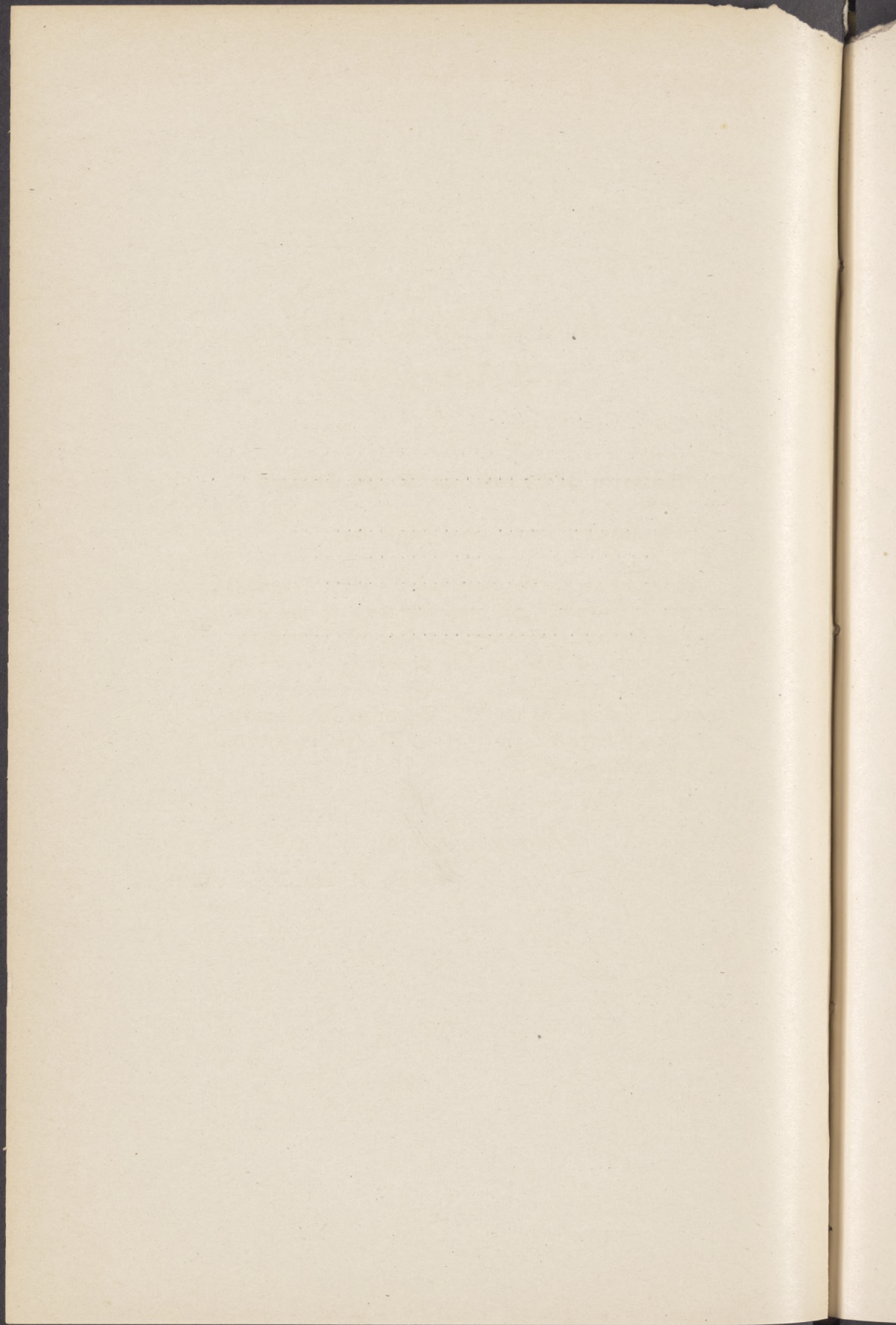


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New Jersey Court of Errors and Appeals

Return of Criminal Court Judge

To the Justices of the Supreme Court:

I, James P. Dolan, Judge of the First Criminal Court of Jersey City, herewith send to the Justice of the Supreme Court holding the circuit for the County of Hudson, the pleadings, record of conviction, transcript of Docket, and notice of appeal, in the case of the The Mayor and Aldermen of Jersey City vs. Herbert A. Thorpe as within I am commanded. 20

Dated, May 1916.

Yours respectfully,

JAMES P. DOLAN. 30

Record of Conviction

	The MAYOR and ALDERMEN OF JERSEY CITY, <div style="text-align: right; margin-right: 20px;">Plaintiff,</div>	Record of Con- viction First Criminal Court of Jer- sey City, N. J. Violation of a City Ordi- nance of Jer- sey City.
10	vs.	
	HERBERT A. THORPE, <div style="text-align: right; margin-right: 20px;">Defendant.</div>	

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

20 Be it remembered that on the twenty-fourth day of May A. D. nineteen hundred sixteen at Jersey City, aforesaid, Herbert A. Thorpe, defendant, was by said First Criminal Court of Jersey City in the County of Hudson and State of New Jersey, aforesaid, convicted of violating the provisions of an ordinance of said City entitled "An Ordinance Concerning the Littering of Streets with Refuse Matter," which said ordinance was approved on the fourth day of May, A. D. Eighteen hundred and ninety-one, in the following manner, to wit: On the twenty-third day of May, A. D. nineteen hundred sixteen at 5:30 o'clock p. m. or thereabouts, upon Summit Avenue, a public street of said City, the said defendant did distribute hand circulars, in violation of section four (4) of said ordinance aforesaid, and in a summary proceeding the defendant was convicted as aforesaid at the suit of the Mayor and
 30
 40 Aldermen of Jersey City, who was plaintiff, upon

Hand Circular

a complaint made by John McNamara, police officer of said City, and further that the witnesses in said proceeding who testified for the plaintiff were, John McNamara, police officer of said City and the witnesses who testified for the defendant were, Herbert A. Thorpe, defendant, of 78 Clendenny Avenue, Jersey City. 10

Wherefore said Court gives judgment that the said Herbert A. Thorpe pay a fine of five dollars.

Witness, James P. Dolan, Judge, First Criminal Court, Jersey City, the day and year first above written.

EDWARD MARKLEY,
Clerk of said Court.

 20
Hand Circular

FOOLS OR COWARDS

Our doctors are either one or the other. If they believe that vaccination is keeping smallpox away, when only one quarter of the population is vaccinated recently enough to afford so-called "protection," (as admitted by themselves) they are fools, and if they do not believe this, they are cowards for keeping silent and permitting the forcing of a needless operation upon thousands of helpless public school children every year. 30

Does twice two make four?

If three quarters of the population can go "unprotected" by vaccination and escape smallpox, surely the other quarter can do the same, but apparently doctors haven't brains enough to see this. 40

Notice of Appeal to Supreme Court

How much longer will *you* put up with this injustice. It is owing to your indifference to your rights that this piece of medical humbug continues to exist, and the children of our City and State suffer unnecessary pain and distress in consequence. Think this over.

10

AN UNANSWERED QUESTION

If London with 7,000,000 population can get along without compulsory vaccination, why cannot Jersey City, with 300,000 population, do the same?

HERBERT A. THORPE,
78 Clendenny Avenue, Jersey City, N. J.

20

Notice of Appeal to Supreme Court

NEW JERSEY SUPREME COURT

30	The MAYOR and ALDERMEN OF JERSEY CITY,	Appellee,
	vs.	
	HERBERT A. THORPE,	Appellant.

*To the Hon. James Dolan Judge of the First
Criminal Court of Jersey City:*

40

Petition

Sir:

Please take notice that the above named appellant Herbert A. Thorpe, deems himself aggrieved by the finding of the Judge of the First Criminal Court, sitting as a jury, upon the trial for violation of section 4 of an ordinance of Jersey City, approved May 4, 1891, providing for a penalty for distributing circulars. Said appellant was found guilty and fined five dollars on May 24, 1916, and hereby appeals from the verdict and findings therein to the Justice of the Supreme Court holding the circuit for Hudson County. 10

Dated, May 27, 1916.

FRANK W. HEILENDAY,
Attorney for defendant-Appellant.

20

Petition

NEW JERSEY SUPREME COURT

The MAYOR and ALDERMEN OF
JERSEY CITY,

Appellee,

vs.

HERBERT A. THORPE,

Appellant.

30

*To the Hon. Francis J. Swayze, Justice of the
Supreme Court:*

The petition of Herbert A. Thorpe, by Frank
W. Heilenday, his attorney, respectfully shows: 40

Petition

1. Your petitioner is a resident of the City of Jersey City, County of Hudson and State of New Jersey.

2. Your petitioner was arrested on May 23, 1916, charged with a violation of section 4 of an ordinance of Jersey City, approved May 4, 1891, which ordinance provides a penalty for distributing circulars. That the circulars distributed by petitioner expressed only his sentiments on the question of compulsory vaccination.

3. That on May 24, 1916, your petitioner was illegally convicted by the Judge of the First Criminal Court of Jersey City of a violation of said ordinance and fined Five Dollars.

4. That said section 4 of said ordinance is in violation of Article 1 of the Amendments of the Constitution of the United States, and of Article 1, paragraph 5 of the Constitution of the State of New Jersey.

5. That the proceedings before said Magistrate are in all respects illegal, unjust and oppressive, and should be set aside.

Your petitioner prays that an order may be made by your Honor directed to the Hon. James P. Dolan, Judge of the First Criminal Court of Jersey City, commanding him to send before your Honor the complaint, warrant, proceedings and record of conviction, so that the legality of such proceedings may be reviewed and determined; and for such further relief as may be just.

FRANK W. HEILENDAY,
Attorney of Appellant.

Order

NEW JERSEY SUPREME COURT

The MAYOR and ALDERMEN OF
JERSEY CITY,

Appellee,

10

vs.

HERBERT A. THORPE,

Appellant.

This matter being opened to the Court by Frank W. Heilenday, attorney for the petitioner and appellant herein, and good cause being shown, I do hereby order, on this third day of June, 1916, 20 that Hon. James P. Dolan, Judge of the First Criminal Court of Jersey City, do send before me on the 17th day of June, 1916, at the Court House in Jersey City, the complaint, warrant, proceedings and record of conviction and the commitment herein, so that the legality of such proceedings and conviction may be reviewed and determined according to the statute in such case made and provided.

FRANCIS J. SWAYZE, 30
Justice of the Supreme Court.

Rule for Judgment

NEW JERSEY SUPREME COURT

10	HERBERT A. THORPE, <div style="text-align: right;">Appellant,</div>	}	On Appeal from Police Court.
	vs.		
	The MAYOR and ALDERMEN OF JERSEY CITY, <div style="text-align: right;">Respondent.</div>		

20 The above named appellant having been convicted in the First Criminal Court of Jersey City of violation of Section 4 of an ordinance adopted by the Board of Street and Water Commissioners of Jersey City and approved May 4th, 1891, and the said appellant having appealed from such conviction, and the said appeal having come on to be heard before me, under the statute in such case made and provided, on the 7th day of October, 1916, and the Court having considered the conviction aforesaid, and having heard the argument of counsel and duly considered the same;

30 It is thereupon, on this 14th day of November, 1916, ordered that the conviction of the said appellant, Herbert A. Thorpe, in the First Criminal Court aforesaid, be and the same hereby is affirmed.

FRANCIS J. SWAYZE,
Justice Supreme Court.

**Notice of Appeal to Court of Errors
and Appeals**

NEW JERSEY SUPREME COURT

<p>The MAYOR and ALDERMEN OF JERSEY CITY,</p>		<p>Appellee,</p>	10
<p>vs.</p>		<p>On Appeal from Police Court.</p>	
<p>HERBERT A. THORPE,</p>		<p>Appellant.</p>	

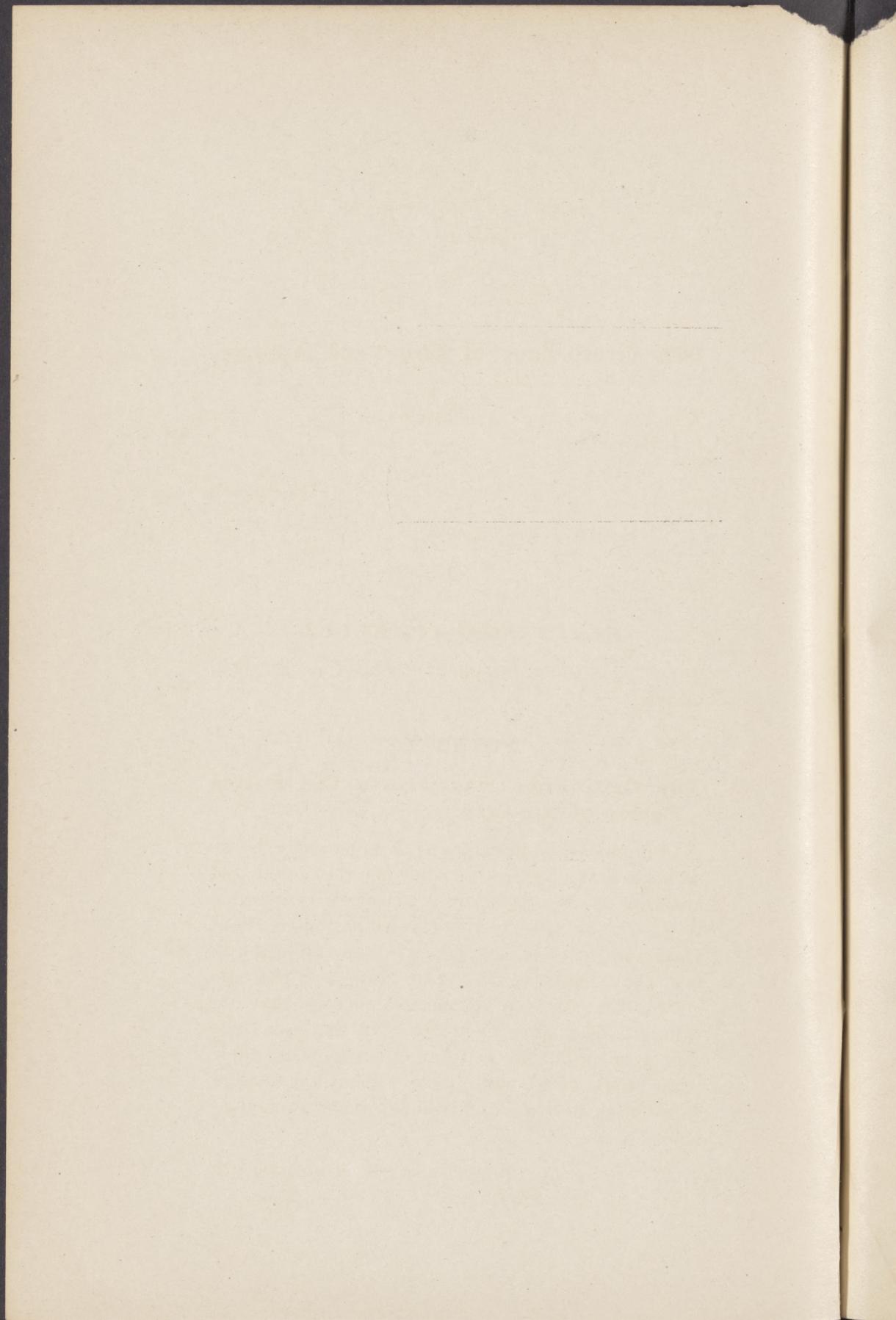
To John Bentley, Esq., attorney of Appellee:

PLEASE TAKE NOTICE that the Appellant, Herbert A. Thorpe, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, on the following grounds: 20

That the said judgment, sustaining the conviction of the appellant, is in violation of Article 1 of the Amendments of the Constitution of the United States, and of Article 1, paragraph 5 of the Constitution of the State of New Jersey.

Dated, December 2, 1916.

FRANK W. HEILENDAY, 30
Attorney for Appellant.



New Jersey Court of Errors and Appeals.

THE MAYOR AND ALDERMEN OF
JERSEY CITY,

Appellee,

vs.

HERBERT A. THORPE,

Appellant.

10

On Appeal.

BRIEF FOR APPELLEE.

The facts stated in appellant's brief are accepted
as true.

20

POINT I.

The Ordinance was within the Police Power of the City.

In appellant's brief Point I apparently is inserted for the purpose of showing the intent and meaning of the ordinance by a process of elimination. The purpose would seem to be that if Point II in that brief is well taken in contemplation of law, the purpose indicated in Point I is the only alternative. It is by no means conceded that one thing follows from the other. It has been held that a grave danger to life and limb exists where loose paper is allowed to blow about the streets, frightening horses so as to make them unmanageable.

30

City of Philadelphia vs. Brabender, 51
Atl., 374.

40

Appellant concedes the delegation by the State of the power, if the State possessed the same, to regulate the use of the streets with regard to distributing pamphlets or circulars. At least it is so assumed, in view of the fact that no such point is raised. The Charter of 1870 conferred that power upon the Board of Works, and all of the powers of that body descended to the Board of Street and Water Commissioners under the act found in the

10 Pamphlet Laws of 1891 at page 249, creating a Board of Street and Water Commissioners in cities of the first class. It only remains to consider whether or not the organic law conferred upon appellant a right that no statute or ordinance could take away.

He would be a bold man who might undertake before this Court to deny any of the quotations or facts contained under the heading of appellant's second point. There are names and charters that

20 stand for all the principles upon which our government is founded. But how counsel can draw the conclusions sought to be forced is beyond the power of the writer of this brief to fathom. The adjudications referred to do not appear to have passed upon the inherent authority of the commonwealth to regulate the use of property or the enjoyment of individual rights.

The logical conclusion to which the appellant would find himself driven is that he might erect

30 a barrier in the public street, provided the only purpose for which he did it was to have a place upon which to post a placard. In fact, it goes much further than that, and would logically clothe him with the right to plaster his views upon the private property of other individuals, because if he has the power to abuse the public property in the streets, he has an equal right to appropriate to his own purposes the property of any private

40 person. He, while entirely innocent of the effect

of his argument, would subvert all other rights to his right to infringe every other provision of the law to carry out the publication of his ideas.

An ordinance of the City of Boston providing that "No person shall, in or upon any of the public grounds make any public address * * * except in accordance with a permit from the Mayor" was held to be within the police power in *Commonwealth vs. Davis*, 162 Mass., 510.

The District Court of the United States did not think the act of Congress unconstitutional that prohibits the mailing of obscene matter in the case of *United States vs. Harmon*, 50 Fed. Rep., 921. 10

Substantially the same question was similarly decided by the Supreme Court of the United States in *Re Jackson*, 96 U. S., 727.

Surely such an ordinance passed for the safety of pedestrians and drivers upon the street, the saving of expense in the matter of cleaning the public highways and the preservation of streets in a clean and sanitary condition is beyond any attack. 20

The judgment of the Supreme Court should be sustained.

Respectfully submitted,

JOHN BENTLEY,
Attorney for and of
Counsel with Appellee. 30

To be argued by

HARRY WEINBERGER.

New Jersey Court of Errors and Appeals

THE MAYOR AND ALDERMEN OF
JERSEY CITY,
Plaintiff-Appellees,

against

HERBERT A. THORPE,
Defendant-Appellant.

POINTS FOR APPELLANT.

Facts.

The defendant above named was convicted on May 24, 1916, in the First Criminal Court of Jersey City, for violating Section 4 of the Ordinances of said City, which reads as follows:

“No person shall distribute or strew about any street or public place, or place in any areaway, in front of any house or upon the door step of the same, or cause to be so distributed or strewed about or placed in any street or public place or areaway or upon any door step any piece of paper, circular, card or pamphlet, and no person shall drop or throw into any street or public place any

newspaper or any piece of paper, circular, card or pamphlet."

On appeal, the Supreme Court affirmed the conviction, November 14th, 1916.

The evidence shows that the defendant, Herbert A. Thorpe, gave to people on the streets of Jersey City circulars entitled: "Fools or Cowards," relative to a public measure and the action of public officials (p. 3, l. 30).

POINT I.

The ordinance was intended to keep the streets clean.

The very title of the ordinance, adopted by the Board of Street & Water Commissioners of Jersey City, "An Ordinance Concerning the Littering of Streets with Refuse Matter," shows its purpose and meaning, and shows that it was not the intention of this ordinance to limit the right of free press, even if the Board had the power, but to legislate in reference to materials or matter "rejected as unfit for use or thrown away, rubbish."

There is nothing in the ordinance which prohibits distributing circulars or newspapers *to people*. It refers merely to littering streets—"public places, areaways, front of houses, door steps." Newspapers, circulars and pamphlets become refuse matter when discarded, not before. The person who receives a circular or newspaper and throws it into the street or in front of any house, etc., would be guilty of violating the ordinance, not the person who gives it to him.

As *Kent* in his *Commentaries*, Vol. 1, p. 462, Rules for the Interpretation of the Statutes, said:

“The real intention when accurately ascertained will always prevail over the literal sense and terms.”

As stated in

Colwell v. May's Landing Water Power Co., 19 *N. J. Eq.*, 243:

“A statute ought to be so construed, if possible, as to bring it into harmony with the Constitution.”

Under the interpretation given in the lower courts, the sale and distribution of newspapers, the giving out of church tracts, the disposal of literature and political circulars and handbills are illegal in the streets of Jersey City, and yet newsboys, political workers or church workers have never been arrested in Jersey City for distributing newspapers, handbills or church tracts.

In the case of an appeal to the Court of General Sessions of the Peace, of New York, entitled

People v. Samuel W. Simpson,

from a conviction under a similar New York City ordinance, Judge OTTO A. ROZALSKY (October 16, 1914) stated that:

“The distribution on the public highway of a petition to be signed by citizens and addressed to the Governor and to members of the Legislature of this State * * * does not come within the purview of Subd. 5, Sec. 408 of the Ordinances.”

On an appeal from another conviction for distributing a circular in the streets of New York City, entitled "The Cause of War," in

People v. Samuel W. Simpson,

decided January 5, 1915, by Judge JOSEPH F. MULQUEEN, the Court of General Sessions of the Peace reversed the conviction and remitted the fine, as the distribution was not within the prohibition of the ordinance.

The judgment of conviction of the defendant for handing circulars to people in the streets of Jersey City should be reversed, as the ordinance was not violated.

POINT II.

Ordinance unconstitutional.

If Section 4 of the Ordinances of Jersey City prevents the distribution of defendant's circular, "Fools or Cowards," it is unconstitutional.

History shows that newspapers, pamphlets and circulars have been the weapons of all thinkers in the struggles of the past for liberty. Samuel Adams issued dozens of pamphlets and circulars before the American Revolution. The speech of Patrick Henry about "Give me liberty or give me death" was issued in circular form and reached one-half million people. Thomas Jefferson issued pamphlets and circulars. The greatest pamphlets ever issued in America were Thomas Paine's "Common Sense" and "The Crisis." The original pamphlet of "The Crisis," beginning with the words: "These are the times that try men's souls," was the explosive that turned the tide toward victory in the American Revolution. Every soldier in the

Continental Army was given one of these pamphlets and they were read at the head of each regiment. These are the men who wrote the Constitution of the United States, and the Jersey men of the Revolution wrote the Constitution of the State of New Jersey.

The word "press" is defined in Funk & Wagnall's Standard Dictionary as:

"The newspapers or periodical literature of a country, district or town taken collectively; also *printed literature in the abstract.*"

The Constitution of the State of New Jersey reads:

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

In the famous Virginian "Bill of Rights," unanimously adopted June 12, 1776, is this clause:

"The freedom of the press is one of the bulwarks of liberty and can never be restrained but by despotic government."

Cooley in his *Constitutional Limitations* (7th Ed.), p. 604, said:

"The liberty of the press might be rendered a mockery and a delusion and the phrase itself a by-word, if, while every man was at liberty to publish what he believes, the public authorities might, nevertheless, punish him for harmless publications. * * *

Their purpose has evidently been to protect parties in the free publication of matter of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. * * * *The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seem absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.*"

As *Blackstone* in his *Commentaries*, at p. 638, said :

"Every freeman has an undoubted right to lay what sentiments he believes before the public; to forbid this is to destroy the freedom of the press."

What was the method of laying printed sentiments before the public in the days of *Blackstone*, before we had our present system of mails? Personal distribution on the streets, highways and by-ways of the land.

Story on the *Constitution*, says at p. 625 (5th Ed.) :

"Every man shall be at liberty to publish what is true, with good motives and justifiable ends. And with this reasonable limitation, it is certainly right in itself, but it is an inestimable privilege in a free govern-

ment. * * * A little attention to the history of other countries and other ages will teach us the vast importance of this right."

In

Ex parte Neill, 32 Tex. Crim. Rep., 275,

the Court said:

"A city ordinance declaring a newspaper called 'The Sunday Sun' to be a public nuisance and prohibiting its circulation within the city, is a violation of the Bill of Rights. * * * We are not informed of any authority which sustains the doctrine that a municipal corporation is invested with the power to declare the sale of newspapers a nuisance. *The power to suppress one implies the power to suppress all, whether such publications are political, secular, religious, decent, indecent, obscene or otherwise.* The doctrine of the Constitution must prevail in this State, which clothes with liberty to speak, write or publish his opinion upon any and all subjects, subject alone to the responsibility for the abuse of such privileges."

The Declaration of Independence avowed its "decent respect to the opinions of mankind," but there cannot be true opinions without a freely distributed press. Guttenberg, when he gave the printing press to the human race, gave them a fighting weapon more powerful than all arms, because he gave the people the power to think together and protect themselves. Lincoln said: "Let the people know the truth and the country is safe."

The greatest right in the world is the right to be wrong. If the world or majorities think you

are right, no one will interfere with you; but let the world or majorities think you are wrong, then comes force and government with its tendency to suppress. When some people talk against the things we consider holy; when some people question the things we consider proved; when some people shake the pillars of what we call society, how the old inquisition in us tends to awaken and we feel inclined to call government and force and the prison to our aid to suppress. But when, with a saner vision we look over the history of the martyrs who have died and suffered for free press and free speech, our desires of curtailment or suppression cease.

Freedom of the press is a mockery, unless I am free to circulate and disseminate what I write, and when the government restricts my right to circulate what is published, the government to that extent restricts my freedom of the press. If not permitted to use the streets as well as the mails, you might as well abolish the freedom of the press. How can the vast public know of meetings (free speech) to be held, except by the same means of circulars or pamphlets freely distributed on the streets, if one cannot afford to pay for advertisements in newspapers or for mailing notices?

We are a government of and by discussion.

The ordinance is unconstitutional because it prevents discussion by means of a free press, freely distributed.

LAST POINT.

In view of the history and decisions on "free press" as guaranteed in the Constitutions and a true construction of the ordinance, the conviction of the lower court should be reversed.

Respectfully submitted,

FRANK W. HEILENDAY,
Attorney for Defendant-Appellant.

HARRY WEINBERGER, Esq.,
of Counsel.