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Supreme Court

of the

State of New Jersey

Writ Of Certiorari

10

New Jersey, ss:

The State of New Jersey to Edward Mark-
ley, acting Judge of the First Criminal
(Seal) Court of Jersey City, New Jersey,
GREETING:

We, being willing, for certain reasons to be
certified of the judgment, order conviction and
proceedings given and made before you in a cer-
tain action, plaint or proceeding brought against
John R. Hennessey at the suit of the Mayor and
Aldermen of Jersey City to recover a fine for an
alleged violation of an ordinance of said City, do
hereby command you that you send under your
seal to our Justices of the Supreme Court of
Judicature of the State of New Jersey on the 29th
day of May instant, the judgment, order, convic-
tion and proceedings aforesaid, with all things
touching and concerning the same as fully and
entirely as they remain before you by whatsoever
names the parties may be called therein, together
with this writ, that we may further cause to be
done what of right and according to law ought to
be done.

WITNESS William S. Gummere, Esquire, Chief
Justice of our Supreme Court at Trenton, this
10th day of May, Nineteen hundred and seventeen.

WILLIAM C. GEBHARDT,

Melosh & Merton,

Clerk. 40

Attorneys for Deft.-Pros.

Return To Writ

NEW JERSEY SUPREME COURT

10	THE MAYOR and ALDERMEN OF JERSEY CITY, Plaintiff-Respondent, vs. JOHN R. HENNESSEY, Defendant-Prosecutor.	}	On Certiorari
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*To the Hon. the Justices of the Supreme Court
of Judicature of New Jersey:*

20 IN OBEDIENCE to the command of the within writ to me directed, I, EDWARD MARKLEY, Acting Judge of the First Criminal Court of Jersey City, DO HEREBY CERTIFY AND SEND, under the seal of the said First Criminal Court, the judgment, order, conviction and proceedings wherein The Mayor and Aldermen of Jersey City is Complainant and John R. Hennessey is Defendant, together with all papers touching and appertaining to the same, as fully and entirely as before the said First Criminal Court they remain, as is commanded.

30 IN WITNESS WHEREOF, I, EDWARD MARKLEY, Acting Judge of the First Criminal Court of Jersey City, have hereunto set my hand and the seal of said Court this 6th day of September, A. D. 1917.

EDWARD MARKLEY,
Acting Judge of the First
Criminal Court of Jersey City.

(Seal.)

Complaint

HEALTH BUREAU COMPLAINT

State of New Jersey,)
 County of Hudson,) ss:
 City of Jersey City.)

Thomas J. Steele of full age, being duly sworn according to law, on his oath says: That he is a 10
 milk inspector of the Health Bureau of Jersey
 City, New Jersey, and that on the twelfth day of
 April A. D. Nineteen Hundred and sixteen J.
 Hennessey, 804 Newark avenue, Jersey City, de-
 fendant, at Jersey City aforesaid, did violate the
 provisions of Section 26 of an ordinance entitled
 "An ordinance regulating the general conditions
 governing the sale of milk or cream in Jersey City
 * * * Adopted April 1, 1915.

In This That; the said J. Hennessey did sell 20
 milk on premises known as 804 Newark avenue,
 Jersey City, which milk contained less than 11.5%
 total solids and more than 88.5% water, in viola-
 tion of the aforementioned section.

Wherefore, deponent prays that process in the
 nature of a summons or warrant may issue at the
 suit of The Health Bureau of Jersey City, for and
 on behalf of the Mayor and Aldermen of Jersey
 City, against the said person so above charged
 for the recovery of twenty-five—dollars, the pen- 30
 alty prescribed for said violation.

THOS. J. STEELE.

Sworn and subscribed before me
 this 6th day of June, A. D. 1916.

Edw. Markley, of Jersey City.
 Clerk of the 1st Criminal Court

(Seal)

Summons

HEALTH BUREAU SUMMONS

FIRST CRIMINAL COURT OF JERSEY CITY

10 THE MAYOR and ALDERMEN OF
 JERSEY CITY,
 vs.
 J. HENNESSEY.

City of Jersey City,)
 County of Hudson,) ss.:
 State of New Jersey.)

*To any Policeman of said City or Constable of
 said County:*

20 WHEREAS, Thomas J. Steele, a milk inspector
 of the Health Bureau of Jersey City, New Jersey,
 has this day made complaint upon oath before
 the First Criminal Court of Jersey City, that on
 the 12th day of April, A. D., one thousand nine
 hundred sixteen at Jersey City aforesaid, J. Hen-
 nessey of 604 Newark avenue, Jersey City, did
 violate Section 26 of an ordinance entitled "An
 ordinance regulating the general conditions gov-
 30 * * *" Passed April 1, 1915.

in the following manner, *viz.*: the said J. Hen-
 nessey did sell milk on premises known as 804
 Newark avenue, Jersey City, which milk contains
 less than 11.5% total solids and more than 88.5%
 water, in violation of the aforementioned section.

Testimony

These are, Therefore, in the name of the State of New Jersey, to authorize and command you to summon the said J. Hennessey, 804 Newark avenue, Jersey City, personally to be and appear before the 1st Criminal Court of Jersey City on Thursday, the 8th day of June, 1916, at the hour of nine o'clock in the forenoon, to answer unto the Mayor and Aldermen of Jersey City for such alleged violation of said Ordinance, and to be further dealt with as the law directs. 10

WITNESS, Jas. P. Dolan, Judge of the 1st Criminal Court of Jersey City, this 6th day of June, 1916.

(Seal.) EDW. MARKLEY,
Clerk.

Testimony

20

FIRST CRIMINAL COURT OF JERSEY CITY

THE MAYOR and ALDERMEN of
JERSEY CITY,

Complainant,

vs.

JOHN R. HENNESSEY,

Defendant.

30

Jersey City, June 15, 1916.

Before: HON. EDWARD MARKLEY, Acting Judge.

Joseph A. Carlin—Direct

Appearances:

Frank J. Reardon, Esq., for the Complainant.
Melosh & Morten, Esqrs. (Mr. Morten) for the
Defendant.

JOSEPH A. CARLIN, sworn:

10 Direct-examination by Mr. Reardon:

Q. You are employed in the Board of Health
of Jersey City? A. Yes, sir.

Q. And in your capacity have you charge and
control of the Minutes of the Board of Health?

A. I have now, so far as they exist in the Board
of Health.

Q. I show you the Minutes of the Board of
Health, bearing date May 6th, 1904, and ask you
if those are the original Minutes of the Board
20 of Health? A. Yes, sir, those are the original
Minutes of the Board of Health as turned over
to me.

Q. And have since been in the possession of
the Board of Health? A. Yes, sir.

Mr. Reardon: I offer the Minutes of the
Board of Health, dated May 6th, 1904, in
evidence.

Marked Exhibit C-1

30 to show that the Board of Health of Jersey
It is admitted that the Minutes purport
City was organized pursuant to an Act of
the Legislature known as Chapter 189 of
the Laws of 1904, on May 6th, 1904.

No Cross-examination.

Thomas J. Steele—Direct

THOMAS J. STEELE, sworn:

Direct-examination by Mr. Reardon:

Q. You are an Inspector of the Board of Health of Jersey City? A. Yes, sir.

Q. And on the 12th day of April, 1916, did you visit the premises of John Hennessey, number 804 Newark Avenue, Jersey City? A. Yes, sir.

Q. Did you take a sample of milk from Mr. Hennessey's store? A. Yes, sir, I did. 10

Q. Did you take the sample known as Inspector No. 3479, Sample No. 1534? A. Yes, sir.

Q. After taking that sample what did you do?
A. I sealed both bottles up and put an inspection number and sample on. I took one bottle with me and I left the other bottle in the store of Mr. Hennessey.

Q. You sealed both bottles in the presence of Mr. Hennessey? A. Yes, sir. 20

Q. What did you do with the one you took with you? A. I took it to the laboratory for inspection.

Q. How did you take it there, sealed? A. Yes, sir.

Q. Did you put it in the container? A. Yes, sir.

Q. Describe the container. A. It is a leather valise with compartments, one pocket for each bottle. 30

Q. Did you put these bottles in the container with the necks up? A. Yes, sir.

Q. Did you deliver that bottle to the chemist?
A. Yes, sir.

Thomas J. Steele—Cross

CROSS-EXAMINATION by Mr. Morten:

Q. Mr. Steele, did you make a lactometer test prior to taking the sample of the milk? A. Yes, sir.

Q. Was there anybody present but you and Mr. Hennessey when the sample was taken? A. There were one or two people around there but I don't know if they took any particular interest or not.

Q. What did your lactometer reading show; do you remember? A. 1.12 in a temperature of 52.

Q. What would that make the lactometer reading at 60? A. At 60?

Q. Yes. A. That would make probably 1.06.

Q. 1.06? A. Yes, sir.

Q. Can you tell us how you arrive at that calculation? A. We take a point off for every degree below sixty.

Q. You take a point off for every degree below sixty? A. Yes, if the temperature is at sixty and the lactometer is at sixty, and the temperature is at ten below, say fifty, then we take four points for that.

Mr. Reardon: I object to this line of testimony and move that it be stricken out as immaterial.

Mr. Morten: It is immaterial whether it is stricken out or not.

The Court: Strike it out.

Q. Where did you take this milk from? A. A can.

Q. You say this milk was taken out of a can? A. Yes, sir.

Thomas J. Steele—Cross

Q. How much milk was there in the can that you took it out of? A. Twenty quarts.

Q. Was the milk stirred or not at the time you took the sample? A. We always stir it so as to get an equal amount of the contents of the can.

Q. You say when you took the sample in question that it was sealed similar to the sample, which is inspection number 3479, taken by you as Inspector? 10

Mr. Reardon: I object to that question.

Mr. Morten: I am asking him whether that is the way in which he sealed it.

The Court: He may answer the question.

A. That is the method we use in sealing.

Q. This sample which I now show to you is a bottle containing how many ounces of milk? A. About four.

Q. And through the neck of the bottle, there are drilled two holes? A. Yes, sir. 20

Q. And after the cork is inserted a wire is passed through the cork and sealed with a lead seal and a tag, reading "Department of health of Jersey City-dated-Inspection No.-Sample No.-Inspector-Witness-this specimen is then taken for analysis"; is that right? A. Yes, sir.

Q. There is no wax placed upon the top of the bottle? A. No, we don't do that.

Q. And the sample which you took in the case now being tried had no wax placed upon the neck of the bottle? A. No, sir. 30

Mr. Morten: I ask to have the bottle marked for the purpose of identification.

Thomas J. Steele—Cross

Mr. Reardon: I object; this sample is not the one on which we are trying this defendant and it is not material.

The Court: It may be marked.

Marked "D-1 for identification, W. B. R."

10 Q. Now, you say you took the sample and delivered it to whom? A. To Mr. Hennessey.

Q. One of them? A. Yes, sir.

Q. And to whom did you deliver the other sample? A. To Doctor von der Lieth.

Q. Both samples were identical, identical as to size and amount of milk placed in the bottle, and identical as to the manner in which they were sealed? A. Yes, sir.

Q. Now, who is Doctor von der Lieth? A. He is a chemist.

20 Q. A chemist where? A. He does all the chemical analyses of Jersey City.

Q. He is a chemist for who?

Mr. Reardon: I object to the question as immaterial.

The Court: The chemist is here?

Mr. Reardon: Yes, your Honor.

A. He is making chemical analyses for Jersey City now.

30 Q. He is not the chemist for the County of Hudson? A. He is the bacteriologist for the County and in chemistry also, I guess.

By Mr. Reardon: Now, Inspector, when you say that the sample was delivered to a chemist and it was sealed in a like manner, do you mean to say that it was sealed identically, or was that the method that you used? A. That was the method I used.

Tomas J. Steele—Cross

Q. You did not mean to say that from gazing at this sample that the sample in the case that we are now trying, was sealed identically in the same way? A. No, it is just the method I am talking about.

By Mr. Morten: Q: Do you know of any difference between sample 3479 and the Exhibit D-1 for identification? A. What do you mean? 10

Q. You have said that they are similar in method; now do you know of any different method? A. No, I do not know of any different method.

Q. So far as you know, you do not know of any different method in which these two bottles were sealed? A. No, sir.

Q. So far as you know this was the custom which you always followed, D-1 for identification and sample No. 3479 were identical, so far as you know now? A. Yes, sir. 20

Q. I show you a tag and ask you if that is the tag that you put on this sample which was delivered to this defendant? A. Yes, sir.

Q. Does that bear your handwriting? A. Yes, sir.

Mr. Morten: I ask to have that card marked for identification.

Marked D-2 for identification, W. B. R.

By Mr. Reardon: Q. Is this the case (showing witness a small valise) that you referred to in your testimony as having compartments in and in which you placed these samples? A. That is not the exact, same case, but it is made like that; it is identical with this case. 30

J. F. von der Lieth—Direct.

Q. You mean that that is not your personal case? A. No, sir, but it is identical with that.

Q. There are ten compartments here, in it. A. Yes, sir.

Mr. Reardon: I ask to have that valise marked for identification.

Marked C-1 for identification W. B. R.

10

JOHN F. VON DER LIETH, sworn:

Direct-examination by Mr. Reardon:

Q. Doctor, you are the person who makes the analysis of milk for Jersey City for the Health Department? A. I make the analysis for the Board of Health.

20 Q. I show you a card dated April 12th, 1916, inspection No. 3479, Sample No. 1534, containing under the heading—I show you this card and ask you if this your signature? A. Yes, sir.

Q. I ask you if the markings on this card, showing the analysis of this milk, was the result of ascertainment by you from a chemical analysis? A. Yes, sir.

Mr. Reardon: I offer the card in evidence.

30 Mr. Morten: I object on the ground that it is irrelevant and incompetent.

The Court: I will order it marked.

Mr. Morten: I ask an exception.

Card marked C-2 in evidence.

Q. Tell us what the result of your analysis was?

A. Water 18.57; 11.43 solids; 8.43 solids not fat.

J. F. von der Lieth—Cross

CROSS-EXAMINATION by Mr. Morten:

Q. You are not the City Chemist of Jersey City?

A. Yes, sir.

Q. Have you been appointed? A. I have been appointed temporarily by Mayor Fagan and Doctor Edsall.

Q. Were you ever appointed or not?

Mr. Reardon: We bring him here as the chemist who made the analysis for the Board of Health of Jersey City. 10

Q. You are not the City Bacteriologist either, of Jersey City, are you?

Mr. Reardon: I objected to that question.

The Court: I will sustain your objection.

Mr. Morten: I will call your Honor's attention to Section 10 of the Ordinance, if your Honor insists on overruling my question: it says "either the chemist or Bacteriologist must make the analysis" and I take an exception to your Honor's ruling. 20

Q. Were you ever appointed as the City Chemist by the Board of Health of Jersey City? A. I was requested by them, they asked me to be the Chemist.

Q. Did you ever receive a commission from Jersey City to act as the Chemist? A. A verbal commission, yes, sir.

Q. Did you ever get it from the Board of Commissioners of Jersey City? A. No, sir. 30

Q. Did you ever get it from the Board of Health, constituted by the various Commissioners appointed under the Walsh Act? A. I got it from Doctor Edsall; tell me who the Board of Health is and I will tell you.

J. F. von der Lieth—Cross

Q. Don't you know who the Board of Health is?

Mr. Reardon: I object to this line of examination; we all know that Doctor Stillman was the City Chemist and he died, and pending the appointment of a chemist for Jersey City, Doctor von der Lieth has been acting.

10

Q. I ask you if you ever received a commission, from either the Board of Health or the Commissioners appointing you either Bacteriologist or Chemist? A. I am telling you that Doctor Edsall—

Q. I want to know what about the Board of Health or the Commissioners of Jersey City? A. I asked you who the Board of Health is; no, Doctor Edsall told me in the presence of Mayor Fagan—

20

Q. And is he the only one that ever gave you any authority to analyze those samples? A. Those two gave me that authority.

Q. You mean Commissioner Fagan and Doctor Edsall? A. Yes, sir.

Q. Now, Doctor, how long have you been an analytical chemist?

Mr. Reardon: I object to that question.

The Court: I will allow it.

30

A. Well, for the past three years.

Q. And where did you graduate from? A. The Brown University.

Q. When? A. I received my Bachelor's Degree in 1912 and I received my Master's Degree in 1913.

J. F. von der Lieth—Cross

Q. I want to know when you graduated? A. In 1912.

Q. Did you take any further course outside of that? A. I pursued the work at Brown University.

Q. For how long? A. Up to 1915.

Q. Then you did not do any work except such work as you got with your course of study up to June, 1915? A. No, sir; while a student, I did outside work. 10

Q. That was while you were taking up your post-graduate work? A. Yes, sir.

Q. What kind of work did you do during the post graduate course? A. I was concerned in bacteria in water and milk.

Q. For whom did you do that work? A. For the Providence Board of Health under the supervision of Doctor Crossman and Doctor Chapin. 20

Q. You were there as assistant? A. Yes, sir.

Q. For how long did you do that work? A. I don't know exactly the time; two years, about.

Q. About two years? A. Yes, sir.

Q. And that carried you down to June, 1915? A. Yes, sir.

Q. And then what did you do? A. Why, from that time I took my own examination.

Q. I mean after you finished your graduation course in 1915? A. I accepted a position with Hudson County, as County Bacteriologist. 30

Q. And you are still that? A. Yes, I am still that.

Q. And that is the position that you hold now? A. Yes, sir.

J. F. von der Leith—Cross

Q. And you received your commission as County Bacteriologist? A. Yes, sir.

Q. How many samples have you analyzed, as near as you can tell us, officially for the Board of Health, of milk taken in Jersey City? A. I could not give you the number unless I look up the record.

10 Q. Well, five hundred? A. I would not say exactly.

Q. A thousand? A. No, I would not say a thousand.

Q. Well, approximately? A. Well, Mr. Steele can give you that information.

Q. Well, I want you to give it to me, approximately? A. Well I average about thirty or forty samples in a week.

Q. You think five hundred is a fair estimate?
20 A. I think a thousand would be nearer.

Q. Where did you conduct these analyses?
A. At the laboratory at the City Hospital.

Q. And how did you proceed to analyze this milk? A. As to what analysis?

Q. This sample No.3479. A. Remove the milk from the container and shake it so as to get a fair mixture.

Q. Did you examine the milk at all before you shook it up? A. Yes, sir.

30 Q. For what purpose? A. To see if there was a leak in the bottle, as a matter of protection.

Q. What difference would it make whether there was a leak in the bottle or not? A. There was a possibility of adulteration by water or something else getting in there.

J. F. von der Leith—Cross

Q. Then, one reason why the milk is sealed is to prevent any possible adulteration of the milk, until it is submitted for analysis; suppose the milk is exposed to the air, would it diminish the amount of solids? A. Evaporation would take place.

Q. You say if it is exposed to the air, evaporation will take place? A. Anything containing a 10 fatty substance will.

Q. And the idea of sealing it is to so seal it as to be airtight until it comes to you? A. Yes, sir, and to avoid adulteration and to keep the milk in the same condition.

Q. To keep the milk in the same condition as when it comes into you, and the only way to do that is to seal it airtight, isn't it? A. Yes, sir.

Q. And when the inspector brings this milk to you, do you see the case in which it is brought? 20 A. I see the valise, yes, sir.

Q. And that case has ice in it? A. Yes, sir.

Q. And those bottles are all securely packed in the ice when they are delivered to you? A. Yes, sir.

Q. And, of course, a certain part of that ice has melted at the time he brings the milk to you? A. Yes, sir; I suppose so.

Q. And if these bottles are not entirely sealed, the water might possibly get in? A. If there is an 30 opening it would.

Q. And as those bottles are brought to you there is a hole in them? A. Yes.

J. F. von der Leith—Cross

Q. And if those holes are not tight water would get in the milk? A. Yes, sir.

Q. And if water did get in the bottle, the milk would show it, and it would not be in the same condition as when the sample was taken? A. Yes, sir; but under those conditions I would not analyze that sample.

10 Q. If you knew that there had been any water in the bottle you would not analyze it? A. If on my examination of that bottle I thought there was a loss due to water or any other substance getting into the bottle, I would not examine it.

Q. How do you satisfy yourself? A. By turning it upside down.

Q. But if the bottle had been opened and the cork had been pressed in tight again, you would not know if it had been opened or not? A. If it
20 was a tight fit, no, sir.

Q. I show you this bottle, marked D-1 for identification and ask you whether you would examine that bottle if it had been submitted to you, whether you would analyze that bottle of milk if it had been submitted to you? A. No, sir.

Q. You would not? A. No, sir.

Q. That is due to the fact that the bottle will leak when it is turned upside down? A. That particular bottle, yes, sir.

30 Q. Now, I have pressed the cork in a little bit (illustrating), suppose it was in that condition, and it would not leak when you turned it upside down, then would you have no reason to refuse to analyze it in that condition? A. Yes, it still leaks.

J. F. von der Lieth—Cross

Q. Well, we will press the cork in a little bit tighter, does the bottle leak now? A. Yes, sir.

Q. Does it leak as much as it did before? A. I could not say that exactly.

Q. You think it does? A. I would not like to give an opinion on it in drops; it is leaking, and that is all I know about it.

Q. You think it is possible to put corks in bottles that are sealed in the manner that Exhibit D-1 is sealed so as to make them airtight? A. The bottles which I examined were tight. 10

Q. But whether they have been tight all the time until you examined them, you don't know? A. I accept the Inspector's word; I take his word that they are tight when he got them and they were tight when he gave them to me.

Q. Now, after you get the bottle first turned over to you, what do you do with it, the particular bottle? A. I break the seal and remove the cork, and turn that very amount of milk into a clean receptacle. 20

Q. You mean that you pour the contents of the bottle into a clean receptacle? A. Yes, sir.

Q. What kind of a receptacle? A. A beaker, and then pour from one beaker to another in order to get a homogeneous mass, that is a complete mixture of the milk.

Q. What do you do after that? A. After the milk has been shaken into a homogeneous mass, that is we get a homogeneous mixture of milk, then we proceed to determine the amount of fat in that milk. 30

J. F. von der Lieth—Cross

Q. We don't question the fat in this case; just proceed to tell us, or describe what you did? A. I always determine that by means of the Babcock method.

Q. Now tell us what that Babcock method is. A. It is a standard tube, Babcock tube.

10 Q. And what do you do; do you pour the milk into this tube? A. No, sir; that is the receptacle in which we put the milk.

Q. You leave the entire contents of this sample in this beaker? A. Yes, afterwards we have the homogeneous mixture we use a standard pipette which has been standardized by the United States Government; there is a seal on it when we buy it.

Q. What is the mark of that seal? A. I don't remember, still it is graduated to be the stamp of some laboratory.

20 Q. You take a standard pipette which is graduated to this particular mark of 17.6? A. Yes, sir.

Q. What does that mean? A. That means, if the glass is right, you have taken 17.6 of this homogeneous mass.

30 Q. Yes; what do you do with it; from that pipette you put this 17.6 cc. into a Babcock Tube, then we put in a nominal amount of sulphuric acid, after we get the mixture; we revolve that particular tube so as to get the homogeneous mixture and then after turning it around to get that mixture, I don't know how many times you do that, then we put that mixture into a standard centrifugal apparatus and revolve it there for three minutes and then we add hot water, and

J. F. von der Lieth—Cross

then we revolve the centrifugal apparatus again for a few minutes, which is graduated, I believe, it is in ten fractions, one, two, three and four and each point is divided into ten parts, do you know that, or do you think? A. When you say that you believe there are ten marks on that tube, I know it has ten marks, that particular one that I used had ten marks.

10

Q. Are you sure that the standard tube has ten marks? A. Yes, sir.

Q. What does the first mark mean? A. It begins after you get your zero.

Q. What is the next mark? A. You have got it on the scales.

Q. What does those little lines mean? A. One tenth percent.

Q. One tenth of what? A. On tenth of fat in this particular sample.

20

Q. What does it mean in the sample with sulphuric acid? A. It means that that much fat is present.

Q. Do you know what the line down at the bottom means? A. That is the graduation on that tube, which from the zero mark to the first line would represent one tenth of one percent butter fat.

Q. Suppose you add water in there, what would you get? A. You would not get any action.

30

Q. What does the mark at the top represent? A. One tenth percent; you have first to have your zero.

J. F. von der Lieth—Cross

Q. You do not know what these various marks mean on this tube? A. Milk and sulphuric acid.

Q. And you do know what they mean for anything else? A. No, sir; I do not.

Q. Supposing you take 18 cc. instead of 17.6, then what would you get? A. I would not follow out the standard procedure.

10 Q. The standard procedure is something that you have for the purpose of ascertaining the butter fat present?

Mr. Reardon: I object to that question.

A. (No answer.)

Q. You do not know anything about these tubes or the standard tests other than what you yourself have read about? A. Which I have read about and which I have followed from experience, and have been taught by people who are qualified to determine that particular matter.

20 Q. Where did you get this standard method from? A. I do not know where I got it from; I gained it by experience; I could not lay my fingers on, where.

Q. You, yourself, never tested one of these tubes to ascertain what it represented? A. No, sir.

Q. And you, yourself, have never tested the standard test to see whether it is a correct test or not, have you? A. No, sir.

30 Q. Now, when you talk about this tube, isn't it a flask that you mean? A. If you wish to call it such, yes, sir.

J. F. von der Lieth —Cross

Mr. Reardon: I would like to inquire from counsel whether this examination is in line of the Doctor's qualification or whether it is a question of his analysis.

Mr. Merten: It is a question of his analysis.

Mr. Reardon: I think the Court should be sufficiently satisfied without permitting this witness to be hackled any further; I have no objection to counsel asking him how he formed his analysis, but I have objection to his being hackled. 10

Q. Isn't that the recognized name for it? A. Yes, sir.

Q. And you have not got one of those flasks here with you? A. I have not, no.

Q. Have you one with you? A. No, sir.

Q. Can you make a diagram of it? A. Yes, sir; 20
but I am not very much of a draughtsman..

Q. Now, bearing in mind that we are speaking of these flasks, those marks that you speak of, are on the neck of the flask? A. Yes, sir.

Q. Now, you have ascertained your butter fat test with 17.6 cc. of the sample? A. Yes, sir.

Q. Do you know, yourself, why 17.6 cc. are taken? A. No.

Q. Do you know why the Babcock Flask is graduated as you have described it? A. Yes, sir. 30

Q. Why? A. Why we know from the principle, the man who devised this, that all milk would have a certain percentage of fat.

Q. Why is it graduated to one tenth of one per-

J. F. von der Leith—Cross

cent. A. That is the limit to be read, to allow that much reading.

Q. Now, on the reading, you take 17.6 cc.? A. Yes, sir.

Q. About what percentage was that of the sample? A. I don't know, exactly, about one tenth.

Q. Then, what did you do? A. After completing my centrifuging and adding my hot water, I have a reading.

Q. After completing your Babcock test then what did you do? A. I took my reading from the tube; assuming that we have the fat, we proceed to find out the total solids.

Q. And, tell us how you proceed to find out the total solids? A. Well, we have aluminum dishes at the laboratory which we use for the evaporation of the milk; we find out the known weight of that particular aluminum dish.

Q. First you weigh the dish? A. Yes, sir.

Q. And what is the dish known as? A. As the reading dish.

Q. How do you proceed to get this weight? A. By means of an analytical scale.

Q. Have you an analytical scale in your laboratory? A. Yes, sir.

Q. What kind? A. Armand.

Q. How sensitive is that scale? A. One thousandth of a milligram.

Q. Have you yourself ever tested that scale to know whether it is correct or not? A. Yes, sir.

Q. Do you want to tell us that the scale that you use is sensitive to a thousandth of a milli-

J. F. von der Leith—Cross

gram? A. Not a milligram, I mean a thousandth of a gram.

Q. Is it sensitive to a milligram? A. Yes, sir.

Q. Now, I ask you whether you had ever tested the scale yourself to see whether it was correct, and whether it was in proper condition? A. We have such a thing on that scale known as a balance or rider, and, of course, I always test the scale. 10

Q. Before making every analysis? A. Yes, before weighing any particular substance on that scale.

Q. Now, then, you take your scale and you adjust it by means of a rider, and by that, you mean, what? A. It is a balance which is pushed forward and backward in order to place the scale at an exact balance.

Q. Can you describe this balance? A. Why, the particulars of it are: You have a knife edge, 20 which acts as a fulcrum, and at the end of the fulcrum you have a pan to suspend it, and each one of these pans are used as a scale; your scale is balanced, you have a knife edge which acts as a fulcrum, and at the end of which you have a pan suspended on a piece of metal, and you weigh on the other side of that particular balance.

Q. What is this rider that you speak of, how big is it? A. It is a piece of platinum, I know it is platinum wire. 30

Q. You know that? A. Yes, sir.

Q. Can you handle it with your fingers? A. We generally handle that with brass forceps.

Q. Now, then, you weigh your dish, is that right? A. Yes, sir.

J. F. von der Leith—Cross

Q. How much did your dish weigh, in this instance, in this certain analysis? A. I cannot recall now.

Q. Does the record which you have produced here disclose it? A. No, sir; not this record.

Q. This record, then, that you have here, is not the original record that you made up? A. Yes, 10 sir; that is the calculation of the record.

Q. It is a calculation made up from the original record? A. I first calculate my records.

Q. This is a copy made up from your original calculation?

Mr. Reardon: I object to that question.

A. (No answer)

Q. Don't you first have to put the result of your calculation on the paper on which you calculate them? A. We use ordinary paper to make them.

20 Q. And after that you make up your calculations? A. Yes, sir.

Q. And then you transfer them to this record? A. Yes, sir; but that is only a part of my particular test.

Q. After you have made your original calculations you transfer the result of your original calculations to this record that you have produced here? A. No, sir, we cannot do it in that way.

30 Q. After you have made your original calculation by which you determine the amount of solids in this sample, you transfer that result, shown on your original calculations, that the solids in this milk were 11.59, did you not? A. You did not ask me that question before; you asked me the weight of the dish.

J. F. von der Lieth—Cross

Q. I want to know whether or not you made calculations to determine the amount of solids in this milk? A. Then you wish—You asked me the weight of the dish, that is as far as I can go into the technic.

Q. In determining the amount of total solids in this milk you have to make a calculation? A. Several calculations. 10

Q. And those calculations were made on some paper that you had there at the time? A. Yes, sir.

Q. And after you had arrived at, or reached the result of these several calculations, they disclosed that there was 11.43 total solids in this milk? A. Yes, sir.

Q. And then you put down this record which you have here? A. No, sir, I have a book in the Laboratory in which all the records are kept. 20

Q. And that is the original record? A. Yes, sir.

Q. And this here is merely a copy from your book in the laboratory? A. I have two copies, one stays in the laboratory and the other goes to the Board.

Q. This record that you have produced here does not contain the original calculation? A. The card does not, no, sir.

Q. Then it is not your original record showing your calculation? A. It is the result of my calculations put on that card. 30

Q. After you have obtained them on some other paper? A. Yes, sir.

J. F. von der Lieth—Cross

Q. You say that you weighed your dish in this scale? Yes, sir.

Q. Then what did you do? A. Then we took a certain quantity of the milk.

Q. How much, in this instance, did you take?

A. We determined that by weighing, I do not know, or I don't recall now.

10 Q. After you took this certain quantity, which you say you determined by weighing, what did you then do? A. I made a note of the weight of that quantity.

Q. And that is on the original record that you made, isn't it? A. Yes, sir.

Q. And then what did you do with the sample? A. I put the sample in the evaporating bath, which consists of having water underneath the bath, so you don't burn the particular sample.

20 Q. Is that all the bath consists of? A. It is just an ordinary bath.

Q. What do you mean by that? A. A water bath, it is an apparatus in which you heat water, and you put your sample on top and the water will evaporate from that particular water bath.

Q. And after you put in this water bath, you say you evaporate the water in the milk that you have taken a sample of? A. Yes, sir.

30 Q. Then what do you do? A. Put it in a drying oven, it is made of copper; it is a utensil used for that purpose and the interior is dry and you raise your temperature to 100 cc.

Q. How long does it take to evaporate this water? A. We generally take one or two hours.

J. F. von der Lieth—Cross

Q. And these water baths that you had, are they all exactly alike? A. There is one bath known as a vapor bath, and the other is a drying bath, two different utensils.

Q. You have one water bath in which you put the milk, and evaporate the water from it? A. Yes, sir.

Q. And then you have one drying oven? A. 10
Yes, sir.

Q. And you say that you had it two hours in the water bath? A. Yes, and about two hours in the drying oven.

Q. How big is this bath you speak of, this water bath? A. I should judge two by four feet, that is the surface area.

Q. After you have it in the oven two hours what do you do? A. We immediately remove it to a desiccator. 20

Q. What is a desiccator? A. It is an apparatus that we use, it consists of a jar and a cover.

Q. How long do you keep the sample in the desiccator? A. About an hour or two, I don't know exactly.

Q. How big is this desiccator that you speak of? A. Well, the diameter is about seventeen or eighteen inches.

Q. It is round? A. Yes, it is an apparatus, I could not tell you exactly how large. 30

Q. Do you have it in there for an hour, did you say? A. About an hour.

Q. Then what do you do? A. I take the weight.

Q. How do you weigh it? A. On the same scale which I have described before.

Q. You have said that you do not know how

J. F. von der Lieth—Cross

much milk you took in this instance? A. Yes, sir.

Q. Can you approximate it? A. I think it was five grams, that would be approximately, I don't know exactly.

Q. How far did you carry out your calculations in decimals, as to the weight? A. Three places.

10 Q. Three places? A. Yes, sir.

Q. In the weight of the milk and the dishes and the residue that is left, how far do you carry out your calculations, how many places, about? A. Three places.

Q. When you say three places, you mean a milligram, don't you? A. Yes, sir.

Q. How many tests did you make of this sample 3479, one? A. Two tests.

Q. You made two tests? A. Yes, sir.

20 Q. Are you sure that you made two tests of this particular sample? A. It is a matter of routine; all samples that are put on test are proven and we make another test.

Q. How long does it take to make the second test? A. About two hours.

Q. Did you make the second test as you made the first test in this particular instance? A. Yes, sir.

30 Q. How many samples did you analyze that day? A. I don't know.

Q. You have not your records here, but you have records which disclose the result of your second test also? A. Yes, sir.

Q. But you have not those records here, neither? A. No, sir.

J. F. von der Lieth—Cross

Q. Then you cannot tell us what these two tests disclose? A. No, sir.

Q. Was this milk sweet when you examined it? A. I did not taste the milk.

Q. You do not know whether the milk that you analyzed was sweet or sour, do you? A. No, sir.

Q. Do you know what the term "sweet" means when it is applied to milk? A. I believe it is—the decomposition that has taken place in the milk. 10

Q. You did not know this in this sample of milk? A. No, sir.

Q. If this milk becomes sour, can you analyze it and determine the amount of solids that was in that milk before it was sour? A. No, sir.

Q. When milk becomes sour a chemical decomposition takes place by which the total amount of solids is decreased, isn't it? A. The character of the solids is decreased. 20

Q. And you cannot determine the total amount of solids that existed before in it, before it became sour? A. If the milk is sweet?

Q. If I should give you a sample of sour milk at this moment and ask you to analyze it, you could not analyze that sample accurately and determine the total amount of solids present at the time that the milk was sweet? A. I do not know; I assume that it was the same sample. 30

Q. What do you mean by that? A. If the sample is given? I never tried that.

Q. Then you do not know whether it is a fact if milk becomes sour it destroys the total amount of solids in that milk or not? A. No, I do not know.

Thomas J. Steele—Re-direct

RE-DIRECT-EXAMINATION by Mr. Reardon:

Q. Now, Doctor, these cabinets that you referred to here, the bottles are put in, of course, with the necks up, and in order for any ice to get in any of these holes, that Mr. Morten has referred to, the ice would have to be over the neck of the
10 bottle?

Mr. Morten: I object to that question as leading.

Mr. Reardon: I will reframe the question.

Q. Doctor, I show you this sample with a bottle in it, neck up, and ask you, in order for any water leaking from ice to get into that bottle, how much ice in your judgment would be necessary to be in this case? A. To approximately the
20 surface of that hole.

Q. You would have to pack it from the bottom of the case up to the neck of the bottle? A. Yes, sir.

THOMAS J. STEELE, re-called:

Direct-Examination by Mr. Reardon:

30 Q. Inspector, when you took these samples of milk, as soon as you sealed them, will you indicate for the Court, what manner you placed them in that satchel? A. That way (illustrating).

Q. Now, assuming that you did pack ice into this case, how much ice and how far, as indicated on this bottle, would you pack the ice?

Thomas J. Steele—Cross

Mr. Morten: I object to that question as immaterial and irrelevant.

Q. In this particular case, did you put any ice in the bag? A. No, sir, it was not necessary.

Q. Was there any ice in that case at all that day? A. No, sir.

Q. If you were putting ice in the case, how much ice would you put in? 10

Mr. Morten: I object to that question as immaterial and irrelevant.

Mr. Reardon: I will withdraw the question.

Q. Now, Inspector, about what time in the day did you collect this sample? A. Why, possibly that particular sample, I collected between eleven and twelve o'clock, as I remember it.

Q. And what time did you deliver it to the laboratory? A. Immediately. 20

Q. Immediately after you made this sample up you took it right to the laboratory? A. Yes, sir.

CROSS-EXAMINATION by Mr. Morten:

Q. Is that the last sample that you took that day? A. Yes, that day.

Q. Where did you take it from; where was the milk when you took it? A. Eight hundred four Newark Avenue.

Q. Where is the laboratory? A. On Baldwin 30 Avenue.

Q. And how far from the laboratory is it to 804 Newark Avenue? A. About fifteen minutes, I can walk it in that time.

Thomas J. Steele—Cross

Q. Eight hundred four Newark Avenue is near where? A. Near Germania Avenue.

Q. How many blocks is from there up to the Five Corners? A. About four blocks, I guess.

Q. How many blocks from the Five Corners is it over to the City Hall? A. I don't know, I never counted them, I didn't take that much interest in it.

Q. But you think you could walk from there to the City Hospital in fifteen minutes? A. Yes, but I didn't walk it, I rode.

Q. Now, you are sure that you did not have any ice in this grip on this day? A. Positive.

Q. Did you have any ice in the grip the next day when you took samples. A. No, sir.

Q. Did you have any ice in the grip when you were taking other samples? A. Not yet; I have not taken any only on the days when it has been warm.

Mr. Reardon: Your Honor, that is our case, and I offer the certified copy of the Ordinance in evidence.

Mr. Morten: I move to strike out all the evidence of Doctor von der Leith, on the ground that it is immaterial and irrelevant, because of the fact that he has not produced his original records, and he testified, on direct-examination, that that was his record, and now it appears that it is not, and that his record is at the laboratory.

The Court: I will deny the motion.

Mr. Morten: I ask an exception to Your Honor's ruling.

Certified copy of Ordinance marked Exhibit C-3.

Argument

Mr. Morten: I move to have the proceedings dismissed on the ground that the requirements of the ordinance have not been complied with; that the sample has not been submitted to the City Chemist or the City Bacteriologist, and there is no authority on the part of Doctor von der Leith to examine the milk. 10

The Court: I will deny the motion.

Mr. Morten: I further move that the proceedings be dismissed on the ground that the Board of Health has no authority to enact the Ordinance in question, a certified copy of which has been offered in evidence.

Mr. Reardon: In answer to that I submit that the Statute of 1904, Chapter 187, Section 4, under which the Board of Health of Jersey City is governed, which section reads as follows: (Reading section 4, Chapter 189,) and that the Court should take judicial notice of that Statute. 20

Mr. Morten: My reply to that is that the state since the passage of that Ordinance, and under the Act of 1911 has adopted a Pure Food Law and has prescribed the manner in which violations of the Pure Food Law shall be dealt with, that actions must be brought in the District Court, and that even if the Board of Health has power to enact ordinances relative to health, it has no power to enact ordinances, prescribing the standard of pure food, and under 30

Benjamin Jurist—Direct

that Ordinance relating to public health, it cannot enact what shall be the standard for purity of food.

10 Mr. Reardon: My answer to that is, even without the Statute of 1904 being on the books, that the City under its general by-laws has the inherent right to pass any ordinances affecting the health of the community.

The Court: I will deny the motion.

Mr. Morten: I ask an exception.

 BENJAMIN JURIST, sworn:

Direct-Examination by Mr. Morten:

20 Q. Where do you reside? A. No. 2929 West Thirty-second Street, Brooklyn.

Q. What is your profession? A. Chemist.

Q. How long have you been in that profession?
A. Thirteen or fourteen years.

Q. Are you a graduate of any institution? A. I am.

Q. What institution? A. Cooper Union, New York City.

30 Q. Have you had any experience in analyzing milk? A. I have.

Q. For how long? A. That length of years that I have testified to as having been a chemist.

Q. Have you ever analyzed any milk? A. I have.

Benjamin Jurist—Direct

Q. About how many thousand? A. A good many thousand.

Q. More than five thousand? A. Yes, sir.

Q. Where are you located? A. Nineteen Park Place, New York City.

Q. And for whom have you examined samples of milk? A. For the milk trade; I might also say that I examined samples of milk while I was connected with the Department of Health of New York City. 10

Q. For how long? A. Five years, and I was also assistant in the milk laboratory and I have been a director of a number of milk dealer associations.

Mr. Reardon: I will admit the Doctor's qualifications.

Q. Did you examine sample number 3479, taken by Inspector Steele of the Jersey City Board of Health, on April 12th, 1916? A. Yes, sir. 20

Q. In what condition was the seal on the bottle when you received it? A. The seal was intact.

Q. Do you recall whether or not the bottle was air-tight? A. Well, I doubt very much if I ever received a duplicate sample from any dealer in Jersey City, or vicinity, which might be termed air-tight.

Q. Is this sample which has been marked D-1 for identification air-tight? A. No, sir. 30

Q. Is it possible, with a bottle sealed in the manner in which this D-1 for identification is sealed, namely, by placing a cork in the neck of the bottle and running a wire through the neck of the bottle, and then sealing the cork with a lead seal, is it

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possible that it would be airtight? A. It is not probable.

Q. Is it the proper way to seal milk? A. No, sir.

Q. How should it be sealed? A. It should be sealed with **wax**.

Q. How? A. Covering the top and the entire neck of the bottle.

10 Q. You examined this sample when it was given to you? A. I did.

Q. Have you your original record showing the result of that analysis? A. Yes, sir.

Q. How much water did you find in the milk? A. Eighty-eight and Forty-one one hundreds.

Q. How much butter fat? A. Three and ten one hundreds.

Q. How much total solids? A. Eleven and fifty-nine one hundreds.

20 Q. How much solids, not fat? A. Eight and forty-nine one hundreds.

Q. How many teste did you make? A. We made two tests; that is, we made the tests in duplicate of that sample.

Q. At the same time? A. Yes, sir; at the same time.

Q. Have you the result of the tests made by you? A. I have.

30 Q. What does the second show regarding total solids? A. The second showed 11.59 and the first test 11.586.

Q. That is stated at 11.59? A. Yes, sir.

Q. Is that a variation that is permitted in chemical analyses? A. Why, certainly it is.

Benjamin Jurist—Direct

Q. Would the fact that this analysis differed to the extent that you have indicated be regarded as placing any inaccuracy upon the analysis? A. Not at all, on the contrary it would show that the work was done correctly; the difference there, if you notice, is only six thousandths of one percent, due to equations and so forth.

Q. If milk is exposed to the air what effect will it have on the solids present, will it cause them to decrease or increase? A. The total solids in milk exposed to the air will become decreased if the temperature is high, due to the fact that the bacteria in the air and in the milk act upon the milk sugar. 10

Q. And if the sample of milk is sour when it is presented for analysis, is it possible to analyze that sample and to determine from that analysis the total amount of solids in the milk at the time it was sweet? A. No, sir. 20

Q. If a sample is sealed like D-1 for identification and it should come in contact with water, what effect would it have upon the determination of total solids at the time when the sample was taken?

Mr. Reardon: I object to that question on the ground that it is highly immaterial.

A. If the sample was brought in contact with water, the contents would naturally become diluted and the total solids would naturally become decreased and have a lower percentage than we would find in normal milk. 30

Q. Would it give a fair analysis of the milk at the time the sample was taken? A. Oh, no.

Benjamin Jurist—Cross

CROSS-EXAMINATION by Mr. Reardon:

Q. Doctor, do you mean to say that the same temperature and the possibility of the milk not being air tight, without any additional contamination would cause a chemical change in the milk?

A. Why, certainly, it would.

10 Q. Will you explain how this is from a bacteriological standpoint; what temperature would you say would be necessary to accomplish that condition? A. Any temperature over sixty, the higher the temperature the more rapid the decomposition.

Q. How long would it take for that change to set in? A. That depends on the condition of the milk and the temperature at which it is kept.

20 Q. Would you say that that would happen in an hour? A. Oh, yes, it could, if the temperature was seventy degrees.

Q. And the temperature would have to be about what? A. About seventy degrees.

Q. Now you say that the probability is great where the bottle would not be air tight, that the substance would change the solids? A. Certainly, by the action of the bacteria upon the milk sugar you must remember that there are bacteria present in milk as well as in air.

30 Q. You are speaking from a bacteriological standpoint? A. Yes, sir, because it is first converted into another chemical substance which is called lactic acid, now this lactic acid has a lower weight than the milk sugar present in the milk, because of the alkali and carbonate of soda have given up the gases conse-

Benjamin Jurist—Cross

quently if we take any of the total solids that we have, we take some of the milk sugar from the milk solids in the milk and there would be a decrease.

Q. Would you say that that condition could come in a bottle sealed as D-1 is sealed? For instance, would you say that that condition of change that you have just described, could have taken place between the time that the sample was collected and the time that it was delivered to you? A. Oh, yes, it could; there is no doubt of it. 10

Q. Without knowing what temperature the milk was kept in? A. Yes, sir.

Q. Isn't it a fact that the temperature is a vital element in determining that? A. It has a vital and important effect.

Q. And in order to determine it you have to know the temperature at which the milk is kept? A. Not at all. 20

Q. How would you determine it? A. By the total weight, we don't care for the temperature.

Q. You just said it was a vital element. A. Yes, in the decomposition in the chemical change.

Q. Do I understand you that the decomposition is the splitting up, whether it is bacteriological splitting or the chemical splitting; could that take place in a sample like bottle D-1 is sealed; could you tell that without knowing the temperature? 30

A. Why, certainly; you can tell it in a number of ways, in the first place by using your eyesight, if that has developed to any great extent, when that sample was brought into the laboratory I

Benjamin Jurist—Cross

would notice that the sample was sour; another way to tell is taste and smell, and the most important way to determine it is by chemical action, the total solids.

Q. Now, then, taking a sample sealed as that one was sealed, and brought to you in an absolute air-tight condition, would you be aware of the probability, and as you have testified, the reason for the change taking place in the milk? A. No, you don't understand my answer.

Q. Well, what is that? A. When that sample is taken and it is brought to the laboratory, if that sample is not thoroughly iced during the transit, the greater will be the decomposition; now if this milk were carted around and the temperature were high, in all probability by the time the inspector reaches the laboratory, if the sample is not iced, that sample will be sour: if that sample is iced that action will take place, but it will take place to a smaller or lower degree.

Q. Now, I understand your answer perfectly. What you say then, is this, that the change does occur, that we have discovered would be likely to take place where the Inspector sealed the sample similar to that in which D-1 is sealed, in the same manner, and brought within fifteen minutes or a half an hour to the laboratory? A. No, there would be no change apparent to the naked eye.

Q. And that is also true, in view of the fact, that the bottle might not be absolutely airtight? A. Yes, sir.

Q. You say that the only way that milk can be airtight is to have a wax seal over the top of the bottle? A. That is the proper way.

Benjamin Jurist—Cross

Q. Are there any other ways? A. Yes, sir.

Q. How? A. You may place the milk in a bottle with no holes in the neck and take a cork and force it down in the neck of the bottle; another way is to take a blank substance and cover the entire top of the bottle.

Q. You say where you have a bottle with holes in the neck such as are in Exhibit D-1, with the cork put in tightly, that that would not be airtight? 10

A. No, the bottom of that cork does not cover the holes.

Q. Well, now, this is just what I want to get at; whether the cork protruded far enough into the neck of the bottle to cover the neck? A. Exactly.

Q. Did you examine the bottle in this case in order to determine whether or not the cork protruded alongside and passed the holes in the neck of the bottles? A. I did. 20

Q. And what did you find? A. I found in this particular case that there was apparently no leakage.

Q. So that with that conclusion then, it would be that it was airtight? A. Practically.

Q. Well, practically as far as determinable by the naked eye? A. Yes, sir.

Q. So that as far as you could see it was practically airtight? A. Yes, sir.

Q. Now, then, will you tell us what method 30
you pursued in the chemical analysis of this milk; first of all let me ask you, did I understand you to say you are a graduate of Cooper Union? A.
I am.

Benjamin Jurist—Cross

Q. What year did you graduate? A. 1903.

Q. Day or evening course? A. I took both the day and night courses.

Q. Did you ever hear of Professor Russeau of Harvard University? A. I did not.

Q. Did you ever hear of the Russeau Standard Method of milk analysis? A. Might I suggest
10 that you spell the name?

Q. R-u-s-s-e-a-u. A. No, sir, I never heard of it.

Q. What standard analysis of milk have you heard? A. Do you want me to answer that question?

Q. I want you to tell me whether there are any standard methods? A. There are.

Q. What standard methods are there? A. There is the method of the United States
20 Bureau of Agriculture, the official method, which is the method I have used, there is also the method of the Public Health Association, which is identical with the Agriculture Department, there is also the method of the Department of Health of New York City.

Q. And isn't that a steal from the New York stadard method? A. They are all essentially the same.

Q. These three are essentially the same? A.
30 Yes, sir. Now, the method which I have used is this: for total solids five grains of the thoroughly mixed milk which was taken for examination.

Q. Doctor, is that weighed right away; did you take that out of the bottle and weigh it from the bottle, did you get this homogeneous mixture first?

Benjamin Jurist—Cross

A. We took five grams of this thoroughly mixed milk which is mixed by pouring the milk into another receptacle, now, the milk is poured back from this beaker into the mixer until we get a mixture and are sure of getting a mixture; a fair homogeneous mixture as it is called; then by means of the pipette we weigh it correctly on an analytical scale, the particular scale which I used is sensitive to one tenth of a milligram, that is one ten thousandth of a gram. 10

Q. That has a difference of ten thousandths between the one that Doctor von der Lieth uses?

A. It is ten times more delicate. Now, then, after weighing off five grams of this mixture in a weigh dish—

Q. What is the composition of the dish? A. It is a tin the same as is used in the Department of Health of the City of New York, and this dish with its contents is then placed upon a water bath this water bath is nothing else than a covered vessel, either rectangular or circular, which holds water and is covered that way, you might say, with a perforated cover, the openings on top are about a quarter of an inch smaller than the dish the dish is placed upon a filter paper over this opening and the water bath is then heated, and this dish, with its contents, is kept on this water bath for two or three hours, this is called an evaporation of no particular substance, the chemical term is ; after it has been allowed to stand upon the water bath for the time I have specified it is then taken up and 20 30

Benjamin Jurist—Cross

the bottom of the dish wiped with filter paper and transferred to the water oven, which your chemist calls a drying oven, this is nothing but one vessel inside of another; the reason the water bath is used is to take off any water there may be.

10 Q. This water oven that you speak of, what is the purpose of putting this dish into water?

A. The condensing of any water from the steam.

Q. In other words it is for the purpose of being dried? A. It has already been dried in the water oven.

Q. You have already evaporated it in the evaporating bath and you now put it in the water oven? A. Yes, sir.

20 Q. And this water oven is for the purpose of condensing? A. No, it is to dry off the water, a condenser, that is the water bath gives off some steam: this steam has a tendency to stick to the side of the vessel, and in order to be sure that all the water is off the side of the vessel.

Q. That is what we call a drying oven? A. Yes, I told you that the scientific term is a water oven, and after it has been allowed to remain in this water oven for a few hours it is taken out and transferred to the desiccator; the object of transferring it to a desiccator—

30 Q. I just want to know the process. A. The object is to permit of the drying of the solids in a dry atmosphere. After it has been allowed to stand in the desiccator it is rapidly taken out and put on the balance, now, the weight of the dish plus the residue, plus the make the total solids.

Benjamin Jurist—Cross

Q. Now, Doctor, have you got your original records here? A. I have.

Q. Will you let me see them? A. Yes, sir, here they are.

Q. So that this is the record upon which you determined the weight of the dish? A. Yes.

Q. And the method of calculation which you have just gone through? A. Yes, sir.

Q. That is the way that you ascertain the total solids? A. No, not at all. 10

Q. Well, what does? A. We then, after weighing it up, we note the weight of the dish and then put it back in the drying oven for a further period of half an hour.

Q. Why? A. After allowing it to remain in that for half an hour, it is then taken out and laid on the desiccator, and weighed up again. The reason for that is to determine whether all of the water has been driven off from the milk, and that is determined if the weight is constant. 20

Q. After it comes out of the desiccator you first check up this work by the same process again? A. Yes, sir.

Q. That is merely done to verify the first drying process? A. Yes, sir; that is to tell us the total solids.

Q. Now, before you go into that, can you tell me at this time, with the exception of the technical terms or technical names, is there any distinction between the process used by you and that enumerated by Doctor von der Lieth? A. Yes, sir; there is a great distinction. 30

Q. What is it? A. First, in the method of weighing.

Benjamin Jurist—Cross

Q. That is the weighing? A. That is most important, for without a correct weight there is no reason for making an analysis.

Q. Only because your scale takes a greater per cent? A. Yes, that is one reason.

10 Q. And isn't it a fact that such a sensitive scale as you have and as Dr. von der Lieth has are sensitive to touch? A. Why all things are sensitive to touch.

Q. Do you mean to say that a scale which will weigh ten times less than the one Dr. von der Lieth uses, would be less than the one he mentions? A. Why, yes, sir.

Q. Less sensitive? A. Yes, sir.

20 Q. Will you explain that to me? A. Yes, in my laboratory I have a scale which is sensitive to less than one milligram; now, with that balance we weigh other samples of cream for the Babcock test and we have got to be very careful not to touch the beams, because there are no resting parts of the beams; whereas the balance which I use in my work is so constructed that this beam never rests on the knife edge, which acts as a fulcrum, but rests on its two sides, and it is what we call a three-support scale.

Q. Isn't that just identical with what Dr. von der Lieth testified to? A. No, sir.

30 Q. What is a rider used for? A. A rider is used as a weight, the smaller weights, that is the weights which represent one thousandths of a gram are too small and too thin and are too delicate to hold in the balance forceps, so in doing away with the smaller weights we use this rider

Benjamin Jurist—Cross

on the graduated beam, and we use this rider to go back and forth on this beam instead of the small milligram weights; as a matter of fact it is this beam which is graduated into certain divisions which gives us the delicacy which we have in our tests here.

Q. Will you tell us just what difference mathematically would occur from the sensitiveness on the seal which you have described and the scale which Dr. von der Lieth has described? A. Why the difference mathematically would be ten times with my scale; my scale would be ten times more accurate than his. 10

Q. Ten times more accurate as to weight? A. Yes, sir.

Q. Then you can measure ten times less with his scale than he can with yours? A. No, I do not understand your question. 20

Q. Well, your scale will measure ten times finer in weight, an article ten times finer in weight than Dr. von der Lieth's? A. That is true.

Q. Now, isn't it simply a mechanical graduation of scales? A. It is; well, I might say yes to that question, and then add on, that the greater the weight, that is the finer the weight, the more accurate would be our results; therefore when we weigh to the fourth decimal place of a milligram, that stands to reason that our results would come out closer to the true weight of the total solids in the milk by the use of our balance than I would get by the use of the balance that has been testified to. 30

Benjamin Jurist—Cross

Q. Describe that, please. A. I will give you an illustration; we have taken a sample of milk and we then find that the dish weighed 7.99 grams, then weighing it up again we find that the total solids in the milk and the dish to be 8.533.

Q. A difference between the two would be the weight of the total solids? A. Yes, sir.

10 Q. Now, if we were to take the same figures and add on to them ten or one point, because yours is more sensitive, you would have a difference of one milligram in the way of total solids; that would be in the fourth place? A. That would be in the third place in your case.

Q. Then, proportionately, the result would be the same? A. No, it won't. If we take the ordinary grocer's scale and we had a pound of anything, we will say that we cannot get any finer than that; now, that will not be as sensitive a
20 scale, that would give you the pounds and ounces, while there is the same percentage between my scale and that scale.

Q. That would only make you define more accurately the percentage? A. Well, it is the percentage that we have in this particular case.

Q. But proportionately there would not be any difference, that is to say if you take this pound weight, as an example, in a grocery store, and take any shop scale in a butcher store, and weigh something on them, you would get a pound weight in either case? A. Well, now, that depends on
30 the scale, not unless both scales were identical. If we weigh a pound of sugar on the ordinary grocery scale and he calls on you for a pound,

Benjamin Jurist—Cross

you take it and call it a pound, roughly; but if you want to know the true weight, you take it in to another man and he has a finer scale, and he says that weighs one pound and something.

Q. Now, then, the point I want to bring out is, what is the difference between this scale that weighs one, and your scale that weighs ten, if you have a sample identical? A. How are we going to determine the quantity of the goods before we weigh them? If a pound of sugar weighs exactly one pound on the chemical balance, then I would say, Mr. Grocer or Mr. Butcher, your scale is correct. 10

Q. Well, your scale may be susceptible of weighing less in degrees than Doctor von der Lieth's, now, would you say that if you took five grams accurately that there would be any material difference? A. If we each took five grams accurately why we would each have five grams; the question is how are you going to determine whether we each took five grams. 20

Q. Then, in that case, you would be measuring, so to speak, ten times closer than Doctor von der Lieth? A. Yes, sir.

Q. So in Doctor von der Lieth's case you would have an advantage of ten in weight? A. I would not say whether it was an advantage or a disadvantage. 30

Q. You said that yours was ten times more accurate? A. Yes, ten times more accurate.

Q. And sensitive? A. Yes, sir.

Q. And then if yours is ten times more accu-

Benjamin Jurist—Cross

rate and sensitive than Doctor von der Lieth's then he has given you the advantage often? A. I would not say that he was giving us as many as ten.

Q. The scale may be out of adjustment? A. I won't say that.

10 Q. What will you say? A. His scale may be in adjustment.

Q. And still give you the ten? A. Yes, sir.

Q. How? A. By the fact that he does not weigh off the same point that I do.

Q. He is giving you that much now? A. No, he is not.

Q. If your scale weighs ten times more accurate than his does? A. No, you don't use the word accuracy in the right sense, the way we get that is that our balance is correct.

20 Q. It is ten times more accurate than Doctor von der Lieth's? A. Yes, sir.

Q. So that if you took five grams and Dr. von der Lieth measured five grams on your scale, that is to say, take it this way; you take and measure five grams on your scale and Doctor von der Lieth does the same on his scale, allowing for the net loss in change, if the weight is identical, five grams on your scale, it would then say five grams and ten milligrams? A. No, sir.

30 Q. What would it say? A. It would show on my scale the true weight, whether it is plus or minus.

Q. If your scale measures ten times greater then, if he had five grams accurately, of course,

Benjamin Jurist—Cross

there would only be five grams on your scale?

A. If we were taking this as a hypothetical question; if his scale was adjusted to correspond to my scale then if he weighed off anything then his scale would correspond to my weight up to the third place.

Q. Now then, it simmers itself down to the identity of his scale to the adjustment of your scale up to the third place? A. Yes sir. 10

Q. He has gone up to the third place on his scale? A. Yes, sir.

Q. Now, Doctor, let us have your analysis as to the fat? A. The fat is determined by two methods.

Q. The way he did it? A. The fat is determined by two methods, both official and standard, one is what we call the volumetric method and the other the gravimetric method, meaning volume first and the other by weight. 20

Q. Now, then, the volumetric, which method did you use in this sample? A. I used the two methods. The volumeric method is called and known as the Babcock machine method.

Q. What kind of a machine is that? A. The Babcock Centrifugal Machine. Now, then, a certain volume of milk, determined by the standard pipette, holding 17.06 cc. is transferred to a flask known as the Babcock milk bottle or flask, an equal volume of sulphuric acid, of a specific gravity of 1.81 is then added to the milk, the total is then shaken to insure a solution of everything in that milk by the sulphuric acid that is shown by the milk, then the milk is churned and 30

Benjamin Jurist—Cross

becomes yellow and brown and gradually black; it is then placed in this centrifugal machine and whirled for five minutes, at the expiration of this time—I might state that the number of revolutions in which it is whirled in the machines that are used in our laboratory is nine hundred to a thousand revolutions per minute for that particular type of machine—it is whirled at that rate for five minutes, at the expiration of that time hot water is added to this mixture in the bottle, and until the water reaches the neck of the flask, to within one inch of the top, it is then whirled for a further period of two minutes, at the expiration of that time, the flask is taken out and the reading noted on the scale, of the the neck of this bottle; this reading gives you the correct percentage of fat in that sample of milk.

10
20 Q. Now, Doctor, is there any material difference in the process used by you and that described by Doctor Von der Leith in the ascertaining of this fat? A. There is, in that he whirls his mixture three minutes instead of five.

Q. What would the effect of that be? A. That he would not get a true reading of the fat, because the whirling for that time would send all the fat into the neck of the machine, and we get what is termed a kinetic reading, that is a fat reading, and it gives you a higher percentage of fat.

30 Q. Where the revolutionary force was either too small or too great? A. Yes, sir.

Q. Now, the specific gravity of this sulphuric acid that you use in this test you say, the average

Benjamin Jurist—Cross

specific gravity is 1.81? A. Yes, sir; which I use in the laboratory, which is called for by the standard methods.

Q. What do you mean by the standard methods?

A. The government methods.

Q. Now, aside from those criticisms that you have offered as to the three and five minutes, the method especially employed by you is what is known as the agricultural standard method? A. No, it is known as the Babcock method. 10

Q. As to the solids? A. Yes, sir.

Q. And it is the method endorsed and advised by the agricultural Department of the United States? A. Yes, the Bureau of Chemistry.

Q. And that is what you refer to as the State Standard Method, is it not? A. One of the standard methods.

Q. Now, then, taking it step by step, allowing for the difference, as to our workings, the principle, I am not talking about the mathematical calculation, the principle employed by Doctor Von der Leith step by step is identical to yours? A. The principle? 20

Q. Yes, the principle. A. What would you say of that fact that he whirled his machine for three minutes?

Q. No, I say the fact that he took the dish and placed it on the bath and then put it in the centrifugal machine and whirled it for three minutes, what I call the principal step, now I ask is there any difference in the principal step? A. There is a difference in the technique. 30

Benjamin Jurist—Cross

Q. In other words the standard is the same? A. No, sir; I won't say that; whether an operator runs a Babcock test or whether a chemist runs a Babcock test.

Q. You distinguish between the standard itself and the operation of the standard by the operator? A. Yes, sir.

10 Q. Now, I ask you how you distinguish, leaving out the operation of the operator as a method of procedure, as defined and laid out, the steps taken assuming that they are taken, in exact accord with your testimony, as to time, as he has testified to, would you consider that a standard test? A. I would not term it as a standard test, whatever; the principle in this matter is evaporation.

20 Q. I am asking you to tell me whether or not the rules which he followed, no matter how he followed the rules which he followed, are the standard rules?

Mr. Morten: I object to that question on the ground that it is immaterial, we object to any method that will not disclose the true quantities of solids in the milk when the tests are being made.

30 Mr. Reardon: The point I want to get at is whether the rule, if properly followed, is a standard test.

By Mr. Morten: Q. There is only one way to get solids, and that way is to evaporate your solids test? A. There is no other way.—

Mr. Reardon: I object to that.

The Court: The question is allowed.

Benjamin Jurist—Cross

A. (Continuing) I would say that in principle but not in method, in technique it is the same method that I use.

By Mr. Reardon: Q. Now then, as to the technique it is a difference of opinion as to your method of operation and his method of operation; is that true? A. It is a difference of fact.

Q. Of fact determined by you? A. The fact as determined by the analysis I have made and the analysis as made by your chemist. 10

Q. And it is a question of wisdom and judgment, in your analysis and in Doctor Von der Leith's? A. No, sir, his case is not my case, I think you would be justified in putting in technique.

Q. But outside of your peculiarly wonderful technique would you say that it is only a question of judgment as between the two methods? 20
No, it is a question of technique, pure and simple.

Q. Now, Doctor, your total solids are shown to be 11.43,—right? A. Oh, no, 11. 59.

Q. And ours show 11.43? A. Yes, sir.

Q. Now, Doctor after hearing the testimony of Doctor Von der Leith as to the method he pursued, and with your particular knowledge of technique will you tell us how you come to account for that difference? A. In two ways, first, the method, the sample. 30

Q. What do you mean by that? A. I mean in which the sample was taken.

Q. Well, that has nothing to do with the chemical analysis? A. Yes, it has; it is the sample

Benjamin Jurist—Cross

taken by the Inspector, because the sample is taken from the can and it is divided into two parts, and the inspector, if he wishes, can so divide his samples as to give one sample a total percentage of solids, and the other is the technique or the accurate methods used in the analysis.

Q. Do you suppose that the mere division of the
10 samples by the Inspector could account for that 16/100 per cent difference? A. Why, certainly, and I am testifying from personal experience.

Q. Well, how Doctor? A. Well, if the Inspector is careless he fills his lactometer cylinder up.

Q. Let us see: this particular sample under adjudication today as you remember it, you say that you can account for that particular sample being as you have testified to the court (covering the holes and thereby was perfectly air tight)
20 how do you account for the discrepancy between yours and Dr. Von der Lieth's analysis?

Mr. Morten: I object to that question.

A. That is impossible except to say that it may be either due to improper sampling or improper methods in accuracy: if I were present when the analyses were made, or if another chemist was present, then, of course, we could tell.

Q. If Dr. Von der Leith had been present, when you made your test he could have told? A. Yes,
30 sir.

Q. So that this 16/100 per cent that you have referred to as being a great variance, the reasons for it are all conclusions on your part? A. They must be because I can only testify to what I have done.

Benjamin Jurist—Cross

Q. And the results that Dr. Von der Leith give are conclusions? A. Yes, sir.

Q. Now, watery fluid and water is there any distinction between the two? A. When we speak of the fluids: fluids we speak of as water and sul-lactic acid is in the milk and there is water present in the milk also.

By Mr. Morten: Q. And there may be other acids present in milk, that would be watery fluids, may there not? A. Yes, sir. 10

Q. Now, the variance in the results as shown by you and Dr. Von der Leith, if I give you the residue that was in the dish that Dr. Von der Lieth used, who could weigh it the more correctly you on your scale or him on his scale?

Mr. Reardon: I object to that question as calling for a conclusion.

Q. Which scale weigh the more accurately? A. 20
The scale which I have used; I have already testified to that.

Q. And any inaccuracy in taking the first quantity of milk which is to be evaporated would have a material effect on the weight of the residue? A. Yes, certainly.

Q. Now, the residue which you would have if that residue was placed into one big batch, you would have a size of probably a little larger than a buck shot? A. About that. 30

Q. And this 16/100 per cent, could you handle it in any way; would it be discernible? A. I don't see why you should bring up 16/100 per cent of this residue; my total solids were run in duplicate.

Q. I am asking about the difference between

Benjamin Jurist—Cross

yours and Dr. Von der Lieth's, if there was any inaccuracy in taking five grams of milk in the first place it would be easy to account for that difference? A. Why, certainly.

Q. I mean as to how much residue would this 16/100 per cent—how much would the difference be between yours and his? A. No, you can not.

10 Q. Would it be infinitesimal in sight? A. Yes, sir.

Q. The slightest loss of anything in the analysis either in weight or undue exposure would account for it? A. Why, certainly.

Q. This infinitesimal quantity that you speak of that would not be susceptible to sight, that is true of five grams? A. 16/100 per cent?

Q. Yes. A. It is not true of anything except so far as the five grams are concerned.

20 Q. It is true of forty quarts, the same infinitesimal inaccuracy that you are speaking of?

Mr. Morten: I object to that question as to the forty quarts.

A. It would mean 16/100 per cent of forty quarts—

Q. Of milk, at least we will say it is milk?

A. 16/100 per cent of milk in this particular case, your chemist testified that the total solids were 11.43 per cent: of course I am not admitting
30 that 11.43 per cent is the correct per cent.

Q. Are you admitting that 11.59 is correct?

A. Yes, sir; so far as my analysis was taken from that sample, it was.

Q. Are you sure of that? A. Yes, sir; I am sure, my tests show it.

Benjamin Jurist—Re-direct

Q. You talk about your tests being run in duplicate; now Dr. Von der Lieth has testified that he made his tests in duplicate? A. He could not remember his figures.

Q. I am asking you if you did not testify that he made his tests in duplicate? A. So I believe as to solids.

Q. Would you say that your running your tests in duplicate and he running his tests in duplicate you could still have a difference of 16/100 per cent? A. Well, his first test, if I had his figures then I could give you an intelligent opinion and we could also determine the accuracy of the result. 10

RE-DIRECT-EXAMINATION by Mr. Morten:

Q. Doctor, would you say that this difference between this method and the technique that you are referring to, would that make that difference of 16.100 per cent? A. Well, we allow any chemist, the difference permissible is 1/10 of a per cent; in this case it is practically 1/2% generally when two chemists are analyzing two different bottles of the same milk, if they get within 1/10 per cent of each other, it is permissible. 20

Q. If his showed 11.49 and yours showed 11.59, would you say that they were practically the same? A. Yes, sir. 30

By Mr. Reardon: Q. Allowing for that there is still a difference of 6/100 of one per cent? A. Yes, sir.

Q. That is all.

Mr. Morten: I want to offer D-1 for identification and the tag marked D-2 for identification in evidence.

Marked D-1 and D-2

Bruno Bischoff—Cross

BRUNO BISCHOFF, sworn:

Direct-examination by Mr. Morten:

Q. Mr. Bischoff, where do you reside? A. 7 Milton Avenue, Jersey City.

Q. You took sample number 3479, which has been testified to by Mr. Steele, to Doctor Juris, 10 for examination, did you not? A. Yes, sir.

Q. When you received that bottle of milk, did it leak or was it tight? A. It was leaking.

Q. That bottle was sealed in the same manner as D-1 was sealed? A. Yes, with a wire through the cork.

Q. And you say that it leaked?

CROSS-EXAMINATION by Mr. Reardon:

Q. You say that at the time the inspector gave 20 that sample to you, it leaked?

Mr. Morten: I object to that question.

The Court: I will allow it.

A. When I received it it was leaking.

Q. Who did you received the sample from? A. From my driver.

Q. When did you receive it? A. I don't know whether I received it the day it was taken or the day after.

Q. You don't know that? A. No, because some- 30 times the driver is gone home and it stays in the icebox.

Q. You don't know whether it was in the icebox or not? A. I didn't see it.

Q. When did you get it. A. I don't know when I got it.

Bruno Bischoff—Cross

Q. You don't know when you got it? A. I don't know whether it was on the day it was taken or the day after.

Q. You don't know when taken A. No, sir.

Q. You don't know what you did with it? A. I put that sample on the ice, and waited the results, when Mr. Hennessey got notified that the sample was not good, I took it over to Doctor Jurist. 10

Q. So that your sample did not reach Doctor Jurist until you got notice from the Board of Health that your sample was not right; is that right? A. Yes, sir.

Q. Now, you are positive, Mr. Bischoff, that you did not send this sample of milk over to Doctor Jurist until after the Board of Health notified you? A. They did not notify me; they notified Mr. Hennessey.

Q. And Mr. Hennessey notified you? A. Mr. Hennessey notified me and I sent the sample over to Doctor Jurist, right off the reel. 20

Q. What I want to get at is, you are positive that you did not take the sample over to Doctor Jurist until after Mr. Hennessey notified you? A. I am positive of that.

Q. Now, I show you a card, dated April 14, 1916, addressed to John R. Hennessey, mailed 2.30 o'clock in the afternoon, and ask you if it was on that date that you brought your sample to Doctor Jurist? A. I could not say whether it was on that day or the day after. 30

Q. And if Doctor Jurist says that it was on the 13th, he is wrong? A. I don't know.

Thomas J. Steele—Direct

Q. Now, Mr. Bischoff, this bottle, how did you set it up in your ice box? A. I put it in a can cover full of ice.

Q. When you got it it was leaking? A. When I got it off the driver it was leaking.

Q. When you got it off the driver, you knew that it was leaking and you put it in a can cover full of ice; how do you know it was leaking? A. Because the ice didn't come up high enough.

Q. How deep is that can cover? A. You can measure it, well it didn't reach the cork.

Q. Well the cork is inside of the bottle? A. Well, it come up to here (illustrating).

Q. All the way? A. Up to the neck of the bottle.

Q. Do you mean to tell me that the can cover is not as deep as the neck of the bottle? A. It is not.

20 Q. How did you set it in? A. Standing up.

Q. How long did you leave it there? A. Maybe an hour or a couple of hours, or maybe a day; I could not tell you.

Q. Did you leave it there a week? A. No, never.

Q. But you do not know how long you left it there? A. I do not, no.

Q. You don't know about that? A. No, sir.

30 THOMAS J. STEELE, re-called:

By Mr. Morten: Q. Is this card in your handwriting? A. Yes, sir.

Q. Did you send a copy of that card to Mr. Hennessey? A. Yes, sir.

John R. Hennessey—Direct

Q. It is marked in the upper right-hand corner, "similar to the card mailed 2:30 p. m."; does that refer to the date April 14th, 1916? A. Yes, sir.

Q. Prior to mailing that card on April 14th, 1916, did you in any way ever notify Mr. Hennessey that the milk was below standard? A. We never do.

Q. Did you? A. No, sir.

10

Mr. Morten: I object that card in evidence.

Mr. Reardon: I object to that offer on the ground that it is immaterial.

Mr. Morten: I will withdraw the offer at this time, and I will call Mr. Hennessey.

JOHN R. HENNESSEY, sworn:

20

Direct-examination by Mr. Reardon:

Q. Mr. Hennessey, I show you a card, dated April 14, 1916, and ask you if you received a similar card to that? A. I don't remember the card at all.

Q. Do you ever remember receiving a card of that character? A. I do not remember that.

Q. How did you first come to know that the milk which was taken from your store, a sample of the milk taken from your store, was alleged, by the Board of Health, to be below standard? A. I judged so from the Inspector giving me a sample and I immediately called up Mr. Bischoff on the 'phone and I told him that the Inspector had left

30

Thomas J. Steel—Direct

me a sample of milk and he told me to put that sample on ice and I did so, and he received it in the morning.

Q. Did you ever receive a card such as this one?

A. The only card I ever received was a card saying that my milk was below standard and that I should go down to the City Hall and pay the fine. 10
sometime ago there was an inspector there.

Q. Was that card similar to this one? A. Yes, something like that.

Q. Was it after you received that card that you notified Mr. Bischoff that the milk was wrong or was it before? A. The only notification I gave Mr. Bischoff was this over the 'phone, and I judged from the fact that the Inspector gave it to me—after the Inspector told me, when I asked him if the milk was up to standard, and he said no, there is 20
nothing the matter with the milk.

Q. Did you ever have an Inspector take a sample of your milk before? A. Not this year, but some time ago there was an inspection there.

THOMAS J. STEELE, re-called:

Direct-examination by Mr. Reardon:

Q. Inspector, are you positive that you mailed a 30
card similar to that, to John Hennessey on that date?

Mr. Morten: I object to that, as immaterial and not proper proof.

A. I am.

Q. Do you recall this particular sample in question that you took at Mr. Hennessey's store, the manner of your taking it? A. Yes, sir.

John R. Hennessey—Direct

Q. Do you recall whether or not you tightly corked the cork in the bottle? A. Yes, and turned it upside down to see if it leaked, and if they attempt to leak we cork them tighter.

By Mr. Morten: Q. And did you do that with this particular sample? A. Yes, sir.

Q. And did it leak? A. No, sir.

Q. Do you do that with all samples? A. Yes, 10
sir.

Q. Well, sample D-1 leaked? A. Now it does, yes, sir.

Q. And there have been any number of samples that have leaked just the same? A. Not in my possession.

Q. Don't you know that Doctor Edsall has cancelled prosecutions because the samples were not taken properly?

Mr. Reardon: I object to that question. 20

A. No, I don't know that.

Q. Don't you know that the sample bottle of milk taken by you was sent down to the Board of Health empty?

Mr. Reardon: I object to that question.

A. I never sent it.

Q. And the cork in that bottle, there is no reason to believe that it is any better than in any other sample; do you know whether the cork in the sample in question was any better put in than 30
in D-1? A. I don't remember now.

Case closed.

Argument

Mr. Morten: I ask for a dismissal of the proceedings on the grounds that I urged before, and I presume it is not necessary for me to repeat them again, and also on the further ground that the ordinance is repugnant to the statute. The ordinance says (Section 26) that it shall not have
10 "more than eighty-eight and five-tenths (88.5%) per cent of water," whereas the statute says "88.5% watery fluids," and therefore the ordinance requires more than the statute itself does, and it is therefore void.

The Court: I will deny your motion to dismiss the case.

Mr. Morten: I also ask a dismissal of the case on the grounds that this court has no jurisdiction.

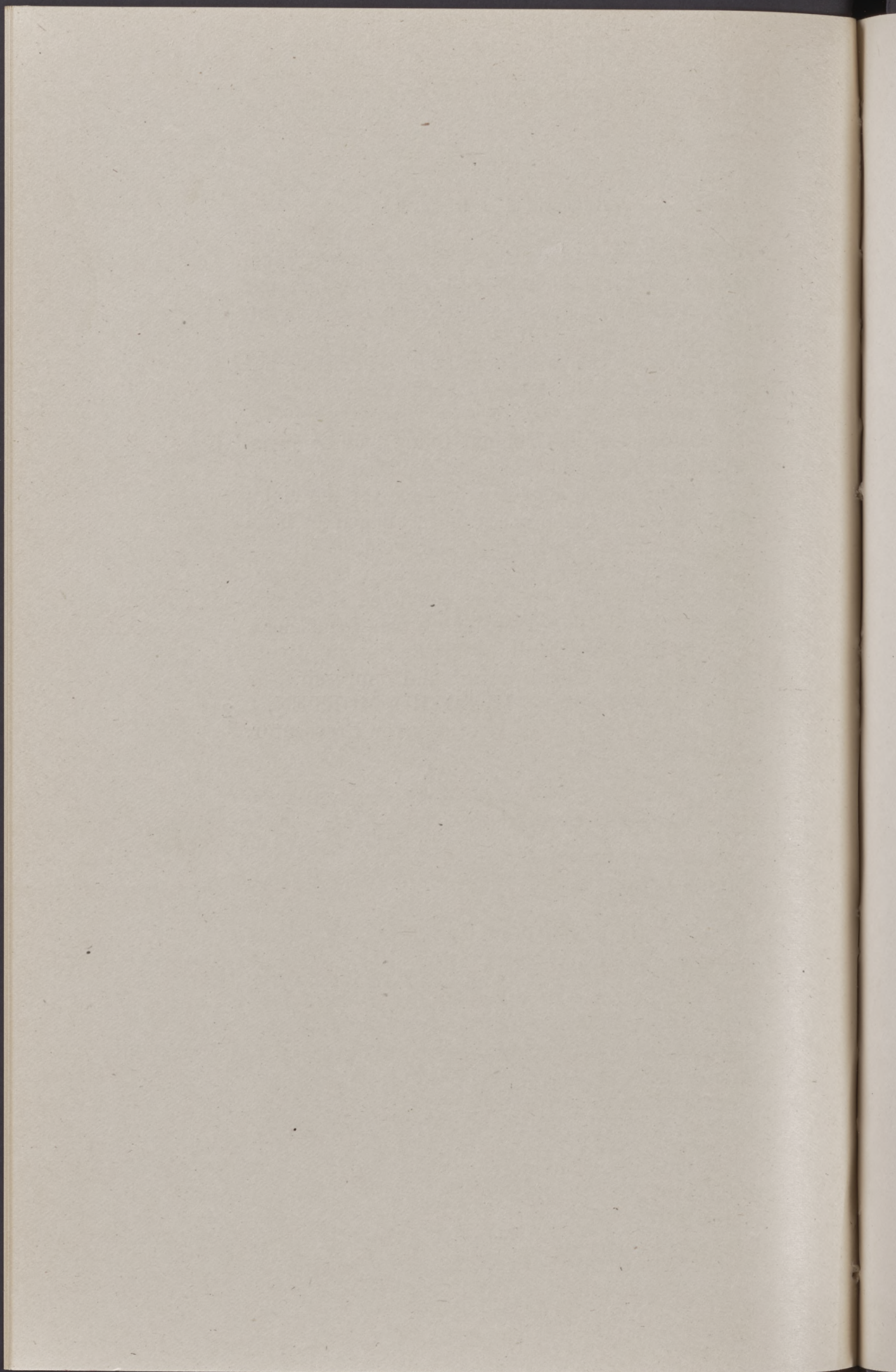
The Court: I will deny your motion. I consider the State has made out a *prima facie* case
20 and I will impose a fine of \$25 against the defendant.

I, Willam B. Richardson, having been first duly sworn by the Court to make a true and correct transcript of such evidence as might be produced in the above entitled cause, do hereby certify that the foregoing is a true and correct transcript of the evidence and proofs submitted to the Court at the trial of said action.

Record of Conviction

<p style="text-align: center;">THE MAYOR and ALDERMEN OF JERSEY CITY,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">J. HENNESSEY,</p>	<p style="font-size: 3em;">}</p>	<p>First Criminal Court Jersey City, N. J. Violation of a City Ordinance of Jersey City, N. J.</p>
<p>Plaintiff,</p>		<p>10</p>
<p>Defendant.</p>		

Be it remembered that on this fifteenth day of June, A. D. Nineteen hundred sixteen at Jersey City aforesaid, J. Hennessey defendant was by said First Criminal Court of Jersey City in the County and State aforesaid convicted of violating an ordinance of said City entitled: "An Ordinance Regulating the General Conditions Governing the Sale of Milk or Cream in Jersey City," which said ordinance was adopted on April first, nineteen hundred fifteen in the following manner to wit: on the twelfth day of April, A. D. nineteen hundred sixteen at Jersey City aforesaid the said defendant J. Hennessy did sell milk on the premises known as 804 Newark Avenue, Jersey City, which milk contained less than 11.5% total solids and more than 88.5% water in violation of and contrary to the provision of section twenty-six of said ordinance aforesaid in a summary proceeding at the suit of the Mayor and Aldermen of Jersey City, Plaintiff, upon a complaint made by Thomas J. Steele a Milk Inspector of said Jersey City and further that the witnesses in said proceeding who testified for the Plaintiff were: Thomas J. Steele, Milk Inspector, Jersey City, Joseph H. Carlin, Clerk



Reasons For Reversal

City of Jersey City, may be reversed, set aside and for nothing holden, for the following reasons:

1. Because the said alleged conviction is insufficient in law.

2. Because the said alleged conviction does not comply with the statute in such case made and provided. 10

3. Because said Criminal Court had no jurisdiction to hear and determine said cause.

4. Because the alleged ordinance for the violation of which the prosecutor is alleged to have been convicted, is *ultra vires* and void.

5. Because the proofs upon which the prosecutor is alleged to have been convicted of the violation of said alleged ordinance was insufficient. 20

6. Because the said conviction is in divers other respects illegal, unjust and oppressive.

MELOSH & MORTEN,
Attorneys for Prosecutor.

Rule Affirming Judgment.

The Court having inspected the transcripts and proceedings of the respondent, returned with the certiorari in this cause, and the reasons alleged for reversal of the judgment below and the argument of counsel sub- 30

mitted thereon, and having duly considered the same,

It is, on this tenth day of May, 1918, ORDERED that the judgment of the Second Criminal Court of Jersey City in the above entitled cause be in all things affirmed, with costs.

Rule actually entered May 10th, 1918.

10 On motion of
JOHN MILTON,
Attorney for Respondent.

Opinion.

Submitted February Term 1918. Decided May 10th, 1918.

Before Justices Bergen and Black.

20 For Prosecutor, Messrs. Melosh & Morten.
For Defendant, Frank J. Reardon, Esq.,
and John Milton, Esq.

Per Curiam:

30 The Board of Commissioners of Jersey City adopted an ordinance on April 1, 1915, which was entitled, "An ordinance relating to general conditions governing the sale of milk and cream in Jersey City and the conditions under which milk or cream shall be maintained or handled, etc.

Section 26 requires among other things that, "All milk sold or offered for sale in this city must conform to the statutory require-

ments of New Jersey at present in force or which shall hereafter be enacted governing the composition and purity of milk and cream, and to the ordinances of this city. It must contain not less than three (3) per cent. of butter fats, not less than $11 \frac{5}{10}$ per cent. of total solids, not less than $8 \frac{5}{10}$ per cent. of solids not fat, and not more than $88 \frac{5}{10}$ per cent. of water." The ordinance also provided for a fine of not less than \$25, and not more than \$50, for the violation of section 26 and other sections. On the complaint of the milk inspector of the Health Bureau of Jersey City, the defendant was tried and convicted for violating the 26th section of the ordinance. The judgment recites the conviction for the violation of the ordinance in that, on the 12th day of April, 1916, the defendant did sell milk which contained less than the total solids and more water, giving the percentage, in violation of section 26 of the ordinance. The conviction further sets out the names of the witnesses sworn for both parties and fined the defendant \$25. The defendant was allowed a writ of certiorari to review this conviction and the reasons assigned are (a) that the conviction is insufficient in law, (b) because it does not comply with the statute, (c) Court had no jurisdiction, (d) the ordinance is ultra vires and void, (e) that the evidence was insufficient.

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Section 85 of the Police Court Act C. S. 3993, provides that in a conviction of this character it shall be sufficient to set out the name of the defendant and the number of the section and the title of the statute or ordinance under which the conviction is had, the names of the witnesses sworn and a list of the exhibits produced at the trial and a statement that the defendant was convicted. The prosecutor claims, that the conviction is imperfect because it does not set forth any list of exhibits. So far as we can see after careful examination of this record, the only thing offered in evidence relating to exhibits is a certified copy of the ordinance.

The other matters which the prosecutor seems to consider exhibits, were bottles of milk used by way of illustration in examining the chemist, and they were not put in evidence.

We think there is nothing in this objection, but this conviction appears to have been had under the statute relating to health and section 40 of which C. S. 2671 prescribes, the form of the conviction and the conviction in this case is in the precise words of the statute, except, that the judgment is that the defendant pay a fine of \$25; whereas, the words of the statute are "Recover of the defendant." This we think immaterial. The judgment that the defendant pay a fine

of \$25 sufficiently complies with the statute, "That the plaintiff recover of the defendant."

The next point is that the city had no power to adopt an ordinance prescribing a standard of purity of food. We think section 92 of the health act, which authorizes boards of health to pass ordinances relating to public health, is sufficient to sustain this ordinance.

The next point is that the city cannot fix by ordinance a standard either greater or less than that fixed by statute.

The statute relating to food C. S. 2566, sec. 6, provides, that no person shall sell any milk which contains less than 12 per centum of milk solid, nor more than 88 per cent. of water, and that no person shall sell any cream which contains less than 16 per centum of milk fats unless the amount is plainly marked on the outside of every container.

The ordinance with reference to milk does not exceed that required by the statute, but the prosecutor argues that the ordinance is invalid, because it requires 18 per cent. of butter fat in cream, while the statute makes it an offence only when it contains less than 16.

In the present case, we are only dealing with a conviction for selling milk in violation of the statute, and if the ordinance is illegal as to cream, it can be maintained as

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to milk, but we do not consider that the food law in any way prevents the local board in adopting any reasonable ordinance relating to the character of milk or cream to be distributed.

The judgment of the First Criminal Court of Jersey City is affirmed with costs.

10 **Rule for Substitution of Attorneys for
Prosecutor.**

Filed Aug. 19, 1918.

On the annexed consent of Melosh & Morten, attorneys for prosecutor:

It is ORDERED that Collins & Corbin be and they are hereby substituted as attorneys for defendant in the place and stead of
20 Melosh & Morten.

Entered August 19, 1918,
on motion of

COLLINS & CORBIN,
Attorneys for Defendant.

Substitution of Attorney.

We do hereby consent that Collins & Cor-
30 bin be substituted as attorneys for the above named John R. Hennessey.

Dated August 10, 1918.

MELOSH & MORTEN.
Attorneys for John R. Hennessey.

Notice of Appeal.

Filed Aug. 19, 1918.

TO FRANK J. REARDON,
Attorney for Respondent:

TAKE NOTICE that the prosecutor appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals.

COLLINS & CORBIN
Attorneys for Prosecutor-Appellant.

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Ground of Appeal.

Filed Sept. 18, 1918.

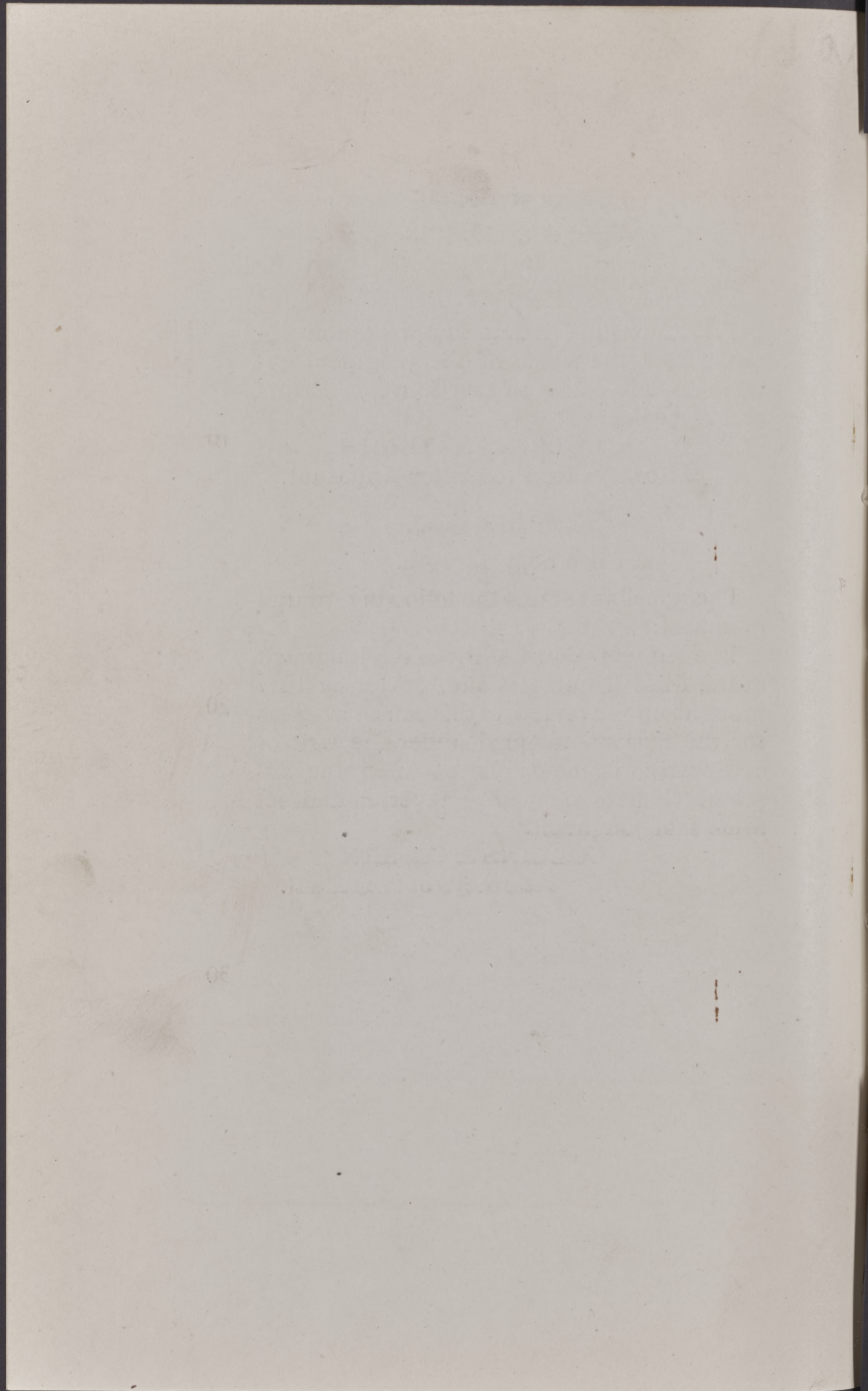
The appellant states the following ground of appeal:

The Supreme Court affirmed the judgment of the First Criminal Court of Jersey City brought up for review in this cause, whereas for the reasons assigned under the writ of certiorari, or some or one of them, the Supreme Court should have reversed and set aside said judgment.

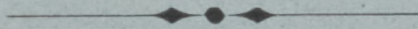
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COLLINS & CORBIN
Attorneys of Appellant.

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AN ORDINANCE

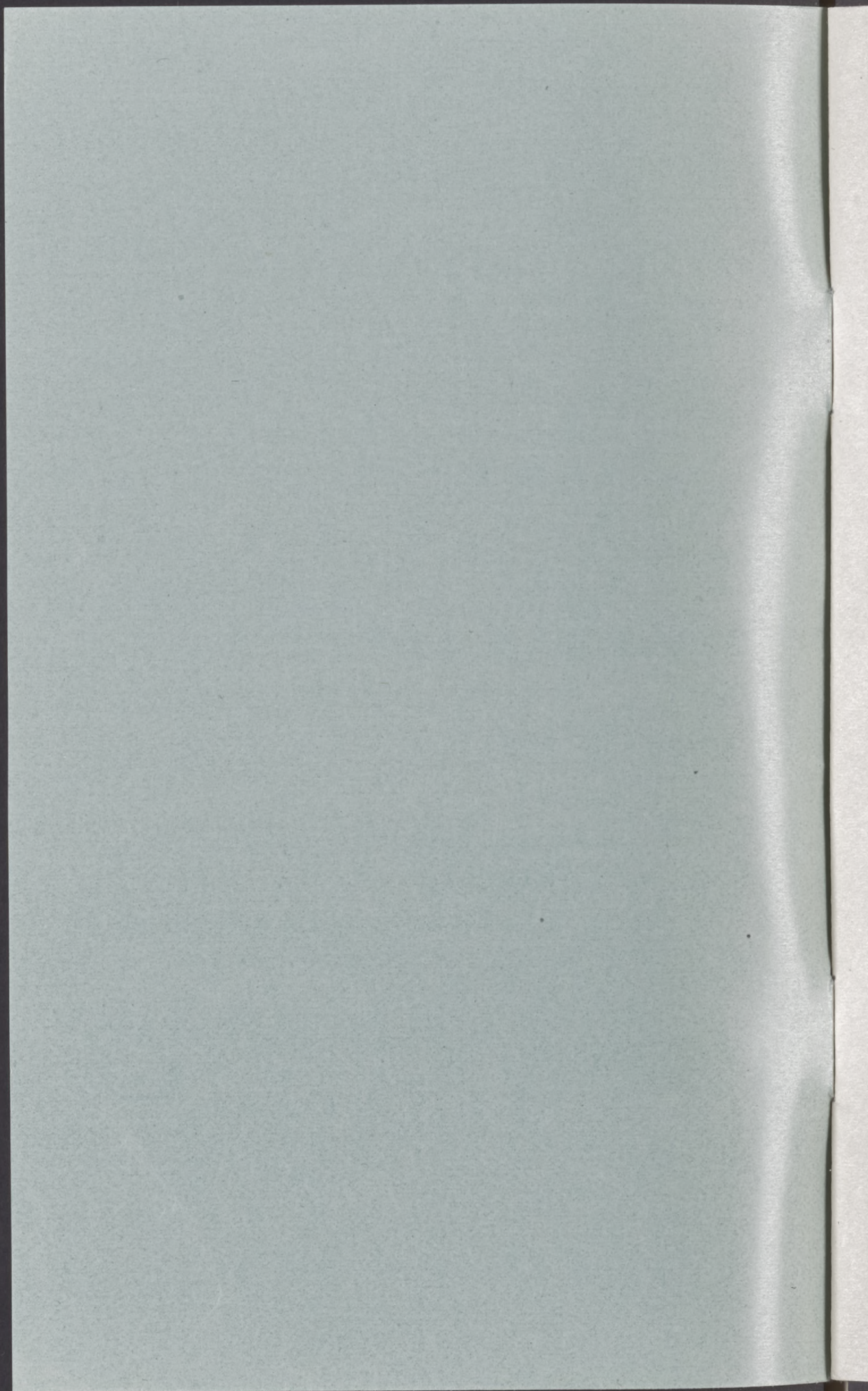


AN ORDINANCE REGULATING
THE GENERAL CONDITIONS
GOVERING THE SALE OF

MILK OR CREAM IN JERSEY CITY

AND THE CONDITIONS
UNDER WHICH MILK OR
CREAM SHALL BE MAIN-
TAINED OR HANDLED AND
THE QUALITY OF MILK OR
CREAM SOLD OR OFFERED
FOR SALE IN JERSEY CITY.





AN ORDINANCE regulating the general conditions governing the sale of milk or cream in Jersey City and the conditions under which milk or cream shall be maintained or handled and the quantity of milk or cream sold or offered for sale in Jersey City.

The Board of Commissioners of the City of Jersey City do ordain:

General considerations governing the sale of milk or cream in Jersey City:

Section 1. No person, firm or corporation shall engage in the business of selling milk or cream in Jersey City, or shall keep for sale or have in his possession with intent to sell milk or cream without having first obtained a permit therefor from the Health Bureau of said city.

Section 2. Applications for such permit to sell milk or cream in Jersey City shall be made upon a printed form to be supplied by the said Health Bureau and shall contain all the information required by that Bureau.

Section 3. Permits to sell milk or cream in Jersey City shall be issued for the period from the first day of May of any year to the thirtieth day of April of the following year and shall be renewed annually.

Section 4. The fee for such permit shall be one (\$1) dollar for each store, restaurant, bar, soda fountain or other place where milk or cream is sold, kept for sale or offered for sale, and two (\$2) dollars for each wagon or other vehicle from which milk or cream is sold or delivered.

Section 5. Permits to sell milk or cream shall be kept at all times conspicuously posted in any store, restaurant, bar, soda fountain, or other public place where milk or cream is sold, kept for sale or offered for sale, and every wagon or other vehicle from which milk or cream is sold or delivered shall have a license plate securely attached, both on the right and on the left side of the wagon or other vehicle, in some place where it can be readily seen from the street.

Section 6. No permit for the sale of milk or cream from any store in Jersey City shall be issued till such store or place of business shall have been inspected by a milk inspector of the Health Bureau and shall have obtained a score of at least 55 per cent. on the score card for milk stores adopted by said Bureau and such special requirements as may be demanded shall have been complied with, and no permit shall be issued for any wagon or other vehicle from which milk or cream is to be sold or delivered unless the Health Superintendent is satisfied that such wagon or other vehicle is suitable from a sanitary standpoint to be so used.

Section 7. Any permit issued by the Health Bureau for the sale of milk or cream may be revoked for cause, at any time, due notice having been given by the Health Superintendent or a duly authorized assistant, and an opportunity to be heard having been granted the person, firm or corporation against whom a complaint may exist.

Section 8. Any person, firm or corporation licensed to sell milk or cream in Jersey City shall promptly notify the Health Bureau in writing of any change in the source from which such milk or cream is procured and shall twice annually, when called for by said Bureau, furnish a complete and true list of names and addresses of all customers to whom milk or cream is supplied, and the Health Bureau shall have authority to compel the discontinuance at any time of milk or cream from any source which is likely to be prejudicial to the health of the consumer, or to require its pasteurization.

Section 9. No person, firm or corporation shall sell, offer for sale or keep with intent to sell within the limits of Jersey City, any milk or cream which does not in all respects conform to the statutory requirements of the State of New Jersey, at present in force governing the purity of milk and cream, and to the standards and requirements adopted by said city in this ordinance.

Section 10. In determining whether any milk or cream sold, offered for sale or had in possession with intent to sell, is impure or unwholesome, a milk inspector from the Health Bureau shall take two or more samples of such milk to be

placed in clean bottles, securely sealed with the seal of the Health Bureau and labelled with the inspection number and sample number, and the date and the hour at which the sample was taken. One of these samples shall be immediately tendered to the owner or person in charge of the milk from which the samples were taken, and the other sample or samples shall be promptly delivered to either the City Chemist or the City Bacteriologist, or to both, for analysis, who shall thereafter report their finding or findings to the Health Superintendent in writing. The Health Superintendent shall retain this report and shall enter a record of it in a suitable record book kept for that purpose.

Section 11. No milk or cream shall be sold, kept for sale or held with intent to sell in Jersey City, in any living or sleeping room or in any store that communicates directly with any living or sleeping room, or with any room where bolognas or other sausages or any meat is smoked, or which communicates directly with any toilet room not ventilated to the outer air, or which is not in a thoroughly sanitary condition, or where any infectious or contagious disease exists, nor in any store where any person is employed who is in contact with such contagious disease or who is afflicted with any venereal disease or with tuberculosis or who has been shown to be a carrier of typhoid bacilli or the germs of any other disease which may be transmitted through milk, excepting only that the provisions of this section relating to stores which communicate with living or sleeping rooms shall not be held to interfere with the sale of milk in bottles by such stores.

Section 12. The Superintendent of Health of this city shall have authority to demand a certificate of health, signed by a physician in good and regular standing, from any employee of a store where milk or cream is sold, kept for sale or offered for sale, who may be suspected to be suffering from a transmissible disease.

Section 13. Ice boxes or refrigerators used for the storage of milk or cream or milk products shall be lined with zinc or enamel. They must be kept at all times clean and free from odor; they shall drip

into a suitably placed, water supplied sink, properly trapped and connected with a sewer, unless a special permit be granted by the Health Bureau where sewer connections cannot readily be made, and they shall not be used for the storage of substances other than milk or cream or milk products.

Section 14. All stores where milk or cream is sold, kept for sale or offered for sale, must be clean, well lighted and ventilated, and free from objectionable odors. Such stores must have all openings screened against flies and other insects between May 15th and October 15th of each year. The walls and ceilings shall be smooth hard finish, painted, not papered. The shelves and all other parts of the store shall be kept free from dust and the floor shall be swept clean each day and scrubbed at least once a week. Dry sweeping or dusting is prohibited. Satisfactory toilet facilities, readily accessible to the employees, and a conveniently situated wash stand equipped with soap and individual towels of paper or other material shall be provided.

Section 15. Each employee or attendant in any store where milk or cream is sold or offered for sale shall wash his hands in soap and water each time after visiting the toilet. His clothing shall be clean and he must not smoke while on duty.

No dog or other domestic animal or live poultry shall be kept in any room where milk or cream is sold, nor shall poultry be killed, plucked or dressed therein, nor in any room directly connected therewith, nor shall poultry be allowed at large in a yard where wagons or other vehicles used in the sale or delivery of milk are stored.

Section 16. No milk or cream shall be kept, stored, or held in any stable or in any room which connects directly with any stable. No milk shall be transferred to bottles or other containers in any stable or upon any street, ferry or other public place, excepting only as this may be done in filling a bottle or other container offered by a customer. It shall be unlawful for a driver or other person engaged in the sale or delivery of milk or cream from any wagon or other vehicle, to have caps or

tops for milk bottles in his possession while so engaged, and he shall not carry any cans or other vessels containing water while so engaged, and it shall be unlawful for such driver or other person to remove milk bottles from any house where a contagious disease exists during the continuance of quarantine thereon, and after quarantine has been lifted not until the bottles have been sterilized in boiling water.

Section 17. No milk bottles shall be received from a customer by any milk dealer that have not been well washed or are not in a cleanly condition when returned, and said bottles must not be used by the consumer for any purpose other than as milk containers. No dealer shall return milk bottles for refilling that are not well washed and in cleanly condition when returned to the bottling establishment. No milk bottles recovered from any dumping place for ashes or refuse shall be returned to the owner or owners or shall be sold for use as milk containers until they have first been washed and sterilized. No milk bottles having the name of the person, firm or corporation owning them blown in the glass of the bottle shall be used by any person other than the rightful owner as milk containers. No cans or other containers for milk or cream shall be returned to a wholesale dealer from any store where milk is sold and no dealer shall return any cans to the source from which his supply is derived that have not been thoroughly washed before being so returned. It shall be unlawful to use milk cans for any other purpose than as milk containers.

Section 18. All milk or cream held, offered for sale or kept with intent to sell in the City of Jersey City, shall be at all times well iced and held in an ice tub or refrigerator. Where loose milk is sold, dippers used for transferring milk shall be kept in the can in which they are used and all utensils used in the sale of milk and all containers for milk other than sealed bottles shall be thoroughly washed and sterilized daily.

Section 19. Any milk or cream held, sold, offered for sale or kept with intent to sell within the City of Jersey City, which may be found not to conform to the requirements of this ordinance in

respect to purity or the temperature at which it is held, by an inspector from the Health Bureau authorized to inspect milk, may be seized and destroyed.

Section 20. All stores in Jersey City where loose milk is sold, offered for sale or held with intent to sell, shall keep all tags from containers on file for not less than sixty days and they shall be exhibited when demanded by an inspector from the Health Bureau.

Section 21. All places where milk or cream is kept, stored, pasteurized, bottled or transferred from one container to another, shall be clean, well lighted and ventilated, and have all openings screened against flies, and must be free from objectionable odors; shall have hard, smooth side walls impervious to water for a height of at least five feet, and shall be painted with a light colored paint. The floors shall be of concrete or other impervious material, sloped to a drain which shall be properly trapped and connected with a sewer. There shall be two rooms completely divided by a partition. One room, in which containers and utensils are washed and sterilized, shall be provided with a sufficient supply of hot and cold water, vats in which to wash milk containers, and utensils, and steam for sterilizing bottles or other containers. The other room shall be used exclusively for storing, transferring, bottling and pasteurizing milk. It shall be provided with a sufficient supply of hot and cold water, adequate means for refrigeration, a milk bottling and capping apparatus, and, if pasteurizing be done, a pasteurizing apparatus approved by the Health Bureau. The apparatus used must not occupy more than 50 per cent. of the available floor space. The pasteurizing apparatus shall be of a type approved by the Health Bureau, shall be susceptible of being readily cleaned, be capable of raising the entire charge quickly to a temperature of 145 degrees F. and of holding it at this temperature for at least thirty minutes; shall have an accurate temperature recording apparatus, and the charts for any run of milk shall be retained for at least seven days and these charts shall be open to inspection by an inspector from the Health Bureau at any time in that interval.

Section 22. No person, firm or corporation shall sell, offer for sale, hold or have in his possession with intent to sell, milk or cream from cows which are kept or stabled within the limits of Jersey City.

Section 23. All premises, wagons, cars or other vehicles in which milk or cream is sold, offered for sale, transported or delivered in Jersey City, all containers, utensils, refrigerating, bottling or pasteurizing apparatus used in the sale of milk or cream and ny milk or cream offered for sale, held or has in possession with intent to sell shall at all times be freely open to inspection when required by any authorized inspector from the Health Bureau, and it shall be unlawful to in any way interfere with or obstruct such inspector.

Section 24. All milk intended for sale in Jersey City shall be promptly removed from any railway car, platform, wharf or dock where such milk may be landed in Jersey City, and no milk cans, bottles or other containers shall be allowed to stand upon the sidewalk in front of the store or other place where such milk is to be held or sold.

Section 25. The Health Superintendent of Jersey City shall have authority to compel any person, firm or corporation selling, offering for sale, holding or having in their possession with intent to sell, any milk or cream in this city, to remove any condition or thing which is likely to render such milk unwholesome or objectionable for human consumption.

General considerations governing the quality of milk sold or offered for sale in Jersey City:

Section 26. All milk sold or offered for sale in this city must conform to the statutory requirements of New Jersey at present in force or which shall hereafter be enacted governing the composition and purity of milk and cream and to the ordinances of this city. It must contain not less than three (3%) per cent. of butter fat, not less than eleven and five-tenths (11.5%) per cent. of total solids, not less than eight and five-tenths (8.5%) per cent. of solids not fat, and not more than eighty-eight and five-tenths (88.5%) per cent. of water.

Section 27. All milk or cream sold or offered for sale in this city shall at all times before delivery to the consumer be held at a temperature of 50 degrees F. or below; it shall not be taken from cows within fifteen days before nor within five days after parturition. It shall be free from slime, visible dirt, objectionable odors or preservatives, and must have no substances added or taken from it; provided, however, that modified milk for infants, condensed milk or skimmed milk may be sold as such under the restrictions hereinafter provided. All milk or cream shall be free from pathogenic bacteria and the presence of colon bacteria shall necessitate the pasteurization of all milk from the source from which such sample was derived.

Section 28. Milk or cream which is subjected to pasteurization shall be raised to a temperature of 145 degrees F. and held at this point for at least thirty minutes and then quickly cooled to 50 degrees F. or below. No milk shall be pasteurized more than once. The grade of any milk shall be fixed by the score of the dairy having the lowest score from which milk in any given supply is derived. All milk sold in Jersey City shall be sold either as Certified Milk, Grade "A" Milk or Grade "B" Milk, Condensed Milk or Skimmed Milk, and cream as cream of the corresponding grade as the milk from which it was taken. Buttermilk, koumiss, matzoon, zoolak, and similar varieties of fermented milk must be produced from a sound, wholesome grade of sweet milk.

Section 29. Certified Milk shall be milk which conforms to all the requirements of the Act of the Legislature of the State of New Jersey, entitled "An Act providing for the incorporation of medical milk commissions, and the certification of milk produced under their supervision and regulating the sale of milk as certified milk," approved April 22d, 1909.

Grade "A" milk or cream may be raw or pasteurized.

Grade "A" milk may be modified for infants' use by the addition of barley water, lime water or similar substance.

Grade "B" milk or cream must be pasteurized.

Section 30. Grade "A" milk shall come from cattle which on physical examination show no evidence of disease and which have been tested for tuberculosis within one year, and from dairies which score not less than 75 per cent. (25 per cent. for equipment and 50 per cent. for methods) by the score card known as the U. S. Government Score Card. It shall not contain more than 75,000 bacteria per cubic centimetre when drawn, and if pasteurized shall not have more than 25,000 per cubic centimeter after pasteurization before delivery to consumer.

No cattle from which it is drawn shall have been fed upon brewer's grains, distillery waste or any other fermented or unwholesome food, and they shall have access to an uncontaminated supply of drinking water.

The milk shall be removed immediately when drawn to a milk house, without pouring, and there cooled to a temperature of 50 degrees F. or below.

If bottled, the cap of the bottle shall be marked in plain black letters Grade "A," with the day of bottling and the owner and location of the creamery where bottled, unless the milk be pasteurized, in which case it shall bear the word, "Pasteurized," and in addition the day and interval when pasteurization was done. It shall be delivered within thirty-six hours of the time it was drawn.

Supplement to Section 31, Milk Ordinance.

If bottled, the cap of the bottle containing Grade "B" milk shall be marked in plain letters Grade "B" the location of the creamery where bottled and the name of the owner, the word "Pasteurized" and the day and interval between which pasteurization was done, and if in cans must bear a tag similarly marked.

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Section 30. Grade "A" milk shall come from cattle which on physical examination show no evidence of disease and which have been tested for tuberculosis within one year, and from dairies which score not less than 75 per cent. (25 per cent. for equipment and 50 per cent. for methods) by the score card known as the U. S. Government Score Card. It shall not contain more than 75,000 bacteria per cubic centimetre when drawn, and if pasteurized shall not have more than 25,000 per cubic centimeter after pasteurization before delivery to consumer.

No cattle from which it is drawn shall have been fed upon brewer's grains, distillery waste or any other fermented or unwholesome food, and they shall have access to an uncontaminated supply of drinking water.

The milk shall be removed immediately when drawn to a milk house, without pouring, and there cooled to a temperature of 50 degrees F. or below.

If bottled, the cap of the bottle shall be marked in plain black letters Grade "A," with the day of bottling and the owner and location of the creamery where bottled, unless the milk be pasteurized, in which case it shall bear the word, "Pasteurized," and in addition the day and interval when pasteurization was done. It shall be delivered within thirty-six hours of the time it was drawn.

Section 31. Grade "B" milk shall be from cattle which show no evidence on inspection of tuberculosis or other disease. It shall be from dairies scoring not less than 50 per cent. on the U. S. Government Score Card, of which score not less than thirty (30..) per cent. shall be for methods. It shall be pasteurized and shall contain not more than 500,000 bacteria per cubic centimeter before pasteurization and not more than 30,000 per cubic centimeter when delivered to the consumer, none of which shall be pathogenic in character. It shall be delivered to the consumer within thirty-six hours of the time it was drawn.

Section 32. Skimmed milk shall be from cattle from which all or part of the butter has been removed. It shall conform in all other respects to not less than the requirements of Grade "B" milk, and

containers shall have tag attached having the words "Skimmed Milk" stamped thereon in letters not less than one inch in height, and shall be sold in containers having a capacity of not less than twenty quarts.

Condensed milk shall be milk from which all or part of the water has been driven off by evaporation. In other respects its minimum requirements shall be those of Grade "B" milk.

Section 33. All cream kept, sold or offered for sale in Jersey City shall be taken from milk conforming to at least the minimum requirements of Grade "B" milk, and if from milk having requirements lower than Grade "A" raw milk, shall be pasteurized.

No cream sold as such shall have less than 18 per cent. of butter fat, and if it have less than 30 per cent. butter fat it shall be sold as "light" cream. Cream having 30 per cent. of butter fat, but less than 40 per cent., may be sold as "heavy" cream, and cream having above 40 per cent. of butter fat may be sold as "extra heavy" cream.

Section 34. (a) Any person, firm or corporation violating the provisions of Sections 1, 2, 3, 5, 8, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24 or 25 shall be subjected to a fine of not less than ten (\$10.00) dollars nor more than fifty (\$50.00) dollars.

(b) Any person, firm or corporation violating the provisions of Section 23 of this ordinance shall be subjected to a fine of not less than one hundred (\$100.00) dollars, nor more than two hundred (\$200.00) dollars.

(c). Any person, firm or corporation who shall violate the provisions of Sections 26, 27, 28, 30, 31, 32 or 33 shall be subjected to a fine of not less than twenty-five (\$25.00) dollars and not more than fifty (\$50.00) dollars.

Provided, however, that in any such case it shall be the duty of the Health Bureau of the City of Jersey City within forty-eight hours after making an inspection which shall disclose a violation of Sections 26, 27, 28, 30, 31 or 32 of this ordinance, to cause to be mailed to the person, firm

or corporation charged with such violation a notice stating the nature of the violation, and that, therefore, such person, firm or corporation is guilty of a violation of this ordinance and stating the liability incurred thereby. In case the person, firm or corporation charged with such violation has not previous thereto violated the provisions of the sections of this ordinance with which such person, firm or corporation is now charged, and shall within fourteen days after the mailing of the said above mentioned notice pay to the Superintendent of the Health Bureau of Jersey City, for the use of the municipality, a penalty of fifteen (\$15.00) dollars (and such payment shall constitute a first conviction for violation of said sections of this ordinance), no action for the recovery of a penalty shall be commenced against such person, firm or corporation for said violation.

And it is further provided, that the provisions of Section 31 of this ordinance regulating the pasteurization of all Grade "B" milk shall not take effect or become operative until six months after the date of the passage of this ordinance.

And it is further provided, that all ordinances heretofore passed which in any way deal or conflict with the provisions of this ordinance shall be and the same are hereby repealed from the date of the passage of this ordinance.

GEORGE F. BRENSINGER,
HENRY BYRNE,
FRANK HAGUE,
A. HARRY MOORE,
MARK M. FAGAN,

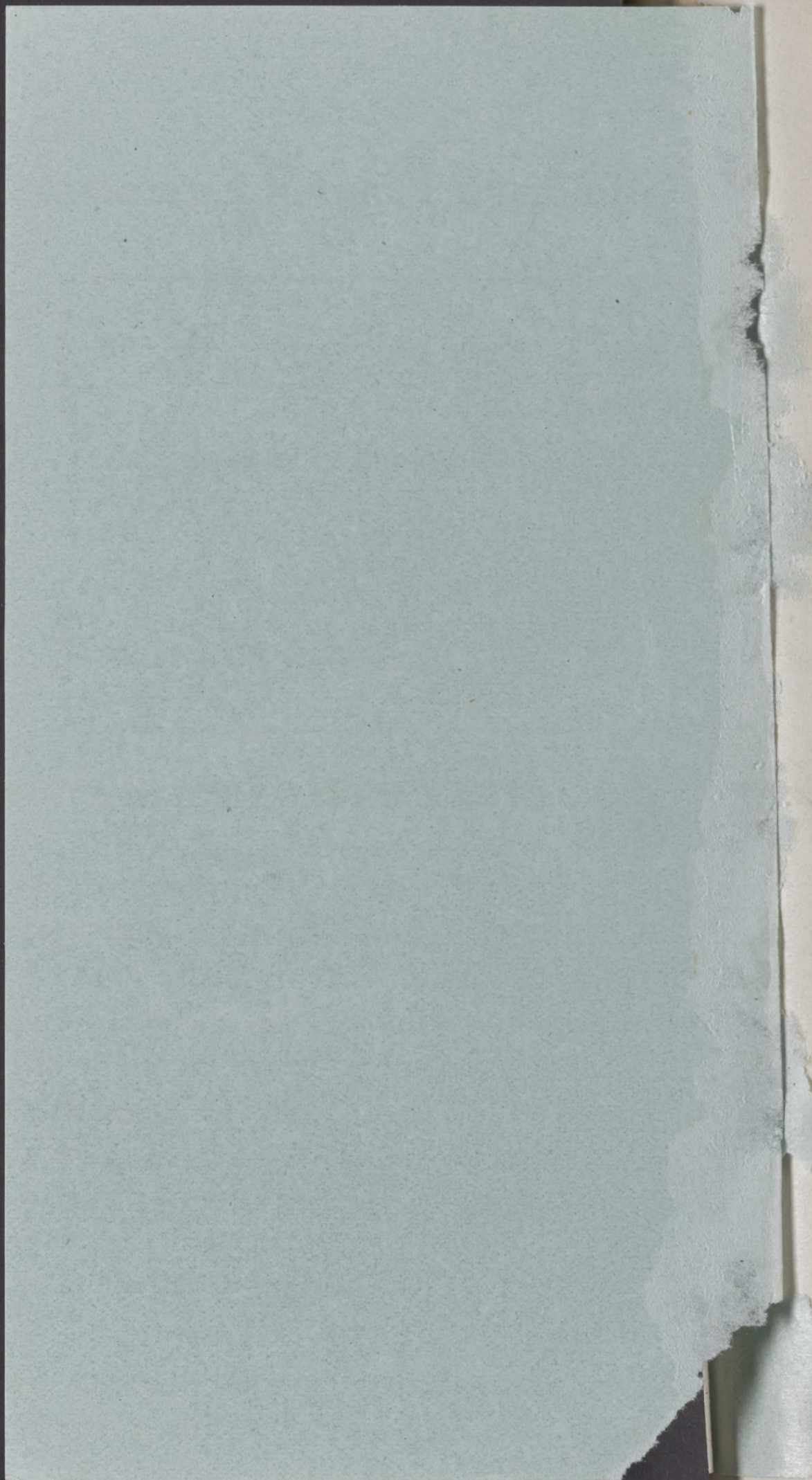
Commissioners.

Passed April 1, 1915.

MICHAEL I. FAGEN, City Clerk.







40.61
New Jersey Court of Errors and Appeals.

THE MAYOR AND ALDERMEN OF
JERSEY CITY,

Respondent-Appellee,

vs.

JOHN R. HENNESSEY,

Prosecutor-Appellant.

On
Certiorari.

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RESPONDENT'S BRIEF.

On June 15, 1916, the prosecutor was tried in the First Criminal Court of Jersey City for violating Section 26 of an ordinance entitled, "An Ordinance regulating the general conditions governing the sale of milk or cream in Jersey City", adopted April 1st, 1915, in that the prosecutor did sell milk which contained less than 11.5% total solids and more than 88.5% water.

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POINT I.

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The conviction is sufficient in law to justify the imposing of the penalty or fine.

It is true that the record of conviction in this case omits to provide a list of exhibits produced at the trial, as required by the Police Courts and Magistrates Act (C. S. 3993, Section 85), but the conviction is not under this section of the statute, but under Section 40 of the Compiled Statutes at page 2671, which is a subdivision of the statute

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affecting health, and more particularly local boards of health. It is to be noted that the record of conviction (p. 69, State of Case) is almost identical with the language of the statute, and any variance between the record and the statute is one of form only, and not of substance.

10 The case of *McEwan vs. Board of Health*, 61 N. J. L., p. 468, cited in prosecutor's brief, does not apply to the record of conviction in this case, because the certified judgment in that case showed clearly that there was no record of conviction at all.

POINT II.

The city has inherent power to adopt an ordinance prescribing the standard of purity of food.

20 "Since health as well as order is an essential of good living, and one of the primary purposes of municipal incorporation, sanitary powers may not only be expressly conferred by the Charter, or implied therefrom, but they have been judicially declared to be inherent in a municipality as a necessary attribute thereof." (Hemenway on Public Health, p. 173, etc.)

30 Assuming, however, that such power was not inherent, it is specifically conferred under Section 92 of C. S., p. 2684, under which act the present Board of Health of Jersey City (now under Commission form of Government) was organized.

It is argued by the prosecutor that the power given to cities of the first class under Section 92, S. C., 2684, was impliedly repealed by the adoption of the Pure Food Law of 1907. In support of this theory, he cites the cases of *Chicago vs. Burke*, 80 N. E., 720, and *Chicago vs. Union Ice Cream Manufacturing Company*, 96 N. E., 872.

40 It is to be noted, however, that in the case of

Chicago vs. Burke the subject matter dealt with by ordinance and statute was identical, yet thoroughly inconsistent with each other as to the provisions concerning their respective administrations; while in the case of *Chicago vs. Union Ice Cream Manufacturing Company* the Court said:

“The great weight of authority is to the effect that the Legislature may confer police power upon a municipality over subjects within the provisions of existing State laws. **10**
* * * Municipal authorities cannot, under a general grant of power * * * adopt ordinances which infringe the spirit of the State law or are repugnant to the policy of the State as declared by general legislation, but the police regulations of a municipality may differ from those of the State upon the same subject, if they are not inconsistent therewith.”

There is no inconsistency between Section 26 of the ordinance in question and Section 6 of the Pure Food Act (C. S., 2566) as amended by the Laws of 1911 (Chapter 40, p. 61). The provisions are identical, except as to the division in the ordinance of total solids; the statute (Laws of 1911, p. 61) provides for not less than 11.5 per centum of milk solids, as does Section 26 of the ordinance in question, wherein the 11.5 per centum of milk solids is restricted, in that they cannot contain more than 8.5 per centum of solids not fat. The testimony of Dr. von der Lieth **20**
(p. 12, State of Case, line 30) shows that the result of the analysis was water 18.57 (typographical error—should be 88.57), 11.43 solids, **30**
8.43 solids not fat.

It is a matter of common knowledge that this restriction of solids not fat to 8.5 per centum relates to the protein and salt value of the milk, which is the real nutritive factor in milk, the fat content being that portion of the milk calculated **40**

to supply heat to the body, while the proteins in salt are calculated to give nutritive value for muscle and bone in the human body.

POINT III.

The municipality can prescribe by ordinance a greater standard of purity of food than prescribed by the State Statute.

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While it is true that municipal ordinances must be in harmony with the general laws of the State, and that they cannot infringe upon the spirit of the State law or be repugnant to the policies of the State as declared by general legislation, yet the standard established by the Pure Food Law of 1907 was enacted for the purpose of setting the minimum degree of purity. That which the Legislature in its judgment has said to be the least possible standard under which milk may be sold with safety to public health cannot mean that the Legislature intended to divest the municipal boards of health of the power delegated to them by the Act of 1904 (C. S., 2684, Sec. 92) of passing ordinances affecting public health, but, on the contrary, the Legislature has set by the Pure Food Law of 1907 a barrier beyond which no municipal power can go in enacting legislation governing the sale of milk by fixing a standard under that already established by the State. In other words, this statute is restrictive in its operation with reference to the power of municipal control of this subject, rather than prohibitive.

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The State Board of Health of Kansas, by authority of the State law established set standards for milk sold in the State. The City of Kansas City adopted an ordinance establishing a higher standard for milk sold in the City. A dairy was convicted of selling milk which was below the

standard required by the city ordinance. He asserted that the city ordinance was void because it was in conflict with the state legislation, but the Supreme Court of Kansas decided that the city ordinance was valid. This decision was made in December, 1915, and reported in Pac. Rep., 548. In this case the Court said:

“The difference in the standards fixed is not great, but it is substantial, and the question arises whether the city can prescribe higher standards and greater restrictions in the sale of milk than the State prescribes and may impose a more severe penalty for the violation of the ordinance than is annexed by the State for a violation of the statute. The power of the city in this respect is derived from the State, and is only such as is clearly conferred by statute. Kansas City has adopted the commission form of government, and the legislature has authorized such cities to enact ordinances for all named purposes not repugnant to the constitution and laws of the State. One of the purposes specifically named is to make regulations to secure the general health of the city (Gen. Stat. 1909, secs. 1243, 1278). The ordinance regulating the sale of milk comes clearly within the power so conferred, and, unless it conflicts with the statutes or constitution or is clearly unreasonable, it must be upheld. It is well settled in this State that, where power is conferred upon cities to enact ordinances for the preservation of peace and good order within the city or for the preservation of the health of its inhabitants, it may be exercised, although the legislature has provided State regulations on the same subjects (*Franklin v. Westfall*, 27 Kans. 614; *Monroe v. City of Lawrence*, 44 Kans. 607, 24 Pac. 1113, 10 L. R. A. 520; *In re Thomas*, Petitioner, 53 Kans. 659, 37 Pac. 171; *In re Jahn*, Petitioner, 55 Kans. 694, 41 Pac. 956; *Assaria v. Wells*, 68 Kans. 787, 75 Pac., 1026). An ordinance may not be enacted which conflicts with or will operate to nullify the State law. (*Assaria*

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10 *v. Wells*, supra; *In re Van Tuyl*, 71 Kans. 659, 81 Pac. 181). A City may not by ordinance authorize that which a statute prohibits, nor punish the doing of an act which the statute expressly authorizes, but, as we have seen, it is competent for a city, under the authority of the legislature, to provide that an act shall be an offense against the authority of the city, although the same act is made an offense against the State. An ordinance enacted in the exercise of the police power is not necessarily inconsistent with a State law on the same subject because the city provides for greater restrictions or makes higher standards than is provided or made by the statute (*Walker v. Railway Co.*, 95 Kans. 702, 149 Pac. 677). Nor is an ordinance repugnant to a statute merely because the penalty prescribed is greater than is fixed by the statute for the commission of a like offense (*Minneola v. Naylor*, 84 Kans. 147, 113 Pac., 309; *Stark v. Geiser*, 90 Kans. 504, 135 Pac., 666).

20 "It is argued that regulations of the kind in question should be uniform, and that there is no good reason for prescribing different standards of milk in a city than is generally provided for the people of the State. As was noted in *Walker v. Railway Co.*, supra, it may be necessary to make additional requirements and stricter regulations and to impose more severe penalties in a congested district like a city than are made and enforced in a rural district. In *Town of Neola v. Reichart*, 131 Iowa, 492, at pages 497, 109 N. W., 5, at page 7, this question was under consideration, and it was held that municipalities are warranted in making other and greater restrictions than are provided for the State at large * * *."

POINT IV.

The provisions of the ordinance with respect to the city chemist have been complied with.

It is argued that the analysis made by Dr. Von der Lieth is null and void because it does not conform to Section 10 of the ordinance, which requires that “* * * The sample or samples shall be promptly delivered to either the city chemist or city bacteriologist, or to both, for analysis, who shall thereafter report their finding or findings to the Health Superintendent, in writing * * *.” It is admitted that Dr. Von der Lieth is not either the city chemist or the city bacteriologist, but on the contrary, is the county bacteriologist at the County Laboratory attached to the City Hospital of Jersey City. On page 13 of the State of the Case it appears how he came to act in this capacity:

“CROSS EXAMINATION BY MR. MORTEN:

“Q. You are not the City Chemist of Jersey City? A. Yes, sir.

“Q. Have you been appointed? A. I have been appointed temporarily by Mayor Fagan and Doctor Edsall.

“Q. Were you ever appointed or not?

“MR. REARDON: We bring him here as the chemist who made the analysis for the Board of Health of Jersey City.

“Q. You are not the City Bacteriologist either, of Jersey City, are you?

“MR. REARDON: I objected to that question.

“THE COURT: I will sustain your objection.

“MR. MORTEN: I will call your Honor’s attention to Section 10 of the Ordinance, if your Honor insists on overruling my ques-

tion: it says 'Either the chemist or Bacteriologist must make the analysis' and I take exception to your 'Honor's ruling.

"Q. Were you ever appointed as the City Chemist by the Board of Health of Jersey City? A. I was requested by them, they asked me to be the Chemist.

"Q. Did you ever receive a commission from Jersey City to act as the Chemist? A. A verbal commission, yes, sir.

10 "Q. Did you ever get it from the Board of Commissioners of Jersey City? A. No, sir.

"Q. Did you ever get it from the Board of Health, constituted by the various Commissioners appointed under the Walsh Act? A. I got it from Doctor Edsall; tell me who the Board of Health is and I will tell you.

"Q. Don't you know who the Board of Health is?

20 "MR. REARDON: I object to this line of examination; we all know that Doctor Stillman was the City Chemist and he died, and pending the appointment of a chemist for Jersey City, Doctor Von der Lieth has been acting.

"Q. I ask you if you ever received a commission, from either the Board of Health or the Commissioners appointing you either Bacteriologist or Chemist? A. I am telling you that Doctor Edsall—

30 "Q. I want to know what about the Board of Health or the Commissioners of Jersey City? A. I asked you who the Board of Health is; no, Doctor Edsall told me in the presence of Mayor Fagan—

"Q. And is he the only one that ever gave you any authority to analyze those samples? A. Those two gave me that authority."

40 If the prosecutor's contention in this regard were to be upheld, it would mean that the functions of the government would cease to operate; this is particularly true with regard to this position, appointment to which is made after a determination as to eligibility by the State Civil

Service Commission. Hence, a long period of time may elapse between the death of the City Chemist and the determination by the Civil Service Commission of the eligibility of the candidates for the position and the appointment of one of the candidates. Meanwhile, violations of the ordinance could be most flagrant, and the City lose its power to bring the violators to justice.

POINT V.

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The ordinance in question is not at variance with the State Statute.

The prosecutor lays stress in his brief (p. 18) upon the alleged variance between the statute and the ordinance in question, and points out what he calls "inconsistencies", while in reality it is merely a difference of formality in terms. "Watery fluids" as used in the statute, as distinguished from the word "water" as used in Section 26 of the ordinance, is not inconsistent, because you could not abstract water from milk without also abstracting the soluble matter in the water. The soluble matter in the water plus the water equals watery fluids. Since it is impossible to withdraw water without the soluble matter, the terms are identical in essence. 20

The term "milk fats" used in the statute as distinguished from "butter fats" used in the ordinance, is not at variance, for the reason that it is from the fat in the milk that butter is made, and there is no other fat in the milk; hence the term "butter fats" is one of dairy use and the term "milk fats" relates to the fat contained in the milk. There is absolutely no distinction in substance. 30

The term "milk solids" as used in the statute, as against the term "total solids" as used in the ordinance, cannot constitute a variance, for the reason that if the water is evaporated by means 40

of a hot water oven used for analyzing milk, the residue consists in the proteins, salt and fat. known as "solids" and spoken of in chemical terms as "milk solids", while in mathematical terms as "total solids". After a determination of the total solids a further process is instituted, which separates the proteins and salt from the fat, which gives us the distinction between total solids and solids not fat, as set forth in the ordinance.

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POINT VI.

There is proof that the milk offered for sale by the defendant was in violation of the ordinance in question.

The prosecutor contends that the difference between the analysis as shown by the testimony of Doctor von der Lieth and the standard required by the ordinance is so slight as to be immaterial in this case, and says: "It is hardly to be presumed that the City authorities would care to urge that this milk was unhealthy because it lacked the difference between what it actually showed and the requirements of the ordinance * * *". That is true, but the City does ~~not~~ seriously contend that this argument is unsound, because to allow such a question to be raised would be to eternally question in each particular case if the milk in question was comparatively healthy, rather than the point at issue in this case, viz: Has the ordinance been violated?

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Counsel for the prosecutor inquires as to the necessity of passing Sections 64 and 65 of the Health Act if the powers contended for by the City were wholly conferred upon it by Section 92, C. S. 2684. It is to be noted that Sections 64 and 65 of the Health Act only apply to boroughs, towns, townships and villages, while the Act of 1904, the basic power for the enactment

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of the ordinance in question, applies to cities of the first class. What Jersey City has done in the enactment of this ordinance is this: It has copied entirely the Pure Food Law of 1907, as amended by the Laws of 1911 (p. 61), and where that statute has failed to provide the distinction between total solids which might contain butter fats of 6 per centum and nutritive value of only 5.5 per centum, as against a limitation of not less than 8.5 per centum solids not fat, and as heretofore recited, the solids not fat supply the nutritive value of the milk. **10**

This, therefore, the respondent insists is wholly within the power of the municipality, and respectfully submits that the conviction below should in all respects be affirmed.

JOHN MILTON,
Counsel for Respondent.

20**30****40**

of the ordinance in question applies to milk of the first class. That the law has been in the ordinance of this ordinance is this: It has been amended by the Food Law of 1907 as amended by the law of 1911 in 1911 and which has been amended to insert the distinction between total solids which must contain but one of 8 per centum and another value of only 7.5 per centum as against a limitation of not less than 7.5 per centum solids not fat and as hereinafter stated the solidified fat supply the milk the value of the milk.

1870

The fact that the respondent herein is wholly within the provisions of the ordinance and is not in violation thereof is the conviction below should be held in favor of the respondent.

John Minor
 Counsel for Respondent

1880

The respondent herein is wholly within the provisions of the ordinance and is not in violation thereof is the conviction below should be held in favor of the respondent.

1890

The respondent herein is wholly within the provisions of the ordinance and is not in violation thereof is the conviction below should be held in favor of the respondent.

1900

The respondent herein is wholly within the provisions of the ordinance and is not in violation thereof is the conviction below should be held in favor of the respondent.

61

M

New Jersey Court of Errors and Appeals

THE MAYOR AND ALDERMEN OF

JERSEY CITY,

Respondent,

vs.

JOHN R. HENNESSEY,

Prosecutor-Appellant

On Appeal
from
Supreme
Court

Brief for
Appellant.

Statement of the Case

The appellant was convicted in the First Criminal Court of Jersey City of violation of Section 26 of "An ordinance regulating the general conditions covering the sale of milk or cream in Jersey City," etc. The entire ordinance will be found pasted at the end of the printed Case. It was passed April 1st, 1915, after the adoption by Jersey City of the Commission Government Act.

Said section reads as follows:

"Section 26. All milk sold or offered for sale in this city must conform to the statutory requirements of New Jersey at present in force or which shall hereafter be enacted governing the composition and purity of milk and cream and to the ordinances of this city. It must contain not less than three (3%) per cent. of butter fat, not less than eleven and five-tenths (11.5%) per cent. of total solids, not less than eight and five-tenths (8.5%) per cent. of solids not fat, and not more than eighty-

eight and five-tenths (88.5%) per cent. of water."

Another pertinent section of the ordinance is as follows:

"Section 33. All cream kept, sold or offered for sale in Jersey City shall be taken from milk conforming to at least the minimum requirements of Grade 'B' milk, and if from milk having requirements lower than Grade 'A' raw milk, shall be pasteurized.

"No cream sold as such shall have less than 18 per cent. of butter fat, and if it have less than 30 per cent. butter fat it shall be sold as 'light' cream. Cream having 30 per cent. of butter fat, but less than 40 per cent., may be sold as 'heavy' cream, and cream having above 40 per cent. of butter fat may be sold as 'extra heavy' cream."

The alleged violation of section 26 was the sale of milk which contained less than 11.5% total solids and more than 88.5% water.

On certiorari, the Supreme Court affirmed the conviction, and the prosecutor has appealed to this Court.

The questions involved, as raised by said certiorari, are:

1. Whether it was competent for the Board of Commissioners of Jersey City to legislate on the subject embraced said ordinance.

2. Whether it was competent for the Board of Commissioners of Jersey City to impose greater restrictions upon the character of milk and cream to be sold in that city, than those imposed by sections 6 and 7 of the Pure Food Law. (P. L.,

1907, p. 485, as amended, P. L., 1911, p. 61.)—
in the absence of any declaration in the ordinance
or proof in the case that milk or cream not com-
ing up to the requirements of the ordinance is
injurious to health. Sections 6 and 7 of the Pure
Food Law read as follows:

(P. L., 1911, p. 62.)

“6. No person shall distribute or sell,
or have in his possession with intent to
distribute or sell, any milk which contains
less than eleven and one-half per centum
of milk solids, or more than eighty-eight
and one-half per centum of watery fluids,
or less than three per centum of milk fats;
provided, however, that it shall not be un-
lawful for any person to distribute or sell,
or have in his possession with intent to
distribute or sell, in a container having a
capacity of not more than twelve fluid
ounces, milk especially prepared for in-
fant or invalid, feeding by adding thereto
pure water, lime water, milk sugar, cereal
starches, or other substances, which shall
not differ in purity, quality or strength,
from the standard fixed by this act, or by
removing therefrom the sugar or any part
thereof, if every such container have blown
or moulded in it the words “modified milk,”
in letters which shall not be less than one-
quarter inch in height and the several
lines of which shall be not less than one-
sixteenth of an inch in width; *and pro-
vided, also,* that the milk in such container
before modification shall have been milk
of the standard fixed by this act.”

(P. L., 1907, p. 489.)

"7. No person shall distribute or sell, or have in his possession with intent to distribute or sell, any cream which contains less than sixteen percentum of milk fats, unless the amount of milk fat contained therein is plainly and legibly marked on the outside of every can, bottle, vessel or container in which such cream is kept, stored, shipped, transported, or from which it is sold."

3. Whether the inclusion in the ordinance of restrictions greater than those imposed by the Pure Food Law renders the ordinance void as to the character of milk and cream, irrespective of whether or not restrictions alleged to have been violated are within the range of the Pure Food Law.

Grounds of Appeal.

The Ground of Appeal in this Court is: (case p. 77)

"The Supreme Court affirmed the judgment of the First Criminal Court of Jersey City brought up for review in this cause, whereas for the reasons assigned under the writ of certiorari, or some one of them, the Supreme Court should have reversed and set aside said judgment."

The "reasons" relied on are the following: (case p. 71)

"3. Because said Criminal Court had no jurisdiction to hear and determine said cause."

"4. Because the alleged ordinance for the violation of which the prosecutor is al-

leged to have been convicted is, *ultra vires* and void."

"6. Because the said conviction is in divers other respects illegal, unjust and oppressive."

Argument.

I

The City had no power to pass an ordinance prescribing the standard of purity of food.

A city has no inherent power to provide a standard for the purity of food. The power to do so must be found in its charter and it must either be expressly given or be a necessary incident to the carrying out of a power so granted, or it may be granted by legislation subsequent to the charter. The power, however, must be plainly and unmistakably authorized by the Legislature.

The only power under which the Board of Commissioners, successors to the Board of Health, of Jersey City presumed to act was either Compiled Statutes 2662, Section 12, or Compiled Statutes 2684, Section 92. Plainly under C. S. 2662, Section 12, the city had no power to pass the ordinance in question, as the only power granted was "to aid in the enforcement of the law as to the adulteration of all kinds of food and drink." This does not give the city the right to make the law, but only to aid in the enforcement of the law as expressed by the Legislature.

If it is attempted to justify the passage of the ordinance, under C. S. 2684, Section 92, an examination of the law will disclose that there is no

authorization of the ordinance in question under that statute.

It is true that the Legislature may delegate the power to municipalities to legislate upon certain subjects, but this power may at any time be taken away and the Legislature may resume the exercise of it themselves.

Wilkie vs. Chicago 58 N. E. 1004, 1006-1007.

The appellant contends, first, that under Section 92 aforesaid there is no power to adopt the ordinance in question. But even conceding, for the purpose of argument, that the power was given to cities of the first class under this section, yet the power conferred under the law of 1904 was taken away by the adoption of the Pure Food Law of 1907.

The contention that a subsequent law may repeal by implication the power granted to cities to regulate certain subjects, seems to have been upheld.

Chicago vs. Burke, 80 N. E., 720, 724
and *Chicago vs. Union Ice Cream Co.*
96 N. E., 872.

If this contention is sound, then the Board of Health of Jersey City was deprived by the Pure Food Law of 1907 of whatever power it had under section 2 aforesaid, so far as it may be possessed of the power to prescribe standards of foods and penalty for the violation thereof.

II

A city cannot prescribe by ordinance a stand-

ard of purity of food, either greater or less than that prescribed by the State statute.

The Pure Food Law adopted by the Legislature in 1907, provides that the standard of cream shall contain 16 per centum milk fats. The ordinance prescribes that cream shall contain 18 per centum butter fat.

Conceding that milk fat and butter fat are one and the same thing, yet this ordinance is void because it must be conceded that the laws of the state operate within the limits of municipal corporations same as elsewhere, unless otherwise clearly provided by the municipal charter or statute. Local laws and regulations are at all times subject to the paramount authority of the Legislature.

Municipal ordinances must be in harmony with the general laws of the state, and with the municipal charter. In case of a conflict the ordinance must give way.

Municipal authorities cannot under a general grant of power adopt ordinances which infringe the spirit of a state law, or are repugnant to the policies of the state as declared by general legislation.

Chicago vs. Union Ice Cream Co., 96 N. E. 872.

In the case of the *City of St. Louis vs. Dreischner*, 147 S. W. 998, the Supreme Court of Missouri was called upon to construe a statute passed to protect a public park from the contiguous nuisances enumerated therein, and forbidding their erection within the limits of one-quarter of a mile from the exterior lines of the park.

The City of St. Louis passed an ordinance including five of the callings in the legislative act and sixteen other callings not referred to in the act, and prohibited the existence of any of the occupations described in the ordinance within a radius of 600 feet of the park.

The Court held that as far as the ordinance was inconsistent with the act, it was invalid since all ordinances must conform to relevant state statutes, and inasmuch as the information charged the defendant with violating one of the callings mentioned in the ordinance but not embraced in the state statute, the City of St. Louis had no power under its charter to prohibit or abate it.

And in dealing with the power of the City of St. Louis under the statute it held that any fair reasonable doubt concerning the existence of power is resolved by the courts against the corporation and power denied.

In the case of *People vs. Gilbert*, 123 N. Y. S., 264, the defendant was convicted of having violated an ordinance prohibiting the offering for sale of peanuts and pop-corn from any wagon or vehicle unless it was drawn by a horse.

Defendant was an honorably discharged soldier and the state statute provided that honorably discharged soldiers should be entitled to hawk, peddle, vend and sell upon procuring a license for that purpose from the county clerk of the county in which such soldier resided. The Court reversed the conviction and held that:

“It is a well settled rule of law that what the statute has licensed, or expressly permitted, the municipality cannot forbid nor may it license what the state has expressly interdicted.”

See also

State vs. Winterrowd, 91 N. E. 956.

The defendant therefore submits that Jersey City can pass no ordinance forbidding the selling of cream which contains 16 per centum milk fat, and that the attempt on the part of the city to prescribe 18 per centum butter fat instead of 16 per centum milk fat, is nugatory and void.

Consideration of Cases Supporting a Contrary Rule

In the case of *Kansas City vs. Hendre*, 143 Pac., 548, the Kansas Court held, that the powers conferred upon cities to enact ordinances for preservation of health may be exercised even though the State has legislated upon the same subject.

They have even gone so far as to hold that an ordinance may be enacted which conflicts with or will operate to nullify the state law.

This will be found in the case of *Kansas City vs. Hendre*, 153 Pacific Reporter, 548.

The only cases cited which are authority for this principle are decisions of the Kansas Supreme Court.

Two other cases are cited in this opinion, namely, *Neola vs. Reichart*, and *in re Hoffman*, both of which will be discussed later.

In the opinion of the Kansas case just cited the Court itself admits that there is a conflict of authorities, but says that the policy of Kansas is to uphold such ordinances, and therefore the ordinance in that case was upheld.

The case of *Neola v Reichart*, 109 N. W., 5, was decided by the Supreme Court of the State of Iowa on September 26th, 1906, but nowhere in the opinion is it held that a municipality may pass an ordinance which is at variance with the State Statute.

The facts of the case were these: The State Legislature passed a Statute relative to assaults and assaults and batteries. The city enacted an ordinance to the same effect and the authority of the city to pass this ordinance was not questioned excepting upon the single ground that an incorporated town could not declare acts offenses against municipalities when the same acts are denounced by State Statutes and punished accordingly.

By a careful reading of the opinion, page 8, it will be found that the only question decided by the Court in that case respecting municipal ordinances and State Statutes is that there is no impropriety in legislation granting to municipalities power to prohibit and punish by ordinance any act made penal by Statute, when perpetrated within municipal limits; it is no objection that it prescribes the same penalties as the State law.

This case, therefore, is no authority for the proposition laid down in the decision in the Kansas State Court that ordinances may be superior to State Statutes, neither is it any authority for the question now pending before this Court, which is whether or not an ordinance may be passed which prescribes standards different from that prescribed by the State Statutes.

. The case of *ex parte Hoffman*, 99 Pac., 518, was decided by the Supreme Court of California on January 6th, 1909, and the Court held that the

mere fact that the State, in the exercise of the police power, has made certain regulations, does not prohibit a municipality from enacting additional requirements.

Two authorities were cited in support of this principle, namely, *in re Murphy*, 60 Pacific Reporter, page 465, decided by the Supreme Court of California on March 10th, 1900, and *ex parte Hong Shen*, 98 California, 681, decided by the Supreme Court of that state on July 15th, 1893. No authorities from any other state were cited in support of this principle.

An examination of these two cases discloses that they do not go so far as to support the principle laid down in the case of *ex parte Hoffman, supra*.

An examination of the opinion in the *Murphy* case discloses the fact that the defendant was convicted of gambling by playing "Keno." It would seem that the State had passed a statute prohibiting gambling in general, and specially mentioning certain games, but not including the game of "Keno." The Court held that the record in that case did not disclose whether or not the game of "Keno" was a gambling game. But it went further and said that inasmuch as it was competent for the City by ordinance to prohibit all games, whether denounced by the Statutes specifically or not, it did not appear that there was any lack of jurisdiction on the part of the Court and the conviction was affirmed. This case does not support the principle that an ordinance may vary a State Statute. It merely holds that where the State Statute has mentioned certain things in general, municipal ordinances may specifically direct the prohibiting of certain games which come in under the general term of gambling.

The *Hong Shen* case decided by the Supreme Court of California on July 15th, 1893, is no authority for the principle laid down in the Hoffman case.

In that case it appeared that under the Act of 1880 certain terms were prescribed, under which opium might be sold, and it was provided that a violation should be a misdemeanor. Under the municipal ordinance of 1889 the terms prescribed by the State Statute were not varied, but additional regulations were added, providing that the sale of opium without a physician's prescription should be unlawful.

The Court held that there was no conflict between this ordinance and the State Statute, saying:

"It" (the legislature) "has not directly authorized the sale of opium without the prescription of a physician; it has not legislated upon that subject at all" &c.

From this quotation it is clearly apparent that the Court in the *Hong Shen* case was not passing upon the question as to whether or not a municipality could enact an ordinance which was at variance with the State Statute. All that the Court held in that case was that where the legislature had not legislated upon a subject at all, there the municipality under the general powers delegated to it for the preservation of health had the right to pass ordinance for the preservation of health.

Although the decision of the California Supreme Court in the *Hoffman* case seems to be in line with that of the Kansas Supreme Court, yet, the authorities cited by the California Supreme

Court, which are decisions of its own Court, to support the decision in the *Hoffman* case, do not go so far as to sustain the decision in the *Hoffman* case.

The case of *Polinski v. City of N. Y.*, 78 N. Y., page 65, has been cited by those who favor the decision laid down by the Kansas State Court, as an authority for the principle that an ordinance may vary a State Statute, but an examination of this case discloses that it does not sustain their contention.

In this case, under the laws of 1864, the sale of adulterated milk was declared to be a misdemeanor. Under the laws of 1873 the Board of Health was given broad authority to pass sanitary ordinances and to add additional provisions for the security of life, etc. The Sanitary Code was adopted in 1876.

Some time after the adoption of the Sanitary Code the defendant was indicted, the indictment containing three counts, (1) for violation of the statute; (2) for violation of sanitary code and statute and (3) for violation of sanitary code. The defendant pleaded guilty.

The only question involved in this case in so far as the ordinance was concerned was the power of the Legislature to confer power to enact sanitary ordinances having the force of law and the Court upheld the contention that the Legislature had such power and that it conferred the power to enact sanitary ordinances having the force of law.

But nowhere in the opinion of the Court in this case is there any intimation that if the sanitary ordinances as adopted had been contrary to the law or had conflicted with the law, that the

Court would have declared such ordinances to be controlling in the case. The question as to whether or not the ordinance conflicted with the law or varied from the law, was not in any way involved. Therefore, this case is no authority for the principle that municipal ordinances may be at variance with State Statutes.

The case of *City of Bellingham v. Cissna*, 87 Pac., 481, was decided by the Supreme Court of the State of Washington on November 14th, 1906. It has been cited as an authority for the principle that municipal ordinances may conflict with State Statutes and yet be upheld, but a careful reading of the opinion in this case does not warrant such a conclusion.

The opinion discloses that previous to 1905 the City was granted power by the Legislature to regulate and control the use of its streets. The Court held that this power still existed as granted unless it was limited by subsequent statute. Under this power the City adopted an ordinance forbidding a greater speed than six miles per hour for automobiles.

In 1905 a statute was passed by the State Legislature, limiting the speed of automobiles to twelve miles per hour in thickly settled portions of cities, etc., and a subsequent section in the same act forbids a greater speed under any circumstances than was reasonable and proper.

The Court held that in view of this latter section the city still had the power to pass and enforce ordinances for regulation of speed even though less than that prescribed by the statute.

It does not appear, but presumably the power was upheld because the Legislature, in the act of

1905, while forbidding a greater speed than was reasonable and proper did not designate as to who were to determine what speed was reasonable and proper, and inasmuch as the power granted by the Legislature to the city in the former gave the city the right to regulate and control the use of its streets, the Court assumed that there was no one who was a better judge or better qualified to determine what speed was reasonable and proper, than the City itself, and therefore the power was upheld.

It will be noticed that the Court was very careful in this case to say that it was because of the latter section in the statute which forbids a greater speed than was reasonable and proper, that the ordinance of the city to pass under its charter, was upheld. Whether or not the Court would have upheld the ordinance if this section had been absent from the statute and the statute had permitted a speed of twelve miles per hour, cannot be determined.

In the case of *Seattle v. MacDonald*, 17 L. R. A. (N. S., 49), the question was directly involved as to whether or not legislation adopted by the State subsequent to an ordinance adopted by a city supersedes the ordinance, and the Supreme Court of the State of Washington, in October, 1907, decided fairly and squarely that by virtue of certain provisions contained in the charter of Seattle, the city was authorized to enact ordinances for the punishment of offenses already made punishable by State laws.

It does not appear what the provisions of the charter of the City of Seattle were, but it does appear that the Supreme Court of Washington has adopted the principle that a municipality, even in the absence of express authority conferred

upon it by its charter, has the power to enact an ordinance making punishable an act which is made punishable as a criminal offence by the general laws of the State. And, that an ordinance making the doing of an act an offence, enacted by virtue of the municipality's general power, is not superseded by a general law of the State Legislature fixing and defining a punishment for the same act. This will be found on page 52.

At the trial of this case the Trial Judge adopted the contrary rule to that laid down by the Supreme Court of the State of Washington. In dealing with the question, the Supreme Court, on page 52, recognizes the existence of the rule followed by the Trial Court in the following language.

“There are many cases representing, perhaps, the weight of authority, which support the rule followed by the Trial Judge. This Court, however, has adopted the contrary rule.”

We therefore find that in two of the three states in which this rule contended for by the appellee, has been recognized, the Court recognizing such rule has admitted that the weight of authority is to the contrary.

We submit, however, that the rule which has apparently been followed in Kansas, Washington and California has not been adopted in this State, rule that municipal ordinances conflicting with State Statutes are void.

This principle was recognized in the case of the *Pennsylvania Railroad Company vs. The Mayor and Aldermen of Jersey City*, 87 Atlantic Reporter, page 465.

In that case the Court of Errors and Appeals held that where the State Legislature had granted a railroad company the right to operate a railroad, it included the right to consume fuel and emit the smoke arising therefrom, and to be immune from liability for damage to adjacent property provided such damage results notwithstanding proper care is used by the company in operating its railroads, and that a municipality cannot, without at least express power delegated to it, make it unlawful to permit the emitting of dense smoke from the smokestacks of the locomotives unless the escape of such smoke results from negligence or want of due care.

The language used near the conclusion of the opinion would seem to warrant the inference that the Court was not at all satisfied that a municipality could adopt such an ordinance even if express power was delegated to it, but the Court very carefully refrained from expressing any opinion upon this subject as it did not seem to be involved.

III

The ordinance is at variance with the State Statute and is therefore null and void.

An examination of the statute and the ordinance discloses the following inconsistencies:

The statute (Sect. 6) provides that milk shall not contain more than $88\frac{1}{2}$ per centum of *watery fluids*: the ordinance after providing that milk shall conform to the statutory requirements of New Jersey goes further and provides, that milk shall not have more than 88.5 per centum *water*.

The statute (Sect. 6 and 7) provides that milk shall not have less than 3 per centum and cream not less than 16 per centum of *milk fats*: the ordinance provides that milk shall not have less than 3 per centum and cream not less than 18 per centum of *Butter fat*.

The state statute (Section 6) provides that milk shall not have less than $11\frac{1}{2}$ per cent of *milk solids*. The ordinance provides that milk shall not contain less than 11.5 per centum *total solids*.

The prosecutor submits that these variances are fatal to the ordinance even if the Board of Commissioners, as successors to the Board of Health, of Jersey City had power to adopt the alleged ordinance, inasmuch as they are not and are not shown to be in conformity with the state statute.

IV

If Section 33 of the Ordinance is void, then Section 26 and all the other provisions of the Ordinance, as to the character of milk and cream permitted to be sold are also void.

It will have been noticed that Section 33 of the ordinance requires that no cream sold as such shall have less than 18% of "butter fat," while the restriction in Section 7 of the Pure Food Law prohibits only the sale of cream which contains less than 16% of "milk fats."

Conceding, for the argument, that "butter fat" and "milk fats" are merely different forms of description of the same thing, the restriction requiring 18 instead of 16 per centum of fat in cream to be sold was unwarrantable, if the foregoing argument that the State Law must control, is a sound one. The question then is whether the whole ordinance falls so far as the character of milk and cream permitted to be sold is concerned.

A careful reading of the entire ordinance will show that milk and cream are treated together in such a way that the provisions with respect thereof are not separable. The ordinance must stand or fall as a whole, so far at least, as the character of the milk or cream permitted to be sold is concerned. It can hardly be that it was the intention of the city authorities to permit milk to be sold that would not produce cream of prescribed character. The milk must be such as that the cream derived therefrom shall have not less than 18% of fat. If this be so, then the ordinance is more restrictive than the statute and is therefore void.

V

There is no proof that the milk offered for sale by the defendant was injurious to health or had any affect upon same.

When the state delegated to local Boards of Health power to enact ordinances relating to public health (C. S. 2684, Section 92), it did not give them power to prescribe standards of purity, and how can it be argued that milk containing 11.50 per cent total solids is healthy while milk containing 11.43 per cent solids is unhealthy. No such argument has ever been advanced, nor can be sustained. If the milk is pure, it is healthy whether it contain 11.43 per cent. or 11.50 per cent. total solids.

It is hardly to be presumed that the City authorities would care to urge that this milk was unhealthy because it lacked the difference between what it actually showed and the requirements of the ordinance, which was seven ten-thousandths (.0007), a quantity so minute as to be indiscernible to the naked eye when we consider the quantity analyzed.

What the City is attempting to do is to adopt a standard and thereby prevent deception in the distribution and sales of milk. There is no contention in this case that the milk was adulterated, and for that reason was unhealthy. The sole contention is that the milk did not contain sufficient total solids.

If it was intended that Section 92, C. S. 2684, should confer the broad powers contended for by the respondent, why was it necessary to pass in 1910, Section 64 and 65 of the Health Act?

Certainly, if as contended for by the respondent, the City, under the Sections 92 has the power to prescribe standards and purity, it certainly had the powers defined in Sections 64 and 65, and the very fact that the Legislature passed the Act of 1910 is an indication that it did not confer any unlimited powers upon Boards of Health in Section 92.

What Jersey City has attempted to do is this: Under the guise of an Ordinance for the benefit of the public health, they have fixed standards of purity and have endeavored to legislate for the purpose of preventing deception in the distribution and sales of foods, irrespective of the question as to whether or not foods which do not meet the standards fixed by the Ordinances of Jersey City are healthy or unhealthy.

This, the prosecutor insists, is wholly beyond the power of the authorities of Jersey City, and while they may have the power to prevent the sale of articles injurious to health, yet they have no power to fix the standard of purity of any article even though the sale thereof, whether below or above the standard is not injurious to health.

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