

Herbert D. Hamm, for the respondents.

John J. Bennett, Jr., Attorney-General [*Dorothy U. Smith*, Assistant Attorney-General, of counsel; *Henry Epstein*, Solicitor General, with her on the brief], for the Secretary of State, appellant.

Talley & Lamb [*Alfred J. Talley* of counsel; *Edmund J. Delany*, *Maxwell Ross* and *James Flynn* with him on the brief], for the interveners-appellants Optometrical Society of The City of New York, Bronx County Optometric Society and North Queens Optometric Society.

Harold Kohn, for the intervenor-appellant New York State Optometric Association, Inc.

Robert Rosenberg [*N. Bernard Silberg* with him on the brief], for the Retail Opticians of America, *amicus curiae*.

Hill, P. J. Appeal from a peremptory order of mandamus which directs the Secretary of State to file and record petitioners' certificate of incorporation of "Four-Boro Optical Corp." That official bases his refusal upon the ground that the purpose clause in the certificate would permit the corporation to practice optometry, and that a corporation may not be organized for such purpose. He found authority for his refusal in *Matter of Stern v. Flynn* (154 Misc. 609) and in opinions by two Attorneys-General (Opinions of Attorney-General, 1913, 401; *Matter of Right to Form a Corporation*, 21 State Dept. Rep. 75). The wording in the certificate which offended follows: "To carry on a general optical business; to sell at retail spectacles, eyeglasses and lenses for the correction of vision, provided that duly qualified optometrists be in charge of and in personal attendance at the booths, counters or places where such articles are sold in the respective stores or established places of business of this corporation; to employ duly qualified optometrists for the purpose of being in charge of and in personal attendance at the booths, counters or places where this corporation sells at retail spectacles, eyeglasses and lenses for the correction of vision in the respective stores or established places of business of this corporation and for the purpose of examining the eyes of customers of this corporation where such duly licensed optometrists, while in charge of and in personal attendance at such booths, counters or places, deem the same to be necessary in connection with the sale at retail by this corporation of spectacles, eyeglasses and lenses for the correction of vision."

The draftsman of this certificate followed meticulously section 1432-a of the Education Law (added by Laws of 1928, chap. 379) as construed by *Roschen v. Ward* (279 U.S. 337). The statute makes it unlawful to sell at retail spectacles, eyeglasses or lenses for the correction of vision unless a duly licensed physician or duly qualified optometrist is in charge of and in personal attendance at the booth, counter or place where such articles are sold. The *Roschen* case was brought for an injunction to restrain the enforcement of the statute upon the ground of unconstitutionality. It was determined that the act had definite relation to the public health and, therefore, was constitutional. In construing the statute, the opinion by the late Mr. Justice HOLMES states: "But the argument most pressed is that the statute does not provide for an examination by the optometrist in charge of the counter. This as it is presented seems to us a perversion of the act. When the statute requires a physician or optometrist to be in charge of the place of sale and in personal attendance at it, obviously it means in charge of it by reason of and in the exercise of his professional capacity" (p. 339). Counsel for an intervenor here advances the same argument answered in the quoted portion of the *Roschen* opinion, urging that the statement there made is obiter. With this I do not agree, as the meaning and effect of a statute must be considered in determining its constitutionality.

Until 1908 any person could sell spectacles or eyeglasses without let or hindrance. In that year the Legislature enacted the initial statutes concerning the licensing of optometrists. By an amendment to the article (Laws of 1928, chap. 379) section 1432-a was added. (Later amendments do not affect our question.) "It shall be unlawful for any * * * corporation to sell, at retail, as merchandise in any store or established place of business in the State, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and* personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business."

Thus the right to do a lawful act was curtailed. However, the right, so curtailed, still remains. The legislative intent is too clear to support extended argu-