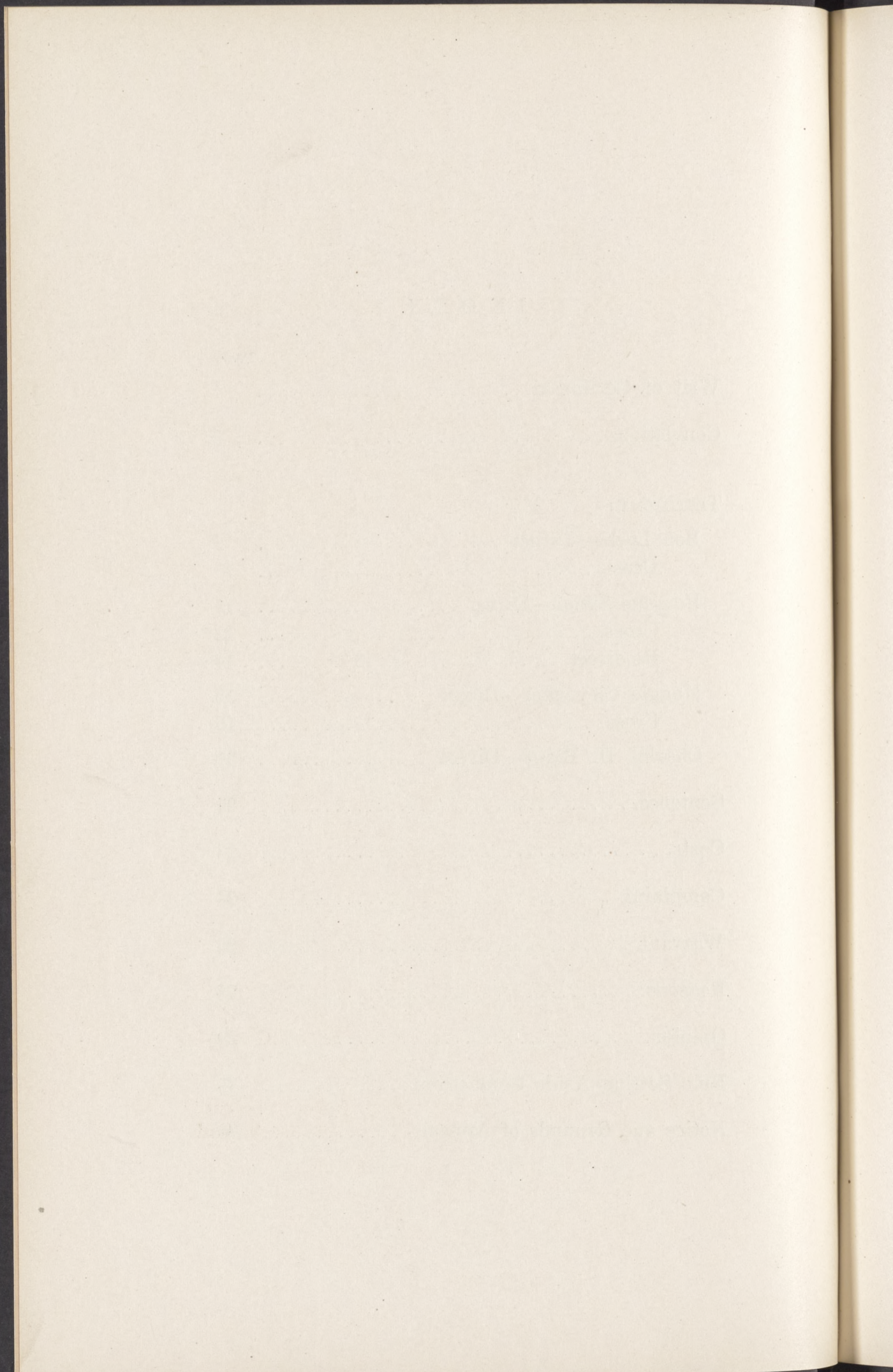


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NEW JERSEY SUPREME COURT.

CITY OF MILLVILLE,
Defendant-in-Certiorari,

v.

HOWARD EVERINGHAM,
Plaintiff-in-Certiorari.

10

WRIT OF CERTIORARI.

HENRY O. BURT, *Attorney,*
106 High Street, Millville, N. J.

20

This writ is allowed: Let it be sealed, and act
as a supersedeas.
February 4, 1924.

LUTHER A. CAMPBELL,
Supreme Court Justice.

NEW JERSEY, ss.

30

The State of New Jersey to Walter H.
(Seal) *Felmey, Mayor of the City of Millville,*
in the County of Cumberland and State
of New Jersey, GREETING:

We being willing, for certain reasons, to be cer-
tified of the conviction and proceedings lately had

before the said Mayor of the City of Millville, in a certain cause wherein one Howard Everingham was charged with the violation of Ordinance No. 234 of said City of Millville, do command that you certify and send said conviction, together with the complaint and warrant filed in said cause, and all things touching and concerning the same, as fully and distinctly as they remain before you, to our Justices of our Supreme Court, at Trenton, on the
 10 27th day of February, 1924, together with this writ that we may cause to be done thereupon what of right and according to law ought to be done.

Witness, WILLIAM S. GUMMERE, Chief Justice of our Supreme Court, at Trenton, this seventh day of February, nineteen hundred and twenty-four.

EDW. J. KELLEHER,
Clerk.

HENRY O. BURT,
Attorney.

20

The record and proceedings within mentioned together with all things touching and concerning the same, I do certify and send to the Justices of our Supreme Court of Judicature, as within I am commanded.

In witness whereof I have hereto set my hand and seal this 8th day of March, 1924.

30

WALTER H. FELMEY,
Mayor of the City of Millville.

CONVICTION.

MAYOR'S COURT.

Before WALTER H. FELMEY,
Mayor of the City of Millville.

10

THE CITY OF MILLVILLE, v. HOWARD EVERINGHAM.	Conviction.
--	-------------

CUMBERLAND Co., ss.

Be It Remembered, that on the 28th day of January, 1924, complaint was made to me, the subscriber, Mayor of the City of Millville (on information and belief), on oath by Charles H. Biggs, that on the 1st day of January, 1924, and at divers other times from thence hitherto at the City of Millville, Cumberland County, New Jersey, one Howard Everingham of Millville, did commit a nuisance in the City of Millville, by violating the provisions of sub-division A of Section one of Ordinance No. 234 of said city, to wit: the said Howard Everingham did violate said sub-division A of Section one of said Ordinance by selling to Ben Locke, Maggie Clevenger, Howard Van Hook, Ed. Bartlett, Louis Craig, Thos. Miller, Bill Lloyd, W. Facemeyer, Daniel Kerns and others, at divers times from the 1st day of January, 1924, to this date, divers quantities of spirituous, vinous, malt or brewed liquors, where the sales were not authorized by law; said liquors having the same intendment and meaning as declared and defined in (Chapter 255 P. L. 1922) of the State of New Jersey, contrary to the provi-

20

30

sions of sub-division A, Section One of Ordinance Number 234 of the City of Millville, which section of said ordinance makes a nuisance and thereby unlawful the habitual sale of spirituous, vinous, malt or brewed liquors, except where the sales shall have been authorized by law.

10 Whereupon I issued a warrant under my hand and seal, directed to the constables of the County of Cumberland, reciting said complaint and commanding them in the name of the State of New Jersey to apprehend the said Howard Everingham, if in their county he might be found, and bring him forthwith before me, to answer said complaint, and be further dealt with as law and justice should require, which warrant I delivered to Charles H. Biggs, one of the constables of the County of Cumberland.

20 On the 1st day of February, 1924, the constable returned said warrant with the defendant into court, and I proceeded to try said accused, touching said complaint as follows:

30 Subpoenas were issued, all tested January 29, 1924, directed to Romlius Simon, Ben Locke and Maggie Clevenger, all of Millville, New Jersey. The defendant was represented jointly by Byron H. Lore, attorney of Bridgeton, and Henry O. Burt, attorney of Millville, New Jersey. The complaint having been read, a plea of not guilty was entered by the defendant. Counsel for defendant having made request that I designate a competent stenographic reporter to report verbatim the trial in this action, C. W. Myrose, a competent stenographic reporter, was by me appointed and duly sworn to report verbatim the trial in this cause, pursuant to the provisions of the statute P. L. 1914, page 256.

Thereupon the trial of this case proceeded as follows:

TESTIMONY.

MAYOR'S COURT.

CITY OF MILLVILLE	}	Complaint for Viola- tion of Section 1 of 10 Ordinance No. 234.
v.		
HOWARD EVERINGHAM,		

City Hall, Millville, N. J., February 1st, 1924.

TESTIMONY.

Before WALTER H. FELMEY, Mayor.

20

APPEARANCES:

For defendant: HENRY O. BURT, Esq., and H.
BYRON LORE, Esq.

(The defendant was arraigned on a complaint
reading as follows: "State of New Jersey, Cum-
berland County, ss. Charles H. Biggs, on in-
formation and belief, being duly sworn, on oath
complains and says: That on the first day of Janu-
ary, 1924, and at divers other times from thence
hitherto, at the City of Millville, Cumberland

30

County, New Jersey, one Howard Everingham, of Millville, did commit a nuisance in the City of Millville, by violating the provisions of sub-divison A of Section 1 of Ordinance No. 234 of said City, to wit: The said Howard Everingham did violate said sub-division A of Section One of said Ordinance by selling to Ben Locke, Maggie Clevenger, Howard Van Hook, Ed. Bartlett, Louis Craig, Thos. Miller, Bill Lloyd, W. Facemeyer, Daniel Kerns and others, 10 at divers times from the 1st day of January, 1924, to this date, divers quantities of spirituous, vinous, malt or brewed liquors; where the sales were not authorized by law; said liquors having the same intendment and meaning as declared and defined in Chapter 255 (P. L. 1922) of the State of New Jersey, contrary to the provisions of sub-division A, Section 1 of Ordinance No. 234 in the City of Millville, which section of said ordinance makes a nuisance and thereby unlawful the habitual sale of 20 spirituous, vinous, malt and brewed liquors, except where the sales shall have been authorized by law.

Whereupon he prays that the said Howard Everingham may be apprehended and held to answer said complaint and dealt with as law and justice may require.

Sworn to and subscribed before me this 28th day of January, 1924, Charles H. Biggs. Walter H. Felme(Mayor of the City of Millville, N. J.'')

30 Mr. Lore: The defendant enters a plea of not guilty.

C. W. MYROSE, stenographer, sworn.

Mr. Lore: The understanding is that this is a copy of the ordinance under which this defendant is being tried. By consent it is admitted that this is a copy of the ordinance.

("City of Millville, Public Notice, Ordinance Number 234.")

"An Ordinance to declare and prevent and summarily to abate certain nuisances caused by the sale of spirituous, vinous, malt and brewed liquor and by drunkenness and by habitual disorderly conduct that disturbs the peace and quiet of the neighborhood.

10

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

1. The commission of any of the following acts in the City of Millville is hereby declared to be a nuisance and violative of the provisions of this ordinance; and the public officers of the city are required and enjoined to use diligent efforts to prevent and summarily abate the same.

20

A. The habitual sale of spirituous, vinous, malt or brewed liquors, except where the sales shall have been authorized by law.

B. The sale of spirituous, vinous or brewed liquors except where the sale shall have been authorized by law.

30

C. The sale or possession of any still, machinery, apparatus, appliances or utensils designed and intended to be used, in the manufacture of intoxicating liquors, except where the manufacture of intoxicating liquors by the vendee or possessor is authorized by law.

D. Habitual drunkenness, whether in a private

dwelling, or place of business or in any other place whatsoever.

E. Habitual cursing, abusive language, fighting, quarreling, loud language, noisy conduct, or indecent or obscene behavior, in any public or private place.

F. Habitual transportation of intoxicating liquors.

10 2. Intoxicating liquor as defined herein shall have the same intendment and meaning as declared and defined in Chapter 255 of the Laws of 1922 (P. L. 315.)

20 3. Any person who shall violate any of the provisions of this ordinance by commission of any act hereinbefore declared to be a nuisance, shall be punished by a fine not less than twenty-five dollars nor more than two hundred dollars, or (except where the defendant is a corporation) be imprisoned in the county jail not exceeding ninety days, or (except where the defendant is a corporation) both; the
30 magistrate before whom any violator of this ordinance is convicted shall have power to impose any fine or term of imprisonment not exceeding the maximum fixed in this ordinance. In default of payment of any fine imposed hereunder any person convicted of the violation hereof may, in the discretion of the magistrate by whom he is convicted, (except where the violator is a corporation) be imprisoned in the county jail for any term not exceeding ninety days.

4. If any section, or sub-section, of this ordinance shall be held invalid; the invalidity thereof shall not be deemed to impair or make void any other section or sub-section of the ordinance.

5. This ordinance shall take effect upon its final passage and publication, as provided by law.

Adopted July 27th, 1923.

Walter H. Felmev,
Mayor.

W. J. Simmerman,
A. M. LaDow,
Walter S. Kates,
W. Fred Ware,
Commissioners.

Attest: John S. Horton, Clerk."

10

BEN LOCKE, sworn.

Direct examination.

Q. Locke, do you know the defendant, Howard Everingham?

A. Yes, sir.

20

Q. Have you purchased any intoxicating liquor from him since the first of January, 1924?

A. Yes, sir.

Q. On what date?

A. I got a pint from him last Sunday night a week.

Q. That is the twentieth of January. What did you buy, a pint, did you say?

A. Yes, sir.

Q. What did you pay for it?

30

A. A dollar and a half.

Q. Was it real whiskey?

A. Yes, sir.

Q. Intoxicating?

A. Yes, sir.

Q. Drink it, did you?

A. I had a drink of it.

Q. Where did you make this purchase?

A. In his restaurant on Oak Street, I think it is.

Q. High and Oak?

A. Yes, sir.

Q. In the restaurant part?

A. Just where you go into the kitchen part there where they do the cooking.

Q. He had it concealed there?

A. Yes, sir, he had it in the back there in bottles.

10 I bought mine in a soda water bottle.

Q. Have you made any other purchases there?

A. No, sir.

Q. That is the only time you ever purchased any?

A. Yes, sir.

Q. Was anyone else present?

A. Yes, sir, this Simon was there with me.

Q. Simon was with you when you made this purchase?

A. Yes, sir.

20 Q. Anyone else?

A. That is all.

Q. No one in the store?

A. Yes, the restaurant was full there, but I didn't know no one that was in there.

Q. What time was this?

A. I don't know just what time it was. It was just around dark.

Q. Did he sell it that openly? Did he sell you this?

30 A. Yes. I just went there and asked for it and he handed it to me.

Q. Tell you to put it in your coat?

A. Didn't tell me to do anything with it. I put it in my pocket and walked out.

Cross-examination.

By Mr. Lore:

Q. Did I understand you to say that you bought it from this man here last Sunday week?

A. Yes, sir.

Q. You are positive about that, are you?

A. Yes, sir. 10

Q. About what time in the day?

A. It was just about dark, at night.

Q. You couldn't be mistaken as to the day, could you?

A. No, sir. It was night time.

ROMLIUS SIMON, SWORN.

20

Direct examination.

By the Mayor:

Q. Do you know the defendant, Howard Everingham?

A. Yes, sir.

Q. You have seen him before?

A. Yes, sir.

Q. Have you bought any stuff of him?

A. No, sir. 30

Q. Have you ever seen anyone else buy of him?

A. Locke.

Q. See Locke buy of him?

A. Yes.

Q. When was it?

A. Sunday night a week.

Q. Last Sunday night a week?

A. Yes, sir.

Q. It was last Sunday night a week?

A. Yes, sir.

Q. You are sure of your time? How do you fix that in your mind?

A. As near as I can judge today, it was Sunday week.

10 Q. You think it was last Sunday night a week?

A. Yes, sir.

Q. Did you drink any of this that he purchased there?

A. No, sir.

Q. You didn't take a drink of it?

A. No, sir.

Q. How did you know it was intoxicating liquor?

A. Well, I don't know.

Q. Did you hear him ask for it?

A. Yes, and seen him when he got it.

20 Q. You know that he bought this liquor, but you can't swear it was liquor because you didn't taste it?

A. No, I didn't taste it.

Q. You heard him ask for liquor, did you?

A. Yes, sir.

Q. And did you see him hand him the money?

A. Yes, sir.

Q. Saw him pay him the money?

A. Yes, sir.

30

Cross-examination.

By Mr. Lore:

Q. What time in the day was it when he bought this?

A. Well, it was after dark. I judge around seven or half-past.

Q. You are positive it was last Sunday night a week?

A. I think it was, yes.

Q. You think now? Do you know?

A. Well, I don't know for sure.

Q. You won't state under oath that it was last Sunday night a week?

A. As near as I think.

Q. Now, as to the time of the day, are you positive it was somewhere between seven and eight 10 o'clock in the evening?

A. Yes, sir.

Q. You are sure about that, are you?

A. No, I am not sure, but it was after dark. I don't know just what time it was. I wasn't looking at the clock to take the time and all.

Q. Who else was in the restaurant when you went in there?

A. I don't know who was in there.

Q. Did you know any one at all that was in there, 20 outside of this man?

A. Yes.

Q. Who was it?

A. Somebody standing in there. I don't know who it was, or what they were there for.

Q. There were quite a number in the restaurant?

A. Yes, we went right in and right out after the man asked for what he wanted.

Q. You went along with this other man, did you? 30

A. We was in there.

Q. You went there along with him? You went there together?

A. Yes.

Q. What part of the restaurant did you go?

A. Right there by the cigar case where he has cigars.

Q. Is that in the front or the rear?

A. Front.

Q. How much was paid for the liquor?

A. Dollar and a half.

Q. You stood right alongside of the other man when he bought it?

A. Stood right aside of him.

Q. And it was between seven and eight o'clock in the evening?

A. Yes.

10 Q. Last Sunday week? You are positive of all those answers, are you?

A. Yes.

Re-direct examination.

By the Mayor:

Q. What door did you go in, Simon?

20 A. Why, we went in the door at the front there next to High Street.

Q. You went in the High Street door?

A. Yes.

Q. Then this cigar case that you say was in the front was right along as you go in the door?

A. No.

Q. Right to the left, was it?

A. It was up this way towards Oak Street, the cigar case was.

30 Q. Do you call that the front of the store on High Street?

A. I call High Street the front.

Q. You know you went to the cigar case?

A. Yes.

Q. You don't know whether that is the front or where you went in is the front of the store?

A. The front is High Street.

By Mr. Lore:

Q. Have you received any moneys or been offered any moneys or expect to receive anything of any value for testifying in this case?

A. No, sir.

Q. You don't expect to receive anything?

A. No, sir, not a thing.

10

MAGGIE CLEVINGER, SWORN.

Direct examination.

By the Mayor:

Q. Have you ever been in Everingham's place?

A. Yes.

Q. His restaurant on High Street?

20

A. Yes.

Q. What did you go there for?

A. I went there lots of times to eat.

Q. You go there to eat, do you?

A. Yes.

Q. Did you ever purchase anything to drink there?

A. Yes.

Q. You say you have purchased something to drink there?

30

A. Yes.

Q. Since the first day of January?

A. Yes.

Q. Where did you make the purchase?

A. In the restaurant.

Q. What did you purchase?

A. A pint of whiskey.

Q. You purchased a pint of whiskey?

A. Yes.

Q. In a bottle, was it?

A. Yes.

Q. What did you pay for it?

A. A dollar and a half. I gave him—I got a cup of coffee and gave him a two dollar bill and he gave me forty-five cents change.

Q. You bought a cup of coffee and bought this—

10 A. Pint of whiskey.

Q. Do you know anything about the date? Are you positive about the date that was purchased?

A. That was Monday week.

Q. Did you purchase this coffee as a blind? Was there someone else in there? Was that the reason you purchased the coffee or did you go in to get a cup of coffee?

A. Well, I just got the coffee.

Q. And then asked for a pint of whiskey?

20 A. Pint of whiskey.

Q. Everingham himself was in there?

A. Everingham waited on me.

Q. Where did he get this liquor from?

A. He came in from around where they cook and brought it out to me.

Q. Anyone else in there at the time?

A. Well, there was some fellows in there, but I don't know who they were.

Q. You didn't know any of them?

30 A. No, I didn't know any of them.

Cross-examination.

By Mr. Lore:

Q. Are you acquainted with Mr. Everingham personally?

A. I have been in his restaurant.

- Q. Is he here this evening?
A. Yes. Here he is right here.
Q. This is the man?
A. Yes.
Q. Sure about that, are you?
A. I am sure that is him.
Q. Since the first of January you have only bought on one occasion from him?
A. I bought once.
Q. And that was when? 10
A. Monday. A week Monday.
Q. In the morning or evening?
A. That was in the morning.
Q. What time in the morning?
A. Around twelve o'clock.
Q. Sure it was last Monday week?
A. I am sure.
Q. Who actually gave you the whiskey?
A. Mr. Everingham.
Q. Over the bar? 20
A. No, I was sitting to the table drinking coffee and he brought the whiskey to me in a pint bottle.
Q. Was it wrapped in a package?
A. Yes. He wrapped it up in a newspaper.
Q. Only a pint?
A. Yes, it was a pint.
Q. Did you drink any of it?
A. Well, no, I didn't drink any of that.
Q. How do you know it was intoxicating, then?
A. Well, it looked like all the rest of it. I didn't 30
drink any of that.
Q. You didn't actually take any of it? You didn't drink any of it?
A. But I drank it out of the pint Saturday night.
Q. I am not speaking about Saturday night. I am asking you about the time you say you bought

since the first of January, and you say you didn't drink any of it?

A. No, I didn't drink any of that.

Q. Therefore you don't know whether it was intoxicating or not?

A. It looked like all the rest.

Q. It was the appearance of it?

A. It looked like what Ben got on Saturday night.

Q. Who is Ben?

10 A. Ben Locke.

Q. That was the preceding witness who was in here just a moment ago?

A. Yes.

Q. You recall, do you not, when Mr. Locke came home on Sunday night, the night before?

A. Yes.

Q. About what time was it?

A. I don't know. It was after dark.

Q. Well, was it after nine, ten o'clock?

20 A. No, he came home, I guess, about around half-past eight.

Q. You live in the same home?

A. Yes.

Q. The same house?

A. Yes, I keep house for Locke.

Q. What became of the whiskey that you bought on this Monday noon?

A. Well, I took it around to the house.

30 Q. Well, what became of it? Did you give it to someone or did you throw it away or what actually occurred?

A. Well, I——

Q. Is that it? (Referring to bottle on the desk.)

A. Has it got a couple of corks in the bottle? That is it.

Q. What did you do with it?

A. Set it in the house.

Q. Where did you set it in the house?

A. Down by the table. Down by the dining room table.

Q. Is that the last you saw of it?

A. Well, that is the last I saw of it.

Q. Until tonight?

A. Until tonight.

Q. So you don't know actually whether this is the same whiskey you bought?

A. I know that is, on account of the two corks in 10 the bottle.

Q. Any other bottle could have two corks in it, couldn't it?

A. Yes, but that is the bottle that I got there Monday morning.

Q. Simply because it has the two corks in it?

A. No. That is the bottle I got there.

Q. You don't know really what became of the whiskey? The last you saw of it, it was near the table? 20

A. It was near the table. I gave it to the marshal.

Q. You went around to Everingham's to buy it and afterwards gave it to the marshal?

A. Yes.

Q. A little while ago I asked you what became of it and you said it was near the table. Which is true?

A. I gave it to the marshal.

Q. That is true?

A. That is true. 30

Q. Why didn't you say so in the first instance? You knew you were under oath, didn't you, when I asked you the question?

A. Well, I told the truth when I said I gave it to the marshal.

Q. You are positive about that?

A. Yes, I am sure of that.

CHARLES H. BIGGS, SWORN.

Direct examination.

By the Mayor:

Q. You are the marshal of the City of Millville?

A. Yes, sir.

10 Q. Did you secure this bottle of liquor from Maggie Clevenger?

A. Yes, sir.

Q. Do you know this is the bottle that you secured from her?

A. I brought it down and labeled it.

Q. This is your label on here?

A. Yes, sir.

Q. Marked "January twenty-first," isn't it?

A. Yes.

20 Q. One point. Do you recognize this as your handwriting that is on there? Did you put that on there?

A. Yes, I put that on, on that date.

Q. You got it on January twenty-first?

A. No, that wouldn't be January twenty-first.

Q. January twenty-first was Monday. Did you get it on Monday?

A. Yes, that is right, January twenty-first. Monday was when it was gotten. I got that in the afternoon.

30 Q. Did you know where it came from?

A. Only from her say.

Q. She told you she had purchased this from Everingham?

A. Yes.

Mr. Lore: What she may have told him, of course, could not be used against Mr. Everingham.

Motion for Discharge of Defendant 21
Sentence

The Mayor: Well, she has testified she bought this from Everingham.

Q. You say you got this on the twenty-first?

A. I got it on the twenty-first, at her house.

Q. You haven't disturbed this, Marshal?

A. The cork, so far as I know, hasn't been out of it.

10

No cross-examination.

CITY RESTS.

Mr. Burt: If your Honor please, I move for the discharge of the defendant on the ground that the ordinance in question under which the defendant is charged is illegal and that it undertakes to punish by ordinance an offense which is a criminal offense and for which the defendant is entitled to be indicted. 20

The Mayor: I deny your motion. (Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)
(Seal)

From which evidence so produced the defendant, Howard Everingham, appeared to me, and I did deem and adjudge him to be guilty of committing a nuisance in the City of Millville by selling intoxicating liquor to Ben Locke and Maggie Clevenger in violation of sub-division A of Section 1, of Ordinance Number 234 where said sales had not been authorized by law, contrary to the provisions of sub-division A of Section 1 of Ordinance Number 30

234 of said city on the first day of January, 1924, and at divers other times from thence hitherto, at the City of Millville, Cumberland County, New Jersey, as charged in said complaint; whereupon the said defendant, Howard Everingham, was convicted by me of the said offense.

Therefore, it is by me, the subscriber, Mayor of the City of Millville, considered and adjudged that the said Howard Everingham do pay a fine of two
 10 hundred dollars to the City of Millville, besides eleven dollars and ten cents costs of this prosecution, and in addition that he be imprisoned in the county jail for a term of ninety days; and that in default of payment of said fine, including costs, he remain confined in the county jail until said fine and costs are paid; not exceeding sixty additional days, unless said defendant be thence delivered by due course of law.

A copy of the taxed bill of costs is attached.
 20 In testimony whereof I hereto set my hand and seal this 23rd day of February, 1924.

WALTER H. FELMEY,
Mayor of the City of Millville.

Upon request of counsel for the defense and with the consent of the city solicitor, Louis H. Miller, I
 30 stayed execution of sentence for a period of ten days from this date, to wit:: until Monday, the eleventh day of February, 1924, at twelve o'clock noon, the defendant giving bond in the amount of five hundred dollars for his appearance at that time.

WALTER H. FELMEY,
Mayor.

A true copy.

WALTER H. FELMEY,
Mayor.

COSTS.

MAYOR'S COURT.

Before WALTER H. FELMEY, Mayor.

<hr style="width: 10%; margin: 0 auto;"/> CITY OF MILLVILLE, v. HOWARD EVERINGHAM.)	Costs.	10
--	---	--------	----

	Mayor	Constable	Als.
Warrant	.75		
Subpoenas at 25c 3	.75		
Constable serving warrant		1.50	20
Mayor taking examination not in writing	2.00		
Swearing 3 witnesses at 25c	.75		
Serving 3 subpoenas, under one mile at 20c each		.60	
Attending prisoner		1.00	
Mayor drawing and taking 1. recognizance	.75		
Mayor drawing costs	.50		
3 witnesses at 50c each			1.50 30
	\$6.50	\$3.10	\$1.50
Justice	3.10		
Constable	1.50		
Als.	1.00		
Complaint	\$11.10		

CUMBERLAND, ss.

I hereby tax the costs in the above stated case at eleven dollars and ten cents and certify the same as being correct.

(Signed) WALTER H. FELMEY,
Mayor of the City of Millville.

A true copy.

WALTER H. FELMEY,
Mayor.

10

COMPLAINT.

(Filed February 1, 1924.)

STATE OF NEW JERSEY, }
CUMBERLAND COUNTY, } ss.

20

CHARLES H. BIGGS, on information and belief, being duly sworn, on oath complains and says: That on the 1st day of January, 1924, and at divers other times from thence hitherto at the City of Millville, Cumberland County, New Jersey, one Howard Everingham, of Millville, did commit a nuisance in the City of Millville, by violating the provisions of subdivision A of Section one of Ordinance No. 234 of said city, to wit: the said Howard Everingham did violate said sub-division A of Section one of said Ordinance by selling to Ben Locke, Maggie Clevenger, Howard Van Hook, Ed. Bartlett, Louis Craig, Thos. Miller, Bill Lloyd, W. Facemeyer, Daniel Kerns and others, at divers times from the 1st day of January, 1924, to this date, divers quantities of spirituous, vinous, malt or brewed liquors; where the sales were not authorized by law; said liquors

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having the same intendment and meaning as declared and defined in (Chapter 255 P. L. 1922) of the State of New Jersey, contrary to the provisions of sub-division A, Section One of Ordinance Number 234 of the City of Millville, which section of said ordinance makes a nuisance and thereby unlawful the habitual sale of spirituous, vinous, malt or brewed liquors, except where the sales shall have been authorized by law.

Wherefore he prays that the said Howard Ever- 10
ingham may be apprehended and held to answer
said complaint and dealt with as law and justice
may require.

Sworn to and subscribed before me this 28th day
of January, 1924.

(Signed) CHARLES H. BIGGS.

(Signed) WALTER H. FELMEY,
Mayor of the City of Millville, N. J.

A true copy.

WALTER H. FELMEY,
Mayor.

20

30

WARRANT.

(Filed February 1, 1924.)

CUMBERLAND, ss.

10 *The State of New Jersey to the Sheriff*
(Seal) *or any Constable of the County of Cum-*
 berland:

Whereas complaint has this day been made to me, Mayor of the City of Millville, on oath by Charles H. Biggs, on information and belief that on the 1st day of January, 1924, and at divers other times from thence hitherto, at the City of Millville, Cumberland County, New Jersey, one Howard Everingham of Millville did commit a nuisance in the City of Millville by violating the provisions of subdivision A of Section One of Ordinance No. 234 of said city, to wit: the said Howard Everingham did violate said sub-division A of Section One of said ordinance by selling to Ben Locke, Maggie Clevenger, Howard Van Hook, Ed. Bartlett, Louis Craig, Thos. Miller, Bill Lloyd, W. Facemeyer, Daniel Kerns and others, at divers times from the 1st day of January, 1924, to this date divers quantities of
20 spirituous, vinous, malt and brewed liquors; where the sales were not authorized by law; said liquors having the same intendment and meaning as declared and defined in (Chapter 255 P. L. 1922) of the State of New Jersey, contrary to the provisions of sub-division A of Section 1 of Ordinance Number 234 of the City of Millville, which section of said ordinance makes a nuisance and thereby un-
30

lawful the habitual sale of spirituous, vinous, malt or brewed liquors, except where the sales shall have been authorized by law.

These Are, Therefore, in the name of the State of New Jersey, to authorize and require you to apprehend the said Howard Everingham if in your county he may be found and bring him forthwith before me or some Justice of the Peace of the City of Millville, to answer the said complaint and be further dealt with as law and justice may require. Hereof you are not to fail. And for so doing this shall be your warrant. 10

Given under my hand and seal, at my office, in the city hall, of said city, this 28th day of January, 1924.

(Signed) WALTER H. FELMEY,
Mayor of the City of Millville, N. J.

A true copy.

WALTER H. FELMEY,
Mayor. 20

I return the within warrant with defendant in custody this 1st day of February, 1924.

(Signed) CHARLES H. BIGGS,
Constable.

REASONS.

The plaintiff, by Henry O. Burt, his attorney, comes and prays that the judgment of conviction rendered against him by Walter H. Felmev, Esq., Mayor of the City of Millville, N. J., in a certain complaint brought against him for violation of Ordinance No. 234 of the said City of Millville, may
10 be reversed, set aside and for nothing holden, for the following reasons:

1. Under the complaint and ordinance the plaintiff-in-certiorari was charged with a criminal offense, and brought to trial without the presentment or indictment of a grand jury, in a case not subject to impeachment, or cognizable before a justice of the peace, or arising in the army or navy, or in
20 the militia, contrary to the provision of Article 1, Sec. 9 of the Constitution of the State of New Jersey.
2. No power has ever been delegated to the City of Millville to provide for the punishment of offenses of the nature prescribed against the plaintiff-in-certiorari, in the complaint.
3. The Court, magistrate or officer hearing the
30 complaint in this case had no jurisdiction.
4. The offense with which the plaintiff-in-certiorari is charged would make him liable to an indictment for a crime at common law, as well as under the statute law.

OPINION.

NEW JERSEY SUPREME COURT.
Nos. 209, 210, 211.

HOWARD EVERINGHAM,
Prosecutor, }
v. } On Certiorari. 10
CITY OF MILLVILLE,
Defendant.)

W. FREDERICK STECKLE,
Prosecutor, }
v. } On Certiorari. 20
CITY OF MILLVILLE,
Defendant.)

RALPH FAGAN,
Prosecutor, }
v. } On Certiorari.
CITY OF MILLVILLE,
Defendant.)

30

Before JUSTICES KALISCH, BLACK and CAMPBELL.

For the prosecutors: HENRY O. BURT.
For the defendant: LOUIS H. MILLER.

Per curiam: The three cases involve the same legal proposition and were argued together. The complaints upon which the prosecutors were convicted are couched in the same language so that the quoting of the contents of one will properly present the legal question, involved in all. The complaint, reads: "That on the first day of January, 1924, and at divers other times from thence hitherto at the City of Millville, Cumberland County, New Jersey, 10 one Howard Everingham, of Millville, did commit a nuisance in the City of Millville, by violating the provisions of Sub-division A of Section one of Ordinance No. 234 of said city to wit: the said Howard Everingham did violate said Sub-division A of said ordinance by selling to Ben Locke, Maggie Clevenger, Howard Van Hook, Ed. Bartlett, Louis Craig, Thos. Miller, Bill Lloyd, W. Facemeyer, Daniel Kerns and others, at divers times from the 20 first day of January, 1924, to this date, divers quantities of spirituous, vinous, malt or brewed liquors; where the sales were not authorized by law; said liquors having the same intendment and meaning as declared and defined in (Chapter 255, P. L. 1922) of the State of New Jersey, contrary to the provisions of Sub-division A, Section one of Ordinance Number 234 of the City of Millville, which said section makes a nuisance and thereby unlawful the habitual sale of spirituous, vinous, malt or brewed liquors, except where the sales shall have been 30 authorized by law."

The ordinance alleged to have been violated is entitled: "An ordinance to declare and prevent and summarily to abate certain nuisances caused by the sale of spirituous, vinous, malt and brewed liquor and by drunkenness and by habitual disorderly conduct that disturbs the peace and quiet of the neighborhood.

The ordinance then proceeds to declare that the commission of any of the following acts contained in the various sub-divisions of the ordinance is a nuisance.

For the prosecutor it is contended and his counsel argues, in his brief, that under the complaint and ordinances the prosecutor is charged with an indictable criminal offense and brought to trial without the presentment or indictment of a grand jury and trial by jury in violation Article 1, Sec. 9 of the Constitution of the State of New Jersey, and that, therefore, the conviction of the prosecutor should be set aside. 10

We are of the opinion that the facts set out in the complaint charged the prosecutor with an indictable offense, and, hence, was not within the jurisdiction of the Mayor's Court to try and determine.

A public nuisance is an indictable offense. The habitual unlawful sales of liquor constitute the place where it is sold a nuisance. 20

In *State v. Anderson*, 40 N. J. L. 224, Beasley, C. J., said: "A statute authorizing the prosecution of the offence of keeping a disorderly house by a city court, without an indictment found by a grand jury, is illegal on constitutional grounds." See *Meyer v. State*, 41 N. J. L. 6; affirmed by Court of Errors and Appeals, 42 N. J. L. at pages 157, 158.

In *Atlantic City v. Annie Rollins*, 76 N. J. L. 254, Garrison, J., in speaking for the Supreme Court, at page 255, says: "The complaint was that the prosecutrix kept a disorderly house. It is said that the conviction is authorized by city ordinance and that such ordinance is authorized by "An Act relating to, regulating and providing for the government of cities." P. L. 1902, p. 284. "If the Statute or any other statute purports to authorize the prosecution and conviction of the offence of keeping a dis- 30

orderly house otherwise than upon indictment by the grand jury, such statute is invalid upon constitutional grounds. This is established in this court by the case of *State v. Anderson*, 11 Vroom 224."

Mr. Justice Trenchard, in speaking for the Court of Errors and Appeals, in *State v. Rodgers*, 91 N. J. L. 212, at pages 214, 215, says: "We think it is quite clear that the thing prohibited in the supplement of 1913, namely, the driving of an automobile or other vehicle upon a public street, while under the influence of intoxicating liquor, is not a public or common nuisance indictable at common law. The essential elements of the statutory offense are: (1) driving an automobile or vehicle; (2) upon a public street; (3) while under the influence of intoxicating liquors."

"The essential elements of a public or common nuisance are quite different. "A public or common nuisance is any act or neglect the product of which works an annoyance or injury to the entire community; or the product itself is termed a nuisance. 1 Bish. Crim. 1 Sect. 1072."

The facts set out in the complaint, in the present case, in express terms, charges the prosecutor with the commission of acts constituting a public nuisance.

We cannot distinguish the legal principle governing the ordinance and the facts of the present case from the principle declared in *Hedden v. Hand*, 90 N. J. E. 583, by the Court of Errors and Appeals, in construing a statute entitled: "An act declaring all buildings and places wherein or upon which acts of lewdness, assignation or prostitution or the habitual sale of intoxicating liquor in violation of law are permitted or occur to be nuisances, and providing for the abatement thereof by the Court of

Chancery, and where the Court held, that not only was the act unconstitutional because it attempted to give the Court of Chancery authority to abate certain public nuisances, of a character specified in the act, which are criminal offences, but, also, because in effect it was holding a person for a criminal offense without the presentment or indictment of a grand jury.

The title of the ordinance under consideration reads: "An ordinance to declare and prevent and summarily to abate certain nuisances caused by the sale of spirituous, vinous, malt and brewed liquor," etc. 10

The legal situation, presented by the complaint and facts in *Richardson v. State Board, etc.*, 98 N. J. L. 690, is analagous to the situation in the case *sub judice*. In the case cited complaint was made against the accused for the violation of the provisions of "An Act concerning the welfare of children," P. L. p. 441, in the Quarter Sessions, and the case was tried by the Court in a summary proceeding, as directed by the statute. The complaint set forth acts which constituted assault and battery and the prosecutrix having been convicted, upon an appeal to the Supreme Court the conviction was set aside upon the ground that as the offense was one indictable at common law, the offender was only punishable after an indictment, trial and conviction by a jury. 20

On appeal to the Court of Errors and Appeals, that Court in affirming the Supreme Court, said: "Assuming that for the purpose of deciding the present appeal that the statute has this scope, it is clearly unconstitutional to that extent. An assault and battery, no matter under what circumstances it may have been committed, is crime indictable at common law, punishable by fine and imprisonment 30

or both. Whether a person who has committed a crime indictable at common law can be tried, convicted, and punished in this state, in a summary proceeding, is not an open question. It was considered and decided in the case of *State v. Anderson*, 40 N. J. L. 224, 227, adversely to the contention of the present appellant, and the soundness of that decision has never been challenged in any subsequent judicial pronouncement." 123 Atl. Rep. 720, 10 721.

What is attempted to be accomplished by the ordinance, in question, is not only to subject an accused to be tried in a summary proceeding for the commission of a common law offence, in a city court, in express violation of constitutional provisions, as has been sufficiently pointed out, but, also, upon conviction of an offender to abate the nuisance, a power which is only lodged in our criminal courts, proceeding in the course of the common law.

20 The conviction in each case is set aside, with costs.

RULE SETTING ASIDE CONVICTION.

(Filed Mch. 6, 1925.)

NEW JERSEY SUPREME COURT.

THE CITY OF MILLVILLE, }
Defendant-in-Certiorari, }
v. }
HOWARD EVERINGHAM, }
Prosecutor. }
On Certiorari.
Rule Setting Aside
Conviction.

10

This cause having been brought on for argument in the presence of counsel of the respective parties; and the Court having inspected the conviction and proceedings brought before the Court for review, and considered the reasons assigned against the legality of the same; and argument of counsel having been heard thereon, and it appearing to the Court that the said convictions are invalid: 20

It is, therefore, on this fifth day of March, nineteen hundred and twenty-five, on motion of Henry O. Burt, attorney of prosecutor, ordered that the said conviction be, and the same hereby is, reversed, set aside and for nothing holden, with costs of prosecutor to be taxed. 30

HENRY O. BURT,
Attorney of Prosecutor.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

10	CITY OF MILLVILLE, <i>Defendant-in-Certiorari,</i> v. HOWARD EVERINGHAM, <i>Prosecutor.</i>	}	On Certiorari. Notice and Grounds of Appeal.
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Sir:

20 Take notice that the City of Millville, defendant-in-certiorari, appeals from the judgment entered in the above stated cause dismissing the writ of certiorari herein to the New Jersey Court of Errors and Appeals to the last resort in all causes on the following grounds:

1. The Supreme Court erroneously entered judgment setting aside the conviction in the Court below, whereas said Court should have given judgment for the defendant, adjudging the said conviction to be legal.
- 30 2. The proceedings brought before the Court for review by the writ of certiorari were adjudged invalid, whereas the Supreme Court should have adjudged the same lawful.
3. The Supreme Court erroneously adjudged valid all or some of the reasons assigned by prose-

cutor for setting aside the proceedings brought before the Court for review in the above stated cause whereas said Court should have adjudged said reasons, and every of them, not good ground for vacating the conviction and proceedings below and given judgment for prosecutor accordingly.

4. The Supreme Court erroneously gave judgment against the defendant-in-certiorari, setting aside the conviction, whereas said Court should have given judgment against prosecutor affirming the conviction and proceedings below. 10

Attorney of Defendant-in-Certiorari.
To HENRY O. BURT, ESQ.,
Attorney of Prosecutor.

20

[ENDORSED]

Due and legal service of the within notice and grounds of appeal is hereby acknowledged March 5, 1925.

Henry O. Burt,
Attorney of Prosecutor.

30

cases for setting aside the proceedings brought before the court for review in the state of Ohio, and who are said to have been admitted and to have taken part in the proceedings for the purpose of influencing the judgment for the benefit of the party.

The Supreme Court of Ohio, in the case of the State of Ohio vs. the Cincinnati and Hamilton County, Ohio, in the year 1852, held that the proceedings were void, and that the judgment should be set aside, and a new trial granted, on the ground that the parties to the proceedings were not duly admitted, and that the proceedings were void.

Attorney of the State of Ohio,
The State of Ohio vs. the Cincinnati and Hamilton County, Ohio.

The court held that the proceedings were void, and that the judgment should be set aside, and a new trial granted, on the ground that the parties to the proceedings were not duly admitted, and that the proceedings were void.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

CITY OF MILLVILLE,
*Defendant-in-Certiorari-
Appellant,*

v.

FRED STECKLE,
Prosecutor-Respondent.

ON CERTIORARI.

CITY OF MILLVILLE,
*Defendant-in-Certiorari-
Appellant,*

v.

RALPH FAGAN,
Prosecutor-Respondent.

ON CERTIORARI.

CITY OF MILLVILLE,
*Defendant-in-Certiorari-
Appellant,*

v.

HOWARD EVERINGHAM,
Prosecutor-Respondent.

ON CERTIORARI.

ON APPEAL FROM SUPREME COURT.

BRIEF OF DEFENDANT-IN-CERTIORARI.

These three cases involve the same issue of law. They are certioraries of three several convictions had before the Mayor of Millville for violation of Sub-section A of Section 1 of Ordinance No. 234 of the City of Millville which reads as follows:

ORDINANCE NUMBER 234.

An Ordinance to declare and prevent and summarily to abate certain nuisances caused by the sale of spirituous, vinous, malt and brewed liquor and by drunkenness, and by habitual disorderly conduct that disturbs the peace and quiet of any neighborhood.

THE BOARD OF COMMISSIONERS OF
THE CITY OF MILLVILLE DO
ORDAIN:

1. The commission of any of the following acts in the City of Millville is hereby declared to be a nuisance, and violative of the provisions of this ordinance; and the public officers of the city are required and enjoined to use diligent efforts to prevent and summarily abate the same.

A. The habitual sale of spirituous, vinous, malt or brewed liquors, except where the sales shall have been authorized by law.

B. The sale of spirituous, vinous or brewed liquors except where the sale shall have been authorized by law.

C. The sale or possession of any still, machinery, apparatus, appliances or utensils designed and intended to be used, in the manufac-

ture of intoxicating liquors, except where the manufacture of intoxicating liquors by the vendee or possessor is authorized by law.

D. Habitual drunkenness, whether in a private dwelling, or place of business or in any other place whatsoever.

E. Habitual cursing, abusive language, fighting, quarreling, loud language, noisy conduct, or indecent or obscene behavior, in any public or private place.

F. Habitual transportation of intoxicating liquors.

2. Intoxicating liquor as defined herein shall have the same intendment and meaning as declared and defined in Chapter 255 of the Laws of 1922 (P. L. 315).

3. Any person who shall violate any of the provisions of this ordinance by commission of any act herein before declared to be a nuisance, shall be punished by a fine not less than twenty-five dollars nor more than two hundred dollars, or (except where the defendant is a corporation) be imprisoned in the county jail not exceeding ninety days, or (except where the defendant is a corporation) both; the magistrate before whom any violator of this ordinance is convicted shall have power to impose any fine or term of imprisonment not exceeding the maximum fixed in this ordinance. In default of payment of any fine imposed hereunder any person convicted of the violation hereof may, in the discretion of the magistrate by whom he was convicted (except where the violator is a corporation), be imprisoned in the county jail for any term not exceeding ninety days.

4. If any section, or sub-section, of this ordinance shall be held invalid; the invalidity thereof shall not be deemed to impair or make void any other section or sub-section of the ordinance.

5. This ordinance shall take effect upon its final passage and publication, as provided by law.

Adopted July 27th, 1923.

The prosecutors, in the reasons assigned by them, in their respective cases, challenged the validity of the proceedings because the offense inhibited by the ordinance and charged in the complaint is one that, they say, may be punished by indictment only, and consequently the ordinance and the convictions had thereunder are void.

The Supreme Court sustained this contention of prosecutors and on that ground, set the convictions aside.

POINTS.

1. The proceedings are regular in form.
2. The ordinance and proceedings are valid.

I.

THE PROCEEDINGS ARE REGULAR IN FORM.

The conviction in each case seems to be in proper form, and is supported by sufficient evidence to warrant the determination of guilt and sentence im-

posed. The regularity of the conviction is, indeed, not attacked.

II.

THE ORDINANCE AND PROCEEDINGS ARE VALID.

1. The statute P. L. 1916, page 306, applies to commission-governed cities. The Court will take notice that Millville adopted the Walsh Act in 1913.

By the statute of 1916 it is enacted that such cities are vested with power and authority to enact and enforce by imposition of reasonable fines or imprisonment or both all ordinances necessary * * * for the enforcement of all laws of the state regulating the sale of spirituous, vinous, malt and brewed liquors; to

“declare and prevent and summarily to abate nuisances, whether caused by the sale of spirituous, vinous, malt, intoxicating and brewed liquors, or otherwise,” &c., P. L. 1916, p. 306.

Under and by virtue of the authority of this statute those provisions of Ordinance 234 challenged in these cases were adopted.

2. The proceedings, as has been indicated in Point I, are not attacked as to form; but, as has been stated, they are regular as will appear by inspection of the record, and the conviction was justified by sufficient evidence.

3. The real question presented is, whether it was within the power of the Legislature to authorize the enactment of an ordinance for the enforcement of the liquor laws of the State and to declare and pre-

vent and abate nuisances caused by the sale of vinous, malt, intoxicating and brewed liquors. The prosecutors challenge the proceedings and conviction because, they say, the offence prohibited by the statute constitutes a criminal offence of such a nature that it is triable only upon indictment by a grand jury, so that the conviction is contrary to the provision of Article I, Section 9 of the State constitution. The City of Millville maintains that, on the contrary, the statute and the ordinance are valid because they do not charge such an offence as, at common law, constituted a crime.

The same point has been before the Court several times.

In *State v. Anderson*, 40 N. J. L. 224, Chief Justice Beasley held that a statute authorizing the prosecution of the offence of keeping of a disorderly house by a city court, without an indictment found by a grand jury, is illegal, on constitutional grounds, but not so a statute authorizing a prosecution for the sale of ardent spirits without a license. He said (at page 228):

“The offence of selling liquor without a license is a purely statutory offence. Independently of a prohibition by the legislature, such a sale is neither immoral nor illegal, and the law maker, therefore, can put it under such control as may be thought best. Not being in its nature an indictable offence, it can be made punishable by a penalty, without indictment. * * * This law, therefore, which gives the exclusive right of prosecution and punishment to the City of Paterson in this case, is valid and must be sustained. 40 N. J. L. at p. 228. See also *State v. Ziegler*, 46 N. J. L. 307.”

A house in which unlawful sales of liquor are habitually made is an indictable nuisance, although

there is a city ordinance prescribing the penalties for such sales, as such traffic is not only a breach of the city law but also of the statutory policy of the State. *Meyer v. State*, 42 N. J. L. page 145

In *Riley v. Trenton*, 51 N. J. L. 498, it was held that:

“Certain acts which are indictable as offences against the State may also be, by the legislature, constituted offences against the police regulations of municipalities, so as to subject the offender to the mode of trial incident to proceedings for violation of ordinances; and if, in such cases, the legislature has not made special provision for a trial by jury, it cannot be demanded as a matter of right. 51 L. 498, citing *Howe v. Plainfield*, 8 Vr. 145; *Greely v. Pascaic*, 42 N. J. L. 87.”

The same act may constitute an offence both against the State and municipal corporation. And both may punish without violation of any constitutional principle. *Howe v. Plainfield*, 37 L. 146; *State v. Ziegler*, 46 L. at p. 311; *Sherman v. Paterson*, 82 L. at page 347, citing *Howe v. Plainfield*. The same general doctrine is discussed and elucidated in 28 *Cyc.*, 697. See also *State v. Terry*, 73 L. 554. The same principle is embodied in the rule that, even in criminal cases one may be tried in both jurisdictions when the same acts constitute offenses against the State and Federal government. *U. S. v. Lanza*, 260 U. S. 377, 67 L. E. 314.

In *Katz v. Eldredge*, 96 N. J. L. 382, the Supreme Court held that the Van Ness Act was not invalid because a summary trial before a magistrate was provided. On appeal the question was propounded in the Court of Errors, as follows:

“Does the act, &c., commonly called the Van

Ness Act, which makes any person who violates any of its provisions a disorderly person, triable by a magistrate without a jury, and, on conviction, liable to sentence or confinement in the work house, penitentiary or common jail, for a period of six months, or to pay a fine not to exceed \$500, or both, violate Article 1, par. 7, of the constitution of New Jersey, which provides *inter alia* that the right to trial by jury shall remain inviolate; and, also, Id., par. 9, which provides *inter alia* that no person shall be held to answer for a criminal offence, unless upon the presentment or indictment by a grand jury?

Yes. Chancellor Walker, Justices Swayze and Kalisch, and Judges Ackerson and Van Buskirk—5.

No. Chief Justice Gummere, Justices Parker, Black and Katzenbach and Judges White and Williams—6.”

Thus the Court of Errors voted to sustain the Supreme Court on the point under discussion.

4. As it is very obvious that the same act may constitute an offense against the state and a municipal corporation, it is almost universally conceded that a municipal corporation, acting within its delegated powers, may legislate on subjects covered by state laws, and provide for the punishment of acts which constitute offenses against itself although such acts are also punishable under the laws of the State. 21 Am. and Eng. Enc. of L. 955, title “Ordinances,” and cases in notes 4 and 5.

Most of the legislative enactments of municipalities are referable to the police power which is delegated to them. Among the subjects on which municipalities may legislate is the “abatement or pre-

vention of nuisances generally," 21 Am. & Eng. 952, Sec. 7, and cases in note 3 at page 955.

"Under a number of the statutes any place where liquors are sold in violation of law is a nuisance, as where sales are made without license even though the liquors were sold for an innocent purpose, or where one having a license makes sales not within the scope of the license. As none of these statutes makes it an element of the offense that the place where the intoxicating liquors are sold should be sold in a disorderly manner, it is not necessary that it should be so kept to make it a nuisance, neither is it necessary that the liquors so sold shall be drunk on the premises. It is not necessary to constitute the offense that the place be kept as charged for any length of time. It is the nature of the acts done, not the length of time during which they are committed, which constitutes the offense. 17 Am. and Eng. Enc. of Law, title 'Intoxicating Liquors,' page 318, and cases in note 3."

A conviction of a nuisance thus committed may under some statutes be based on a single sale. One sale may disclose the unlawful intent as well as the keeping. *Ibid.* page 319, citing in note 7 *State v. Reyelts*, 74 Iowa, 499.

The offense of *maintaining a nuisance by selling* intoxicating liquors is a *distinct offense from selling* intoxicating liquors. A party is punishable for the offense of thus maintaining a nuisance, either independently of, or in addition to the punishment for illegally selling liquor. *Ibid.* page 318, note 3, citing *State v. Warwick*, 45 Iowa, 516; *State v. Ho-worth*, 70 Iowa, 157.

No doubt the reason why unlawful sales of intoxi-

cating liquors are deemed to constitute a nuisance is, because the experience of mankind has led us to believe that such sales often tend to provoke breaches of the peace, to the annoyance of the public.

“They (nuisances) * * * usually, if not invariably arise from personal misconduct, such as the commission of offenses against the public morals or decency, or * * * from acts constituting or tending to provoke breaches of the peace.” 21 Am. & Eng. En. of L. pp. 683, 684.”

It is respectfully submitted, therefore, that there is statutory authority for the enactment of the ordinance and that the proceedings and conviction were in conformity with the ordinance.

Nor has the statute of 1916 been modified, nor repealed either expressly or by implication. If it shall be contended that the Prohibition Enforcement Law of 1922 has repealed, or superseded, the 1916 statute, then that contention is met by an examination of the 1922 statute itself (P. L. 615). The enforcement law of 1922 is not at all inconsistent with the Act of 1916. It makes the offenses inhibited thereby much graver offenses against the state than are the same offenses against the municipalities affected by the 1916 supplement to the Walsh Act, but it does not repeal the provisions of the 1916 supplement nor impair the validity of any ordinance enacted in pursuance of its provisions.

The three convictions are lawful and the judgments of the Supreme Court should all be reversed and the several convictions affirmed.

Dated March 9, 1925.

Respectfully submitted,
LOUIS H. MILLER,
*Of Counsel with City of Millville,
Defendant-in-Certiorari-
Appellant.*

NEW JERSEY
COURT OF ERRORS AND APPEALS

CITY OF MILLVILLE,
Defendant, in Certiorarii Appellant.
V.
HOWARD EVERINGHAM,
Prosecutor---Respondant.

CITY OF MILLVILLE.
Defendant, in Certorarii Appellant
V.
RALPH FAGAN,
Prosecutor---Respondant

CITY OF MILLVILLE,
Defendant, in Certiorarii Appellant
V.
W. FREDERICK STECKLE,
Prosecutor---Respondant

ON APPEAL FROM THE SUPPEME COURT
ON CERTIORARII.

BRIEF OF RESPONDANTS,

HENRY O. BURT,
Counsel of Respondant

The respondants in these cases were convicted before the Mayor of the city of Millville of the habitual sale of intoxicating liquors in the city of Millville in the year 1924, in volation of Ordinance No. 294 of the city of Millville, purporting to be an ordinance to abate certain nuisances. These convictions are brought up on certiorarii for the following reasons or points:

THE HISTORY OF THE
CITY OF BOSTON

FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME

BY
NATHANIEL BENTLEY

IN TWO VOLUMES.

VOLUME THE SECOND.

BOSTON: PUBLISHED BY
J. B. BENTLEY, 1822.

PRINTED BY
J. B. BENTLEY, 1822.

THE HISTORY OF THE
CITY OF BOSTON

FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME

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IN TWO VOLUMES.

VOLUME THE SECOND.

BOSTON: PUBLISHED BY
J. B. BENTLEY, 1822.

PRINTED BY
J. B. BENTLEY, 1822.

1

UNDER THE COMPLAINT AND ORDINANCE THE PROSECUTORS WERE CHARGED WITH A CRIMINAL OFFENSE, AND BROUGHT TO TRIAL WITHOUT THE PRESENTMENT OR INDICTMENT OF A GRAND JURY, IN A CASE NOT SUBJECT TO IMPEACHMENT, OR COGNIZABLE BEFORE A JUSTICE OF THE PEACE, OR ARISING IN THE ARMY OR NAVY, OR IN THE MILITIA, CONTRARY TO THE PROVISION OF ARTICLE 1, SEC. 9, OF THE CONSTITUTION OF THE STATE NEW JERSRY.

Each of the defendants was charged in the complaint made against him under the ordinance of the city of Millville, with numerous and separate unlawful sales of intoxicating liquors in the city of Millville, on divers different days of the year 1924. See *States of Case, Millville v. Everingham*, p. 29; *Millville v. Fagan*, p. 25; *Millville v. Steckle*, p. 24) The sale of intoxicating liquor is prohibited by statute (P. L. 1922, p. 624, and by the same statute, p. 617) made a criminal offense.

"No person shall be held to answer for a criminal offense, unless on the present or indictment of a grand jury, except in cases of impeachment or in cases cognizable before justices of the peace, or arising in the army or navy, or in the militia." (State Constitution, Article 1, Sec. 9; *State v. Anderson*, 40 N. J. L. 224; *Meyer v. State*, 41 N. J. L. 6; affirmed 42 N. J. L. 157; *Atlantic City v. Anna Rollins*, 76 N. J. L. 254; *Geiger v. Recorder's Court of the town of Irvington, Essex County et al.*, 96 Atl. 1006) *Hedden V. Hand*, 90 N. J. E. 583; *Richmond v. State Board* 98 N. J. L. 690; affirmed 123 Atl. 720.

In *State v. Anderson*, 40 N. J. L. 224, the court held that the city of Paterson had the only right to prosecute for a sale of liquor which was prohibited by ordinance because "where the ordinance of such cities provide for the

punishment of the offence of keeping a disorderly house, it shall not thereafter be lawful to prosecute, by indictment, any person accused of keeping a disorderly house in such city, where the alleged offence consists only of the continuous and frequent violation of the laws above mentioned inhabiting the sale of ardent spirits by unqualified persons." In the same decision the court said on page 228, "The offence of selling liquor without a license is a purely statutory offence. Independently of a prohibition of the legislature, such a sale is neither immoral or illegal, and the law maker therefore, can put it under such control as may be thought best.

Not being in its nature an indictable offence, it can be made punishable by a penalty, without indictment. Such is the effect of the present law in certain localities, and I can perceive nothing unconstitutional or illegal in such an arrangement. This law, therefore, which gives the exclusive right of prosecution and punishment to the city of Paterson in this case, is valid and must be sustained."

It is submitted that under the present laws of this State any person who sells liquor at any place in this State unlawfully is subject to indictment and prosecution thereunder, and further that the City of Millville was never given the right by the legislature of this State to prosecute for an illegal sale of liquor, or by prosecution to exempt the person prosecuted from indictment, exclusive jurisdiction in all cases being placed in the courts of quarter sessions, under the prohibition enforcement act of 1922.

2

NO POWER HAS EVER BEEN DELAGATED TO THE CITY OF MILLVILLE TO PROVIDE FOR THE PUNISHMENT OF OFFENSES OF THE NATURE PRESCRIBED IN THE COMPLAINTS AGAINST THE PROSECUTORS IN CERTIORARII.

The reasons above set forth are repeated.

Chapter 150 of the laws of 1916, p. 306, provides that certain cities are "vested with power and authority to enact and enforce by imposition of reasonable fines or imprisonment, or both, all ordinances necessary for the protection of life, health, and property, and for the enforcement of all laws of the State regulating the sale of spirituous, vinous, malt and brewed liquors; to declare and prevent and summarily to abate nuisances, wheather caused by the sale of spirituous, vinous, malt, intoxicating and brewed liquors, or otherwise---and shall have all powers necessary for its government, not in conflict with the laws applicable to all cities of this State, or the provisions of the Constitution."

It is submitted that since the passage of this act by the adoption of the 18th amendment to the United States Constitution, as well as by the State enforcement act of 1922, all laws of the State regulating the sale of intoxicating liquors for beverage purposes have been abolished, and that such sales are now not REGULATED by law, but absolutely prohibited. This act expressly provided that the authority of the city in such cases should not apply to cases in conflict with the State Constitution.

In *State vs. Rodgers* the court said "The character of the offense is determined, not by the evidence which may be legally admissable under the complaint, but by the charge and the evidence which is required to sustain the

charge." The charge in these cases sets forth that the defendants have committed a crime both under the law of this State and under the common law, and the evidence supports the charge.

3

THE COURT, MAGISTRATE OR OFFICER IN THESE CASES HAD NO JURISDICTION.

By the prohibition enforcement act of 1922, p. 624 the sale of intoxicating liquor is made a misdemeanor, and a person charged with a misdemeanor cannot be tried therefor except upon indictment in the quarter sessions.

4

THE OFFENSE WITH WHICH THE PROSECUTORS WERE CHARGED IS A CRIME AT COMMON LAW AS WELL AS UNDER THE STATUTE LAW.

The defendants are charged with having repeatedly in the year 1924 sold intoxicating liquors unlawfully, at their places of business in the city of Millville.

In *State v. Williams* (30 N. J. L. 102) it was held that the sale of liquor on the Sabbath was unlawful, and the practice of so keeping a house as to violate the law is to make it disorderly, and the person offending of keeping a disorderly house. Under the enforcement act of 1922 it is made a misdemeanor to sell intoxicating liquor at any time, and the practice of doing so, as charged against the prosecutors in these cases, would make them guilty of keeping a disorderly house, an indictable offense at the common law.

HENRY O. BURT.
COUNSEL FOR RESPONDENTS.

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