New Jersey Court of Errors and Appeals

ALFRED H. HOLBROOK, *Prosecutor-Appellant,* *vs.* CITY OF EAST ORANGE and ANDREW MURRAY, *Respondents and Appellees.*	*In Certiorari.* *On Appeal from Supreme Court.*

BRIEF FOR RESPONDENT ANDREW MURRAY.

This case grows out of a special election held in the City of East Orange May 7, 1918, under the act known as the Local Option Act, Chapter 2, Laws of 1898.

The declared result of said election being 73 majority in favor of prohibition.

A petition to contest the validity of said election was filed under the said act, directed to the Honorable William S. Gummere, Chief Justice of the Supreme Court, setting forth that the constitutional and statutory provisions of this State in regard to 1,500 voters in the military and naval service had not been complied with; that 90 ballots received from such voters had been unlawfully rejected; that said voters had been deprived of their votes, and praying that said election be set aside.

A hearing was had thereunder, with the result that an order was made by the Chief Justice, reciting the facts found by him (pp. 76-78) and concluding as follows: "The said facts having been considered and the argument having been heard and it appearing that qualified electors of the City of East Orange in the military and naval service of this State or of the United States, who had a right to vote at the aforsaid election were deprived of the right and opportunity to vote was sufficient to have changed the result of such election: It is, therefore, on this 16th day of July, 1918, ORDERED, that the aforesaid election and the result thereof be and the same is hereby set aside and for nothing holden." This was confirmed by the Supreme Court in certiorari (state of case, p. 185).

1.

Sufficient and valid grounds appear in the petition contesting the validity of the election to give the Justice jurisdiction.

Petition, pp. 61-63, Sec. 25, Chapter 2, Laws of 1918, p. 32.

2.

Voters absent in military and naval service were entitled to vote. Compliance with the laws enabling them to vote was an essential preliminary step of the election.

Knowledge of the election could not be imputed to them as in the case of a general election where the date and object is fixed by statute.

Article II, Par. 1 of the Constitution provides that in time of war no elector in actual military service of the State or United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from his election district, and the Legislature shall have power to provide the manner, etc., in which he may vote and return and canvass of such votes in the election district in which they may respectively reside.

This provision, the appellant contends, only applies to general elections and not to special elections, and that Chap. 150, Laws of 1918, which provides for special as well as general elections, is, in this respect, unconstitutional as to the election in question.

We deny that the Constitution is capable of such a limited construction, but if it is, then we reply:

1st. The Local Option Act (Chap. 2, 1918) provides for a petition signed by "legal voters," followed by the submission of the proposition to the "legal voters." **The "legal voters" are they who are made such by the Constitution, and that being so, they are entitled to the rights of "legal voters," under the Constitution.**

2nd. If it is held that the Constitution does not cover special elections, then it is at most SILENT, in which case it is clearly within the province of the Legislature to include special elections in the act.

15 Cyc., pp. 301-302, citing

Morrison v. *Springer,* 15 Iowa, 304.

State v. *Main,* 16 Wis., 398.

Lehman v. *McBride,* 15 Ohio St., 573.

The cases cited by the appellant, viz., *Opinion of Judges,* 30 Conn., 591; *People* v. *Blodgett,* 13 Mich., 127; *Chase* v. *Miller,* 41 Pa. St., 403, and *Opinion of Judges,* 37 Vt., 665, are cited in the same connection and paragraph in Cyc., but in those cases the State institutions designated the place as well as the time of voting, without any provisions for votes to be taken elsewhere, and therefore do not apply to this case, because our Constitution provides for the taking of the soldier and sailor vote in time of war.

Following the Constitution, the General Election Act (Com. Stat., 2-2141-220-232) provides the method of voting, etc., and also that 30 days before any general or SPECIAL election the Secretary of State shall forward to such voters materials with which to vote.

These provisions are superceded by Chapter 150 of the Laws of 1918, intended to meet the exigencies of the present war.

This act imposes certain prescribed duties on the Secretary of State and Municipal Clerk in procuring names and addresses of such absent voters and forwarding to them voting materials, etc., and covers SPECIAL as well as general elections.

The City Clerk of East Orange did absolutely nothing with respect to these absent voters. The Secretary of State says that he was unable to obtain information as to the names and addresses of such voters from the Adjutant General as required by the act, and requested the City Clerk to procure the same and furnish them to the Secretary of State. The City Clerk only referred him to the Local Draft Board in East Orange, and from that board the Secretary of State obtained 400 names and addresses, to whom he sent, 10 days before the election (not 20 days, as the act requires), ballots, envelopes, etc.

At this point the respondents insist that if this statute, enacted to carry out the Constitution, was impossible of performance, then the constitutional right of the voter was subverted and the election would be void.

There were 1,000 residents of East Orange in the military and naval service, 600 of whom were left entirely out of consideration by the Secretary of State and Municipal Clerk. Out of 400 ballots, etc., mailed by the Secretary of State, 200 were returned marked "not found."

124 votes were received from these voters and counted in the result, thus showing that at least five-eighths, or 615, of the 1,000 in such service were legal voters. Whether any of these omitted

received any notice from any other source the respondent does not know, and if such was the case it was incumbent upon the prosecutor to have shown it, because it fully appears that they did not receive such notice as the law requires.

It further appears that 90 unofficial envelopes, said to contain ballots, were received by the Secretary of State and by him turned over to the County Election Board within the 30 days allowed them by said act to canvass the vote of those in military service. These were from Anniston, Alabama. *No ballots, etc., were sent by the Secretary of State to that place.*

These 90 envelopes bear an endorsement above the signature of the voter, showing that they were made up after the date of the election, and also that the voters did not have knowledge of the date of the election prior thereto, and so made up their ballots and mailed the same as soon as they acquired such knowledge.

The Election Board determined in the manner required by the act that these 90 persons were legal voters, and then rejected the same because they were not made and mailed on the day of said election.

Here was positive proof, and it was so considered by the Chief Justice, *that 90 legal voters were deprived of their votes because the law was not complied with,* and because they did not receive other timely knowledge of the election, *which 90 would be more than sufficient to change the result.* Therefore, the respondent insists that the judgment of the Chief Justice must stand on this proposition, if on no other.

The prosecutor cites *People* v. *Wood,* 148 N. Y., 142, but in that case the Court says, "*the object of the election laws is to secure the rights of duly qualified electors and not to defeat them.*" The Constitution of New Jersey and the statutes cited relating to the franchise of those in military and naval service constitute the election laws, but they were not carried out.

So, in *People* v. *Chandler,* 41 App. Div., 178, arising from a technicality, but in that case it appears there was a "*full vote,*" in which event no one was harmed. In this case it appears there was not a full vote. Those in service were deprived of their votes. Ninety are impounded and not counted.

So, in *Re Clement,* 29 Mis. Rep., 29, in which the Court says, "it appears there was a *full and fair vote,* and there was *nothing to show that this irregularity affected the expression of the will of the people.*"

So, in *Peters* v. *Sisson,* 102 Mis. Rep., N. Y., 465, in which the Court says, "I am mindful of the fact that a situation may arise where an official failure to perform a duty demands a resubmission of the question, *especially so if the voters were misled or kept in ignorance of the submission of the question,* but nothing of the sort was claimed here."

So, in *Norman* v. *Thompson,* 72 S. W., 64; 30 Tex. Civil App., in which the Court says, "We think the literal compliance shall be required only *when necessary to protect electors in their right of suffrage.*"

Thus it follows, under these cases, relied on by the prosecution, that if by reason of what is complained of there was not a full and fair vote; if the voters were kept in ignorance of the question submitted, and if the number of voters who did not receive notice of the election in question would be sufficient to effect the expression of the will of the people, the election must be void.

In this case there was no compliance whatever with the law in respect to voters in military and naval service.

Knowledge of the date of the election could not be imputed to them, because it was a special election called by the Common Council when they were not present in the municipality under a statute passed in their absence.

The general election is fixed by statute, and everybody knows the date upon which it falls, but a special election is another matter, and unless they were informed of the date they could not vote, although entitled to do so.

The respondent insists that the 90 ballots received by the County Election Board from Anniston, Alabama, *should have been counted,* because the duties charged upon the Secretary of State and Municipal Clerk were not performed; that the act is mandatory only so far as not preparing and mailing the ballots before the date of the election; that the purpose of the act as expressed in Sec. 3 is that every such elector shall have the right to vote, and Sec. 14 provides that the act shall be *liberally* construed for the purpose of affording the opportunity to such electors to vote. These 90 did vote after the date of election, but within the 30 days allowed the Election Board to canvass the vote, and stated their reason on the backs of the envelopes above their signatures, which reason was that they had not received timely notice of the election. The Election Board determined that they were legal voters and then rejected the vote because

they were not prepared on the day of the election, which respondent claims was erroneous.

4.

Prosecutor contends that Chap 150, Laws 1918, is unconstitutional because it provides for the return and canvass of the military vote by the County Board of Elections instead of in the election districts, as provided by the Constitution. The County Election Board, however, transmits the result to where it belongs, so it may be said that the vote is canvassed in the districts, because the districts are eventually credited with it.

However, if this act is unconstitutional, then the election must fail, because then the provisions of the General Election Act, above referred to, would be in force, and these provisions were not complied with in any particular.

5.

This was not a general election for the election of officials merely to carry on and to perpetuate the government, which one might do as well as another. But it was a special election effecting every individual's rights and personal liberty, and in some cases his property, and there is no way in which he could protect himself except by constitutional right of suffrage.

Respectfully submitted,

JAMES K. NUGENT,
Counsel for Respondent Andrew Murray.

Southern Bond