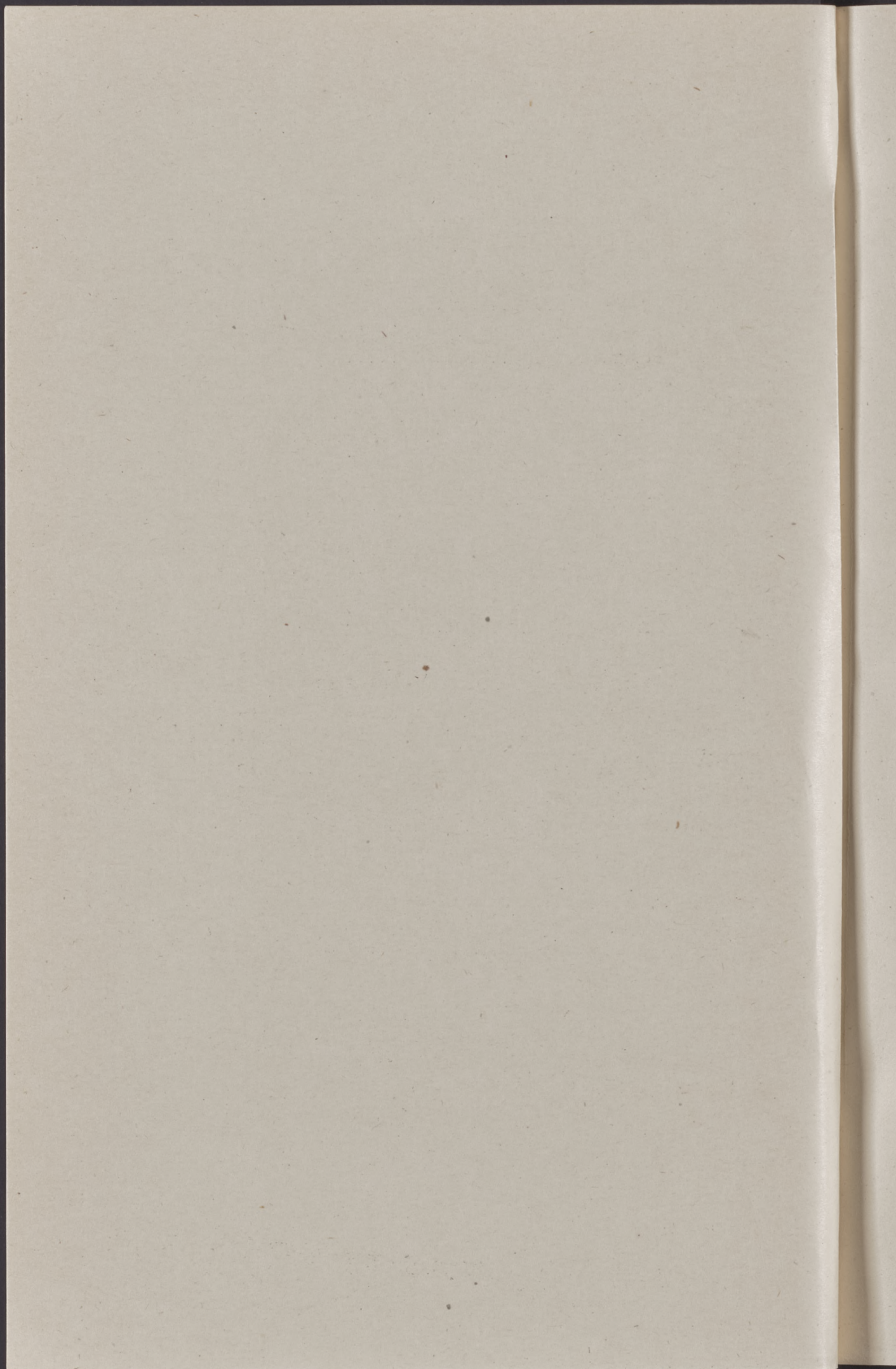


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Supreme Court

of the

State of New Jersey

Writ Of Certiorari

20

(Filed Oct. 21, 1917)

New Jersey, ss.

The State of New Jersey to: James
P. Dolan, acting Judge of the Se-
cond Criminal Court of Jersey City,

GREETING:

(Seal)

30

We, being willing, for certain reasons to be certified of the judgment, order, conviction and proceedings given and made before you in a certain action, plaint or proceeding brought against Harry Rothberg 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, conviction and proceedings aforesaid, with all things touching and concerning the same as fully and entirely as they remain before you by whatsoever

40

10

Return to Writ

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 of May, Nineteen hundred and seventeen.

MELOSH & MOREN,
Attorneys for Deft-Pros.

20

Wm. C. Gebhardt,
Clerk.

Return To Writ

NEW JERSEY SUPREME COURT

30

THE MAYOR and ALDERMEN OF
JERSEY CITY,

Plaintiff-Respondent,

vs.

HARRY ROTHBERG,

Defendant-Prosecutor.

} On Certiorari.

*To The Hon. The Jutices of The Supreme Court
of Judication of New Jersey:*

40

IN OBEDIENCE to the command of the within writ directed to James P. Dolan, Acting Judge of the Second Criminal Court of Jersey City, I, WILLIAM V. O'DRISCOLL, Judge of the Second

Complaint

10

Criminal Court of Jersey City, (the said James P. Dolan's term of office having expired) Do HEREBY CERTIFY AND SEND, under the seal of the said Second Criminal Court, the judgment, order, conviction and proceedings wherein The Mayor and Aldermen of Jersey City is Complainant and Harry Rothberg is Defendant, together with all papers touching and appertaining to the same, as fully and entirely as before the said Second Criminal Court they remain, as is commanded. 20

IN WITNESS WHEREOF, I, WILLIAM V. O'DRISCOLL, Judge of the Second Criminal Court of Jersey City, have hereunto set my hand and the seal of said Court this 31st day of August, A. D. 1917.

WM. V. O'DRISCOLL,
Judge of the Second Criminal,
Court of Jersey City.

Seal.

30

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 40 according to law, on his oath says; That he is a sanitary and milk inspector of the Health Bureau of JERSEY CITY, NEW JERSEY, and that on

the seventh day of December A. D. Nineteen hundred and fifteen Harry Rothberg, 94 Clerk Street, Jersey City, defendant, of JERSEY CITY aforesaid, did violate the provisions of Section 33 of an ordinance entitled "An Ordinance regulating the general condition 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 quality of milk or cream sold or offered for sale in Jersey City." Adopted April 1, 1915.

IN THIS THAT: the said Harry Rothberg did sell from wagon (said wagon being at the time in front of premises known as 356 Henderson Street, Jersey City) cream having less than 18% of butter fat, in violation of Section 33 aforesaid.

WHEREFORE, deponent prays that process in the nature of summons or warrent 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 penalty prescribed for said violation.

THOS. J. STEELE.

Sworn and subscribed

before me this third day of

Fred. J. Blackshaw,

Act. Clerk of the 2nd

Criminal Court of Jersey City.

Summons

HEALTH BUREAU SUMMONS.

SECOND CRIMINAL COURT OF JERSEY
CITY

<p>THE MAYOR and ALDERMEN of JERSEY CITY, vs. HARRY ROTHBERG</p>
--

20

<p>City of Jersey City, County of Hudson, State of New Jersey,</p>	<p>} ss.</p>
--	--------------

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

WHEREAS, Thos. J. Steele, a sanitary & milk 30
inspector of the Health Bureau of Jersey City,
New Jersey, has this day made complaint upon
oath before the Criminal Court of Jersey City,
that on the 7th day of December, A. D. one
thousand nine hundred and fifteen, at Jersey City
aforesaid, Harry Rothberg of 94 Clerk Street,
Jersey City, did violate Sec. 33 of an ordinance
entitled "An ordinance regulating the general
conditions governing the sale of milk or cream
in Jersey City and the conditions under which 40
milk or cream in Jersey City and the conditions
which milk or cream shall be maintained or hand-
led and the quality of milk or cream sold or
offered for sale in Jersey City," Adopted Apr. 1,

'15, in the following manner, viz., the said Harry Rothberg did sell from wagon (said wagon being at the time in front of premises known as 356 Henderson Street, Jerse City) cream having less than 18% of butter fat, in violation of Section 33 aforesaid.

20 These are, Therefore, in the name of the State of New Jersey, to authorize and command you to summon the said Harry Rothberg, 94 Clerk Street, Jersey City, personally to be and appear before the 2nd Criminal Court of Jersey City on Thursday, the 6th day of Apr.1916, at the hour of nine o'clock in the forenoon, to answer unto the Mayor Aldermen of Jersey for such alleged violation of said Ordinance, and to be further dealt with as the law directs.

30 WITNESS, Charles F. X. O'Brien, Judge of the 2nd Criminal Court of Jeresy City, this 3rd day of April, 1916.

FRED J. BLACKSHAW,
Acting Clerk.

Testimony

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SECOND CRIMINAL COURT OF JERSEY
CITY

THE MAYOR and ADERMEN of JERSEY CITY, Complainant, vs. HARRY ROTHBERG, Defendant.	}	20
--	---	----

For violation of Section 33 of an Ordinance on the rules and regulations of the Board of Health of Jersey City, entitled "An Ordinance regulating the sale of milk and cream in Jersey City.

30

Jersey City, April 11th, 1916.

Before, HON. JAMES P. DOLAN, Judge.

Appearances:

Frank J. Reardon, Esq., for the Complaint.
 Messrs. Melosh & Morten, for the Defendant.

Mr. Morten: If your Honor please, I wish to make an objection on the part of the defendant to this Court proceeding with trial of this case on the grounds: 40

Testimony

10

FIRST That the State has passed a Pure Food Law and that any ordinance that the City may pass that contravenes or varies the Food Law as prescribed by the Statute is *ultra vires* and void.

Second: I contend that all actions under the Pure Food Law must be brought in an action of debt in the District Court.

20 The Court: I will deny your motion. Your motion is based on the ground that this court has no jurisdiction as the statute provides that any action for a violation of the Pure Food Law must be brought in a District Court. In order for me to dismiss this action, which is brought here, I would have to determine that that City Ordinance is without effect, and therefore I will sustain the action in view of the fact that it is brought, not under the Pure Food Act, but is brought under the City Ordinance, and I will refrain at this time from passing on the validity of the Ordinance.

30 (Inspector Thomas H. Steele was thereupon called as a witness)

It is admitted that the witness Thomas H. Steele purchased from the defendant a quantity of cream for which he paid seven cents: that after receiving the same he put it into two bottles, both of which he sealed, one of which was delivered to the complainant and the other to the County Laboratory for analysis.

40 (Dr. Vanderhoof was thereupon called as a witness)

It is admitted that the analysis made by Dr. Vanderhoof of the sample of cream in question, known as Inspection 3090, sample #1273, made

on the 8th day of December, 1915, contained only sixteen per cent fat, in contravention of the milk ordinance which requires eighteen per cent.

Mr. Reardon: I would like to read into the record Section 33 of the milk Ordinance of Jersey City, passed April 1st, 1915.

Mr. Morten: I will object unless it appears from the evidence that the Ordinance was adopted in accordance with the provisions of the statute. 20

Mr. Reardon: I offer in evidence a certified copy of the Ordinance and read into the record Section 33 of the 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 and cream sold or offered for sale, approved April 1st, 1915, and I offer in evidence a certified copy of the same and read it into the record. 30

Mr. Morten: I object to the offer on the ground that the Ordinance has not been properly proven.

The Court: I will overrule your objection.

Mr. Morten: I ask an exception.

Mr. Reardon: Section 33 reads as follows:

"All cream kept, sold or offered for sale in Jersey City, shall be taken from milk conforming at least to 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 butter fat, and if it have less than 30 percent, it shall be sold as light cream. 40

Testimony

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Cream having 30 per cent butter fat, but less than 40 per cent, may be sold as heavy cream, and cream having 40 per cent of butter fat may be sold as extra heavy cream."

Mr. Reardon: Your honor, that is the case for the City.

20 Mr. Morten: I renew my motion for a dismissal of the case on the grounds already stated and on the further ground that the City has not proved its case and also that the Ordinance of the City has not been properly proven.

The Court: I will deny your motion.

Mr. Morten: I ask an exception.

The Court: I find the defendant guilty and I will fine him \$25.00, but I will postpone the sentence until the determination of the certiorari proceedings as to whether this Ordinance is *ultra vires* and void.

30

I, William 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.

(Sigd.) WILLIAM B. RICHARDSON

40

Transcript From Docket 3, 2nd Criminal Court, Jersey City.

10

No. of Case	Date	Precinct	Defendant	Age	Color	
	1916					
1621	Apr. 11	5	Rothberg, Harry 94 Clerk St.	44	W	
Nativity	Charge	Arraignment and Plea		State Witnesses		
Austria	Vic. Milk Ordinance Sec. 33	Apr. 11/16		Patlm Mullins		
				Thomas J. Steele Insp. of Milk City Hall		20
Witness Defense	Date of trial	Disposition	Remarks			
Harry Rothberg	Apr. 11/16	Guilty Fined \$25.00 payment of fine postponed	Judge Dolan Sitting			

30

Reasons for Reversal

(Filed, Oct. 21, 1917.)

NEW JERSEY SUPREME COURT

THE MAYOR AND ALDERMEN
of JERSEY CITY,
vs.

HARRY ROTHBERG,

Respondent,
Prosecuter.

On Certiorari.

40

The prosecutor, by Melosh & Morten, his attorneys, comes and prays that the conviction had

Reasons for Reversal

against him for the violation of an ordinance of the City of Jersey City, before James P. Dolan, Acting Judge of the Second Criminal Court of the 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
20 comply with the statute in such case made and provided.
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 were insufficient.
- 30 6. Because the said conviction is in divers other respects illegal, unjust and oppressive.

MELOSH & MORTEN,
Attorneys for Prosecutor.

Rule Affirming Judgment.

10

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 submitted 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. 20

Rule actually entered May 10th, 1918.

On motion of

JOHN MILTON,

Attorney for Respondent.

Opinion.

30

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

Before Justices Bergen and Black.

For Prosecutor, Messrs. Melosh & Morten.

For Defendant, Frank J. Reardon, Esq., and John Milton, Esq.

Per Curiam:

The same reasons for reversal and the same questions are argued as in No. 247, Hennessey v. The Mayor and Aldermen of Jersey City, except in this case the prosecu- 40

10 tor was convicted of a violation of section thirty-three (33) of an ordinance of Jersey City, in that he sold cream, having less than eighteen per centum of butter fat.

The conviction should be affirmed for the same reasons, as stated in the per curiam opinion in that case. The judgment of the Second Criminal Court of Jersey City is affirmed with costs.

20 **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 prosecutor in the place and stead of Melosh & Morten.

30 Entered August 19, 1918,
on motion of

COLLINS & CORBIN,
Attorneys for Prosecutor.

Substitution of Attorney.

Filed Aug. 19, 1918.

40 We do hereby consent that Collins & Corbin be substituted as attorneys for the above named Harry Rothberg.

Dated August 10, 1918.

MELOSH & MORTEN.
Attorneys for Harry Rothberg.

Notice of Appeal.

10

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 Appellant.

20

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.

30

COLLINS & CORBIN

Attorneys of Appellant.

40

Notice of Appeal

Filed August 1, 1911

To the Honorable Justices of the Supreme Court of the State of New York

Applicant: The People of the State of New York

Respondent: The People of the State of New York

GOLDBERG & CORBIN

Attorneys at Law

Grounds of Appeal

That the respondent

has violated the following provisions of the Constitution of the State of New York

Article IV, Section 1, and Article IV, Section 2

of the Constitution of the State of New York

in that the respondent has

appointed a Justice of the Court of Appeals

who is not a member of the Bar of the State of New York

and who is not a resident of the State of New York

and who is not a member of the Bar of the State of New York

GOLDBERG & CORBIN

Attorneys at Law

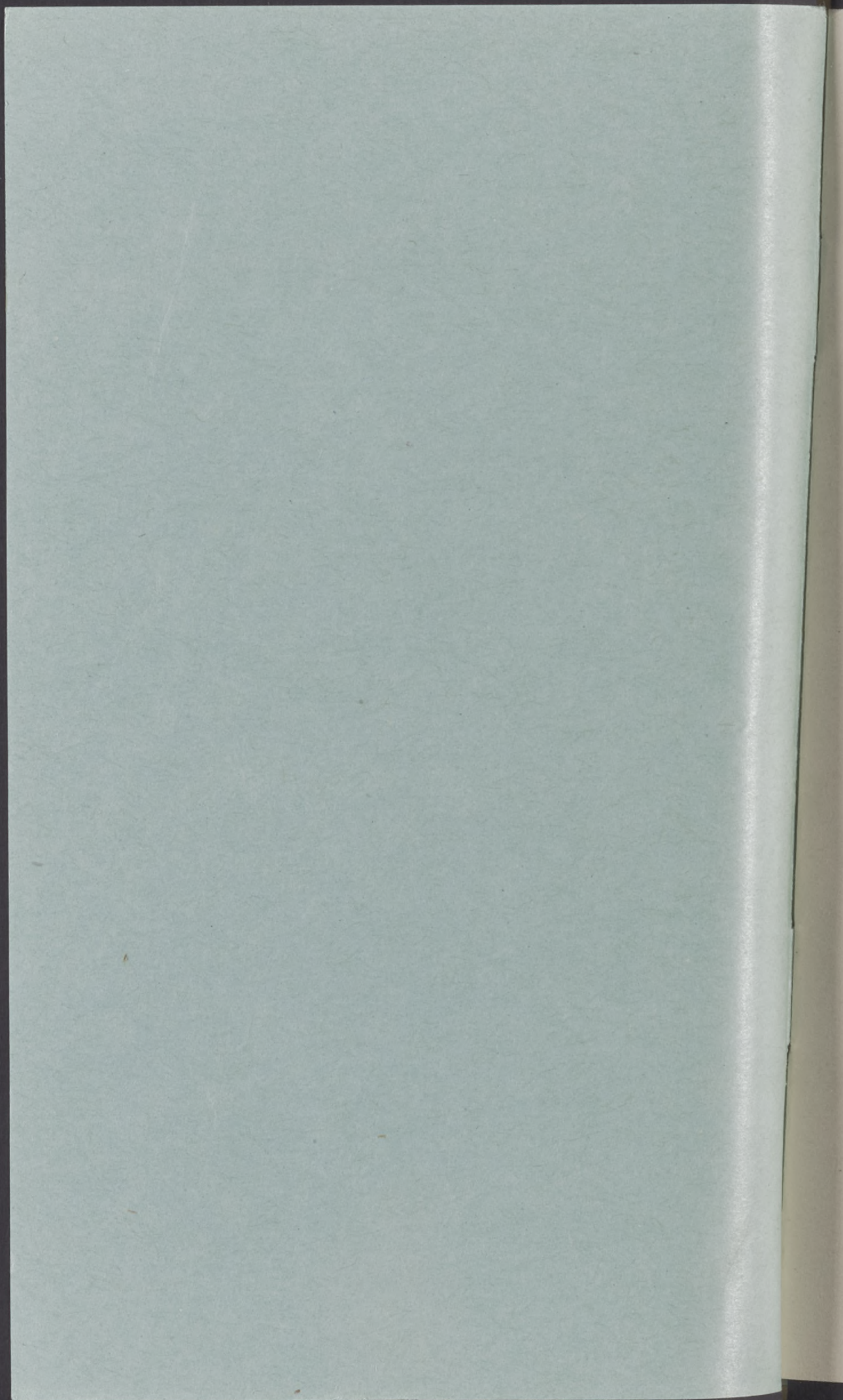
AN ORDINANCE

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 milk from which all or part of the butter fat has been removed. It shall conform in 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.

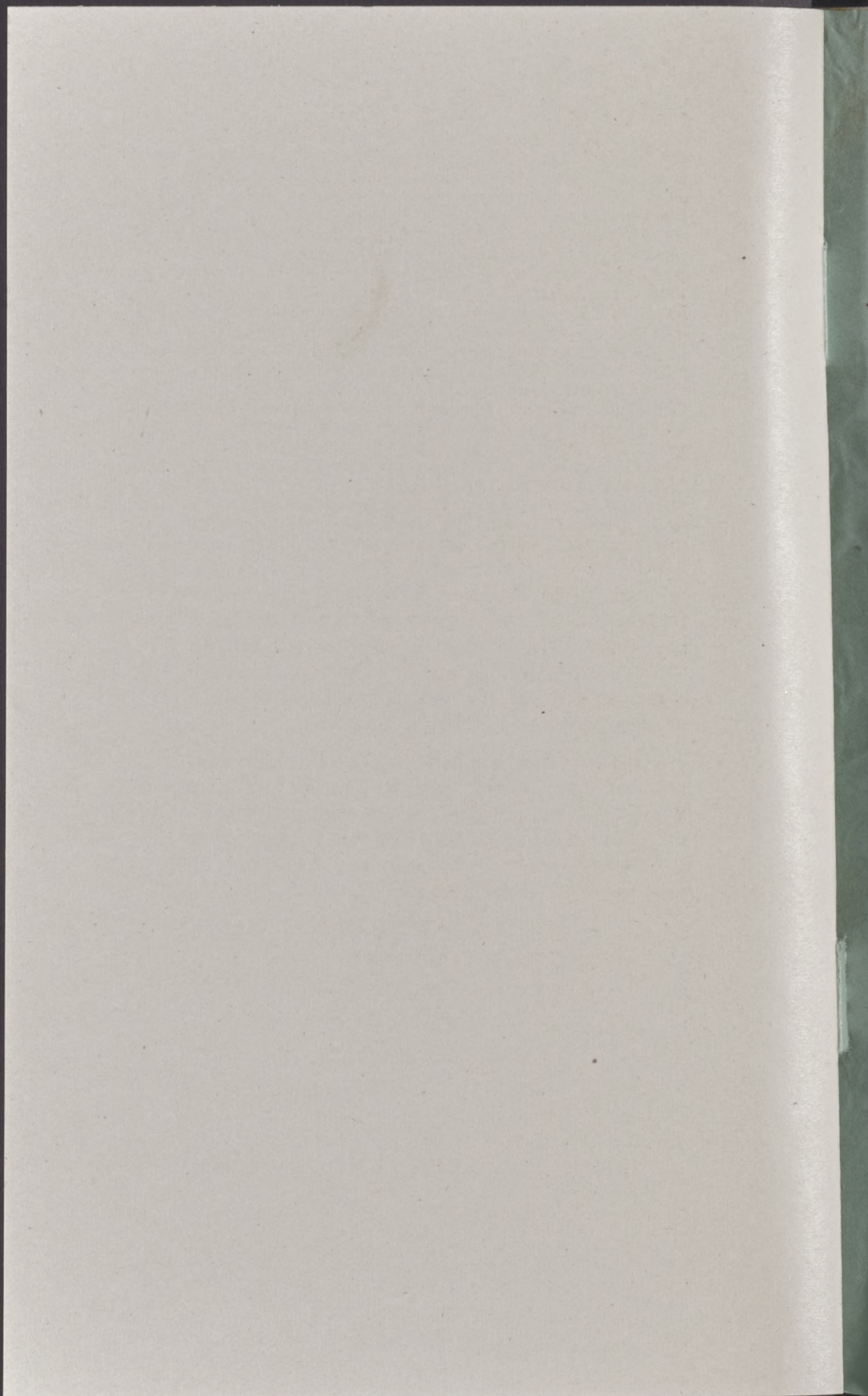
And it is further provided, that all ordinances heretofore passed which in any way deal or conflict with the provisions of this ordinance shall be and the same are hereby repealed from the date of the passage of this ordinance.

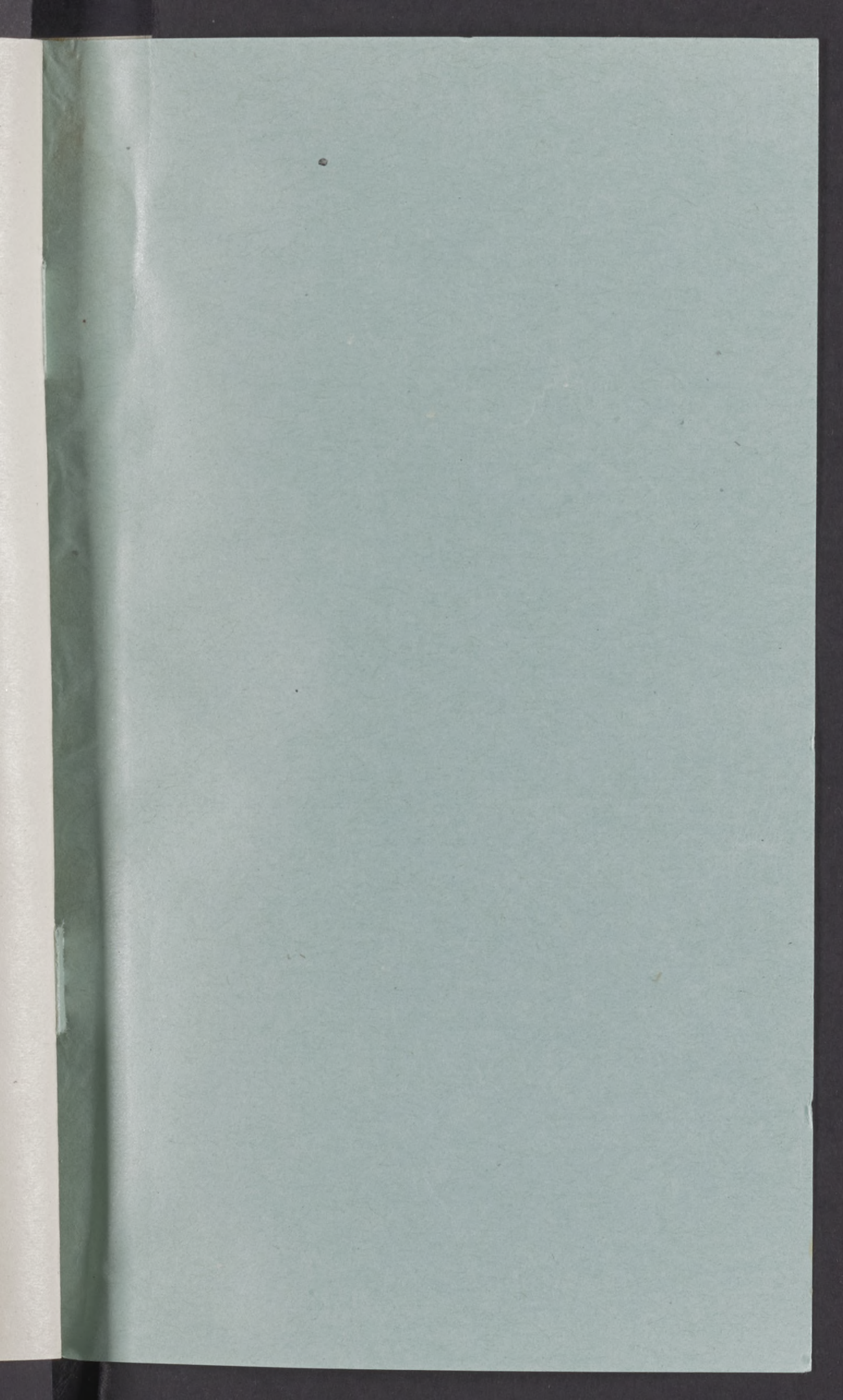
GEORGE F. BRENSINGER,
HENRY BYRNE,
FRANK HAGUE,
A. HARRY MOORE,
MARK M. FAGAN,

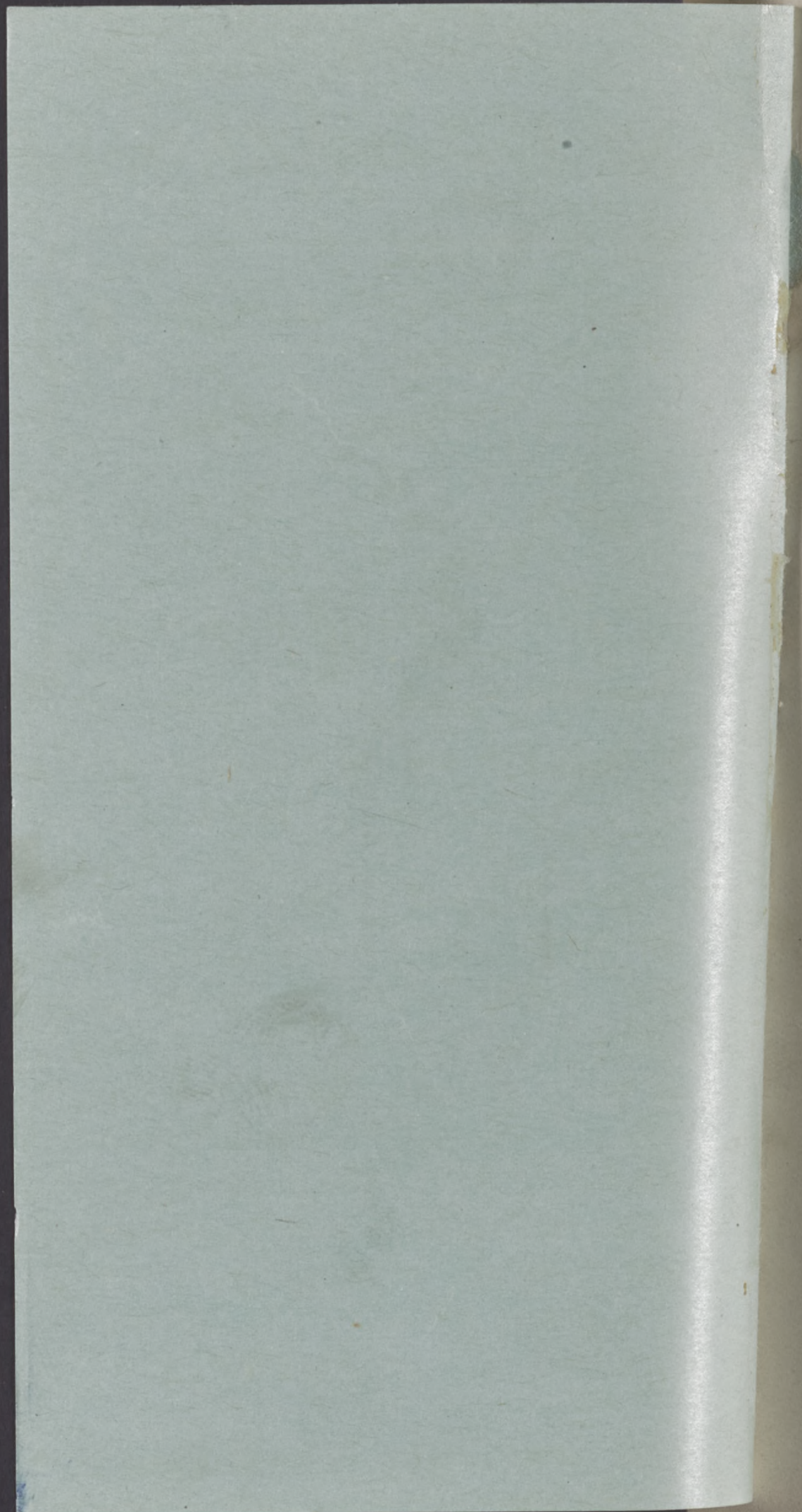
Commissioners.

Passed April 1, 1915.

MICHAEL I. FAGEN, City Clerk.







No 63

New Jersey Court of Errors and Appeals.

<p>THE MAYOR AND ALDERMEN OF JERSEY CITY, <i>Respondent-Appellee,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>HARRY ROTHBERG, <i>Prosecutor-Appellant.</i></p>	<p>On Certiorari. 10</p>
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**BRIEF ON BEHALF OF RESPON-
DENT.**

On April 3rd, 1916, Thomas J. Steele, one of the Inspectors of the Board of Health of Jersey City, made complaint in the Second Criminal Court that the defendant had violated Section 33 of an ordinance of Jersey City entitled, "An Ordinance regulating the general conditions governing the sale of milk or cream in Jersey City," adopted April 1st, 1915, in that he did sell cream having less than 18% of butter fat. 20

POINT I.

The conviction is sufficient in law to justify the imposing of the penalty or fine. 30

On page 11 of the State of the Case there appears a transcript from the docket of the Second Criminal Court of Jersey City, in which is contained all of the essential requirements of Section 85 of the Compiled Statutes, p. 3993. While it is true that under the heading in the docket of "Charge" the effect and full title of the ordinance 40

is not set forth, there is, however, sufficient data to clearly indicate what the ordinance was and the section violated.

10 With reference to the assumption of counsel for the prosecutor that the statement in the docket above referred to does not show that defendant was convicted, it is to be noted that under the heading in the docket of "Disposition" appear the words, "Guilty—fined \$25.00; payment of fine postponed." This clearly is sufficient to justify the requirements of the statute.

While it does not appear that this record of conviction was signed by the Judge or the Clerk, it is apparent from the make-up of the docket above referred to that all of the essentials required by the statute have been adhered to, and the lack of such signatures cannot be urged as defective.

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POINT II.

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

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"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.)

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.

40 It is argued by the prosecutor that the power given to cities of the first class under Section 92,

C. S., 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. 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. * * * 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 (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, 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 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.

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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 au-

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thority 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 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).

“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: 10

"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. 30

"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- 40

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 de-

termination 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 the City lose its power to bring the violators to justice.

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POINT V.

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.

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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.

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The term "milk solids" as used in the statute,

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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 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.

POINT VI.

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

20 The prosecutor contends that the difference between the analysis as shown by the testimony of Doctor von der Leith 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?

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 40 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 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**

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The first of these is the fact that the
 Government has not yet decided
 whether it will purchase the
 surplus of the Government
 stocks of the various
 departments. It is
 possible that the Government
 will purchase the surplus
 of the various departments
 and that it will sell it
 at a profit. It is also
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JOHN H. HARRIS
 Chairman of the Board

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New Jersey Court of Errors and Appeals

THE MAYOR AND ALDERMEN OF

JERSEY CITY,

Respondent,

vs.

HARRY ROTHBERG,

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 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 33 was the sale of cream having less than 18% of butter fat.

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 within said ordinance.

2. Whether it was competent for the Board of Commissioners of Jersey City to impose greater restriction upon the character of cream to be sold in that city than that imposed by Section 7 of the Pure Food Law (P. L. 1907, pp. 485-489)-- in the absence of any declaration in the ordinance or proof in the case that cream not coming up to the requirement of the ordinance is injurious to health. Said section reads as follows:

"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 per centum 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 there was any conviction of the prosecutor.

Grounds of Appeal.

The Ground of Appeal in this Court is (case p. 15).

“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 of them, the Supreme Court should have reversed and set aside said judgment.”

The “reasons” relied on are the following: (case p. 11).

“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.

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 convicted, is *ultra vires* and void.”

Argument.

This cause will be argued with another entitled: The Mayor and Aldermen of Jersey City against John R. Hennessey, involving a conviction under section 26 of the same ordinance.

The argument in the Hennessey case for the appellant is applicable for the appellant in this case, except that point IV need not be considered for the reason that the alleged violation of the ordinance relates to the sale of *cream*, and there is no doubt that in that respect section 33 of

the ordinance imposes a greater restriction on the sale of cream than does section 7 of the Pure Food Law. In order therefore, to save repetition and unnecessary printing, I refer the Court in this cause to points I, II, III and V in the Hennessey case, as applicable to my argument in this case. Of course, in Point V, I was dealing with the ordinance as relating to milk, while, in this case, the Court must consider it as relating to cream and the difference between the requirements of the Pure Food Law and the ordinance, is greater as to cream than as to milk; but there is no charge or proof that cream having less than 18% of butter fat is unwholesome.

There is a point in the present case that is not involved in the Hennessey Case, and I submit that it is fatal to the judgment under review.

In the Supreme Court it was said (case p. 13) that the cases were identical, except that one dealt with milk and the other with cream. This is a mistake. In the Hennessey case it was argued that the conviction was defective: a point which I have not made on appeal. In the present case, the point was and is that there was *no conviction at all*. What was claimed as a conviction was the "transcript from docket" printed on page 11. This clearly was not a conviction under the statute and adjudged cases.

The Board of Health Act (Comp. Stat. 2671, sec. 40) prescribes the form of conviction and requires it to be signed by the Magistrate. This provision is mandatory *State, McEwen v Board etc.*, 61 N. J. L. p. 468 and *State, Ruddy v. Board etc.*, 42 Atl. Rep. p. 830.

In the Hennessey case there was an attempt to comply with this statute, but in the present

case, there was no such attempt. It is arguable that the cases fall within a later statute namely; "An Act to Provide for the Appointment of Police Justices in Cities of the First Class." There was no compliance even with that Statute.

Section 7 (Comp. Stat. p. 3993 pl. 85) reads as follows:

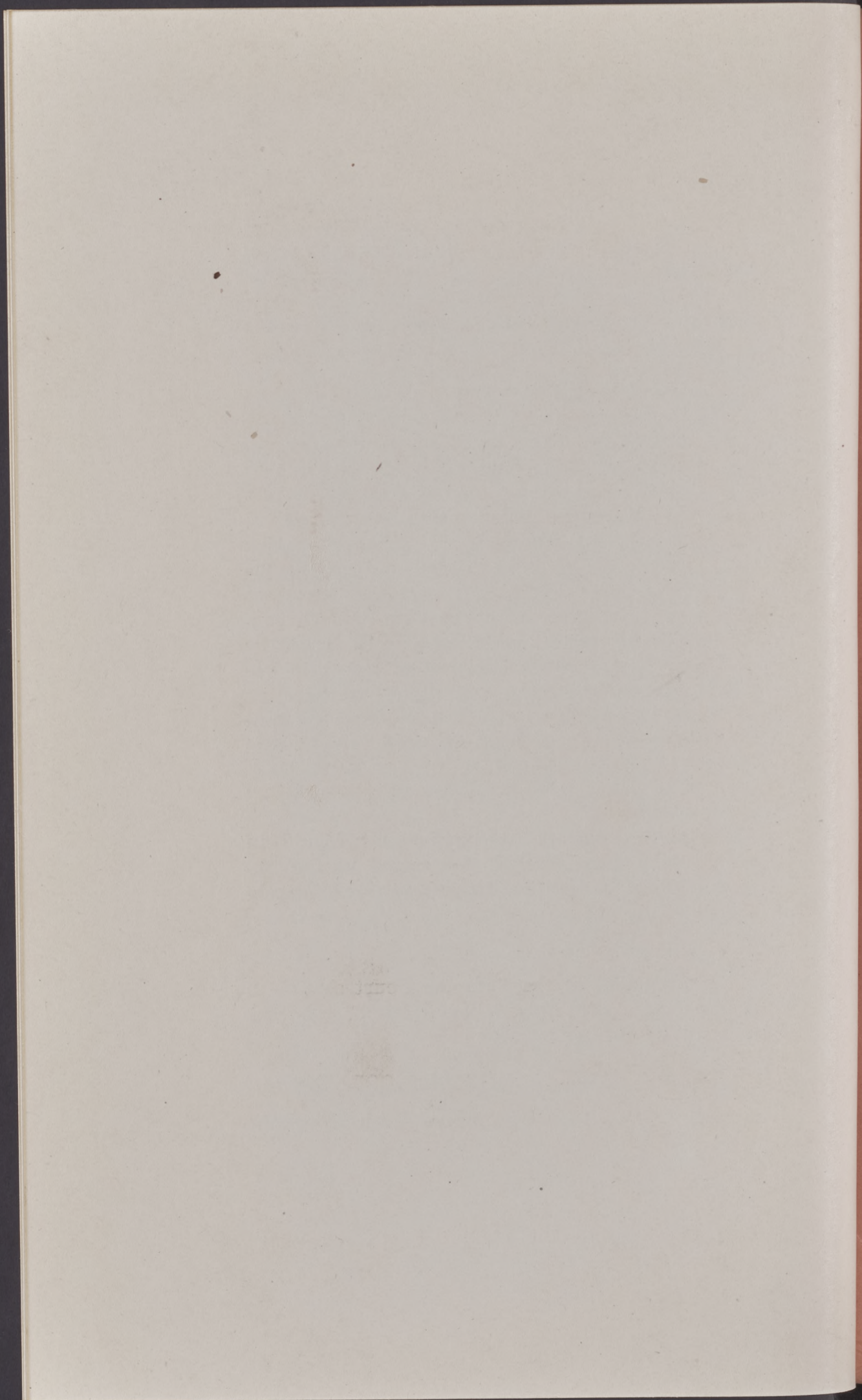
7. "That if any person shall be convicted in any of the said courts, it shall be sufficient for the conviction to set out the name of the defendant, and the number of the section and the title of the statute or ordinance under which the conviction is had, the names of the witnesses sworn and a list of the exhibits produced at the trial, and a statement that the defendant was convicted, with the date of such conviction, which conviction may be signed by the judge of such court or tested in the name of the judge and signed by the clerk thereof under seal of such court; it shall not be necessary to set forth in said conviction the whole or any part of the testimony upon which such conviction is had."

Under this statute, the supposed "record" in the present case was, as was stated in the Supreme Court under like circumstances, "utterly devoid of any legal force" *Jersey City v. Neihaus*, 66 N.J.L., p. 554.

The judgment of the Supreme Court should be reversed and the alleged conviction of the prosecutor should set aside.

GILBERT COLLINS

Of Counsel With Appellant



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