CONSTRUCTION ORDINANCE.

It is contended by prosecutors that Chap. 171, P. L. 1929, does not remove the restrictions contained in Sect. 73, P. L. 1903, as thus amended, because there is nothing in the 1929 Act which in any way affects the thirty year limit or the rate of interest of four and one-half per centum or the requirements for a special election contained in said Sect. 73. This point, however, is completely without merit, at least so far as the same is attempted to be directed at the Highway Construction Ordinance, for the very apparent reason that there is nothing in that ordinance providing for the issuing of bonds or other obligations.

It will be noted that the statute referred to in said reason (point 3 of pros. brief) provides only the modus operandi to be adopted by the municipality in the issuing of bonds and other obligations. There is no bond issue provided for in the Highway Construction ordinance; that is taken care of by the Bond Issue Ordinance, here designated as Suit No. 2.

It has not been shown by prosecutors that this particular ordinance was passed in compliance with the 1903 Act, or the Walsh Act, or the Home Rule Act; although there can be no doubt that this ordinance is authorized by the Home Rule Act, as well as other acts. Therefore, if there was and is any legislation permitting the ordinance in question, the city is entitled to rely upon it without specific reference thereto. This point seems to be clearly set forth in the decision rendered by Mr. Justice Parker, in the case of Livermore vs. Millville (85 L. 655), at p. 657, where he says,

“If there was and is any legislation permitting such a bond issue for the purpose indicated, the city is entitled to rely upon it without specific reference thereto in the ordinance.”

While it is true that the Highway Construction Ordinance estimates the cost of the improvement therein provided for as Two Million Dollars, and while that sum is appropriated to carry out the cost of said improvements, yet the mere appropriation of said Two Million Dollars would not increase the debt limit of the City of Long Branch in excess of fifteen per cent., or any other per cent., because the ordinance further provides that,

“Section 6. The cost of said improvements, including the cost of acquiring land and easements in any land, shall be paid by special assessments to be levied on property specially benefited as near as may be in proportion to the peculiar benefit, advantage or increase in value which the respective lands, or parcels of land, or real estate shall be deemed to receive by reason of said improvement; and in no case shall any assessment on any parcel of land exceed in amount such peculiar benefit, advantage or increase in value; and if benefits as assessed

shall not equal the entire cost the balance shall be paid by the City."

What, then, is the balance that shall be paid by the city? Non constat that the city's debt limit would be to any measure increased thereby.

Since it is shown that the city had the right to rely upon any legislation permitting this ordinance in question, then even if it is held that the ordinance had to come within the purview of the 1929 supplement, nevertheless it would still be good, because it cannot be said that the city did not have authority under the Home Rule Act to pass such an ordinance. This being so, and it being well settled that the Walsh Act and all other acts, in so far as they relate to the operation of ordinances authorizing any improvement or the incurring of any indebtedness, have been superseded or repealed by the Home Rule Act (*Wethling vs. Orange*, 94 L. 36), it follows that this ordinance must hold good.

In the case of *Public Service Ry. Co. vs. General Omnibus Co.* (93 L. 344), where Mr. Justice Kalisch, quoting from the case of *Eldridge vs. P. & R. Railroad Co.* (83 L. 463), says that:

"When the legislature frames a new and general rule covering an entire subject matter all earlier and different rules touching the same matter are to be discarded in favor of such later rule, 'is particularly applicable to the situation created by the passage of the Home Rule Act in regard to the procedure for the passage of ordinances.' To the same effect is *Haynes vs. Cape May*, 52 Id. 180."

And in the case of *Lombardi vs. Mayor and Council of Lodi* (7 M. R., p. 72), this court in a *Per Curiam* opinion, refers to the case of *Public Service Ry. Co. vs. General Omnibus Co.* (*Supra*), and says:

“Up to this point the prosecutor and respondent are not in disagreement, but respondent asserts, and correctly so, that subsequent to the 1921 amendment of Sect. 26 of the Borough Act, Sect. 1, of Art. 20 of the Home Rule Act, respecting ordinances and the adoption thereof was amended * * * again evincing the intention of the legislature as was said in *Public Service Ry. Co. vs. General Omnibus Co.* (supra), “To do away with the differentiation * * * *and to establish a uniform rule by placing the passage of all ordinances * * ** in all municipalities, whether under the form of Commission Government or under Mayor and Council, or any other form of municipal rule.” (*Italics mine*)

Moreover, the court’s attention is called to the fact that if there was any omission or defect in the ordinance in question, the same has been cured by Chap. 127 P. L. 1930, p. 392.

“An act to validate ordinances of cities providing for the laying out, widening, straightening, improving and constructing of a highway or highways, avenue or avenues, and the acquisition of land or interest therein for said purpose, and for the grading, curbing and paving of any such highway or avenue, and for the levying of assessments on property especially benefited thereby.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. All ordinances heretofore adopted by cities providing for the laying out, widening, straightening, improving and constructing of a highway or highways, avenue or avenues, and the acquisition of land or interest therein for said purpose, and for the grading, curbing and

paving of any such highway or avenue, and for the levying of assessments on property especially benefited thereby, be and the same are hereby validated, approved and confirmed, notwithstanding any omission or defect in said ordinances or notice thereof; provided said ordinances were adopted and notice thereof given by publication in newspapers as required by law.

2. This act shall take effect immediately."

Comment upon this curative act and another curative act will be made hereafter.

POINT VI.

RESPONDENT NOT ONLY COMPLIED IN ALL RESPECTS WITH CHAPTER 287, P. L. 1929, P. 674, BUT ALSO COMES WITHIN THE PERVIEW OF CHAPTER 171, P. L. 1929, P. 319.

Appellants should not be permitted to question the fact of whether or not a copy of the ordinance in question, together with a notice of introduction thereof and the time and place when and where such ordinance would be further considered for final passage, "shall be mailed to every person whose lands may be affected by such ordinance or any assessment which may be made in pursuance thereof," because, as heretofore shown, prosecutors are not such parties whose lands may be affected by the ordinance. Surely it was not necessary for the City Clerk to give notice to anyone except those whose lands *would* be so affected. The case of *Root vs. Mayor, etc., Jersey City* (5 M. R., p. 973), clearly demonstrates this point. That case was one where the prosecutors were the owners of three lots of land that would be affected by the ordinance. The record

disclosed that no notice was given to the prosecutors of any hearing to be held on the ordinance, before its proposed passage; nevertheless the court held, *inter alia*,

“It is true that under paragraph (b) it is further provided that failure to mail the notice therein provided for shall not invalidate any ordinance, proceeding or assessment.

“This provision seems to us can only be understood in the sense, if that is practicable, *so far as owners of land affected* by the ordinance, who have received statutory notice, *the failure to give such notice to one or more owners of lands affected by the ordinance* shall not invalidate such ordinance as to those who have received notice. To adopt any other view would not only make the provision of the statute requiring the giving of notice an idle ceremony but would impliedly sanction the taking of one's property without due process of law.” (*Italics mine*)

The record in the instant case, as heretofore stated, clearly shows that the prosecutors are not the owners of land that may be affected by the ordinance. They were not, therefore, entitled to any notice. The statute contemplates the giving of notice to only those whose land may be affected thereby, and to no one else. Appellants cannot claim that, as a result of their receiving no notice, they would be deprived of their property without due process of law. The record also shows that the ordinance was introduced on December 17, 1929, laid over for two weeks during which time it was advertised and a public notice setting forth the fact that it was introduced and that the Commissioners would consider the final passage at its regular meeting held December 31, 1929. That meeting was held and the ordinance finally passed. The affidavits of publication so show. (State of Case, P. 47, lines 10-20).

Moreover, in the case of *Specht et als. vs. City of Orange et als*, 8 Misc. R., p. 647, the per curiam opinion states, among other things,

“It is the right of a landowner specially affected by a public improvement to be informed, either by actual or constructive notice, of the time and place appointed for the meeting of the governing body to consider their proposed action. *Groel vs. Newark*, 78 N. J. L., 142. But constructive notice when provided by the statute is sufficient. *State, Boice vs. City of Plainfield*, 38 Id. 95.

“We construe section 12 and directory and give full value to that portion of the section which directs that failure to mail the notice provided for in the section shall not invalidate any proceeding or assessment. We have in mind that *Root vs. Mayor & Alderman of Jersey City*, 5 Mis. R., 973, gave a more limited significance to that language. That opinion, however, determined the ordinance under review to be void in toto for other reasons; had the case turned upon the reasoning therein applied to section 12, the proceedings would have been declared valid *as to those to whom a mailed notice had been sent*. We consider that the expressions with regard to section 12 were dicta. We consider that the constructive notice provided by section 9 and given in the instant case was an adequate notice under the law.” (*Italics mine*)

Since appellants, without question, are, admittedly, those whose property was so far distant from the proposed improvement that under no circumstances was the Clerk required to give them notice of such improvement, and since there was or is no complaint from anyone within the area that even might be affected by the proposed improvement, it is respectfully contended that the respondent has,

in all respects, complied with the law and particularly with section 1(b), Chapter 287, P. L. 1929, p. 674.

POINT VII.

CHAPTER 127, P. L. 1930, P. 392, VALIDATED, APPROVED AND CONFIRMED THE ORDINANCE IN QUESTION.

The ordinance was adopted and notice thereof was given by publication in newspapers as required by section 1(b) of Chapter 287, P. L. 1929, p. 674, as shown in Point VI. It needs no further argument, therefore, to show that Chapter 127, P. L. 1930, p. 392, is, indeed, a full and complete validating act, and the Supreme Court was correct in so holding.

POINT VIII.

THE BOND ISSUE ORDINANCE WAS NOT PASSED IN VIOLATION OF EITHER THE WALSH ACT OR THE PIERSON ACT, AND NO EVIDENCE HAS BEEN PRODUCED TO SHOW THE VIOLATION OF EITHER OF SAID ACTS.

It will be noted that Subdivision 2, Sect. 12 of Chapter 174, P. L. 1929, p. 325, provides that,

“(2) Prior to the passage of any ordinance or resolution authorizing notes or bonds under this act the chief financial officer shall make and file a supplemental debt statement unless such notes or bonds are exclusively for the following purposes.” (The purposes include ocean front improvements and all indebtedness which is deductible from the gross debt).

The only question prosecutors asked the finance officer concerning this procedure was,

“Q. At the time of the introduction of those ordinances had you prepared a supplement to the debt statement of the City of Long Branch showing the net debt of the city at that time, as provided by the 1916 bond act, or the Pierson Act?”

A. I prepared a statement but I did not file it with the bond, as it was not required.”

(S. of C., p. 49, lines 22-30).

It was not necessary for the commissioner of finance, under the act, to file this statement *prior* to or at the time of the *introduction* of the ordinance; but only “prior to the passage” of the ordinance. There is a recognized difference between the introduction of an ordinance and the passage of an ordinance. It is not to be expected that the defendant was there to show that the supplemental debt statement was filed prior to or at the time of the introduction of the ordinance or at any other time; that was for prosecutors to show. There is not a word in the evidence or any place to show that the finance officer did not file the supplemental debt statement “prior to the passage” of the ordinance, although, as a matter of fact, he did and had it with him at the time of the taking of the testimony. Moreover, it showed that the *debt limit* under the Pierson Act had not been exceeded. (*Italics mine*)

Although a Herculean effort was made by the prosecutors to show by the Commissioner of Finance, and otherwise, that the net debt of the city would exceed 7% upon the passage of these ordinances, and that, therefore, Sects. 3 and 4, printed on p. 17 and 18 of prosecutors’ brief, should have been complied with in making up the supplemental debt statement, nevertheless, try as they did, and

manipulate the figures as much as they could, they completely failed in their efforts.

The question is asked,

“Q. Have you that statement with you?

A. I will see. Yes, I have it here.”

(S. of C., p. 40, lines 28-30).

“Q. Is that made up by reason of the provisions of the Pierson Act?

A. Yes.

Q. What does that show as the net debt of the municipality as stated in the 1928 annual debt statement?

A. \$1,182,472.03.”

(p. 50).

Subsequently (p. 53, S. of C.) the 1928 debt statement was offered in evidence.

Then the 1929 debt statement was also offered in evidence (S. of C., p. 61) and showed the net debt of the city as \$1,195,412.29, and the percentage as .0654%, the gross debt of the city as shown in this 1929 debt statement (S.ofC.p.62) was \$5,873,955.38.

Under point five of prosecutors' brief (p. 22) the net debt of the city as shown in the 1928 debt statement amounted to \$1,124,681.71, to which has been added increase of \$57,790.32. Prosecutors then add \$2,000,000.00 of highway bonds, which were shown in the 1929 debt statement and called the total debt of the City of Long Branch.

There is no such thing as total debt under the Pierson Act. We have gross debt and net debt, and we cannot arrive at a figure which we may call total debt by taking the net debt from the 1928 annual debt statement and adding \$2,000,000.00, as shown in the 1929 annual statement.

At p. 22 of prosecutors' brief, the statement is made that “this is the reason that the supplemental debt statement was not prepared,” but reference to

the testimony of the finance officer, prosecutors' own witness, will show that the debt statement was prepared and the only reason that prosecutors did not offer this debt statement in evidence was because it showed the net debt of the city to be within the legal per cent. required by the Pierson Act.

It is again most emphatically asserted that there is nothing in the testimony nor in any of the exhibits which shows the net debt of the city to have exceeded the 7%. In these respects, therefore, the Pierson Act has been followed to the letter.

But again the finance officer was asked by the prosecutor the following question (S. of C., p. 50, lines 38, &c.),

“Q. In computing the supplemental debt statement at the time of the passage of these two ordinances, did you compute Item F, G, H, I and J, as referred to in Sect. 12, subdivision 2, Chap. 174, Laws 1929?”

This reference should have been to subdivision 3, which is a section of the Pierson Act as amended, and which requires additional information in a supplemental debt statement only where the passage of an ordinance for a given improvement will run the net debt above 7%. This additional information required is set forth in Items F, G, H, I and J under this section. Under subdivision 4 of the same section (see p. 18 of pros. brief), no ordinance or resolution prior to the passage of which a supplemental debt statement must be filed, should be passed if it appears that the percentage of the net debt exceeds 7%, provided, however, such ordinance may nevertheless be passed if the percentage of the net increased debt stated in subdivision J does not exceed 2%.

The effort of prosecutors to show on the examination of the Finance Commissioner that the net debt would exceed 7% upon the passage of the ordinance

and that therefore Sects. 3 and 4, printed on p. 17 and 18 of prosecutors' brief, should have been complied with in the supplemental debt statement, was without avail.

In this connection, too, the court's attention is called to Chap. 126, P. L. 1930, p. 391, and Chap. 128, P. L. 1930, p. 392.

"An Act to validate, ratify and confirm proceedings of cities for the issuance of bonds for the purpose of financing a highway and authorizing the issuance of such bonds.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. All proceedings heretofore adopted by cities of this State for the issuance of bonds for the purpose of financing a highway are hereby validated, ratified and confirmed, notwithstanding that ordinances authorizing such bonds shall not have been in compliance with provisions of an act entitled 'An act to authorize and regulate the issuance of bonds and other obligations and the incurring of indebtedness, by county, city, borough, village, town, township, or any municipality governed by an improvement commission,' approved March twenty-second, one thousand nine hundred and sixteen, constituting chapter two hundred and fifty-two of the Pamphlet Laws of one thousand nine hundred and sixteen and the acts amendatory thereof and supplemental thereto, and the issuance of such bonds pursuant to said act and this act, and by virtue of said ordinances is hereby authorized, validated and approved; *provided*, that an ordinance authorizing such bonds has been adopted and published by such city in accordance with the provisions of an act entitled 'An act concerning municipalities,' approved March twenty-seventh, one thousand nine hundred and seventeen, constituting chapter one

hundred and fifty-two of the Pamphlet Laws of one thousand nine hundred and seventeen and the acts amendatory thereof and supplemental thereto.

2. This act shall take effect immediately."

"An Act respecting the issuance and sale of municipal notes and bonds.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. When any municipal corporation has heretofore or shall hereafter be authorized by any act to issue notes or bonds for any public work or improvement, and such act is silent as to the method or mode of procedure to be adopted in the issuance and sale of such notes or bonds, such procedure shall conform, in all respects, to the provisions of an act entitled 'An act to authorize and regulate the issuance of bonds and other obligations and the incurring of indebtedness by county, city, borough, village, town, township, or any municipality governed by an improvement commission,' approved March twenty-second, one thousand nine hundred and sixteen, and the acts amendatory thereof and supplemental thereto.

2. This act shall take effect immediately."

Chap. 127, P. L. 1930, p. 392.

It is respectfully submitted that [redacted] heretofore referred to in Point V, as well as the last two above mentioned bills, would and do cure all defects, if any, relative to the passage of both ordinances in question.

In the case of the State, James Bonney, Prosecutor, v. George Reed, Collector of Bridgewater, 31 Law 133, it was held, syllabus, on Certiorari, in matter of Taxation:

"1. An act of the legislature legalizing the proceedings of a township meeting directing money to be borrowed to pay volunteers, and

of a town committee imposing and assessing a tax to pay such loan, and which provides that no suit or proceeding shall be commenced or prosecuted to set aside any assessment that may have been made, is not an ex post facto law and is valid.

2. The act applies as well to proceedings commenced before its passage as to those commenced afterwards."

It will be noticed, at page 135, that the insistent there was that the suit, having been commenced before the passage of the act, was not affected by it, and that to attempt to do so would in effect be to give to the act a retrospective construction and the character of an ex post facto law.

Mr. Justice Haines, speaking for the Supreme Court, answering this argument, says:

"The constitution prohibits the passage of any ex post facto law or any law impairing the obligation of contracts. This prohibition, as to the ex post facto laws, applies only to laws of a penal and criminal nature, and there *is no constitutional objection* to the passage of a law that is retrospective, if it do not impair the obligation of any contract." (Italics mine.)

At the bottom of the page, the Court goes on to say:

"We are now asked, after the passage of this act and in the face of it, to set aside and annul this assessment. If the motion is granted it must be in violation of an act which, in terms, forbids it. But the act goes further, and provides that no suit or proceeding shall be commenced or prosecuted to set aside any assessment so made. Admitting that it does not embrace a writ of certiorari issued before its pas-

sage, it certainly does prohibit the further prosecution of it to set aside the assessment. The motion cannot be sustained.

A question here arises as to what judgment should be rendered. To affirm the assessment would subject the prosecutor to his own costs not only, but to those of the defendant as well—and that, too, on a proceeding which was lawful at the time of the allowance of the writ.

It is well settled that this court may, on its own mere motion, dismiss a certiorari which has been improvidently allowed, or which at any time may appear to be one which should be no further prosecuted.

In accordance with this practice, I think the writ of certiorari and the proceedings under it should be dismissed, but without costs."

Ogden and Vredenburg, Justices, concurred.

The case of *In Re Commissioners of Elizabeth*, reported in 49 Law 488, should be read with considerable care, to establish the following syllabus:

"3. Where the subject of legislation is of a general character, all matters reasonably connected with it which are appropriate to accomplish or facilitate the object of the act may be embraced in it without infringing the constitutional interdict which prohibits the intermixing of such things as have no proper relation to each other."

Syllabus No. 5 (see page 496) :

"5. The power to correct, amend and validate taxes and assessments by curative legislation, or to provide for re-levy or re-assessment, where the tax or assessment is inefficacious on account of illegalities in the levy or assessment, is an essential attribute of the sovereign power

of legislation, and is necessarily without any limit except such as is imposed by constitutional restrictions or limitations, if the tax or assessment be one that the legislature could authorize."

This case was certified from the Union Circuit Court to the Supreme Court for an advisory opinion. The matter was argued before the Supreme Court made up of Beasley, C. J., and J. J. Depue, Scudder and Reed. Opinion by Depue, J.

At page 496 the following rule of law is clearly stated:

"It is equally well settled that the legislature possesses like powers by retroactive legislation over assessments for benefits derived from local improvements either to amend defects and irregularities or to provide for a re-assessment where the original assessment has failed, *either on account of the unconstitutionality of the law by which it was made or by reason of irregularities or illegality in the method of making the assessment.*" (Italics mine.)

Citing cases.

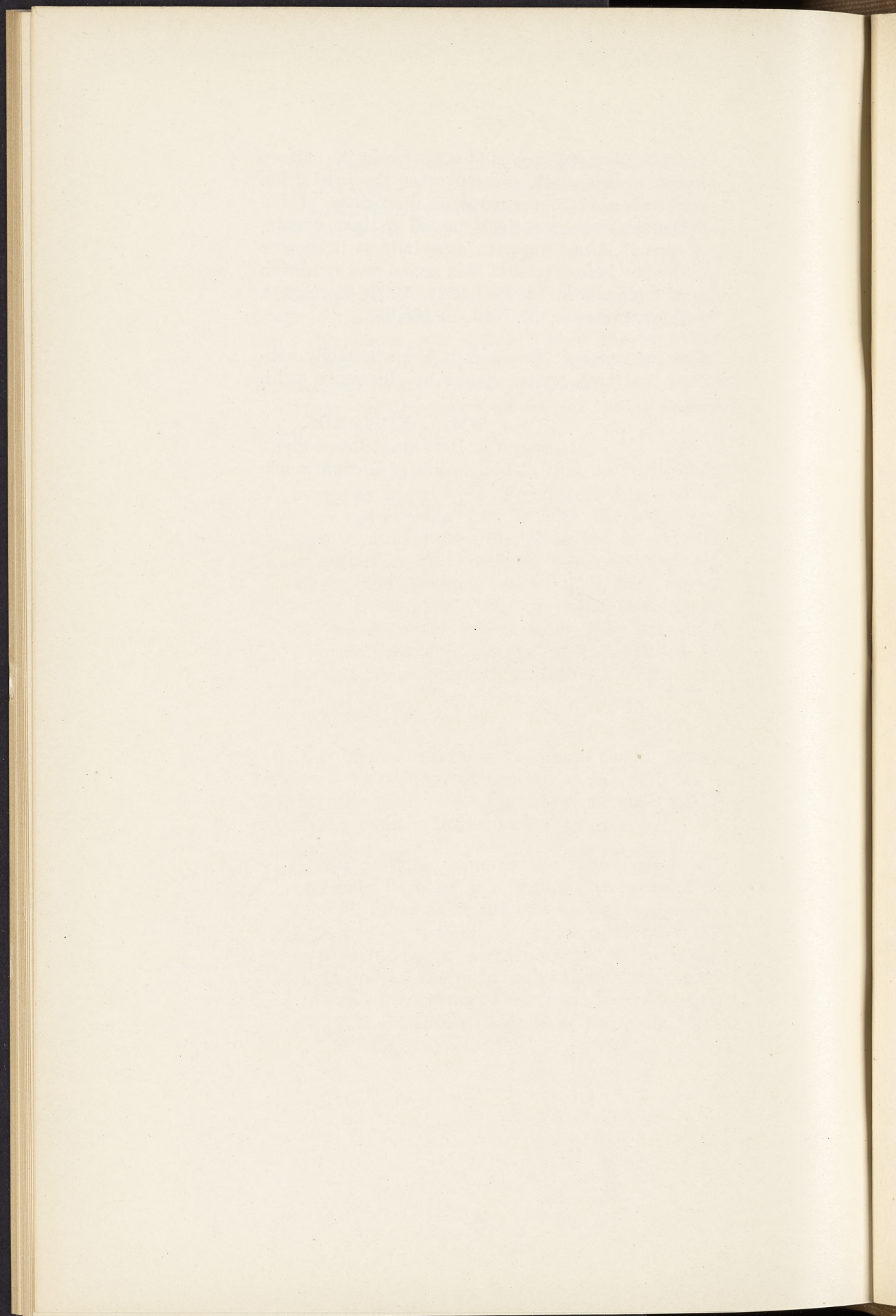
In the Monmouth County Circuit Court, Judge Lawrence, in the case of DeKyne v. Lewis, 5 Misc. 948, at page 955, makes the following observation concerning curative legislation:

"But if it be assumed that the consent of plaintiffs husband was legally necessary, that is to say, that he should have joined in the execution of the assignment, which in all other respects, including execution and acknowledgment, was in due form under the statute, plaintiff can take nothing of the irregularity. Pamph. L. 1926, ch. 154, p. 258, being in terms retro-

active, is applicable and curative in its nature, and even though enacted after the institution of this suit, is regarded as dispositive of the issue. The court feels bound to take cognizance of it and apply it, especially as it became the law before trial of this action and rendition of judgment. 36 Cyc. 1221, 1222; Bonney v. Reed, Collector, 31 N. J. L. 133."

For the reasons aforesaid, it is respectfully submitted that both writs should be dismissed with costs.

WM. L. EDWARDS,
Attorney for Defendant-Respondent.
City of Long Branch.



New Jersey Court of Errors and Appeals

WALTON SHERMAN and FRANK M.
BAXTER,
Prosecutors-Appellants,

vs.

CITY OF LONG BRANCH,
Defendant-Respondent.

ON APPEAL
FROM SUPREME
COURT.

—
ON CERTIORARI.
NO. 102 D.
MAY TERM,
1931.

BRIEF OF McDERMOTT, ENRIGHT & CARPENTER, FOR APPELLANTS.

This appeal brings up a judgment of the Supreme Court upholding an ordinance of the City of Long Branch which provides for the opening and constructing of a new highway running from the Monmouth Beach line southerly to the intersection of West End Avenue with the West End Plaza, one hundred feet in width throughout (Record, p. 34). This ordinance provides that the City shall acquire lands within the lines of the new highway by purchase or condemnation. The estimated cost of the improvement is \$2,000,000. The Supreme Court affirmed this ordinance, but in the same opinion set aside a second or companion ordinance, authorizing the issuance of \$2,000,000 of highway bonds of 1930 of the City for the purpose of permanently financing the new highway provided for under the highway ordinance under review (see Bond Ordinance, Record, p. 39).

The City did not appeal from the judgment setting aside the bond ordinance.

Grounds of Appeal.

The grounds of appeal urged and relied upon are:

(1) Because the Supreme Court affirmed and approved the highway ordinance.

(2) Because Chapter 171, P. L. 1929, the act under which said ordinance was attempted to be adopted by the City of Long Branch, violates Article IV, Section VII, paragraph 11 of the State Constitution, in that it is a private, local or special law relating to the laying out and opening of a road or highway; and regulates the internal affairs of Long Branch.

(3) Because Chapter 171, P. L. 1929, violates Article IV, Section VII, paragraph 4 of the State Constitution, in that said statute does not embrace one object, and that object is not expressed in the title.

(4) It is also alleged that said statute violates Article IV, Section VII, paragraph 4 of the State Constitution, in that said law while purporting to be a general law is in fact special and local in character applying only to Long Branch.

(5) It is further alleged that said ordinance violates Section 73 of "An Act relating to, regulating and providing for the government of cities" (P. L. 1903, p. 292, as amended by P. L. 1907, p. 257), and Section 74 of said Act as amended by P. L. 1905, p. 407, in that an election of the voters of the City of Long Branch was not held to adopt said ordinance.

(6) It is also alleged that the estimated cost of the improvement, \$2,000,000, appropriated to carry out the cost of said improvement, would increase the debt limit in excess of fifteen per cent.

of the value of property of Long Branch rated for taxation.

(7) It is also alleged that Chapter 127, P. L. 1930, which attempted to validate the ordinance under review, did not accomplish the purpose because Long Branch did not comply with paragraph 1 (b) of "An Act concerning municipalities", Chapter 287, P. L. 1929, in that it did not mail or cause to be mailed a copy of such ordinance with a notice of the introduction thereof, and the time and place when and where it would be further considered for final passage, to every person whose land might be affected.

(8) Finally, because the Supreme Court erred in holding that Chapter 127, P. L. 1930, validated the ordinance under review.

POINT I.

Chapter 171, P. L. 1929, under which the ordinance in question was passed, is unconstitutional.

Chapter 171, P. L. 1929, supplements "An Act relating to, regulating and providing for the government of cities", approved April 8, 1903.

Long Branch is the only City in the State which adopted the provisions of the Act of 1903, being Chapter 168, P. L. 1903 (Stipulation, p. 72).

Section 1 of Chapter 171, P. L. 1929, provides:

"Any city now or hereafter governed by the provisions of the act to which this act is a supplement, in addition to the powers by said act conferred, shall have the power to manage, regulate and control its finances and property, real and personal; to borrow money, and negotiate temporary loans in anticipation of taxes and other revenues, and to

authorize, provide and pay for public improvements, including the acquiring, laying out, widening, straightening, improving, constructing, reconstructing and maintaining streets and highways, and to issue bonds, notes or other evidences of debt in payment thereof, which said bonds, notes and other evidences of debt may be refunded or repaid in whole or in part from benefit assessments, levied on property in such city, benefited thereby, which said bonds, notes or other evidences of debt, so issued, for the purposes of this act, shall not be included as part of the debt statement, or computed in the net debt of the municipality, or in any wise be subject to the provisions of an act entitled 'An Act to authorize and regulate the issuance of bonds and other obligations and the incurring of indebtedness by county, city, borough, village, town, township or any municipality governed by an improvement commission,' approved March twenty-second, one thousand nine hundred and sixteen, and the acts amendatory thereof and supplemental thereto."

The sole purpose of this Act undoubtedly was to remove Long Branch from the restrictions imposed by the debt limit of 7% in the Pierson Act (P. L. 1916, Sec. 12, par. 3, p. 538), as amended by Chap. 174, P. L. 1929.

Chapter 171, P. L. 1929, is repugnant to Article IV, Section VII, paragraph 11 of the State Constitution, which provides:

"The Legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: laying out, opening, altering and widening roads or highways; regulating the internal affairs of towns and counties" &c.

Mr. Justice Depue in *Wanser v. Hoos*, 60 N. J. L., at p. 525 said:

"The courts, in a series of cases too numerous to be cited, have given to this constitu-

tional provision a fixed construction. In the first case in which this provision came before the court, a general law, as contra-distinguished from a special or local law within the meaning of the constitution, was defined to be a law that embraced a class of subjects or places and did not omit any subject or place naturally belonging to such a class. *Van Riper vs. Parsons*, 11 *Vroom*, 1.

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. It is also equally well settled by decisions of our courts that, although population may be made the basis of a classification in statutes relating to municipal bodies, such a classification cannot be made the means of evading the constitutional interdict of local or special laws. 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, the statute is or is not a general law as defined by the courts.

The Supreme Court of the United States has likewise proceeded upon this principle in deciding upon the validity of statutes under the equality clause in the fourteenth amendment to the federal constitution. In *Gulf, Colorado and Santa Fe Railway Co. v. Ellis*, 165 U. S. 150, the court held that there might be classification for the purposes of legislation, but that the mere fact of classification was not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection; and in the application of that principle the court set aside an act of state legis-

lation as in violation of the constitutional provision. . . .

The constitutional prescription relates to the regulation of the internal affairs of towns and counties without regard to population, and it applies as well to the lesser as to the greater municipalities in this state."

Again in his opinion Mr. Justice Depue said:

"That the cities or municipalities to which it applies have been properly classified for general municipal purposes, does not of itself furnish a sufficient reason for sustaining such legislation. . . ."

That an act of the Legislature appearing on its face to be general may, nevertheless, be in conflict with said section of the Constitution, was determined in *Smith v. Board of Chosen Freeholders of Monmouth County*, 135 Atl. Rep., p. 678, 5 Misc. 153.

See also

Board of Tenement House, Etc. v. Mittleman, 104 N. J. L., p. 486.

Since Long Branch is the only City of the State which adopted the Act of 1903, and since Chapter 171, P. L. 1929, was designed to give Long Branch unlimited power to manage, regulate and control its finances, and real and personal property, and borrow money, without in any way being subject to the provisions of the Pierson Act, which by its terms applied to every city, borough, village, town, township or any municipality in the State, it follows that Chapter 171, P. L. 1929, was a special act within the meaning of the Constitution and is null and void.

Although couched in general terms, this act points to Long Branch as certainly as if in its title it stated that the purpose was to give the Commis-

sioners of Long Branch unlimited power to make improvements and borrow money to pay for them, without regard to debt limits or limits affecting other cities of the State.

Although said chapter is entitled a supplement to the 1903 Act, it is more. It not only states that any city now or hereafter governed by the provisions of the 1903 Act shall have power to manage, regulate and control its finances, and real and personal property, but it states it shall have power to pay for public improvements and to issue bonds, "which said bonds, notes or other evidences of debt, so issued, for the purposes of this act, shall not be included as part of the debt statement, or computed in the net debt of the municipality, or in any wise be subject to the provisions of an act entitled 'An Act to authorize and regulate the issuance of bonds and other obligations and the incurring of indebtedness by county, city, borough, village, town, township or any municipality governed by an improvement commission,' approved March twenty-second, one thousand nine hundred and sixteen, and the acts amendatory thereof and supplemental thereto" (the Pierson Act).

This act therefore had two purposes. The first was to supplement the Act of 1903 in order to enlarge the powers of the City. The second purpose was, *pro tanto*, to repeal so much of the Pierson Act as affected Long Branch.

The Pierson Act is a general statute relating to the financing of all counties, cities and municipalities of every kind in the State. It affected Long Branch as well as every other city, town and village in the State.

The object of attempting to take Long Branch out of the provisions of the Pierson Act was not expressed in the title, although it is a substantial part of the scheme of allowing Long Branch to build the highway in question, irrespective of its

debt limit, without any authorizing election of the qualified voters of the City, and without any of the restrictions which apply to all the other municipalities of the State.

If this statute is valid then any city in the State which has reached its debt limit under the provisions of the Pierson Act or the Walsh Act, may adopt the provisions of Chapter 168, P. L. 1903, and go on piling up debts without limit or restriction.

Suppose Hoboken, merely by way of illustration, should reach its debt limit and be unable to finance improvements desired by the Commissioners. If Hoboken should immediately adopt the provisions of Chapter 168, P. L. 1903, it could do anything provided by said law, at any cost, and without any election, and without any regard to a debt limit, and contend that its action is valid under Chapter 171, P. L. 1929.

Suppose that the Pierson Act, which is a general scheme for financing and by its terms applicable to all counties, cities and municipalities of the State, had provided that it is applicable to all counties, cities, municipalities, boroughs, towns, townships and villages, excepting Long Branch, or cities which have adopted the provisions of Chapter 168, P. L. 1903. There is no reason why the provisions of the general municipal financing acts should not apply equally to all municipalities, and no sound reason for excluding cities operating under one certain charter. By the same token, Chapter 171, P. L. 1929, is invalid, for it attempts to say that municipalities acting under Chapter 168, P. L. 1903, may regulate and control their finances, borrow money and issue bonds, and that the amount thereof shall not be computed in the net debt of the municipality under the provisions of the Pierson Act. *Board of Tenement House, Etc. v. Mittleman*, 104 N. J. L. 486.

This is in effect to repeal the provisions of the Pierson Act so far as it relates to cities adopting the provisions of one particular statute. It does not act upon all cities of the State, nor does it act upon all cities of one class within the State.

In so many words, it is limited to such cities as have adopted the provisions of this particular statute. It happens that but one city comes within the class. This particular statute was conceived and passed for the very purpose of taking this particular city out of the provisions of the statute fixing a debt limit beyond which the policy of the Pierson Act said a municipality in this State should not go in creating obligations.

The Supreme Court refused to declare the statute in question unconstitutional, but the Supreme Court said:

“It may well be that it is not desirable legislation and may be the initial movement to remove, one after another, municipalities of the several recognized classes from the requirements and control of the Pierson Act, so that, eventually, it will completely lose its value and effectiveness. But, it would seem, with this the courts are not concerned, but it is rather a matter requiring the exercise of legislative discretion and judgment” (Opinion, Record, p. 89).

It is submitted that under the decision in *Wanser vs. Hoos, supra*, a broader view should be taken, and that the Act should be declared to be in conflict with Article IV, Section VII, paragraph 4, of the State Constitution.

POINT II.

The prosecutors are in a position to attack the ordinance under review.

The Supreme Court held that the bonding ordinance, the companion ordinance to the highway ordinance under review, is invalid.

These two ordinances considered together constitute a complete legislative plan. The first part of the plan provided for the laying out and constructing of the highway at an expense of \$2,000,000, and the companion ordinance provided for the financing of the \$2,000,000 with bonds.

It cannot successfully be claimed that the highway ordinance standing alone is valid merely because \$2,000,000 is appropriated to construct the highway, and nothing is said about how this money shall be raised beyond providing that the cost of the improvement shall be paid by special assessments. The Supreme Court suggested in its opinion that these particular prosecutors could not complain of this ordinance for the reason that the \$2,000,000 was to be raised by special assessments (Opinion, p. 92). This suggestion overlooks the last clause in paragraph 6 of the ordinance (Record, p. 36), which provides:

“and if benefits so assessed shall not equal the entire cost the balance shall be paid by the City”.

Therefore, these prosecutors are or may be directly affected by the balance of cost, which shall be paid by the City.

When it is considered that this highway is only to be one mile in length, and that property on either side of it may have to stand the special benefits assessed on the basis of \$1,000,000 per

mile of road, it will be seen that assessments levied upon adjoining property will be staggering.

POINT III.

The ordinance was not validated by Chapter 127, P. L. 1930.

After the writ of certiorari had been allowed in this case, "An Act to validate ordinances of cities providing for the laying out, widening, straightening, improving and constructing of a highway or highways, avenue or avenues, and the acquisition of land or interest therein for said purpose, and for the grading, curbing and paving of any such highway or avenue, and for the levying of assessments on property especially benefited thereby", was introduced in the Legislature, passed and approved.

The Supreme Court held that the effect of this statute was to validate this ordinance.

This statute would have validated said ordinance, except that the concluding paragraph of said statute provided as follows:

"provided said ordinances were adopted and notice thereof given by publication in newspapers as required by law."

It is submitted that this proviso was not complied with.

"An Act to amend an act entitled 'An act concerning municipalities'", being Chapter 287 of the Laws of 1929, page 674, paragraph 1 (b) provides that certain ordinances shall be published twice and copies mailed to all persons affected.

Paragraph 1 (b) provides:

"In case of ordinances providing for local improvements authorized by Article XX, or

providing that all or a part of the cost of any work, acquisition of property or improvement shall be assessed upon abutting land or lands specially benefited thereby (excepting sidewalks); or providing for the establishing or change of grade, or the vacation, of any street, avenue, highway, lane or alley or portion thereof, or the vacation as hereinafter defined, of any square, place or park, or any portion thereof, dedicated to the public, but which has not been accepted or opened by the municipality; such publication shall be twice, once of which shall be at least ten days prior to the time fixed for further consideration for final passage, and at least one week prior to the time fixed for further consideration for final passage of said ordinance, a copy of such ordinance, together with a notice of the introduction thereof and the time and place when and where such ordinance will be further considered for final passage, shall be mailed to every person whose lands may be affected by such ordinance or any assessment which may be made in pursuance thereof so far as the same may be ascertained, directed to his last known postoffice address. The owner of any lands may file with the clerk of the municipality, or other official designated by the governing body or ordinance, a list of lands owned by him with a postoffice address to which all notices shall be directed. Failure to mail notice herein provided for shall not invalidate any ordinance, proceeding or assessment."

The returns in this case show that the said ordinances were published one time on December 18, 1929 and on January 3, 1930 (Record, p. 4d).

These ordinances were introduced on December 17, 1929, and given a first reading and laid over until December 31, 1929 (Record, pp. 30 and 32) when they were passed.

Long Branch did not in any way comply with the provision of this section of the Municipalities

Act that at least one week prior to the time fixed for further consideration for final passage of said ordinance "a copy of such ordinance, together with a notice of the introduction thereof and the time and place when and where such ordinance will be further considered for final passage, shall be mailed to every person whose lands may be affected by such ordinance or any assessment which may be made in pursuance thereof" (Clerk's Certificate, Record, p. 43). The ordinance was only published once.

For this reason alone Long Branch does not fall within the proviso of the so-called validating act, and according to its terms it does not validate the proceedings under review.

The Supreme Court says that since the statute itself provides that "the failure to mail the notice herein provided for shall not invalidate any ordinances, proceeding or assessment", and this was construed by the Supreme Court in *Root vs. Jersey City*, 5 Misc. Rep. 973, adversely to prosecutors' contention, therefore Chapter 127, P. L. 1930, validates the ordinance under review.

Not so; for the reason that the condition in Chapter 127, P. L. 1930, was that said ordinance be validated, "*provided said ordinances were adopted and notice thereof given by publication in newspapers as required by law*". This was not done.

Therefore, although under the Home Rule Act it was provided that failure to mail would not invalidate, yet under the validating statute, validation is provided only upon the condition that the notice thereof were given by publication in newspapers as required by law. If this condition was not fulfilled, then, of course, the validating act did not apply.

POINT IV.

The ordinance is invalid because the \$2,000,000 cost of said improvement increases the debt of Long Branch beyond the statutory limit of indebtedness permitted by law.

The Supreme Court in its opinion held the bonding ordinance invalid because it was not adopted in conformity with the provisions of the Pierson Act (P. L. 1916, p. 525).

The same evidence is before this Court which was before the Supreme Court.

The Court will take judicial knowledge of the fact that a \$2,000,000 highway improvement cannot be paid and financed merely by making assessments for benefits.

Such assessments are necessarily collected over a long period of time, as the ordinance under review in terms contemplates.

Financing must be done in order to pay the contractor building the road pending the collection of the assessments.

Since the funding of the cost of the improvement, even temporarily, compels Long Branch to exceed the debt limit, it necessarily follows that this ordinance like the bonding ordinance is in conflict with the Pierson Act.

It is therefore respectfully urged that since the one ordinance falls because it violates the Pierson Act, the highway ordinance must fall for the same reason.

It is respectfully submitted that for the reasons above assigned the ordinance under review should be set aside.

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