

# New Jersey Court of Errors and Appeals.

ROBERT CARSON,  
(Prosecutor) Appellant,

v.

HONORABLE SAMUEL KALISCH,  
JUSTICE OF THE SUPREME COURT,  
AND THOMAS J. SCULLY,  
(Defendants) Appellees.

On Certiorari.  
On Appeal.

## State of the Case.

THEODORE STRONG,

Attorney for Appellant.

LINDLEY M. GARRISON,

THOMAS P. FAY,

THOMAS H. HAGERTY,

Attorneys for Appellees.

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# New Jersey Supreme Court.

(Filed December 1, 1916.)

ROBERT CARSON,  
*(Prosecutor) Appellant,*

v.

HONORABLE SAMUEL KALISCH,  
JUSTICE OF THE SUPREME COURT,  
AND THOMAS J. SCULLY,  
*(Defendants) Appellees.*

10

On Certiorari.  
On Appeal.

## WRIT TO REVIEW RECOUNT OF VOTES IN MIDDLESEX COUNTY.

20

To Hon. Lindley M. Garrison, and Thomas H. Haggerty, Esq., and Thomas P. Fay, Attorneys for Defendants:

Take notice that the prosecutor appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds, viz.:

1. Because the Supreme Court dismissed the writ of certiorari, whereas said Court should have rendered judgment setting aside the order and proceedings brought up by said writ.

30

2. Because the Justice of the Supreme Court who made said order for a recount of said ballots cast in the County of Middlesex was without authority or jurisdiction to make it.

3. Because due notice of the time and place of such recount has not been given to this prosecutor.

*Writ of Certiorari.*

4. Because due notice of the contents of the petition upon which said order was obtained has not been given to this prosecutor.

5. Because said order was not filed within due time.

6. Because said petition was not filed within due time.

7. Because it does not appear in said petition that the petitioner had reason to believe that an error had been made by any Board of Elections or of Canvassers in counting the vote or declaring the result of said election, whereby the result of said election had been changed.

8. Because said petition does not disclose a legal justification for the making of said order.

9. Because the material facts in said petition are sworn to only upon information and belief.

10. Because the affidavit to said petition is general in its terms, whereas it should specifically state the facts sworn to.

11. Because said order and proceedings are in divers other respects illegal, unjust and oppressive, and should be set aside and for nothing holden.

THEODORE STRONG,  
Attorney of Appellant.

Service acknowledged.

THOMAS P. FAY,  
Atty. of Thomas J. Scully.

11/28/16.

30. Service acknowledged.

THOMAS H. HAGERTY,  
Atty. of Thomas J. Scully.

11/29/16.

*Writ of Certiorari.*

(Filed November 18, 1916.)

*State of New Jersey.*

The State of New Jersey to Honorable  
 (L.S.) Samuel Kalisch, Justice of the Supreme  
 Court of the State of New Jersey. Greet-  
 ing:

We being willing for certain reasons to be certified  
 of a certain order made by you bearing date the fif-  
 teenth day of November, nineteen hundred and sixteen,  
 that a recount of the whole of votes cast at the general 10  
 election in the County of Middlesex for member of the  
 House of Representatives of the United States, on the  
 seventh day of November, nineteen hundred and six-  
 teen, be publicly made under your direction by the  
 County Board of Election of the County of Middlesex,  
 at the Court House in the City of New Brunswick, in  
 said county, beginning on the twentieth day of Novem-  
 ber, nineteen hundred and sixteen, do command you  
 that you send under your seal to our Justices of our  
 Supreme Court of Judicature, at Trenton, on the 20  
 twenty-fourth day of November instant, said order and  
 proceedings, with all things touching and concerning  
 the same, as fully and entirely as they remain before  
 you, by whatever names the parties may be called there-  
 in, together with this writ, that we may cause to be done  
 thereupon what of right we shall see fit to be done.

Witness, William S. Gummere, Esq., our Chief Jus-  
 tice of our said Supreme Court at Trenton, this seven-  
 teenth day of November, A. D. nineteen hundred and  
 sixteen. 30

WM. C. GEBHARDT, Clerk.

THEODORE STRONG, Attorney.

Allowed November 17, 1916.

Writ not to operate as a stay.

SAMUEL KALISCH, J. S. C.

Service of this writ acknowledged November 18, 1916.

THOMAS H. HAGERTY,  
 Atty. for Thomas J. Scully, Defendant.

*Return to Writ.*

## RETURN.

I, Samuel Kalisch, Justice of the Supreme Court, in obedience to the command of the within writ, do hereby make return of all things touching and concerning the same, as within I am commanded.

SAMUEL KALISCH,  
Justice of the Supreme Court.

10

(Filed November 21, 1916.)

## NEW JERSEY SUPREME COURT.

ROBERT CARSON,

*Prosecutor,*

20

v.

HONORABLE SAMUEL KALISCH,  
JUSTICE OF THE SUPREME COURT,  
AND THOMAS J. SCULLY,

*Defendants.*

} On Certiorari.

*Writ to Review Recount of Votes in  
Middlesex County.*

30

*Stipulation of Counsel.*

ROBERT CARSON,

*Prosecutor,*

v.

HONORABLE SAMUEL KALISCH,  
JUSTICE OF THE SUPREME COURT,  
AND THOMAS J. SCULLY,  
*Defendants.*

} On Certiorari.

10

*Writ to Review Recount of Votes in  
Monmouth County.*

ROBERT CARSON,

*Prosecutor,*

v.

HONORABLE SAMUEL KALISCH,  
JUSTICE OF THE SUPREME COURT,  
AND THOMAS J. SCULLY,  
*Defendants.*

} On Certiorari.

20

*Writ to Review Recount of Votes in  
Ocean County.*

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It is on the twenty-first day of November, one thousand nine hundred and sixteen, stipulated and agreed by, and between, counsel for the respective parties, that the three above entitled cases shall be argued together upon a single State of the Case, consisting of

*Stipulation of Counsel.*

one of the writs of Certiorari and the return thereto, and the petition, order, notice, reasons for setting aside the proceedings, any and all proofs properly receivable, and any and all orders of the Supreme Court Justice or of the Supreme Court, pertaining to the case (neither side waiving hereby any right to object to or to except to any such proofs or any such order or orders): That the argument shall take place at the State House, in the City of Trenton, on Friday, November twenty-

10 fourth, one thousand nine hundred and sixteen, at 10.30 o'clock in the morning, before the Honorable Samuel Kalisch, one of the Justices of the Supreme Court, who has been designated by the said Court to sit for it, and who is to be taken and considered as if he was the Supreme Court: That the determination of the said Justice Kalisch shall be taken and considered as the determination of the Supreme Court, and that such determination in such case shall be taken and held to be the determination of the Supreme Court in each and all of

20 the three said cases, and that a separate judgment in the Supreme Court shall be entered in each case accordingly.

And it is further stipulated and agreed that, upon the entry of such judgments, appeals shall be taken forthwith to the Court of Errors and Appeals, where said three causes shall be argued together upon a single State of the Case containing the record sent up from the Supreme Court: That the argument before the

30 Court of Errors and Appeals shall take place at the day and hour fixed by the said Court: That the determination of the Court of Errors and Appeals in such case shall be taken and held to be its determination in each and all of the said three cases, and a separate judgment in each case shall be entered accordingly.

Neither side is entitled to or shall require any further notice of the hearing before the Supreme Court fixed as aforesaid for Friday, November twenty-fourth,

*Petition.*

one thousand nine hundred and sixteen, at 10.30 a. m., at Trenton, and shall not require any formal notice of the time and place of argument fixed by the Court of Errors and Appeals in accordance with the stipulation.

LINDLEY M. GARRISON,

Attorney for Thomas J. Scully.

THEODORE STRONG,

Attorney for Robert Carson, Pros.

Notice is hereby acknowledged that the Court of Errors and Appeals has fixed the time for argument of the appeals above, before it, at 10.30 a. m. on Monday, December fourth, 1916, at Trenton.

November 21, 1916.

LINDLEY M. GARRISON,

Attorney for Thomas J. Scully.

THEODORE STRONG,

Attorney for Robert Carson, Pros.

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(Filed November 15, 1916.)

To the Honorable Samuel Kalisch,  
Justice of the Supreme Court.

The petition of Thomas J. Scully respectfully shows that he resides in the City of South Amboy, County of Middlesex and State of New Jersey, and that at the General Election held in the Third Congressional District in and for the State of New Jersey, which is comprised of the Counties of Middlesex, Monmouth and Ocean, on the seventh day of November, nineteen hundred and sixteen, he was a candidate for member of the House of Representatives of the United States.

Your petitioner further shows that at a meeting of the Board of County Canvassers of Middlesex County,

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*Petition.*

held on Monday, November 13, 1916, for which the vote cast at the aforesaid General Election was canvassed and determined, the said Board of County Canvassers issued a statement and certificate by which it appears that your petitioner received in the County of Middlesex 10,156 votes, and that Robert Carson, a candidate for Member of the House of Representatives of the United States, and the opponent of your petitioner, received in the County of Middlesex 9,761.

10 Your petitioner further shows that at a meeting of the Board of County Canvassers of Monmouth County, held on Monday, November 13, 1916, for which the vote cast at the General Election was canvassed and determined, the Board of County Canvassers of Monmouth County issued a statement and certificate by which it appears that your petitioner received in the County of Monmouth for said office 10,244 votes, and that Robert Carson received 9,929 votes.

20 Your petitioner further shows that at a meeting of the Board of County Canvassers of Ocean County, held on Monday, November 13, 1916, at which the vote cast at said General Election in the County of Ocean, was canvassed and determined, the Board of County Canvassers of Ocean County issued a statement and certificate by which it appears that your petitioner received 1,969 votes and that Robert Carson received 2,690 votes.

30 That from said canvass and determination of the three counties, comprising the Third Congressional District, Robert Carson defeated your petitioner for said office by a majority of eleven votes. That there were cast in the three counties comprising the said District upwards of 45,000 votes, and that your petitioner is informed and verily believes many errors were made by the Board of Elections or Canvassers in counting the said vote or in declaring the vote of said election, and that said errors have changed the result of said election.

*Petition.*

Your petitioner further shows that at various polling places in the County of Middlesex, and at various polling places in the County of Monmouth, legal ballots were rejected and illegal ballots were counted, so far as the Member of the House of Representatives of the United States was concerned, and that in the County of Ocean legal ballots were rejected and illegal ballots were counted and errors were made in counting the votes and declaring the vote of such election, whereby the result of such election has been changed. That at said General Election in various districts of each of the three counties comprising the said Congressional District, ballots which were properly marked for your petitioner and which were valid ballots were rejected, and that ballots which were improperly marked for the opponent of your petitioners were counted, and that said valid ballots for your petitioner were rejected and illegal ballots for your petitioner's opponent were counted in such numbers as to change the result of the election. 10

Your petitioner further shows that upon the foregoing facts and information he has reason to believe that errors were made by the respective Boards of Election and Canvassers in counting the vote and in declaring the vote of said election whereby the result of said election has been changed. 20

Your petitioner therefore prays that your Honor will order and cause, upon such terms as you may deem proper, a recount of the whole or such part of the vote cast in said Congressional District in the County of Middlesex as you may determine, to be publicly made by the County Board of Election, of the County of Middlesex under your direction, and after due notice to the parties interested of the time and place of said recount, pursuant to the statute in such case made and provided. 30

And your petitioner will ever pray.

THOMAS J. SCULLY,  
Petitioner.

*Order.*

*State of New Jersey,  
County of Monmouth, ss.*

10 Thomas J. Scully, being duly sworn according to law, on his oath deposes and says that he is the petitioner named in the foregoing petition; that he has read the said petition, and that the matters and facts therein set forth, so far as they relate to his own acts, are true, and so far as they relate to the acts of others he believes them to be true.

THOMAS J. SCULLY.

Sworn and subscribed to before me this  
fifteenth day of November, A. D. 1916.

T. V. ARROWSMITH,

Master in Chancery of New Jersey.

Served November 18, 1916.

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20 To Robert Carson:

Take notice that, pursuant to an order of the Honorable Samuel Kalisch, a Justice of the Supreme Court, a true copy of which order is hereto attached, a recount of the whole of the votes cast at the General Election in the County of Middlesex on Tuesday, November 7, 1916, for Member of the House of Representatives of the United States will be publicly made, under the direction of the said Honorable Samuel Kalisch, Justice of the Supreme Court, by the County Board of Elections of the County of Middlesex.

30 Further take notice, that said recount will begin on Monday, the twentieth day of November, nineteen hundred and sixteen, at the Court House in the City of New Brunswick, at the hour of nine o'clock in the forenoon, and shall continue from nine o'clock in the forenoon until twelve o'clock noon, continuously, and from one o'clock in the afternoon until six o'clock in the

*Order.*

afternoon, continuously, until such recount is completed, Sunday and Thanksgiving Day excepted.

Dated November 16, 1916.

Yours truly,

THOMAS J. SCULLY,

Petitioner.

Served November 18, 1916.

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NEW JERSEY SUPREME COURT.

In the matter of the application of Thomas J. Scully for a recount of the votes cast for Member of the House of Representatives of the United States, in the Third Congressional District of New Jersey at the General Election held on November 7, 1916.

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ORDER.

Application having been made by Thomas J. Scully for a recount of the votes cast in the County of Middlesex, a part of the Third Congressional District of the State of New Jersey, for Member of the House of Representatives of the United States, and it appearing from the Petition of said Thomas J. Scully that said Thomas J. Scully was a candidate for said office in said District at said election, and that he has reason to believe that errors have been made by the Boards of Election and Board of Canvassers in counting and declaring the vote for Member of the House of Representatives

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*Order.*

of the United States in the said Congressional District, whereby the result of said election has been changed.

It is, on this fifteenth day of November, nineteen hundred and sixteen, Ordered, that a recount of the whole of votes cast at the said General Election in the County of Middlesex for Member of House of Representatives of the United States, be publicly made under my direction by the County Board of Election of the County of Middlesex.

- 10 It is Further Ordered that said recount be made at the Court House in the City of New Brunswick, in the County of Middlesex and State of New Jersey, beginning on Monday, the twentieth day of November, nineteen hundred and sixteen, and continuing from day to day until such recount shall have been completed; that the County Board of Elections shall sit each day for the counting of votes from nine o'clock in the morning until twelve o'clock noon, continuously, and from one  
20 o'clock noon in the afternoon until six o'clock in the afternoon, continuously, Sundays and Thanksgiving Day excepted.

And it is Further Ordered, that notice of the time and place of such recount be served upon the said Robert Carson within three days from the date hereof.

- And it is Further Ordered, that the said Thomas J. Scully file with the County Clerk of the County of Middlesex, a bond to the said Robert Carson, with two or more sureties to be approved by me, in the penal sum  
30 of three thousand dollars conditioned to pay all costs and expenses in case the original count be confirmed or the result of such recount is not sufficient to change the result of said election.

SAMUEL KALISCH, J. S. C.

Served November 17, 1916.

## NEW JERSEY SUPREME COURT.

ROBERT CARSON,

*Prosecutor,*

v.

SAMUEL KALISCH, JUSTICE OF THE  
SUPREME COURT, AND THOMAS  
J. SCULLY,*Defendants.*

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## REASONS.

(Filed November 21, 1916.)

The prosecutor assigns the following reasons for setting aside and vacating the order and proceedings brought up by this writ: 20

1. Because the Justice of the Supreme Court who made said order for a recount of said ballots cast in the County of Middlesex was without authority or jurisdiction to make it.

2. Because due notice of the time and place of such recount has not been given to this prosecutor.

3. Because due notice of the contents of the petition upon which said order was obtained has not been given to this prosecutor. 30

4. Because said order was not filed within due time.

5. Because said petition was not filed within due time.

6. Because it does not appear in said petition that the petitioner had reason to believe that an error had been made by any Board of Elections or of Canvassers in counting the vote or declaring the result of said election whereby the result of said election had been changed.

*Reasons.*

7. Because said petition does not disclose a legal justification for the making of said order.

8. Because the material facts in said petition are sworn to only upon information and belief.

9. Because the affidavit to said petition is general in its terms, whereas it should specifically state the facts sworn to.

10. Because said order and proceedings are in divers other respects illegal, unjust and oppressive, and should be set aside and for nothing holden.

THEODORE STRONG,  
Attorney for Robert Carson, Prosecutor.

Service acknowledged this 20th day of November, 1916.

THOMAS H. HAGERTY,  
Attorney for Thomas J. Scully, Defendant.

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(Filed November 28, 1916.)

## NEW JERSEY SUPREME COURT.

ROBERT CARSON,

*Prosecutor,*

v.

HONORABLE SAMUEL KALISCH,  
JUSTICE OF THE SUPREME COURT,  
AND THOMAS J. SCULLY,  
*Defendants.*

10

Argued before Kalisch, J., on stipulation between counsel, November 24, 1916. Decided November 28, 1916.

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For the Prosecutor—Theodore Strong.

For the Defendants—Thomas P. Fay and Lindley M. Garrison.

## DECISION.

*Kalisch, J.*

The prosecutor seeks to set aside an order made by a Justice of the Supreme Court, for a recount of the votes, cast at the last general election, for candidates for Congress in the Third Congressional District, comprising Middlesex, Monmouth and Ocean counties, in which district the prosecutor, Robert Carson and Thomas J. Scully, the defendant, were congressional candidates, upon the ground chiefly, that section 159, of the act concerning elections, (2 Comp. Stats. p. 2125), under which the order was made, does not confer any power or authority on a Supreme Court Justice to make such an order in relation to congressional candidates.

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*Opinion of Supreme Court.*

Section 159, *supra*, provides: "Whenever a candidate at any election shall have reason to believe that an error has been made by any board of elections or of canvassers in counting the vote or declaring the vote of such election. . . . whereby the result of such election has been changed, such candidate. . . . may within ten days, after such election, apply to any Justice of the Supreme Court, who shall be authorized to order and  
 10 cause, upon such terms as he may deem proper, a recount of the whole, or such part of the votes as he may determine to be publicly made under his direction by the county board of elections, after due notice by such candidates to the parties interested of the time and place of such recount; and, if it shall appear upon such recount that an error has been made sufficient to change the result of such election, then such Justice in case of candidates shall revoke the certificates of elections already  
 20 issued to any person, and shall issue in its place another certificate in favor of the party who shall be found to have received a majority of the votes cast at such elections; and in case of referendums or questions shall make a certificate that the result of such election be corrected, which certificates shall supersede all others and entitle the holder thereof to the same rights and privileges as if said certificates had been originally issued by the canvassing board."

Only so much of section 159 has been quoted as is pertinent to the matter in hand.

30 The insistence of counsel for the prosecutor is that the legislative intent was to confine the provisions of this section to candidates for election, such as state senators, members of assembly, surrogates and other county and municipal officers who if elected are, under the statute, entitled to receive their certificates of election from the county board of canvassers. And in furtherance of this view it is strenuously argued that the clear legislative design to exclude candidates at an election for governor,

*Opinion of Supreme Court.*

United States senator, members of congress and presidential electors, whose election under the statute is to be determined by the state board of canvassers, is made manifest by the provisions of sections 160 and 161 relating to the recount of votes, and section 164 relative to contested elections for county offices, etc.

In support of this it is contended that section 160 requires that whenever a certificate is issued by a justice of the supreme court as provided in certain cases by section 159, such certificate "shall be filed with the clerk of 10  
the county or municipality in and for which such election was held"; and that such clerk shall make and certify a copy thereof and shall without delay deliver such copy to the person who shall be declared elected; and that in case of an election for senator, members of assembly or any county officers, the county clerk shall within five days thereafter transmit to the secretary of state at Trenton another copy of such certificate, signed by him and attested by his official seal; and, hence, it is clear 20  
that the statutory machinery provided to put into effect a certificate granted after a recount had, by virtue of the provisions of section 159 is wholly inapplicable to candidates for congress for the reasons, firstly, that the issuance of such certificate is limited to elections held in and for a county or municipality, whereas in the present case the election of a congressman was in and for a district, comprising three counties; and as the declared object of such new certificate is to revoke one previously issued by the board of canvassers of the county in and for which 30  
the election was held, and since no certificate is authorized to be or was issued by the board of county canvassers to either candidate for congress and none filed with the county clerk, and further, because in such a case, the vote is canvassed by the state board of canvassers and the certificate issued by the Secretary of state, that, therefore, there could be no certificate on file to revoke in the office of the clerk of the county, in and for which county election was had.

*Opinion of Supreme Court.*

Secondly, that section 161 of the election act requires the applicant for a recount either to deposit a sum of money with the clerk or give security for the payment of the expenses of such recount to the "incumbent" etc., and that by section 164 of the same act, the term "incumbent" is declared to mean the persons whom the canvassers declare elected, and that section 161 *supra*, further provides that "if it shall appear an error sufficient to change the result has been made then, the expense of  
10 such recount shall be paid by the county or municipality in and for which such election was held," and that, therefore, it is obvious that the applicant for a recount must be an "incumbent" that is declared to have been elected by the board of canvassers before he can apply for a recount, and as the state board of canvassers are not authorized to meet for the purpose to canvass the votes cast at a general election and to declare the result until twenty-one days after the day of election, and  
20 whereas no certificate can be issued to the successful candidate until twenty-one days after such election it follows as a necessary conclusion that a candidate for congress is not within the purview of section 159, because that section requires that the application for a recount by a candidate shall be made within ten days after election; and that such a candidate is, also, not within the purview of the other sections above referred to, because they expressly deal with candidates elected in and for a county or municipality, whereas a congressman is elected in and for a congressional district. Concretely  
30 stated the position taken by counsel for the presecutor is to the effect that the issuance of a certificate of election to the successful candidate is a condition precedent to the right of a defeated candidate to apply for a recount of votes and that in any event a candidate for congress is not within the purview of the act, and, therefore, the order for the recount made in the present case was unauthorized.

*Opinion of Supreme Court.*

The fabric of the argument in support of this contention consists of assumptions and inferences which attempt to refute the express declarations of section 159. This section does not require, as has been assumed, that there shall be a declaration of the vote by a board of canvassers or a certificate issued to the successful candidate before an application may be made for a recount by an unsuccessful candidate for the office, but on the contrary the section in unmistakable terms provides that an error made sufficient to change the result of the election by any board of elections or board of canvassers in counting or declaring the vote shall afford the basis of a recount. The board of elections alluded to is the board of elections of an election district and is a distinct body from the county board of elections which is also the board of canvassers for the county. 10

The statutory basis for a recount is either an error in the count of or in declaring the vote by a board of elections or an error in the count of or in declaring the vote by a board of canvassers. It is, therefore, too plain to admit of any controversy that an unsuccessful candidate may before the vote is sent to the board of canvassers apply for a recount according to the express terms of the statute. 20

Furthermore, since the statute provides that the application for a recount may be made within ten days after the election, which limitation of time has been held to be mandatory in the Van Noort case, by Mr. Justice McInturn 85 Atl. Rep. 813, it is fair to presume that it was the legislative intent that the application should be made as speedily as possible, so that the error if any could be promptly corrected, irrespective of the fact whether the vote had been declared or not by the board of canvassers. But if the view of counsel for the prosecutor were adopted the prime object of the act, which is to secure a recount, would be subject to be defeated, for under 30

*Opinion of Supreme Court.*

the election law the board of canvassers cannot legally convene to canvass votes until six days after the election, and in large counties like Essex and Hudson, where the boards are often required to adjourn to some future day to finish the canvass of votes, such adjournment might extend beyond the ten days limit from the date of the election and thus render the provision for a recount inefficacious.

The provision of section 159 to the effect that where  
10 it shall appear upon such recount that an error has been made sufficient to change the result of such election, the justice of the supreme court shall revoke, the certificates of elections already issued to any person and shall issue in its place another certificate, etc., is consistent with the views above expressed, because the legislature evidently had in mind that there might be candidates who would apply for a recount of the votes after the canvassing board had declared the vote and issued the certificate to the successful candidate, and it was manifestly  
20 to meet such contingencies that this provision was inserted in the act.

The requirement of section 160 "that whenever any such certificate shall be issued, etc., the same shall be filed with the clerk of the county in and for which such election was had" clearly refers to certificates to be issued by the justice, under section 159, to revoke certificates which have been issued to county and municipal officers and does not in legal effect exclude the existence of a  
30 right to the issuance of a certificate in favor of a candidate at an election in whose favor no certificate was issued but who is found on the recount to have received a majority of the votes cast. And as there is a well recognized canon of statutory construction that words relating to persons of inferior rank will not be construed as to include persons of a superior rank, section 160 cannot, therefore, have the legal effect of excepting out of the operation of section 159 candidates for congress.

*Opinion of Supreme Court.*

The legislative design in enacting section 160, was not to narrow the scope of the application of section 159 to any candidate at any election, but to point out a special procedure peculiarly applicable to candidates for county and municipal offices.

And this view is equally applicable to section 161. For if the term "incumbent" in this section is to receive the legislative meaning ascribed to the term in section 164 of the act relating to contested elections, namely, that of a candidate who has been declared elected by a board of canvassers, it can have no other legal effect than to regulate the procedure of a recount in a case where a certificate of election had already been issued to one of the candidates. That is not the case here. 10

But even if it appeared that by reason of the statutory machinery provided by the legislature to carry into effective operation the provisions of section 159 that such machinery is anapt to an election of a candidate for congress, that would not afford a sufficient legal justification to ignore the prime object of the act, namely, that "Whenever any candidate at any election shall have reason to believe that an error has been made by any board of elections or of canvassers in counting the vote or declaring the vote of such election," etc., such candidate is entitled to a recount. 20

It is difficult to conceive of a collocation of words more expressive of a legislative design to inaugurate a public policy in the interest of the people of this state, then the language just quoted. The obvious design was to give effect to the will of the people as expressed by their votes. 30

This broad design would be seriously impaired if it were permitted upon unsubstantial or technical grounds to add to the statutory words, "any candidate at any election" the words "for state senator, member of assembly or county or municipal office." The act as it originally stood P. L. 1880, p. 229 did so limit its provisions

*Opinion of Supreme Court.*

to "any election in this state for member of the senate or member of the assembly" and by P. L. 1895 p. 659, this was changed to "any candidate for any office" and finally changed by P. L. 1898, 310, to "any candidate at any election." Some significance must be given to these changes.

10 No sound reason has been advanced, and it may be fairly said that none can be given, why there should be any differentiation of the will of the people, as expressed by their votes, in a congressional district or in the entire state, from that expressed in the city or county. To give it the construction contended for by the prosecutor would run the statute into the height of absurdity. In *Gage v. Clark*, 51 N. J. L. p. 97, a contested election case, Mr. Justice Dixon, in delivering the opinion of the Supreme Court, on p. 99 said: "A further argument is presented by counsel for the prosecution, based upon the provisions of section 111 of the statute, to the effect that a successful contestant shall  
20 be 'entitled to his certificate' and 'the certificate of election' of the defeated incumbent shall be annulled. Counsel contends that these provisions are inapplicable to justices of the peace, because they do not receive certificates of election, and, therefore, these officers are not embraced in any part of the law."

30 "But we think this conclusion is too broad for the premise. The formal annulment of an old certificate and granting of a new one are quite unimportant for any useful object at which the law aimed. It would be an unreasonable interpretation of the statute to confine its substantial enactments within the limits of these purely formal provisions. It is much more rational to assume that the legislature intended to give full effect to what was important and overlooked the fact what was in all cases immaterial was also sometimes inapt." And in *re Stewart*, a contested election case reported in 50 N. E. Rep. 51, Judge Bartlett, in speaking for the

*Opinion of Supreme Court.*

Court of Appeals, on p. 53, said: "The object of elections is to ascertain the popular will and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not defeat them. Statutory regulations are enacted to secure freedom of choice, and to prevent fraud, and not by technical obstructions to make the right of voting insecure."

It is consonant with the best judicial thought on the subject that in the construction of election laws to construe them liberally. A careful analysis of the provisions of section 159 will reveal that the section affords a complete scheme for a recount in the case of a congressional candidate. 10

This section applies to any candidate at any election. It authorizes in general terms a justice of the supreme court to order or cause upon such terms as he may deem proper a recount of the whole or any part of such votes cast at the election. As one of the terms of the justice could properly order the giving of a bond by a congressional candidate to secure the payment of the cost of such recount. This section further empowers the justice if the recount changes the result of the election to issue a certificate to the successful candidate, etc. Whether the provisions of this section can be effectively enforced after the recount is had and decided is not before me in this proceeding. The only question to be passed on in the present case is whether or not section 159 includes within its terms the granting of a recount in a proper case to a congressional candidate. 20  
The views herein expressed lead to the conclusion that it does. The order for a recount was therefore within the jurisdiction of a supreme court justice to make. 30

The next reason assigned for setting aside the order is that "due notice of the time and place of the recount has not been given to the prosecutor." The statute provides that a justice of the supreme court shall be authorized to order and cause a recount to be made

under his direction, "after due notice of such candidate to the parties interested of the time and place of such recount."

The order was made on the 15th day of November, 1916, and provided that the recount should be begun on Monday, the 20th day of November, 1916. It directed that notice of the time and place of such recount be served upon the prosecutor, Robert Carson, within three days from the date thereof. It appears that it  
10 was actually served upon the prosecutor within two days from the date thereof. This constituted due notice.

Another reason assigned is that due notice of the contents of the petition has not been given to the prosecutor.

The statute on which this proceeding is founded makes no such direction.

The reason assigned that the order was not filed within due time is also without merit. The statute does  
20 not require the filing of any order. The return to the writ in this case shows that a petition for a recount and the order made by the justice of the supreme court were marked filed on November 15th, 1916, the day of the application for the recount. It is conceded by counsel for the prosecutor that he procured a copy of the petition on the 18th day of November, 1916, from one of the counsel of Mr. Scully. It does not appear that any injury resulted to the prosecutor by reason of the failure to have a copy of the petition earlier.

30 The next point urged is that the petition is insufficient to warrant an order for a recount. An examination of the petition shows that it sets out all the facts required by section 159 to constitute the basis of an order for a recount. The cases cited by counsel for the prosecutor in support of his contention deal with contested election cases and are not applicable to petitions for a recount. In *Kearns v. Edwards*, 28 Atl. Rep. p. 723, there was

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an order for a recount, made ex parte by Depue, J., with leave to the candidate interested to apply to set it aside. Upon the argument it was objected that the petition stated no facts upon which the petition was filed that an error has been made in counting the votes. The petition was held to be sufficient.

Lastly, it is objected that the petition is not properly verified.

The precise objection relied on is that the petitioner's affidavit as to the facts set out in his petition relating to acts not his own is made on belief only. This objection appears to be fully answered by what was said by Dixon, J., in *Johnson v. Allen*, 55 N. J. L. p. 400, a contested election case. The learned justice, on p. 401, said: "If the statute had prescribed verification by the oath of the contestant himself, as in *Kirk v. Rhoads*, 46 Cal. 398, it might fairly be urged that it was enough for him to swear to the best of his knowledge, information and belief, because, except in rare instances, he would be able to swear to nothing more, and it could not be supposed that the legislature had in view only such rare instances."

It is to be observed in this connection that section 159 makes no provision as to the manner in which an application for a recount shall be presented, nor does it require a verification of the facts upon which the application for a recount is made.

The writ will be dismissed, without costs.

Filed November 28, 1916.

WM. C. GEBHARDT, Clerk.

## NEW JERSEY SUPREME COURT.

ROBERT CARSON,

*Prosecutor,*

v.

HONORABLE SAMUEL KALISCH,

10 JUSTICE OF THE SUPREME COURT,

AND THOMAS J. SCULLY,

*Defendants.*

} On Certiorari.

## RULE DISMISSING WRIT OF CERTIORARI.

This cause coming on to be heard before the Court,  
and the Court having heard the arguments of counsel  
for the respective parties, and having considered the  
20 reasons filed, and being of the opinion that said writ of  
certiorari should be dismissed without costs,

It is Ordered that the Writ of Certiorari heretofore  
allowed in the above entitled cause be and the same is  
hereby dismissed without costs.

Entered November 28, 1916.

On motion of

THOMAS P. FAY,

Attorney of Defendants.

30 A true copy.

WM. C. GEBHARDT, Clerk.

## New Jersey Court of Errors and Appeals.

ROBERT CARSON,  
Prosecutor-Appellant,

vs.

HONORABLE SAMUEL KALISCH,  
Justice of the Supreme Court,  
and Thomas J. Scully,  
Defendants-Respondents.

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On Certiorari.

### BRIEF FOR DEFENDANT-RESPONDENT SCULLY. 20

The limited time at counsels' disposal causes them to refrain from attempting any general discussion, and to take up the reasons of the Prosecutor *seriatum* and state our position with respect to each.

#### I.

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The first reason is that the Justice of the Supreme Court who made the order for the recount was without authority or jurisdiction to make it.

The order was made under Section 159, Rev. 1898, Comp. Stat., p. 2125. That section distinctly provides that upon application "to any Justice of the Supreme Court" he shall be authorized to order, etc. The section in question provides that any candidate at any election may make the said application.

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As Scully was a candidate at this election, and as the officer to whom he applied was a Justice of the Supreme Court, and as the section distinctly authorizes a Justice of the Supreme Court upon such application to make such an order, it is difficult to see upon what legitimate ground there can be based any argument that the Justice of the Supreme Court who made the order was without authority or jurisdiction to make it.

10 A brief review of the history of this particular subject of legislation demonstrates the propriety of the application and of the order and of the jurisdiction to make the same.

So far as is known, the first attempt to place corrective power in the courts over election matters was by legislation in the year 1876 (Pam. Laws 1876, p. 163, Gen. Stat., p. 1295, *et seq.*). That Act, Sections 100 to 115, inclusive, provided for contested election of county, township or city  
20 offices requiring a petition in writing to be filed, its endorsement by fifteen qualified voters, and the statement of certain material matters and due verification by at least two of the petitioners. By Sections 116 to 121, inclusive, provision was made for contesting the election of members of the Legislature and of Congress to the extent that they provided a means of giving notice, obtaining the attendance of witnesses, taking their depositions and transmitting the same to the proper body where  
30 the incumbent would take his seat and where the person contesting his election intended to make a contest. There was no provision in this Act providing for a recount as such, or for any other method of contesting elections than those above referred to.

The first Act that provided purely for a recount was that of 1880, page 229, Gen. Stat. 1327, Section 195. This was a supplement to the Act of 1876 above referred to and provided for a recount  
40 with respect to members of the Senate or of the Assembly.

This Act began "Whenever any candidate at any election in this State for member of the Senate or of the Assembly," etc. It further provided that the Justice of the Supreme Court if he found errors justifying the same might "revoke the certificate of election already issued to any person as member of the Senate or member of the Assembly, and shall order to be issued in its place another certificate, duly attested under the seal of the county, to the person who shall be found to have received a majority of the votes cast at such election, which latter certificate shall supersede all others, and entitle the holder thereof to the same rights and privileges as a member of the Senate or member of the Assembly, as if said certificate had been issued by the County Board of Canvassers."

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By a supplement passed in 1890 (P. L., 1890, p. 361, Gen. Stat. 1332, Section 233, *et seq.*), there were numerous changes in the law, among them Section 52 of the Act, Section 284 Gen. Stat., p. 1341, whereby proceedings might be had before a Justice of the Supreme Court to have an election set aside and a new election had upon the petition containing certain statements and signed by at least twenty-five legal voters, etc. This section relating as it did to any election in any election district and referring to any candidate or candidates would seem to have been broad enough to have justified the judge, upon proper proofs, to nullify any election for any office and order a new election. However, this section was found so imperfect and incomplete as to be wholly ineffective and nugatory (*Roberts vs. Shafer*, 63 N. J. Law, 182, at 183), and a substitute was provided in 1895.

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The Act of March 25, 1895 (P. L., 659, Gen. Stat. 1367) provided in the thirteenth section proceedings to obtain a recount by any candidate for any office.

The Section in question also provides "that if any candidate for any office within ten days after

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any election shall pray a recount of the whole or any part of the vote, by his petition in writing to one of the Justices of the Supreme Court," certain proceedings should be taken, and "it shall be the duty of such Justice to order such recount to be taken," etc.; and it further provided that "on the conclusion of such recount the said Justice shall certify the result thereof, which certificate shall take the place of the certificate originally issued  
10 by the canvassing board."

The next material legislation was the revision of 1898 (P. L., 1898, p. 237, *et seq.*, Comp. Stat., p. 2073, *et seq.*). Sections 153 to 158, inclusive, contain provisions for contesting elections for members of the Legislature and Congress by notice of contest, taking of depositions and filing of the same with the proper body. Sections 159, *et seq.*, provide for the recount of votes.

Section 159 takes the place of the Act of 1895,  
20 P. L., 659, Gen. Stat., 1363, Section 13. Section 159 of the Act of 1898 provides that "whenever any candidate at any election shall have reason to believe \* \* \* he may, within ten days after such election apply to any Justice of the Supreme Court, who shall be authorized to order and cause \* \* \*."

It will be observed that while the previous Act of 1895 quoted above required the candidate to pray the Court by a petition in writing, there is no such requirement in the present existing Section.

30 The Act of 1898 was intended to provide a complete scheme for all elections held within the State of New Jersey, and by various Sections deals with the nomination of various candidates for various offices, including members of Congress, for the regulation of the expenditures by the candidates, the committees for the candidates, the inclusion of the names of the candidates on the ballot, the method of voting for the candidates and of certifying the results, etc., and in each of these instances the  
40 candidates for members of Congress are specifically or impliedly included.

It is thus demonstrated that under the Election Laws of New Jersey as they exist to-day elections for members of Congress are regulated thereby, there being no Acts of Congress attempting to interfere or regulate the State provisions in these respects, and that Section 159 which invests any candidate at any election with certain rights indisputably includes a candidate for Congress voted for at an election held in the State of New Jersey.

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Our opponent attacks the jurisdiction of the Justice of the Supreme Court to make the order for the recount upon the ground that Section 159 must be confined to county offices. This contention is completely met and overthrown by the reasoning of Mr. Justice Kalisch writing the opinion of the Supreme Court and by the authorities cited therein. Since, however, this is the sole point of any substance on behalf of our opponent, we feel we should cast any light that is possible upon it.

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Our opponent's argument is that a clause in the 159th Section provides that in case the recount changes the result, the justice "shall revoke the certificate of election already issued to any person, and shall issue in its place another certificate in favor of the party who shall be found to have received a majority of the votes cast at such election"; and also because in the 160th Section it is provided that the certificate issued by the justice shall be filed with the clerk of the county or of the municipality and that such clerk shall make and certify a copy and deliver it to the person who shall be so declared elected, and in case of an election for senator, members of the assembly or any county office, the county clerk shall likewise transmit another copy of such certificate to the Secretary of State; and also because in the 161st Section it is provided that the applicant for the recount shall deposit such sum with the county clerk as the Judge shall order, or if the Judge shall so order, shall file

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with the county clerk a bond "to the incumbent."

Based upon these things our opponent argues that the jurisdiction of the Justice is restricted to county or municipal officers.

10 In the first place it should be pointed out that initially the recount statute of 1880, cited above, was confined to members of the State Senate and of the Assembly. When the Legislature came to deal with the same subject matter in 1895 it is quite evident that it intended to extend the recount provision to all and no longer confine it to any limited class of candidates. In the act passed that year, above cited, it was provided that any candidate for any office might have a recount and that the Judge, if the result of the recount changed the result of the election, might substitute his certificate for the certificate issued by the county board of canvassers.

20 When the Legislature next came to deal with the matter in the comprehensive Act of 1898, which as the court will recall was a revision of the election laws, it retained the broad provisions then in the law so that it applied to any candidate at any election; it struck out all provisions requiring petitions, verifications and the like, and simplified the procedure and undoubtedly intended that the result of the recount, if found to change the result of the election, should be effectuated by substituting the certificate of election made by the Judge for the certificate of election made by the county board of canvassers.

30 It does refer to the certificate of election issued to a person and to the new certificate to be issued in favor of the party who shall be found to have received a majority of the votes.

40 Section 159 undoubtedly intended to provide a supplement to the election machinery of the state providing for a summary proceeding by way of recount, so that the results of the votes correctly counted and credited should be substituted for the incorrect returns initially made. Implicit in every line of this section is the idea that the recount shall

take place under the supervision of the Judge and that he should correct the returns in accordance with the results of the recount. The provision with respect to revoking the certificates of election issued to persons and issuing a certificate by the Judge to the person found by him to be elected was ingrafted upon this initial conception so as to cover the cases where a recount was not had in time to be self-executing. The most organic thing in all elections is the counting and the crediting of the votes, it making little difference what votes are actually in a ballot box if returns incorrectly state the result. In order that the results should be correctly stated the Legislature provided the machinery set forth in Section 159, and, of course, intended that the correct results should take the place of the incorrect results throughout the entire process provided for. But it might well happen that something more than this was necessary to carry out the purpose that the Legislature had in mind, and therefore they went further than merely providing that correct results should be substituted throughout for incorrect results, and provided that if a certificate of election had been issued upon the incorrect results the Justice should have the added power of revoking that certificate and substituting one of his own. So that in the case at bar Section 159 authorizes the recount and authorizes the Justice to substitute the results of that recount, if they show that the original returns were incorrect, for such incorrect returns throughout, and wherever such incorrect returns are now filed by law. It further authorized him, if the case is an apt one in which to apply such remedy, to revoke a certificate of election based upon the incorrect returns and base one of his own upon the correct returns.

Summarizing our view above expressed of the proper construction of Section 159, we insist that it clearly intended to provide for the results of the

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recount being made effective throughout the entire election machinery by substituting the Judge's order, statement or certificate of the correct results in place of the incorrect results wherever such incorrect results had theretofore within the election machinery been deposited or filed. When it came to deal with persons outside of the election machinery, persons other than the election boards and officers of the government charged with duties with  
 10 respect to elections, it was necessary to give the Judge express power to effectuate the results of the recount as to such outside persons, and it thereupon and therefor provided that the certificate of such third person should be cancelled and a new one should be issued to the person whom the Judge found was elected by the correct count of the ballots.

If, however, the court should not agree with this construction, then, it is respectfully submitted that  
 20 at most the statutory language employed should be considered as merely inapt to express what was apparently in the legislative mind.

The provisions with respect to filing in the county clerk's office or in the clerk of the municipality are immaterial. If such filing would effectuate the purpose of the Act, well and good; if not, it is harmless that the provision is in the law.

With respect to the provisions of Section 161,  
 30 the first provision does not in any way refer to any incumbent, but simply requires the deposit of a sum of money, and that part of the section which does refer to an incumbent is harmless as against us, because under the 164th Section the term incumbent in the Act is stated to mean the person whom the canvassers declared elected. In any proper use of the term where a certificate or statement or declaration indicates that one person has received more votes than another for the same office, he is  
 40 declared or certified or stated to be chosen or elected; it may be that he is not entitled to the office by

reason of having been elected or chosen in a canvass of the votes of a particular district or county, but with respect to the returns of that county it is proper to say that all those who are shown or declared thereby to have received a majority of the votes for the respective offices are shown by those returns to have been elected so far as those returns are concerned. In any event here again the legislature should be deemed to have merely chosen an inapt phrase to convey its clear intention. 10

In the case of *Gage vs. Clark*, 51 N. J. Law, 97; 15 Atl. 831, in the Supreme Court, Justices Dupue, Van Sickle and Dixon sat, and Judge Dixon wrote the opinion of the court. This was a contested election case for the office of justice of the peace. It was argued by the prosecutor of the writ of certiorari that since Section 111 of the statute under which the proceedings were had provided that a successful contestant shall be "entitled to his certificate," and that "the certificate of election" of the defeated incumbent shall be annulled, the law did not apply to justice of the peace because they do not receive certificates of election. The argument was identical with that made in the case at bar. The prosecutor argued that the Judge or court had no jurisdiction because by the terms of the law it did not apply to the office in question. The Supreme Court in disposing of this contention said: "We think this conclusion is too broad for the premise. The formal annulment of an old certificate, and granting of a new one, are quite unimportant for any useful object at which the law aimed. It would be an unreasonable interpretation of the statute to confine its substantial enactments within the limits of these purely formal provisions. It is much more rational to assume that the legislature intended to give full effect to what was important, and overlooked the fact that what was in all cases immaterial was also some- 20 30 40

times inapt." He therefore held that the court had jurisdiction.

This exactly meets the point made by our opponent in the case at bar. The important thing that the legislature was dealing with was a recount of the ballots actually cast at the election, a recount by the same officers who originally counted the votes now to be made under the supervision of a Judge of the Supreme Court in order that all legal ballots in the box should be counted for the persons who under the law were entitled to them. It must be kept in mind that this is part of the election machinery of the state; it is in no sense a litigation and deals with the very fundamental basis of all elections. It is inconceivable that the legislature after having provided most carefully for official ballots, for the greatest care in seeing that only such are cast, with minute provision as to how such should be credited, and desiring to have a summary correction of errors in the all important matter of properly counting and crediting such ballots, should confine this salutary and almost essential feature to any class of candidates.

Chief Justice Beasley in *Conger vs. Convery*, 52 N. J. Law at page 444 points out that "there appears to be a settled conviction on the part of the community, that the judiciary should participate in investigations of this character." He was there dealing with a contest and not a recount. What is true of a contest is infinitely more relevant in a recount. At page 443 he points out that the procedure provided for in these acts is simply part of the election machinery in order to settle in a summary manner the most elemental things concerning elections.

Our contention, therefore, is that Section 159 providing as it does for a recount at the behest of any candidate at any election who has reason to believe that errors have been made which, if corrected, would change the result, means just what it says. That where the section deals with the

certificate of election, it means the certificate of the result of the election as found by the county board of canvassers and filed in the county clerk's office and in the office of the Secretary of State. Therefore, if the Justice should find errors which would change the result, he should issue a certificate to take the place of the certificate filed by the county board of canvassers. This is unquestionably in line with the intention of the legislature and we respectfully insist that it is the language in the section in question. The board of county canvassers is required under the Act to canvass all the votes cast for any candidate for any office and to state the result of such election and to certify the same. In every proper sense of the word this becomes a certificate of election, *i. e.*, a certificate of the results of the election. Because they also are required to determine what candidates are elected for county and lesser offices, our opponent argues that the latter is the only certificate referred to. We respectfully submit that the Justice may well hold that he has power to and should revoke or annul the certificate of election certified by the county board and filed in the county clerk's office and sent to the Secretary of State, and should put in its place his own certificate correctly setting forth the result of the election, *i. e.*, the number of votes cast for the respective candidates for the respective offices.

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Our opponent argues that the Act should be held not to apply and we should be deprived of the benefit of obtaining the recount and should not have the order for a recount because the Judge had no jurisdiction, and the reason he had no jurisdiction is because, he says, that the certificate the Judge is authorized to make will be ineffective for us and we cannot obtain from that Judge a certificate of election of the character that will do us any good.

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We have already indicated that we think this is unsound reasoning and is not a proper construc-

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tion of the law, but we further insist that even if his interpretation of the meaning of that part of the section is true, it does not in any way interfere with the jurisdiction of the court to order a recount and consequently our right to have the same. Fortunately for us the most succinct and useful argument to sustain our point was made upon a previous occasion by one of the counsel for our opponent.

- 10 In the case of *Conger vs. Convery* (*supra*) Mr. Alan H. Strong was counsel for the contestant, and his brief is printed in the report. At page 430 he takes up the sixth point and disposes of it. It was argued against him that he was not entitled to prosecute the contest he had undertaken because there was a provision in the law for removing the unsuccessful party from office and placing the successful party in office, and it was argued that this invaded the prerogative of the Supreme Court and
- 20 was unconstitutional.

Mr. Strong's argument was that even if this were true, it "would not in the least affect the jurisdiction up to that point. Everything up to and including the judgment is complete in itself, and the contest would fully answer its main purpose, though the power of removal be denied. If the one hundred and twelfth section be rejected, the successful contestant would be in the same position that he would be if the office were filled by a

30 "third person. In such cases the statute makes "no attempt to provide for giving possession. \* \* \*

"The judgment without possession is not nugatory. It is a conclusive determination as between the parties, upon which an action will lie for fees thereafter received by the incumbent. It is also available as *prima facie* evidence, taking the place of the canvassers' certificate upon *quo warranto*."

The Court in that case sustained the jurisdiction.

These considerations lead irresistibly to finding jurisdiction in the Court and therefore dispose of the only point of substance relied upon by the prosecutor-appellant.

The same tendency of the Court is exhibited in the case of *State vs. The Governor*, 25 N. J. Law, 330 at 345, *et seq.* The laws initially passed provided for a canvass and statement of result and determination by the county board as to certain offices and that the Governor should commission the same. At that time clerks and surrogates were appointed and not elected and were not, therefore, included in the law. Later these offices were made elective and the law was changed so as to extend the provisions with respect to requiring a statement by the county board of canvassers of the votes for clerk and surrogate, but nothing was said in the law about commissioning them. The Supreme Court construed the law as requiring the Governor to commission clerks and surrogates and did this upon the theory that it was obvious that the Legislature intended the same and that to round out the election machinery properly such a construction was necessary.

## II.

The second reason is that "due notice of the time and place of such recount" has not been given to the prosecutor.

The statute provides that a Justice of the Supreme Court shall be authorized to order and cause a recount to be made under his direction "after due notice by such candidate to the parties interested of the time and place of such recount." The order in question in this proceeding was made on the 15th day of November, 1916, and provided that the recount should be begun on Monday, the 20th day of November, 1916. It required that notice of the time and place of such recount be served upon

the prosecutor, Robert Carson, within three days from the date thereof. The proofs show that it was actually served upon the said Robert Carson on the 17th day of November, 1916.

This disposes of the second reason.

### III.

10 The third reason is that due notice of the contents of the petition has not been given to the prosecutor.

The statute does not require any petition. In fact a copy of the petition was given to the counsel for the prosecutor, Robert Carson, on the 18th day of November, 1916, as proofs presented to your Honor will show.

### IV.

20 The fourth reason is that the order was not filed within due time.

The statute is entirely silent as to filing, and no provision is made for any filing. As a matter of fact, the Justice of the Supreme Court who made the order has had the same returned to him and it is now in his possession. If that is taken as filing, it was certainly filed within due time.

### V.

30 The fifth reason is that the petition was not filed within due time.

The statute does not require any petition.

The petition that was presented in the case at bar was presented to the Justice within the time required by statute, and if filing is necessary that was sufficient and ample filing in due time.

## VI.

The sixth reason is that it does not appear in said petition that the petitioner had reason to believe that an error had been made by any board of election or of canvassers in counting the votes or declaring the result of said election, whereby the result of said election had been changed.

The statute does not require any petition. As a matter of fact, there was a petition presented in the case at bar which shows every requirement of the statute with respect to the application required. The statute merely requires an application, and such application may be made whenever any candidate shall have reason to believe that an error has been made in counting the vote or declaring the vote. The petition plainly sets forth allegations of error in counting the vote and declaring the result; states that the candidate has reason to believe that such errors have been made and that a correction thereof will change the result.

This completely disposes of the sixth reason.

## VII, VIII, IX.

These reasons are that the petition does not disclose a legal justification for making the order; that the material facts in said petition are sworn to only upon information and belief, and that the affidavit is general in its terms, whereas it should specifically state the facts.

Since no petition is required by the law, this would completely dispose of these points. There is no provision in the law that the application which is required should be in writing or under oath.

In fact, the petition presented does disclose a legal justification for the making of the order, since it discloses the exact requirements of the

statute which the statute requires as a basis for the order. As a matter of fact, the petition asserts without qualification the number of votes stated to have been cast and the result of the canvass in each county, and states without qualification errors in the dealing with legal ballots, stating that such were rejected, and with respect to illegal ballots that such were counted, and that if the ballots had been correctly counted and the result correctly announced the result of the election would have been changed.

These facts are stated without qualification and as of the petitioner's own knowledge, and the affidavit does not qualify these unqualified statements, since it only qualifies with respect to matters related to be the acts of others, and all other things in the said petition he states in his affidavit are true.

This entirely disposes of the above reasons.

## X.

The last reason is general and need not be specifically answered.

For the benefit of the court and to save it time in investigating any phases of this matter which may require illumination, the following is a brief statement of the authorities:

By comparing Section 1 of the Act of 1880, P. L., p. 229, General Statutes, p. 1327, Section 195, with Section 159 of the Act of 1898, Comp. Stat. 2125, it will be found that while the former legislation dealt solely with the recount of votes upon application of candidates for the Senate or Assembly, and the latter dealt with the recount of votes cast at any election for any candidate, otherwise the language of the statutes in all material particulars is identical. The result of this is that cases dealing with Section 195, Gen. Stat. are directly in point with respect to Section 159, Comp. Stat., p. 2125.

Bearing this in mind the following citations are useful:

Although there seems little excuse for so doing, it appears that counsel confused provisions of law with respect to contests with their requirements as to the contents of petitions, etc., with the recount provisions contained originally in Section 195 and now contained in Section 159 as above, and the courts whenever this took place were at pains to point out the confusion of thought and the necessity of clearly distinguishing between the two proceedings. 10

*In re Election of the Register of Essex County*, 12 N. J., L. J. 271, decided Dec. 15, 1888, by Judge Dupue.

That was a case of contested election under Section 101 of the then Election Law, Revision Elections, p. 355.

On page 273 the court refers to the section of the Act of 1880 concerning recount in elections for the Senate or Assembly and points out that under this last cited statute, "reason to believe and probable grounds of belief are all that are necessary to give jurisdiction to the court. \* \* \* This provision, however, is quite different from that of Section 101." 20

*Kearns vs. Edwards*, 28 Atl. Rep., 723 (Jan. 6, 1894), Depue, J. 30

In this case an order for a recount was made *ex parte* with leave to the other side to apply to set it aside. The other side appeared and objected that the petition stated no facts upon which the petitioner based his belief and showed no grounds for believing that any error had been made in counting the votes. It was insisted that the order made upon such a petition was not made upon proofs or evidence, and that it was defective in not setting out an adjudication by the Justice that the 40

petitioner had reason to believe that an error had been made. The petition was held to be sufficient and the order sustained.

*Johnson vs. Allen*, 27 Atl. Rep., 1014, 26 Vroom, 400 (June 19, 1893), Sup. Ct., Dixon, J., writing the opinion.

10 The case was one of contested election and was under Sections 100 to 115 of the then existing law providing for contests.

Objection was made to the verification of the petition, and in discussing that Judge DIXON incidentally discussed what would be required in a case where the verification provided for was that of the candidate alone. He said:

20 "If the statute had prescribed verification by the oath of the contestant himself, as in *Kirk vs. Rhoads*, 46 Cal., 398, it might fairly be urged that it was enough for him to swear to the best of his knowledge, information and belief, because, except in rare instances, he would be able to swear to nothing more, and it could not be supposed that the legislature had in view only such rare instances."

*In re Van Noort*, 85 Atl. Rep., 813 (Dec. 9, 1912), Minturn, J.

30 In this case the Court stated that the power of the Judge to grant the recount under Section 159 is based upon the petitioner's having reason to believe that errors have been made in counting the vote or declaring the vote. That its prime object is to enable its candidate to secure a recount within ten days after election where he has reason to believe that such errors have been committed. He refused to act favorably upon an application made after the ten day period had elapsed.

*Mathais vs. Low*, 34 N. J., L. J. 50 (Dec. 21, 1910), Voorhees, J.

40 In this case a recount was ordered by a Justice of the Supreme Court in a contest for the office

of State Senator. The recount was ordered under Section 159 of the Act of 1898.

The opinion shows that the petition alleged the belief of the petitioner upon credible information that errors had been made, and as before stated the order was made for recount.

Although we have not had opportunity to verify our information we believe that it is the fact that in at least two instances recently similar applications to recount the votes cast for members of Congress have been granted by Justices of the Supreme Court. 10

One of such instances was the contest between Mr. Hart and Mr. Prince for election to Congress, and the order we understand was granted by Mr. Justice Parker. The other instance involved the election of Mr. Wayne Parker and his opponent, either as the nominee for Congress or as the candidate for Congress after nomination, we are not properly advised which. We understand that the order in this case was granted by Chief Justice Gummere. 20

With respect to the term "application" in the Statute, the following authorities are useful:

In Corpus Juris, 4th Vol. Application, p. 1399, Note 9, the case of State vs. Stiles, 12 N. J. L., 296, 297, it was held that the term "on application" in a Statute providing for a release of insolvent debtors, did not necessarily imply that the application must be in writing. 30

We have failed to find any precedent in point wherein the Supreme Court of New Jersey has exercised the power of certiorari to bring up for review the action of a Judge of the Supreme Court invested with this special statutory power by the Act of the Legislature. Unless the Prosecutor justifies and vindicates the power by analogy to other cases he fails to show the jurisdiction of the Supreme Court in the premises. 40

We respectfully submit that the Supreme Court has no jurisdiction in the premises.

There is ample authority that the Supreme Court has no jurisdiction to review the results or the orders based thereon in election matters committed by statute to the determination of special statutory tribunals, such as Justices of the Supreme Court vested with power and authority by the statute.

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*Ruh vs. Frembach*, 18 Vroom, 85;  
*O'Brien vs. Benny*, 33 Atl. Rep., 380;  
*In Re Margarum*, 25 Atl., 702.

We, therefore, respectfully submit that the writ of certiorari should be dismissed and the judgment of the Supreme Court should be affirmed, with costs.

Respectfully submitted,

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THOMAS P. FAY,  
 LINDLEY M. GARRISON,  
 Attorneys for and of Counsel  
 for the Defendant-Respondent Scully.

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## NEW JERSEY Court of Errors and Appeals

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ROBERT CARSON ( <i>Prosecutor</i> ), <i>Appellant</i> ,	}	On Appeal from Supreme Court.
<i>v.</i>		On Certiorari to review order for recount of votes in Middlesex County.
(HON. SAMUEL KALISCH, JUSTICE, &C.) THOMAS J. SCULLY ( <i>Defendant</i> ), <i>Respondent</i> .		

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ROBERT CARSON ( <i>Prosecutor</i> ), <i>Appellant</i> ,	}	On Appeal from Supreme Court.
<i>v.</i>		On Certiorari to review order for recount of votes in Monmouth County.
(HON. SAMUEL KALISCH, JUSTICE, &C.) THOMAS J. SCULLY ( <i>Defendant</i> ), <i>Respondent</i> .		

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ROBERT CARSON ( <i>Prosecutor</i> ), <i>Appellant</i> ,	}	On Appeal from Supreme Court.
<i>v.</i>		On Certiorari to review order for recount of votes in Ocean County.
(HON. SAMUEL KALISCH, JUSTICE, &C.) THOMAS J. SCULLY ( <i>Defendant</i> ), <i>Respondent</i> .		

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### Brief for Appellant.

These appeals are from orders of the Supreme Court in each of the three cases dismissing the writ of certiorari which had been allowed by Justice Kalisch to

review in each case an order for recount of the votes cast in the Counties of Middlesex, Monmouth and Ocean, respectively (composing the Third Congressional District), for the office of Member of the House of Representatives at the election held November 7th, 1916, the prosecutor, Robert Carson, and the defendant, Thomas J. Scully, having been the opposing candidates for said office at said election.

Following said election Mr. Scully presented to Justice Kalisch three petitions setting forth in similar or identical terms the holding of said election in the congressional district; the votes cast in each of the three counties for the said candidates, respectively, as canvassed and determined by the board of county canvassers in each county; that from the said canvass and determination of the three counties composing the Third Congressional District Robert Carson had defeated the petitioner for said office by a majority of eleven votes; that there were cast in said district upward of 45,000 votes, and petitioner is informed and believes many errors were made by the board of elections or canvassers in counting said votes or in declaring the vote of said election, and that said errors have changed the result of said election; that at various polling places legal ballots were rejected and illegal ballots were counted so far as the Member of the House of Representatives was concerned, and that valid ballots for petitioner were rejected and illegal ballots for his opponent were counted in such numbers as to change the result of the election; that upon the foregoing facts and information petitioner has reason to believe that errors were made by the respective boards of election and canvassers in counting the vote and declaring the vote of said election whereby the result of said election has been changed.

The prayer of each petition is "that your Honor will order and cause upon such terms as you may deem proper a recount of the whole or such part of the vote cast in said congressional district in the County of

(Middlesex), as you may determine, to be publicly made by the county board of elections of the County of (Middlesex), under your jurisdiction," &c.

The petition is verified only by the affidavit of Mr. Scully "that the matters and facts therein set forth so far as they relate to his own acts are true and so far as they relate to the acts of others he believes them to be true."

Upon the above petitions three several orders (one for each County) were made by Justice Kalisch, dated the 15th of November, that a recount of the whole votes cast at the said general election in the County of (Middlesex) for Member of the House of Representatives of the United States be publicly made under his direction by the county board of election of said County, with further directions as to time, notice to be given, bond, &c.

Three several writs of certiorari having been allowed by Justice Kalisch argument thereon was had before him, sitting alone, and an opinion was delivered by him and order thereon entered dismissing the writ in each case without costs.

From each of these orders of dismissal an appeal has been taken.

The questions involved are (1) as to the jurisdiction of said Justice, under Section 159 of the Election Law, to order a recount of votes for Member of the House of Representatives; (2) whether said section authorizes a recount of votes for said office in any case, and (3) whether the petition and affidavit are sufficient to confer jurisdiction in the present cases.

The grounds of appeal relied on are:

1. Because the Supreme Court dismissed the writ of certiorari whereas said court should have rendered judgment setting aside the order and proceedings brought up by said writ.

2. Because the Justice of the Supreme Court who made said order for a recount of said ballots cast in

the County of Ocean was without authority or jurisdiction to make it.

7. Because it does not appear in said petition that the petitioner had reason to believe that an error had been made by any Board of Elections or of Canvassers in counting the vote or declaring the result of said election, whereby the result of said election had been changed.

8. Because said petition does not disclose a legal justification for the making of said order.

9. Because the material facts in said petition are sworn to only upon information and belief.

10. Because the affidavit to said petition is general in its terms whereas it should specifically state the facts sworn to.

11. Because said order and proceedings are in divers other respects illegal, unjust and oppressive, and should be set aside and for nothing holden.

## I.

### THE STATUTE DOES NOT AUTHORIZE A RECOUNT OF THE VOTES CAST FOR MEMBER OF THE HOUSE OF REPRESENTATIVES.

This is the fundamental question in the case, and its proper discussion requires a comprehensive review of the sections of the Election Law, *2 Compiled Statutes, page 2111 and following*, which provide for the canvassing of the returns and the determination of the persons elected, as well as an examination of the particular sections (159, 160 and 161) which provide for a recount.

*Section 102* constitutes the county board of elections in each county a board of county canvassers "for all general and special elections in this State, and for all local or municipal elections in the several cities of this State."

*Section 108* requires the members of the board to

examine the statements of the election produced before them by the county clerk and canvass and determine the votes cast at such election and make duplicate statements of the result of such election in a form prescribed in *Section 109*—exhibiting the names of each person voted for and for what office the number of votes cast for each person in each election district for any office, the whole number of votes in the county, and the whole number of votes received by each person, the number of names on the poll book and the number of ballots rejected in each election district.

*Section 110.* One of said statements is to be filed by the county clerk and the other in case of an election for Members of the United States Senate or House of Representatives, or for electors of President and Vice-President, or for Governor, members of Assembly or for any county officers, is to be transmitted to the Secretary of State to be filed by him, and in case of any municipal election in any city the other statement is to be transmitted to the clerk of such city to be filed by him.

*Section 111.* The board of county canvassers in case of an election for member of the Senate, members of the General Assembly, or for any county or city officer or officers *shall proceed to determine the person or persons who shall by the greatest number of votes have been duly elected to the office or offices for which he or they shall have been designated*, such determination to be signed by the chairman attested by the clerk and attached to the statement of the result of the election and delivered therewith to the clerk of the county and filed in his office; and in case of an election for any city officer or officers another copy of such determination as to such officer or officers shall be made, signed and attested and filed with the clerk of such city.

*Section 112* prescribes the form of such determination as follows: "The said board to determine that

at the said election \_\_\_\_\_ was duly elected a member of the Senate of this State; \_\_\_\_\_ were duly elected members of the General Assembly; \_\_\_\_\_ was duly elected sheriff, and \_\_\_\_\_ were duly elected coroners for the said county as the case may be."

*Section 113.* The board, in case of an election for member of the Senate, members of General Assembly, county or municipal officers, or any of them, shall make a statement of the result thereof, and their determination as to the person or persons who shall be elected therein; "*and in all other cases shall make only a statement of the result of the election in such county upon the statements and copies of statements which shall be produced and laid before the board as directed in this act.*"

*Section 114.* The county clerk is required, in case of an election for Senator, members of Assembly or county officers, to make and certify as many copies of the statement of the determination and the certificate appended thereto and deliver one of the same to each person who shall be so elected, and transmit another copy of the same to the Secretary of State, who shall file the same in his office.

*Section 115.* In the organization of the Senate and General Assembly these certified copies of the determination of the board of canvassers are made *prima facie* evidence of the right of the persons therein mentioned to seats in said houses respectively.

*Section 119* provides for a State Board of Canvassers, to be composed of the Governor and four or more members of the Senate representing each political party, to meet at Trenton on the twenty-first day after the election for the purpose of canvassing and estimating the votes given for each person for Members of the United States Senate or of the House of Representatives, or for Presidential electors or for Governor, and of determining the person or persons who shall by the greatest number of votes have been duly elected to such office or offices.

Sections 118 and 124 require the Secretary of State to obtain by special messenger or otherwise any statements or copies thereof of the result in any county or in any election district which may not have been filed with him.

Section 123: The secretary of state shall thereupon produce and lay before such board all statements and copies relating to such election, which he shall have received or obtained; and such board shall then *forthwith proceed to make a statement of the result of such election in the state*; which statement shall contain the whole number of the names of the voters in all the poll-books in the state, the names of all the persons for whom any vote or votes shall have been given for any office or offices to be filled at such election, and the whole number of the votes which shall have been given to each person for any such office or offices, mentioning the office or offices for which each person shall have been designated, and shall contain the name of each county, the number of names in the poll-books in the counties respectively, the number of votes given for each person in each county for any such office or offices; and in such statement the name of each person for whom any vote or votes shall have been given, the whole number of votes given for each person, and the name of each county, shall be in words written at full length; and the whole number of the names of the voters in all the poll-books in the state, the number of the names in the poll-books in the counties respectively, and the number of votes given for each person in each county, may be in figures, and such statement shall be certified to be true and correct, by a certificate appended to the same; and the chairman of such board shall sign his name thereto, in the presence of the clerk of the

board, and such clerk shall attest the signing of the same by such chairman, by signing his name thereto; and the statement and certificate appended thereto shall be in a form similar to that hereinbefore prescribed for the board of county canvassers, as far as the nature of such election will admit; and when the statement and certificate above mentioned shall have been made and subscribed, such board shall *proceed to determine the person or persons who shall, by the greatest number of votes, have been duly elected to the office or offices for which he or they shall have been designated*; and thereupon such board shall make a statement of their determination; and such statement shall be certified to be true and correct by a certificate, which shall be appended to the same; and the chairman of such board shall sign his name thereto, in the presence of the clerk thereof, and such clerk shall attest the signing of the same by such chairman by signing his name thereto; and the statement of such determination, and the certificate appended thereto, shall be *in a form similar to that hereinbefore prescribed for the board of county canvassers*, as far as the nature of such election will admit, and shall be annexed to the statement of the result of such election; and both of such statements and certificates shall forthwith be delivered to the secretary of state, who shall file the same in his office.

Section 126: Such board shall make the statement of the result of such election in the state, and their determination as to the person or persons who shall have been elected therein, *upon the statements of the result of such election, or the copies of such statements which shall have been made by the board of county canvassers in the several counties*, and laid before such board;

*provided*, that if it shall appear, by any such statement from any county, that the statement of the result of such election in any election district of such county is not exhibited by or included in such statement, such board shall give full force and effect to the statement of the result of such election in such district, or the copy of such statement, which shall be laid before such board by the secretary of state, as is hereinbefore directed.

Section 127: The secretary of state shall make as many *copies of the statement of the determination* of such board, and the certificate thereto, as there shall be persons thereby declared to be elected; and shall certify such copies to be true, full and correct, by a certificate appended to each, and shall sign his name thereto and affix thereto the seal of the state, *and shall, without delay, deliver one of the same to each of the persons who shall be so elected.*

Section 130: In case of an election for one or more members of the house of representatives, *the secretary of state shall prepare a general certificate of the election of such member or members*, and lay the same before the governor, who shall sign his name thereto, in the presence of such secretary; and such secretary shall attest the signing of the same by the governor, by signing his name thereto, and shall thereupon affix the seal of the state thereto, *and transmit the same forthwith to the clerk of the house of representatives*, if they shall then be in session, and if not in session, then at their first meeting; and in case of an election for electors of president and vice-president of the United States, such secretary shall prepare a general certificate of the election of such electors, and lay the same before the governor, who shall sign his name thereto, in the presence of such secretary; and

such secretary shall attest the signing of the same by the governor, by signing his name thereto, and shall thereupon affix the seal of the state thereto, and deliver the same to the president of the college of electors, of this state, on the day and at the time and place appointed for the meeting of such college.

From a careful or even casual examination of the statutory scheme exhibited in the above sections it is apparent that two statements of an entirely different character are required to be made by the different canvassing boards. First, there is a statement of the result of the election which is *simply a compilation of the returns* received from all the boards of election within the territory for which the canvassers act, and shows the total number of votes for each candidate without attempting any determination as to the persons elected (*Sections 95, 109*).

*Secondly*, there is a statement in which the canvassing board *determines and certifies what persons were elected* to any office to be filled at the election without giving the number of votes or plurality or any figures whatever. It is a bare declaration that at the election in question a person or persons named was or were duly elected to the designated office or offices. (*Sections 112, 130*).

A statement of the character *first* mentioned is necessary and is provided for wherever there has been an election for an office of broader scope than the territory represented by the local canvassing board so that such board has not before it all the returns upon which a determination of the person elected must be based.

A statement of the character *secondly* mentioned is provided for wherever the canvassing board, whether municipal (*Section 94*), county (*Section 112*), or State (*Section 130*) has before it the returns from all the inferior districts, municipalities or counties in which the candidates have been voted for.

The latter alone can be called a "certificate of election."

It is the only paper issued to the candidate, and is the evidence of his election.

It emanates from the county board of canvassers in case of election for members of the State Senate or General Assembly or for any county or city officer (*Section III*), and from the State Board of Canvassers in cases of election for members of the United States Senate or House of Representatives or for Presidential electors or for Governor. (*Sections 118, 123 and 131.*)

With this distinction clearly in mind between, on the one hand, *the statement of the result of the election*, which is a mere tabulation of the numbers of votes, and on the other hand *the statement of the determination of the persons elected*, which contains no figures at all, we proceed to an examination of the sections providing for a recount in which, if at all, the orders in these cases must find their support.

Section 159: Whenever any candidate at any election shall have reason to believe that an error has been made by any board of elections or of canvassers in counting the vote or declaring the vote of such election, or whenever any citizen shall have reason to believe that an error has been made by any board of elections or of canvassers in counting the vote or declaring the result of any election upon any referendum or question submitted to the electors, whereby the result of such election has been changed, such candidate or such citizen may, within ten days after such election, apply to any justice of the Supreme Court, who shall be authorized to order and cause, upon such terms as he may deem proper, a recount of the whole or such part of the votes as he may determine, to be publicly made under his direction by the county board

of elections, after due notice by such candidate to the parties interested of the time and place of such recount; and if it shall appear upon such recount that an error has been made sufficient to change the result of such election, then such justice in case of candidates shall revoke the *certificates of election already issued to any person, and shall issue in its place another certificate* in favor of the party who shall be found to have received a majority of the votes cast at such election; and in case of referendums or questions shall make a certificate that the result of such election be corrected; *which certificates shall supersede all others and entitle the holder thereof to the same rights and privileges as if said certificates had been originally issued by the canvassing board*; said justice shall have power to decide all disputed questions which the board shall fail to decide by a majority vote thereof.

*Section 160.* Whenever any such certificate shall be issued by any justice of the Supreme Court, the same *shall be filed with the clerk of the county or municipality in and for which such election was held*; and such clerk shall make and certify, under his hand and official seal, a copy thereof, and shall without delay deliver such copy to the person who shall be so declared elected; *and in case of an election for Senator, member of the Assembly or any county officers, the county clerk shall within five days thereafter transmit to the Secretary of State, at Trenton, another copy of such certificate, signed by him and attested by his official seal.*

*Section 161.* Any applicant for such recount upon applying therefor shall deposit with the county clerk such sum as such justice shall order as security for the payment of the expenses of such recount, or if such justice shall so order,

shall file with the county clerk a bond to the incumbent, with two or more sureties, to be approved by such justice, in such sum as he may require, conditioned to pay all costs and expenses in case the original count be confirmed, or the result of such recount is not sufficient to change the result; the said justice shall fix and determine the amount of compensation to be paid for making such recount of the ballots, and the costs and expenses thereof; and if it shall appear that an error sufficient to change the result has been made, then the expenses of such recount shall be paid by the county or municipality in and for which such election was held, upon the warrant of said justice, the same as other election expenses are paid; but if no error shall appear sufficient to change the result, then the expenses of such recount shall be paid by the party making the application.

The original act from which *sections 159, 160 and 161* were adopted in "An act to regulate elections" (Revision of 1898), *P. L. 1898, 310, 311*, was approved March 11th, 1880, *P. L. 1880, 229, Chapter 159*.

This original act applied only to elections for members of the Senate and General Assembly. Upon revocation of the certificate originally granted (in case error was found sufficient to change the result) the authority conferred was to revoke the certificate of election already issued and to order to be issued in its place another certificate duly attested under the seal of the county, etc., which shall supersede all others, etc. This certificate so attested was not to be filed but by *Section 2* the county clerk was required to certify the original under his hand and the seal of the county and "deliver the same to any person who shall be so elected" and transmit to the Secretary of State a true copy thereof in like manner attested.

*Section 3* provided for a bond in \$500 to pay all costs in case the original count be confirmed, etc. If it shall

appear that error sufficient to change the result had been made, the expense of such recount was to be "paid by the collector of the county upon the warrant of the justice, the same as other expenses are paid," but if no such error appeared then the expenses were to be paid by the party making the application.

In the revision of 1898, *Section 159*, the Legislature omitted the words "for member of the Senate or General Assembly" in the second and third lines, thus giving to the section its present general form of expression. It also provided in *Section 160* that the certificate made by the justice should "*be filed with the clerk of the county or municipality in and for which such election was held,*" and such clerk was required to make and certify under his hand and official seal a copy thereof and deliver the same to the person so declared to be elected "and *in case of an election for senator, members of assembly or any county officers,* the county clerk shall within five days thereafter transmit to the Secretary of State, at Trenton, another copy of such certificate signed by him and attested by his official seal."

*Section 161* of the revised act provided, among other changes not now important, that if it should appear that an error sufficient to change the result has been made "then the expenses of such recount shall be paid by the county or municipality *in and for which the election was held,*" &c., and in providing for transmission of a copy to the Secretary of State (in language also then for the first time adopted) only in case of an election for members of the State Legislature or county officers, *significantly omitting any reference to a member of the House of Representatives.* Thus it appears that simultaneously and in the same revision in which the enabling section was extended by dropping out the restriction to candidates for the Senate or General Assembly, entirely new words were introduced in other sections which manifested an unmistakable purpose still to confine the scope of *Section 159* (as

it had previously been confined) to officers elected within the county, although by the revision extending it to *all* such officers. Another change was made in the same revision in that whereas the original act provided that the recount should be made "by the county clerk or such other officer as the said justice may designate," the revised *Section 159* directs that the recount be made by "*the* county board of elections." From this it further appears that the Legislature in the changes it was making still had in mind nothing more extensive than a recount of the vote in a single county.

The same thing is again apparent in the language authorizing a recount of "*the whole* or such part of" the votes, "as he may determine" (the words quoted being also new in the revision), to be made by *the* county board of elections.

Evidently it was considered in the present case that a single order could not be made for a recount of more than one county, for three separate orders were made at the same time, one for each county.

It is not a case where the Court determined that only part of the votes should be recounted, but where intending that *all* the votes should be recounted it was found necessary to institute a separate and distinct proceeding for each county. *The statute however gives no countenance to the idea of splitting up the recount as has here been done.* It provides for but a single order revoking the original certificate of election, not three orders.

The order, moreover, is to be filed with the clerk of the county or municipality "*in and for which such election was held.*"

It cannot be said that the election for member of Congress was held in or for *any* county or municipality. In which of these three counties was such an election held? In which of them is the order to be filed revoking "the certificate of election" if the recount so turns out? There has been and can be no "certificate of

election" in any of the three counties nor in all three combined.

Are there to be three separate orders each setting aside the certificate of election so far as it was held within the county? There is no certificate or determination of the election of member of the House of Representatives as to a single county in existence, and none could have been made by any board of canvassers under the statute.

The only certificate of election that can be given to a candidate for Member of the House of Representatives is that provided for in *Sections 123 and 130* above, which must come from the Secretary of State, based upon the returns from the county canvassers and from the election boards as above expressly required in *Section 126*, covering the whole congressional district.

It is this certificate of election of the State Board of Canvassers prescribed by *Section 123*, which, if a recount is available at all, must be revoked by the order of the Justice in the event that it shall appear that an error has been made sufficient to change the election.

It would, however, be a most extraordinary thing to hold that the Legislature intended that a certificate proceeding from a State board and filed in the office of the Secretary of State, and issued by him, and upon which the holder thereof is accredited as a member of the National Legislature, should be revoked by a certificate made on a recount which is purely a local affair terminating in a certificate filed in the county clerk's office; and that, too, *without any provision for transmitting the revoking certificate to the Secretary of State who the custodian of the certificate revoked*. It has already been noted that in the clause of *Section 160* providing for transmission of a copy of the certificate of the Justice to the Secretary of State the case of an election for Member of the United States Senate or of the House of Representatives, or for Governor, is unprovided for.

Not only is there no authority for the county clerk to transmit the revoking certificate to the Secretary of State, but there is no authority for the Secretary of State to receive or file it in his office.

Indeed we now understand that counsel for Mr. Scully does not claim that the Justice's certificate can revoke the certificate of the State Board of Canvassers in case of an election for Member of the House of Representatives. So absurd did such a claim appear to Mr. Garrison that in arguing before the State Board of Canvassers for an adjournment of the canvass of the returns of the Third Congressional District because of the pendency of the recount, he repudiated with much earnestness the idea that he had ever advanced or sought to sustain it. Counsel on that occasion stated his position to be, not that the Justice could by his order revoke the certificate of election of the State Board of Canvassers if such should be issued, but that the order of the Justice, if the recount should result in an order, would be operative to affect the returns which are the basis of the action of the State Board of Canvassers, so that although these return show a majority for Mr. Carson the certificate of the board (if the recount should so turn out) might, nevertheless, be given to Mr. Scully. By urging before the State Board that their certificate once given would be *irrevocable* Mr. Scully's counsel obtained (confessedly without warrant in the statute), a postponement by the State Board of Canvassers of its action upon the returns for this congressional district in order that said board might have before it the result of the recount.

We are therefore bound to assume that the position on behalf of Mr. Scully before this Court will be the same—namely, that the revoking order, if one shall be made by the Justice, will not operate upon the determination of the Board of Canvassers but will take the place of

the statements or returns upon which the board is required to act in reaching a determination.

It must, however, be remembered at all stages of this discussion that the functions of the different boards under the election act are all purely statutory, and that in such cases the statute is the only guide.

*That only can be done which the statute in terms or by clear implication directs or permits to be done.*

This may be called an axiom of the law. Yet it is only by completely ignoring and setting it aside that the argument for Mr. Scully gains any degree of plausibility.

The Justice under the 159th Section of the Election Act acts merely as a statutory commissioner, and his powers and duties are such as, and no other than, are conferred by the sections relating to the recount. *In re Margarum*, 55 N. J. Law 12, was a case arising under Section 52, P. L. 1890, 391, whereby it was attempted to impose upon a Justice of the Supreme Court the analogous function of setting aside an election upon a petition of a certain number of voters, alleging certain frauds and irregularities, after a hearing and finding of the truth of such allegations. Chief Justice Beasley, delivering the opinion of the Court, said:

“It will be at once perceived, from this summary of this statutory clause, that the judge who is to determine the prescribed contest is not empowered for that purpose to sit in, or under the authority of, any court. The reference to him as ‘the justice of the Supreme Court holding the Circuit Court in and for said county,’ is a mere *designatio personæ*. The expression evidently confers upon the official no authority, except such as is expressly prescribed, which is that he shall entertain the complaint in the capacity of a commissioner acting under and absolutely by the force of a statutory authorization. He is to determine the matter and make an order dis-

missing the petition or setting aside the election, and which order is to be filed with the clerk of the county. This is the entire scope and extent of the power expressly conferred, and it would not seem that, in such an affair, a justice of the Supreme Court has inherent in his office any ability that would materially subserve this statutory endowment."

Section 159 prescribes the only order that can be made upon the recount; that is to say, if it shall appear that an error has been made sufficient to change the result, "such Justice shall revoke the certificate of election already issued to any person, and shall issue in its place another certificate in favor of the party who shall be found to have received a majority of the votes cast at such election." The only order that can be made is one in substitution for the certificate of election "*already issued*," and this shall entitle the holder to the same rights and privileges as if said certificate had been originally issued by the canvassing board.

In *Keohoe v. Stagmeier*, 70 N. J. Law 175, 179, construing this section, the Supreme Court said:

"The act of revocation of the old certificate and the issuance in its place of another to the person 'found to have received a majority of the votes cast,' are one and the same act. No certificate can be made which will not 'supersede all others' and 'entitle the holder thereof to the same rights and privileges as if the certificate had been originally issued by the canvassing board.' The law does not contemplate any certificate unless some other person than the person holding the certificate of the canvassing board is shown to have received 'a majority of the votes cast.' The *prima facie* character of the certificate of the canvassing board cannot be defeated by any condition except by a new certificate, issued under the statute, to some other per-

son who has received a majority of the votes cast. In case of a tie upon the recount, as in the case before us, the certificate of the canvassing board remains the *prima facie* evidence of the right of the holder thereof to take his seat. The body to which such certificate certifies him to be elected cannot recognize a certificate of mere revocation of that certificate issued by the justice of the Supreme Court. The only certificate that they need recognize is a certificate certifying the election of some other person."

It may be, as Justice Kalisch holds, that the act does not necessarily presuppose a certificate of election as in existence when the order for a recount is made, but it does most clearly require that a certificate of election shall have been given before the final order of the Justice at the conclusion of the recount can be made, and that this certificate of the canvassers must be such as can be superseded by the Justice's order which is given the effect of a certificate originally issued by the canvassing board.

If, as is conceded by Counsel for Mr. Scully, the certificate of the State Board of Canvassers of the election of a Member of the House of Representatives cannot thus be revoked the order of the Justice can have no operation whatever, and no order can be made.

There is no authority in the statute or elsewhere for an order correcting the returns or statements of the result of the election upon which, by *Section 126*, the State Board of Canvassers are expressly required to base their determination of the person elected.

These statements are not nor is any one of them the "certificate of election already issued," and which is to be superseded by the order of the Justice.

The order to be made comes in place of the canvassers determination of the person elected and confers the same rights and privileges as if it had been originally issued by the canvassing board. It is of similar char-

acter and form to the certificate prescribed in *Sections 123 and 112*.

It is not contemplated that it shall contain any statement of the numbers of votes received by the respective candidates nor of the plurality of the successful candidate.

The act contemplates a bare declaration of the finding that the applicant for the recount was elected and not the candidate whom the canvassers had declared elected. There is no provision by which a record of the result of the recount similar to the returns of the election officers or the statements of the county canvassers tabulated from these returns as provided in *Section 109*, can be preserved either in the Justice's order or elsewhere.

The operation of *Section 159* is entirely familiar in cases of recount for county or municipal offices where the order is in exact accord with the language of the statute and it is the certificate of election issued by the canvassers that is revoked and superseded. To give a different effect to the statute in case of an election for Member of the House of Representatives and make the Justice's order operate in that case upon the statements of the result under *Sections 108 and 109*, while in other cases it operates upon the "certificate of election" under *Sections 111 and 112*, would be to violate every rule of statutory construction which can possibly apply.

The words "certificate of election" in *Section 159* must mean the same thing in all cases to which the section can apply.

Not only is the language of *Section 159* altogether opposed to the claim now made by counsel for Mr. Scully, but (as before pointed out) there is no provision for transmitting to the Secretary of State or to the State Board of Canvassers a copy of the Justice's order, nor for the filing of such order or a copy thereof anywhere but in the county clerk's office. Moreover, *Section 126* declares upon what the State Board of Canvassers shall make their determination as to the person elected and

excludes the possibility of their acting upon an order under *Section 159*.

The statutory scheme for ascertaining and declaring the persons elected to the various elective offices has been carefully elaborated, and by confining the operation of *Section 159* to elections not more extensive than a single county it takes its place as a coherent and consistent part of the electoral machinery.

The effort to make *Sections 159, 160 and 161* apply to elections within the jurisdiction of the State Board of Canvassers brings them into conflict with the leading features of the general scheme, and creates anomalies and confusion, besides violating the plain provisions of these very sections.

The rule of construction to which Justice Kalisch refers, namely, that where a statute in one part clearly applies to inferior objects only, it is not to be extended by general language to superior objects, applies here. *Sections 160 and 161* throughout manifest a plain intention to confine the scheme of recount to elections within the county. Not only is this true of the language in the original act of 1880 so far as retained, *but of the language newly inserted* in the revision of 1898, when *Section 159* received its present form. It being thus clear from *Sections 160 and 161* that the recount is applicable only to elections of the inferior sort which are confined within the limits of a single county, the rule of construction referred to forbids that by the general words of *Section 159* the scheme of these sections should be extended to an election of a higher grade embracing several counties, and the determination whereof is vested in a different board of canvassers and one of State as opposed to county jurisdiction. Indeed, it is not to be overlooked that if there may be a recount of a congressional district, it may equally well be had of the entire State in case of an election for Governor or of United States Senator. In the latter case there would have to be twenty-one orders on the theory now advanced.

Justice Kalisch, in his opinion, avoids the difficulties we have suggested by saying: "Whether the provisions of this section can be effectively enforced after the recount is held and decided is not before me in this proceeding. The only question to be passed on in the present case is whether or not Section 159 includes within its terms the granting of a recount in a proper case to a congressional candidate."

This, we submit, is altogether too narrow a view.

There are three sections (159, 160, 161) which deal with the matter of a recount and other sections with which the scheme must be harmonized, and with which Section 159 as construed by the learned Justice is, as we have endeavored to show, not in harmony. By limiting his consideration to Section 159 Justice Kalisch puts out of view the most important part of the procedure, namely, the end to be accomplished by it.

A recount is a means to an end, not an end in itself. The end to be accomplished is the revocation of the canvassers' certificate of election if it shall appear to have been given in error.

If it is apparent that this end in a certain class of cases cannot be attained under existing statutory adjustments and under the recount provisions *as a whole*, then in that class of cases the recount itself is futile. The fact that the end cannot be accomplished demonstrated that the means cannot be employed. Nothing can come of the recount but a waste of time and money, which in these circumstances it is the duty of a court to prevent.

The petitions in these cases disclose that there are in each of the counties of Middlesex and Monmouth about twenty thousand votes, and in Ocean County nearly five thousand votes, to be recounted. The orders of the Justice require the election boards of each county to sit from day to day from 9 A. M. till 6 P. M., continuously, except for an intermission of an hour at noon, until such recount shall have been completed—

Sundays and Thanksgiving Day excepted. Under these orders the recount has slowly and laboriously proceeded since November 20th, and is not yet approaching its conclusion. Large numbers of ballots are being laid aside for the consideration of the Justice upon objections made thereto. The recount is necessarily attended with a large amount of expense, and with much inconvenience to a great many persons.

If, as we contend, it can lead to no conclusion because the case is not within the statute, the greater part of this expense must fall upon the county, but a considerable amount will fall upon Mr. Carson. The bond given by the petitioner does not extend to such a situation, and does not protect either the counties or Mr. Carson.

The failure of the provisions for a recount to reach the case of an election for Member of Congress, of course, does not leave the candidate without remedy. The House of Representatives is, of course, the ultimate judge in all cases of the election and qualifications of its members, and it is by that body that the question of this election must in the end be decided.

## II.

THE PETITION AND AFFIDAVIT PRESENTED TO THE JUSTICE WERE NOT SUFFICIENT TO AUTHORIZE THE MAKING OF AN ORDER FOR A RECOUNT.

The following are the statements of the petition in each case so far as they relate to the supposed errors in counting the vote or declaring the result of the election:

“That there were cast in the three counties comprising the said district upwards of 45,000 votes, and that your petitioner is informed and verily believes many errors were made by the board of elections or canvassers in counting the said vote or in declaring the vote of said election,

and that said errors have changed the result of said election.

“Your petitioner further shows that at various polling places in the County of Middlesex, and at various polling places in the County of Monmouth legal ballots were rejected and illegal ballots were counted so far as the Member of the House of Representatives of the United States was concerned, and that in the County of Ocean legal ballots were rejected and illegal ballots were counted and errors were made in counting the votes and declaring the vote of such election whereby the result of such election has been changed. That at said general election in various districts of each of the three counties comprising the said congressional district ballots which were properly marked for your petitioner and which were valid ballots were rejected and that ballots which were improperly marked for the opponent of your petitioner were counted, and that said valid ballots for your petitioner were rejected and illegal ballots for your petitioner’s opponent were counted in such numbers as to change the result of the election.

“Your petitioner further shows that upon the foregoing facts and information he has reason to believe that errors were made by the respective boards of election and canvassers in counting the vote and in declaring the vote of said election whereby the result of said election has been changed.”

The only verification of the petition is an affidavit by the petitioner as follows:

“Thomas J. Scully, being duly sworn according to law, on his oath deposes and says that he is the petitioner named in the foregoing petition; that he has read the said petition and

that the matters and facts therein set forth, so far as they relate to his own acts are true, and so far as they relate to the acts of others he believes them to be true."

The statute (*Section 159*) provides that *Whenever* any candidate at any election shall have reason to believe that an error has been made by any board of election or of canvassers in counting the vote or declaring the result of such election, &c., he may apply to any Justice of the Supreme Court, who shall be authorized to order, &c.

The condition upon which the candidate may apply is that he *has reason* to believe that an error has been made sufficient to change the result of the election.

The existence of this condition must be made apparent to the Justice by proof in some form. An order for a recount made without any affidavit or proof being presented to the Justice could not be sustained.

Is the proof in these cases sufficient?

The statute contemplates that the applicant shall be able to state some definite facts (though it may be on information), from which it can be seen that there is reason to believe that some specific error or errors have been made.

The only *information* which these petitions allege is that *many* errors were made by the board of elections or canvassers in counting said vote or in declaring the vote, and that said errors have changed the result of said election.

It is impossible to gather from such vague and wholesale generality that the petitioner really had any basis for a belief that any particular errors had been made.

The remaining allegations are subject to the same objection; and, moreover, are not stated as matters of information, nor do they relate to the affiant's own acts—the affidavit as to them is merely that he believes them to be true, but no reason is disclosed for such belief.

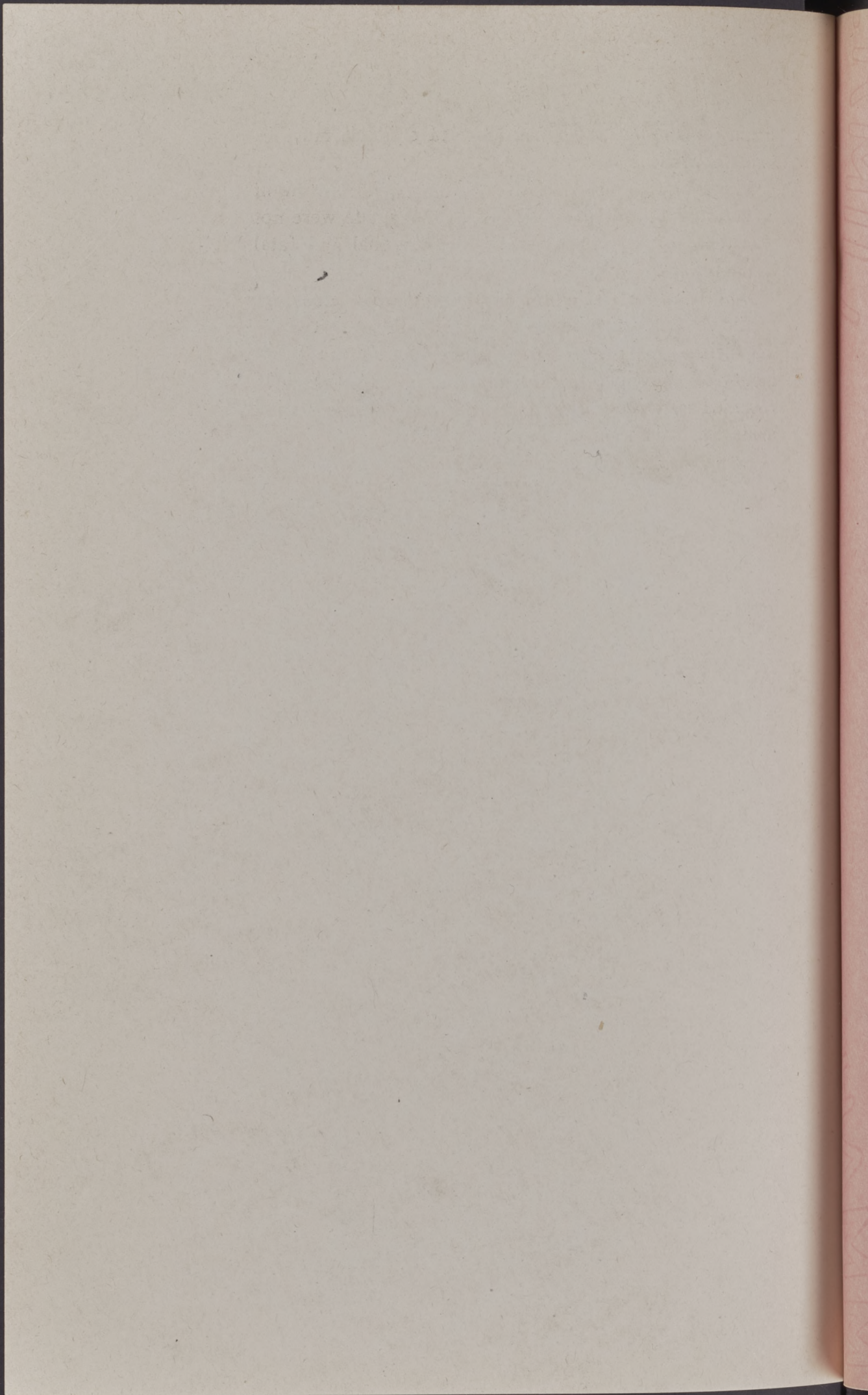
Unless this Court is prepared to encourage mere

fishing excursions, this petition and affidavit must be held insufficient.

The condition upon which such an application might be entertained and an order for recount made were not shown to exist. The defect is jurisdictional and fatal to the orders.

Both because the statute did not authorize a recount of the votes for member of Congress and because of the insufficiency of the petition and verification the judgments of the Supreme Court in each case should be reversed and judgments entered in said Court setting aside the orders for recount, with costs.

THEODORE STRONG,  
ALAN H. STRONG,  
*Of Counsel with Appellant.*





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