

NEW JERSEY
COURT OF ERRORS AND APPEALS

HARRY S. MYERS,

against

BOROUGH OF ROSELLE, *et al*,
ERNEST R. BROWN

On Appeal

against

BOROUGH OF DUNELLEN, *et al*,

**BRIEF FOR McINTOSH AND
WINTER.**

The appeals bring before this court for determination the construction and validity of the Supplement to the Election Act, Chapter 150 of the Laws of 1918, respecting the right of electors in the military service to vote.

The purposes of such supplement cannot be better described than by quoting from Sections 3 and 14 of the Act.

Section 3. "The purpose of this act is to afford to every qualified voter of this state who is in active service in the military forces of this state or of the United States, the right to vote at any primary, general or special election held in this state or in any subdivision thereof."

Section 14. "This act shall be liberally construed for the purpose of affording an opportunity to persons in the active service in the military forces of this state or of the United States, to vote at any primary, general or special election."

The provisions of the supplement cast upon the Secretary of State the following duties:

(a) To ascertain either from the Adjutant General of the State or from the Adjutant General or other proper authority of the United States, the names and addresses of the qualified voters in active military service.

(b) To forward by mail or otherwise, a blank ballot so that the person may vote for any candidate or upon any question submitted.

(c) To furnish to the Clerk of the municipality the names and addresses of such qualified voters in the military service.

(d) To send to such persons either a copy of the act or directions for voting and transmitting ballots as required by the act; also envelopes for returning the ballot.

The only duty which seems to be cast by the act in question upon the Clerk of the Municipality is "to forward to each of such persons by mail or otherwise, a printed or written list of the names of the candidates whose names will appear on the ballot for such election, together with the names of the nomination or office for which such person is a candidate."

By Section 8 it is provided that any such person in military service shall be entitled to fill in the ballot forwarded to him by the Secretary of State. And by Section 9 he is given the right if he shall not have received an official ballot on the day of the election, to fill in an unofficial ballot indicating thereon the candidates for whom he intends to vote and the office for which such persons are candidates and the proposition upon which he intends to vote. This section also provides for the return to the Secretary of State of the unofficial ballot in the same manner as an official ballot is required to be returned.

It will be noticed that the act does not in express

terms require a municipal clerk to forward to soldiers the proposition upon which a vote is to be taken, but merely the candidates' names and the nomination or office for which they are candidates; but by sections 3 and 8 special election is mentioned and in sections 4 and 9 the proposition upon which the soldier intends to vote is mentioned, and by section 14 it is provided that the act shall be liberally construed so as to afford all persons in military service an opportunity to vote at any primary, general or special election.

What is now required is the construction of the foregoing supplement in so far as the same relates to special elections held for the adoption or rejection of Chapter 2 of the Laws of 1918, commonly known as the Local Option Act.

In Roselle, in an election held on the 21st day of May, 1918, 273 votes were cast in favor of the adoption of said act and 263 against it. There were, however, 50 qualified electors or voters of said Borough then in the military service who received no opportunity of voting.

In the Borough of Dunellen, an election was held on June 11, 1918, and 260 votes were cast in favor and 209 against it. There were, however, 54 qualified electors or voters of said Borough who were then in the military service of the United States who were not afforded the opportunity of voting as required by the supplement to the election Act.

Upon proceedings taken pursuant to the Election Act, both of said elections were declared void, and it is from the orders setting aside said elections that writs of certiorari were brought, and after the dismissal of those writs, these appeals were taken. The appellants have assigned numerous reasons which they have divided into eight points. Of those eight points, all except the 6th and 7th apply to Roselle and all except the 6th apply to Dunellen. The eighth of said reasons relates to the constitu-

tionality of the supplement to the Election Act and we will consider the same first.

POINT I.

Chapter 150 of the Laws of 1918 is constitutional.

Article 2 of our constitution relates to the right of suffrage and after declaring who shall exercise the right of suffrage, provides as follows:

“And provided further that in time of war no elector in the actual military service of the state or of the United States, in the Army or Navy thereof, shall be deprived of his vote by reason of his absence from such election district, and the Legislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside.”

It is true that the ballots of soldiers are directed in the first instance to be returned to the Secretary of State. (Section 9.)

Section 10, however, provides for the distribution of the envelopes received to the County Board of Elections for the canvass and counting of the same. The objection raised by the prosecutors in certiorari is that the Statute should provide for the direct return of the votes to the election districts in which the soldiers reside. There is no such provision contained in the constitution, but on the contrary, the constitution vests in the Legislature the power to provide for the return and canvass of the votes in the election districts. Under the provisions of the

sections above stated the votes are through the medium of the Secretary of State returned to the County boards and canvassed and counted.

While it is true that under the provisions of the general election law the votes in the first instance were counted in the small election districts and returns made to the county board, who canvassed the same, this has been changed as regards the soldier vote by the act of 1918, and this enlarges the election district to the entire county in which the original count is made and puts the canvass of the vote in the County Board of Elections. There is nothing there which violates the plain language of the constitution. In a number of our cases this article of the constitution has been questioned and in all of them our courts have held that this constitutional language was clear and unambiguous and that there is not a syllable of the instrument that throws it in doubt.

Allison v. Blake, 57 N. J. L., page 6.

Kimball v. Hendee, 57 N. J. Law, 307.

Ransom v. Black, 54 N. J. L., 446.

McArdle v. Jersey City, 66 N. J. L., 590.

POINT II.

All qualified soldier voters did not have an opportunity to vote.

In reply to the first point made by the appellants it is only necessary to state that the finding of facts by the learned Supreme Court Justice was sustained by the evidence. The evidence was that the Secretary of State did not, twenty days prior to the special election forward to the Clerk of Roselle Borough the names and addresses of the qualified voters in the military service; that said Secretary

did not forward to such voters a blank ballot or a printed copy of the Act or printed directions for voting; the Clerk of the Borough did not forward to each of such qualified voters in the military service any ballot or other notice, expecting to mail to said voters at their usual address within the Borough of Roselle, sample copy of the official ballot. (Case page 114 and 115).

In the Dunellen case the facts are the same, excepting that from some source, but not through the Secretary of State or the Clerk of the Borough, newspapers were sent to soldier voters of Dunellen within the United States, in which newspapers was printed the legal notice of said proposed election.

The election law prior to the enactment of Chapter 150 of the Laws of 1918 provided certain methods for giving notice by advertisement and publication of notice of the proposed election or elections and for the purpose of this argument it is assumed that all such provisions of law were complied with and that were it not for Chapter 150 of the Laws of 1918, the soldier voters would have had legal notice as contended by the prosecutors in certiorari under subdivision A of their first point, but the Statute of 1918 is a supplement to the Election Act and by its express terms requires different and additional notice to soldier voters and therefore it borders on absurdity that anyone should argue that these voters had legal notice of the election. It is true that by virtue of Section 9 of the Act a person in military service has the right to cast an unofficial ballot, but, in the absence of notice, how would such person know when to cast a ballot for a special election held for a special purpose? The most that can be said as to a presumption is that the person is presumed to know the law and the soldier was presumed to know that by reason of Chapter 150 of the Laws of 1918 he would receive a copy of the law or instructions how to ballot.

POINT III.

It is claimed by the appellants under Point II of their brief, that it was impossible to comply with the provisions of the law.

Section 4 of the Act, while providing that the Secretary of State shall ascertain names and post office addresses from either the Adjutant General of New Jersey or of the United States, does not limit the Secretary to inquire from those sources, but imposes upon the Secretary of State the duty of mailing to each person in the active service a blank ballot. Section 6 also imposes on the Secretary of State the duty of sending with each ballot a printed copy of the act or printed directions for voting. By Section 5 the Secretary of State is required to send to the County Clerk or Municipal Clerk, the names and addresses of the qualified voters in the military forces residing in the County or municipality, and while the Secretary of State may have failed to obtain the addresses of soldiers from the Adjutant General of the State or the United States, it is not shown that any other or further attempt was made so that notice of the election might have been given to soldiers. The sole purpose of the Act is to afford to soldiers the right to vote and this right was taken away by the failure to give notice of the elections and there can be no presumption that the soldiers did know when a special election of the character in question was to be held.

It seems to us that this question was disposed of by the Court of Errors and Appeals in the case of *Brown vs. The Street Lighting Department*, 70 N. J. L., page 762. In that case Mr. Justice Pitney, in writing the opinion for the Court of Errors and Appeals very clearly points out that the election

therein involved was one required to be held at a fixed time and that the case therein involved was one which was different from the cases relating to special elections; that in the case of special elections where there is an absence of literal compliance with the statutory provisions the election would be void, notwithstanding that it expressed a full and fair expression of the will of the voters. Citing:

State v. Van Winkle, 1 Dutcher, 73.

State v. Hardcastle, 2 Id., 143.

State v. Carrabrant, 3 Vroom, 444.

Davis v. Rapp, 14 Id., 594.

Morgan v. Gloucester City, 15 Id., 137.

Apgar v. Van Syckel, 17 Id., 492.

Canada Manufacturing Co. v. Woodbridge, 29 Id., 134.

He further says the rule to be derived from a review of the authorities is that where the time, place and purpose of an election are fixed by public law all voters must take notice thereof and such an election if held is not invalid because no special notice was given or proclamation made. Certainly not, if it appear that there has been a fair expression of the will of the voters.

In *Morgan v. Gloucester City*, 44 Law, 137, the Court held that in elections of a special character, where the time and place are not fixed by law, notice must be given, and that the direction to give such notice is mandatory. Cited with approval in *Mittag v. Park Ridge*, 61 Law, 151.

In *D'Espard v. Essex Fells*, 84 N. J. Law, 181, an election for the purpose of obtaining an expression of popular will was held on the day of general election. The election was published in the newspaper. The form of the ballot was questioned. It was held, however, that as there was a full and fair expression of the popular will, the election should

not be set aside by reason of want of compliance by the Borough Clerk of a mere detail of publication. The election was sustained upon the principle that the requirement of notice is directory in all cases of stated public elections.

Thus it must be apparent that there is a vast difference in the rule to be applied to stated public elections and special elections, held at a particular time for a special purpose.

POINT IV.

The third point advanced by the appellants is that those who voted at the special elections are disfranchised.

The result is that the election attempted is declared void and set aside and everybody is in the same position as if there had been no election. If the election were permitted to stand, then it could be said that the soldiers were disfranchised, but where the election is set aside it cannot be said that the persons who attempted to exercise the right of ballot are disfranchised, because their opportunity to vote on the proposition submitted still remains, whereas, if the election were upheld the right of the soldier to vote will never arise again until the elapse of the time stated in Paragraph 2 of the laws of 1918, and although the war might be over within a very short time and the soldier come back to live in Roselle or Dunellen, he has had no voice as a voter in the determination that the town should be wet or dry.

POINT V.

The fourth point is that the soldier voters have no constitutional right to vote on the proposition.

It is not material to now determine whether the right of the soldier to vote on these local option laws is constitutional, statutory or fundamental. The right of suffrage is declared by our constitution and whether that right as declared in the constitution is broader than indicated by the word "officers" therein mentioned is not now necessary to be decided, because it is provided by Section 7 of Chapter 2 of the Laws of 1918 that the election shall be conducted so far as practical in the same manner as required by law for the election of members of the General Assembly. Therefore the proposition submitted under said statute is placed on a parallel with such persons as may run for the office of General Assembly and the constitution expressly provides that the Legislature may make laws so that the soldiers in time of war may vote.

POINT VI.

The fifth point advanced by the prosecutors is that the soldier's right to vote was superseded by the ruling of the Federal authorities.

There is nothing in the stipulation or written facts in either the Roselle or Dunellen case to show that there was any objection by the Federal authorities to the obtaining of a soldier vote. Letters which were offered from the Federal authorities had no bearing at all in the Roselle case. Even

if said letters are considered as evidential, they do not show the soldiers were forbidden by the Federal authorities from voting. The Federal authorities would not furnish lists of the New Jersey soldiers in service. The order of the United States permitted the erections of enclosures for the obtaining of the soldier vote and this part of the order was intended to be restricted to primary and general elections. There is nothing in the order from the Federal Government which prevented the soldier from mailing his ballot for the special election as provided by Chapter 150 of the Laws of 1918.

POINT VII.

In the Dunellen case the number of absent voters were more than sufficient to change the result of the election.

The proposition in Dunellen was carried by a majority of 51. (Case page 140). The stipulation shows that there were 54 qualified voters in service who did not vote. (Case page 144, line 15). It is admitted that the Secretary of State did not forward to the Clerk of the Borough of Dunellen the names and addresses of the qualified voters in the military service and that said Secretary did not forward to such qualified voters a ballot for the purpose of obtaining the vote. Also that said Secretary did not send printed copy of the Act or directions for voting or the two envelopes required by the Act. (Case page 143). The Clerk of the Borough did not forward to each of such qualified electors any ballot or other notice, but on the contrary it is contended that a newspaper, known as the Dunellen Call was printed and published in Dunellen and that in said paper there was pub-

lished the legal notice of such proposed election and that copies of said newspaper were sent to and received by thirty of the Dunellen soldiers. (Page 144). There is nothing, however, in the stipulation which shows that the notice was read by or called to the attention of said thirty voters or that they by reasons thereof attempted to exercise their right of franchise or that they were instructed or had instructions as to the preparation of an unofficial ballot. In other words, counsel for the prosecutors attempts to supplant the statutory notice by the mere fact that a newspaper was mailed by some one to the soldiers. If this argument were sound, then every special election might be fraudulently controlled by persons attempting to prove aliunde that notice either was or was not received by persons who were qualified as voters.

CONCLUSION.

The object of Chapter 150 of the Laws of 1918 was to insure to the soldier his right to vote at the primary, general and special elections, and in all of the cases brought before your Honors by these appeals, the final result was so close that the soldier vote might have in every instance changed the final result, and therefore it cannot be said as a matter of law that the said elections resulted in a full and fair expression of the will of the people.

While it is true that the statute intimates from what source the Secretary of State should get the information as to the names and post office addresses, it does not limit him in that direction. The Secretary of State has failed to furnish the lists of addresses to the Clerks of the municipalities; has failed to forward the blank ballots; has failed to send a copy of the Act or directions for voting or the two envelopes required by statute, so that it was practically impossible for any of the

soldiers in the military service of the United States to have cast a ballot at any of these elections, and as the provisions of the statute were not carried out, the determination made by the Supreme Court Justices on the summary hearings was in all instances correct and their orders and the dismissal of the writs of certiorari should be affirmed with costs.

Respectfully submitted,

ABE J. DAVID,
SAMUEL KOESTLER,
Of Counsel with Stanley McIntosh and
Gustav Winter.

[3765]

PROCES UNO

W. B. B. B.

THE
9

PU