INDEX

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

SAMUEL P. HUNT, *Prosecutor-Appellee,* vs. BOROUGH OF HADDON HEIGHTS, *Defendant-Appellant.*	ON CERTIORARI. NOTICE AND GROUNDS OF APPEAL. 10

To Cyrus Marter, Esq., Attorney of Prosecutor-Appellee:

Take notice that the defendant in certiorari appeals to the New Jersey Court of Errors & Appeals from the whole of the order or judgment entered in 20 this cause, on the following grounds:

First: Because the New Jersey Supreme Court ordered the conviction brought up by the Writ of Certiorari, set aside, whereas the said conviction should have been affirmed.

Second: Because the New Jersey Supreme Court ordered the conviction brought up by the Writ of Certiorari, set aside on the ground that the ordi- 30 nance on which the conviction was founded, failed to support the conviction, whereas said conviction, should have been affirmed for the reason that the said ordinance supported such conviction.

Third: Because the ordinance upon which said conviction was founded was passed in exercise of the licensing and revenue raising power of the Borough

of Haddon Heights, the defendant-appellant, and is not invalid in the respects in which it is held to be invalid by the Supreme Court.

Fourth: Because the provisions of said ordinance held by the Supreme Court to be invalid or infirm, are independent and separable from the remainder of the ordinance and, therefore, do not invalidate the entire ordinance.

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Fifth: Because the conviction brought up by the Writ of Certiorari was not founded upon that part of the ordinance held by the Supreme Court to be invalid.

Sixth: Because, if the provision of the said ordinance held by the Supreme Court to be invalid, is, in fact, invalid, the conviction brought up by the Writ of Certiorari, should nevertheless have been
20 affirmed because supported by valid and effectual provisions of the said ordinance.

Seventh: Because, although one distinct and separable provision of the said ordinance may be bad, its other distinct and independent provisions are not thereby defeated.

Eighth: Because the conviction brought up by the Writ of Certiorari and set aside by the Supreme
30 Court, was founded upon provisions of the ordinance, distinct, independent and separable from the provisions of the ordinance held to be invalid.

Respectfully yours,

JESS AND ROGERS,
Attorneys of Defendant-Appellant.

[ENDORSED]

New Jersey Supreme Court.
Samuel P. Hunt,
Prosecutor-Appellee,
vs.
Borough of Haddon Heights,
Defendant-Appellant.

10

On Certiorari.
Notice and Grounds of Appeal.

Due and legal service of the within Notice &c., hereby acknowledged as of this 12th day of July, 1917.

Cyrus D. Marter,
Sol'r for Sam'l P. Hunt.
Law Offices,
Jess and Rogers, 20
Camden, New Jersey,
531 Federal St.,
Filed July 16, 1917,
Wm. C. Gebhardt, Clerk.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } *ss.*

30

SAMUEL P. HUNT, of full age, being duly sworn according to law, on his oath says that he is a resident of the Borough of Haddonfield, having a meat and provision store in the Borough of Haddonfield; that in addition, he has a wagon from which he sells meats, provisions and poultry; that on Tuesday,

the Twenty-seventh day of February, nineteen hundred and seventeen, he was arrested by a constable, the summons or warrant issued by William J. Dallas, Mayor of Haddon Heights; that on the twelfth day of March, nineteen hundred and seventeen, he was brought before William J. Dallas, Mayor of Haddon Heights, charged with selling merchandise in Haddon Heights, N. J., without a license in violation of a Haddon Heights Borough ordinance, and after a hearing, found guilty and sentenced to pay Ten Dollars and costs. Attached to this affidavit is a copy of the ordinance for the breaking of which deponent was arrested. Deponent says that he believes said ordinance is illegal as discriminating against him, a non-resident of Haddon Heights, and as being in restraint of trade and such an ordinance that the Borough Council had no right to pass.

SAMUEL P. HUNT.

Sworn and subscribed to before me this nineteenth day of March, A. D. 1917.

H. F. MARTER, JR.,
Notary Public.

AN ORDINANCE FIXING LICENSE FEES FOR PEDDLERS.

Be it ordained by the Borough Council of Haddon Heights.

Section 1. It shall be unlawful for any person to hawk or peddle or expose for sale from house to house in the Borough of Haddon Heights any goods, wares or merchandise of any description, except-

ing products of his or her own raising, or articles of his or her own manufacture, or to drive, push or pull any peddler's cart or wagon within said Borough for that purpose without a license for that purpose first had and obtained. All persons who shall go from house to house and sell on orders or by sample any goods, wares or merchandise to be afterwards delivered, shall be considered as hawkers and peddlers within the meaning of this ordinance, and shall be subject to the conditions and penalties herein provided; provided, however, that no person or persons having a regular place of business or residence within the limits of the said Borough of Haddon Heights, and paying taxes thereon, shall be subject to any of the said conditions or penalties, unless, he, she or they are selling the goods of persons who are not residents and taxpayers of said Borough.

Section 2. The license provided for in the first section of this ordinance shall be issued by the Borough Clerk to any person applying for the same upon payment to said Borough Clerk a fee of five dollars ($5), which is hereby imposed for revenue. All such license shall expire on the first day of January next, after the same shall be issued, and shall be renewed annually.

Section 3. Any person violating the provisions of this ordinance shall, upon conviction thereof, forfeit and pay to the Borough a fine of ten dollars ($10), for each and every violation, and in default of the payment of said fine, shall be imprisoned in the county jail for a period of ten days.

Section 4. All ordinances and parts of ordinances inconsistent herewith are hereby repealed and this ordinance shall take effect immediately.

Passed at a regular meeting January 5, 1909.
Approved January 5, 1909.

(Signed) FREDERICK FRIES,
Mayor.

Attest:
(Signed) C. F. COTTRINGER,
Borough Clerk.

10

[ENDORSED]

New Jersey Supreme Court.
Samuel P. Hunt,
vs.
The Mayor and Council of the Borough of Haddon Heights.

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20 Writ of Certiorari.
Affidavit.

Cyrus D. Marter, Att'y.
25 N. 3rd St.,
Camden, N. J.
Filed March 19/17.
C. G. Garrison, J. S. C.
Filed Mar. 26, 1917,
Wm. C. Gebhardt,
30 Clerk.

WRIT OF CERTIORARI.

NEW JERSEY SUPREME COURT.

SAMUEL P. HUNT, vs. THE MAYOR and COUNCIL OF THE BOROUGH OF HADDON HEIGHTS.	WRIT OF CERTIORARI. RETURNABLE APR. 7, 1917. CYRUS D. MARTER, ATTORNEY.

10

NEW JERSEY, to wit.

(Seal) The State of New Jersey to William J. Dallas, Mayor of Haddon Heights and Arthur S. Beck, Clerk of the Common Council of the Borough of Haddon Heights. 20

GREETING:

We being willing, for certain reasons, appearing by the affidavit of Samuel P. Hunt, filed in this cause, to be certified of a certain ordinance passed by the common council of the Borough of Haddon Heights, in the County of Camden, in the State of New Jersey, on the fifth day of January, A. D. nineteen hundred and nine, entitled "An Ordinance Fixing License Fees for Peddlers." 30

We do command you, that the aforesaid ordinance passed by the common council of the Borough of Haddon Heights, on the fifth day of January, A. D.

nineteen hundred and nine, with the records of the meetings of the said common council, at which the said ordinance was introduced and passed together with all things touching and concerning the passing, approving and enacting the said ordinance, as fully and entirely as before you they remain, also the judgment, order or proceedings given or made in the Mayor's Court in a certain action brought against Samuel P. Hunt under the aforesaid ordinance, to
10 our Justices of the Supreme Court of Judicature, at Trenton, on the seventh day of April next, you certify and send, together with this writ, that therein may be done what of right and according to the laws and constitution of this State ought to be done.

Witness William S. Gummere, Chief Justice of the New Jersey Supreme Court, at Trenton, the 19th day of March, nineteen hundred and seventeen.

Wm. C. Gebhardt,
Clerk.

20

[ENDORSED]

New Jersey Supreme Court.
Samuel P. Hunt,
vs.
The Mayor and Council of the Borough of Haddon Heights.

Writ Of Certiorari.

30

Cyrus D. Marter, Atty.,
25 N. Third Street,
Camden, N. J.
Allocatur,
C. G. Garrison,
Jus. Sup. Ct.

RETURN.

NEW JERSEY SUPREME COURT.

SAMUEL P. HUNT, *Prosecutor*, vs. THE MAYOR and COUNCIL OF THE BOROUGH OF HADDON HEIGHTS, *Respondent*.	ON CERTIORARI. RETURN.	10

We, William J. Dallas, Mayor of the Borough of Haddon Heights, and Arthur S. Beck, clerk of the Borough of Haddon Heights, herewith send to the 20 Supreme Court of the State of New Jersey, as within we are commanded, the ordinance passed by the Council of the Borough of Haddon Heights, on the 5th day of January, 1909, entitled, "An ordinance fixing license fees for peddlers," with the record of the meetings of the said Council at which the said ordinance was introduced and passed, together with all things touching and concerning the passing, approving and enacting the said ordinance as fully and entirely as before us they remain; also the judg- 30 ment and proceedings given and made in the Mayor's Court of the Borough of Haddon Heights in a certain action brought against Samuel P. Hunt under the aforesaid ordinance, as by the transcript under our hand and the seal of the Borough hereto annexed more fully appears.

In witness whereof we have set our hands and affixed the corporate seal of the Borough of Haddon Heights, this twenty-fourth day of March, 1917.

WM. J. DALLAS,
Mayor.

A. S. BECK,
Borough Clerk.

Minutes of the Borough Council of the Borough of
10 Haddon Heights.

Haddon Heights, N. J.,
December 10, 1908.

An adjourned meeting of the Borough Council was held this evening in the Council Chamber. Mayor, Mr. Frederick Fries presided.

Members present were, Messrs. Deibert, DeCou, Anderson, McGaghey and Lippincott.

An ordinance entitled "An ordinance fixing license fees for peddlers," was presented by Mr.
20 McGaghey and placed on first reading.

Moved by Mr. Deibert, seconded by Mr. DeCou that same pass first reading. So ordered.

Moved by Mr. Deibert, seconded by Mr. DeCou that when we adjourn, it be to meet on December 29th, 1908. So ordered.

Adjournment followed. Attest, C. F. Cottringer, Borough Clerk.

Haddon Heights, N. J.
January 5th, 1909.

30 The regular meeting of Borough Council was held this evening in Council chamber of Town Hall. Mayor, Mr. Frederick Fries presided.

Members present were, Messrs. Carr, DeCou, Anderson, Lippincott, Atkins and Upham.

An ordinance entitled "An ordinance fixing license fees for peddlers," was placed on second

reading, same read by sections without amendment. Moved by Mr. Carr, seconded by Mr. Anderson that ordinance pass second reading. So ordered.

Moved by Mr. Carr, seconded by Mr. Anderson that the rules be suspended and ordinance be placed on third and final reading. So ordered.

Ordinance above placed on third and final reading.

Moved by Mr. Carr, seconded by Mr. Anderson that ordinance pass final reading. So ordered. 10
Messrs. Carr, DeCou, Anderson, Lippincott, Atkins, and Upham, voting yes.

Attest. C. F. Cottringer
Borough Clerk.

MAYOR'S DOCKET.

Before William J. Dallas, Mayor of the Borough 20
of Haddon Heights.
1917.

THE BOROUGH OF HADDON HEIGHTS, vs. SAMUEL P. HUNT.	ON VIOLATION OF ORDINANCE.

30

Feb. 24. Complaint made by W. S. Soast, police officer, against Samuel P. Hunt for violation of ordinance requiring peddlers to be licensed.

Feb. 26. A summons in the above case, returnable before me at my office on Saturday, the third day

of March, at 3 P. M., which summons was duly served and returned by U. G. Ford, constable.

March 3. Hearing in the above case adjourned to March 8th.

March 8. On motion of Attorney for defendant, hearing adjourned until March 12th.

March 12. Parties appeared and proceeded to trial. Sydney T. Smith, Esq., appeared for the plaintiff, the Borough of Haddon Heights, and
10 Cyrus D. Marter, Esq., appeared for the defendant, Samuel P. Hunt.

Mr. Smith offered in evidence a certified copy of the ordinance of the Borough of Haddon Heights entitled, "An ordinance fixing license fees for peddlers."

Samuel P. Hunt, the defendant, was sworn as a witness for the plaintiff. The defendant called no witnesses.

Having heard and considered the evidence and
20 argument of counsel, I gave judgment of conviction against the defendant of violating the ordinance above referred to and imposed a fine of ten dollars and $1.90 costs.

Mr. Marter, Attorney for the defendant, asked that the judgment be held in abeyance for two or three days as he purposed to apply for a Writ of Certiorari to review the proceedings.

30

COMPLAINT.

State of New Jersey, }
County of Camden, } *ss.*

I, W. S. Soast, police officer, on my oath declare that on the 22nd day of February, 1917, at the residence of Chester Davis, 220 9th Ave., in the Borough of Haddon Heights, Camden County, New Jersey, also at the residence of D. A. Karr, cor. 9th and Garden Street in the above-named town, one S. P. Hunt, of Haddonfield, New Jersey, did sell meats and canned goods at the above-named residence without a license in violation of ordinance of the Borough Council of the Borough of Haddon Heights, New Jersey, in effect since January 5th, 1909.

Against the peace of the State, the government and dignity of the same.

Therefore, I pray that the said S. P. Hunt may be apprehended, held to answer said complaint, and be further dealt with as law and justice may require.

Wm. S. Soast.

Sworn to and subscribed before me this Twenty-fourth day of February, A. D. 1917.

W. L. Sauerhoff,
Justice.

SUMMONS.

State of New Jersey, }
Camden County, } *ss.*

To any Constable of said County:

Summon S. P. Hunt of Haddonfield, Camden Co., N. J., personally to be and appear before the subscriber, one Magistrate of said County, at my office in the Town Hall of Haddon Heights on Saturday the 3rd day of March, one thousand nine hundred and seventeen, at 3 o'clock in the afternoon, to answer unto the charge of selling merchandise without license in violation of Borough Ordinance.

in an action of

for dollars

Given under my hand and seal this 26th day of February, A. D. one thousand nine hundred and seventeen.

William J. Dallas,
Mayor.

RETURN OF CONSTABLE.

I served within Summons February 27th, 1917, on the Defendant by reading it to him and giving him a copy.

U. G. Ford,
Constable.

10

AN ORDINANCE FIXING LICENSE FEES FOR PEDDLERS.

Be It Ordained by the Borough Council of the Borough of Haddon Heights:

Section 1. It shall be unlawful for any person to hawk or peddle or expose for sale from house to house in the Borough of Haddon Heights any goods, wares or merchandise of any description, 20 excepting products of his or her own raising, or articles of his or her own manufacture, or to drive, push or pull any peddler's cart or wagon within said Borough for that purpose without a license for that purpose first had and obtained. All persons who shall go from house to house and sell on orders or by sample any goods, wares or merchandise to be afterwards delivered, shall be considered as hawkers and peddlers within the meaning of this ordinance, 30 and shall be subject to the conditions and penalties herein provided; provided, however, that no person or persons having a regular place of business or residence within the limits of the said Borough of Haddon Heights, and paying taxes thereon, shall be subject to any of the

said conditions or penalties, unless he, she or they are selling the goods of persons who are not residents and taxpayers of said Borough.

Section 2. The license provided for in the first section of this ordinance shall be issued by the Borough Clerk to any person applying for the same upon payment to said Borough Clerk a fee of five dollars ($5.00), which is hereby imposed for revenue. All such licenses shall expire on the first day of January next, after the same shall be issued, and shall be renewed annually.

Section 3. Any person violating the provisions of this ordinance shall, upon conviction thereof, forfeit and pay to the Borough a fine of ten dollars ($10.00), for each and every violation, and in default of the payment of said fine, shall be imprisoned in the county jail for a period of ten days.

Section 4. All ordinances and parts of ordinances inconsistent herewith are hereby repealed, and this ordinance shall take effect immediately.

Passed at a regular meeting January 5th, 1909,
Approved, January 5th, 1909.

(Signed) Frederick Fries,
Mayor.

Attest:
(Signed) C. F. Cottringer,
Borough Clerk.

I, Arthur S. Beck, Borough Clerk of the Borough of Haddon Heights, N. J., hereby certify that the copy of the ordinance attached hereto, and entitled "An Ordinance fixing License fees for peddlers," is a true and correct copy of an ordinance of the Borough of Haddon Heights, passed at a regular meeting of the Borough Council held January 5th,

1909, and approved by the Mayor of the Borough, January 5th, 1909.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of the Borough of Haddon Heights, this 26th day of March, Nineteen hundred and seventeen.

A. S. Beck,
Borough Clerk.

(Seal)

10

REASONS.

NEW JERSEY SUPREME COURT.

Samuel P. Hunt, vs. The Mayor and Council of the Borough of Haddon Heights.	On Certiorari. Reasons.

20

The prosecutor, Samuel P. Hunt, by Cyrus D. Marter, his attorney, comes and prays that the judgment of William J. Dallas, Mayor of the Borough of Haddon Heights, rendered against him in an action of arrest for violation of an ordinance of the Borough of Haddon Heights, known as "An Ordinance Fixing License Fees for Peddlers," may be reversed and the said ordinance set aside for the following reasons:

30

1. That the said ordinance is illegal as it is a discrimination against the Prosecutor, a non-resident of the Borough of Haddon Heights.

2. The said ordinance is illegal because in restraint of trade.

3. The said ordinance is in divers other ways illegal and discriminating and should be set aside and for nothing holden.

4. The said judgment is based upon an illegal ordinance and should be reversed and costs allowed
10 to the Prosecutor.

CYRUS D. MARTER,
Attorney of Prosecutor.

[ENDORSED]

New Jersey Supreme Court
20

Samuel P. Hunt,
vs.
The Mayor and Council of the Borough
of Haddon Heights.

On Certiorari.
Reasons.

Cyrus D. Marter, Atty.,
30 25 N. 3rd Street,
Camden, N. J.
Filed Mar. 26, 1917.
Wm. C. Gebhardt,
Clerk.

OPINION.

NEW JERSEY SUPREME COURT.

BOROUGH OF HADDON HEIGHTS, *Defendant,* vs. SAMUEL P. HUNT, *Prosecutor.*	ON CERTIORARI.

10

Submitted April 20, 1917, Decided April 23, 1917.

20

Before GARRISON, J.

For the Prosecutor: CYRUS D. MARTER, ESQ.
For the Defendant: JESS & ROGERS, ESQ.

GARRISON, J.

The ordinance is infirm whether the occupation tax be a police or a revenue measure, for the reason that there is no rational connection between the occupation that is taxed and the conditions that exempt from such tax. 30

Residence in the Borough is admittedly not enough, and having a regular place of business is

on the same footing, in the absence of a requirement that the business conducted at such place shall bear some relation to the wares so peddled.

To exempt a peddler of produce because he had a music store or a photograph gallery would be arbitrary in the extreme. Whether or not such suggested requirement would meet this defect is not up for decision.

The payment of real estate taxes on a residence
10 or place of business affords no basis for exemption from an occupation tax; the two imposts are entirely unrelated. A non-resident might own and pay taxes on all the real estate in the Borough and still be required to pay this occupation tax.

The grounds of exemption being thus arbitrary and illusory, the ordinance fails to support the conviction, which is set aside with costs.

20

[ENDORSED]

New Jersey Supreme Court.
Borough of Haddon Heights,
Defendant.
vs.
Samuel P. Hunt,
Prosecutor.

30

Opinion.
Garrison, J.
Filed Apr. 25, 1917.
Wm. C. Gebhardt, Clerk.

ORDER SETTING ASIDE ORDINANCE.

NEW JERSEY SUPREME COURT.

SAMUEL P. HUNT, *Prosecutor,* vs. BOROUGH OF HADDON HEIGHTS, *Defendant.*	IN CERTIORARI. ORDER SETTING ASIDE ORDINANCE.

The Court having inspected the transcript and proceedings of Arthur L. Beck, Borough Clerk of the Borough of Haddon Heights, New Jersey, returned with the certiorari in this cause, the reasons for reversing the ordinance, and the argument of counsel thereon, and having duly considered the same, do order that the ordinance of the Borough of Haddon Heights, New Jersey, herewith returned in this cause, be reversed, set aside, made void and for nothing holden, with costs of suit to be taxed, and the said plaintiff in certiorari be restored in all things wherein he hath lost by reason of the said ordinance.

Entered May 1, 1917, on motion of,

CYRUS D. MARTER,
Counsel for Prosecutor.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

In testimony whereof I have set my hand
(Seal) and the seal of said Court at Trenton, this seventeenth day of July, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

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10 [ENDORSED]

New Jersey Supreme Court.
Samuel P. Hunt,
Prosecutor-Appellee,
vs.
Borough of Haddon Heights,
Defendant-Appellant.

Copy Of Rule.

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20 Cyrus Marter,
Attorney.

Filed Jul. 24, 1917.
Thomas F. Martin,
Clerk.

30

NEW JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL P. HUNT, *Prosecutor-Appellee,* vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF HADDON HEIGHTS, *Respondent-Appellant.*	ON APPEAL.

APPELLANT'S BRIEF.

The prosecutor-appellee, Samuel P. Hunt, was convicted before the Mayor of the Borough of Haddon Heights, in the County of Camden, of violating an ordinance of the Borough, entitled, "An Ordinance fixing license fees for peddlers," and a fine of $10.00 and costs imposed. The conviction and all proceedings in connection therewith were then removed by writ of certiorari to the Supreme Court for review. The matter was argued before Mr. Justice Garrison, sitting alone, pursuant to the statute, who held that the ordinance was invalid and ordered the conviction set aside with costs, and appeal was thereupon taken to the Court of Errors and Appeals.

The ordinance upon which the conviction was based reads as follows:

"Be it ordained by the Borough Council of the Borough of Haddon Heights.

"Section 1. It shall be unlawful for any person to hawk or peddle or expose for sale from house to house in the Borough of Haddon Heights any goods, wares or merchandise of any description, excepting products of his or her own raising, or articles of his or her own manufacture, or to drive, push or pull any peddler's cart or wagon within said Borough for that purpose without a license for that purpose first had and obtained. All persons who shall go from house to house and sell on orders or by sample any goods, wares or merchandise to be afterwards delivered, shall be considered as hawkers and peddlers within the meaning of this ordinance, and shall be subject to the conditions and penalties herein provided; provided, however, that no person or persons having a regular place of business or residence within the limits of the said Borough of Haddon Heights, and paying taxes thereon, shall be subject to any of the said conditions or penalties, unless he, she or they are selling the goods of persons who are not residents and taxpayers of said Borough.

"Section 2. The license provided for in the first section of this ordinance shall be issued by the Borough Clerk to any person applying for the same upon payment to said Borough Clerk a fee of five dollars ($5), which is hereby imposed for revenue. All such license shall expire on the first day of January next, after the same shall be issued, and shall be renewed annually.

"Section 3. Any person violating the provisions of this ordinance shall, upon conviction thereof, forfeit and pay to the Borough a fine of ten dollars ($10) for each and every violation, and in default of the payment of said fine, shall be imprisoned in the county jail for a period of ten days.

"Section 4. All ordinances and parts of ordinances inconsistent herewith are hereby repealed and this ordinance shall take effect immediately."

It was not denied, either at the hearing before the Mayor or in the certiorari proceedings, that Hunt had violated the terms of the ordinance. The attack upon the conviction was based wholly upon the claim that the ordinance was invalid and could not support the conviction for the reason that it discriminated against non-resident hawkers or peddlers. Hunt, admittedly, was not a person having a regular place of business or residence within the Borough of Haddon Heights and paying taxes thereon. He, therefore, was subject to the provisions of the ordinance requiring hawkers or peddlers to pay a license fee to the Borough. The opinion of Mr. Justice Garrison, before whom the matter was argued, sitting alone pursuant to the statute, was as follows:

"The ordinance is infirm whether the occupation tax be a police or a revenue measure, for the reason that there is no rational connection between the occupation that is taxed and the conditions that exempt from such tax.

"Residence in the Borough is admittedly not enough, and having a regular place of business is on the same footing, in the absence of a requirement that the business conducted at such

place shall bear some relation to the wares so peddled.

"To exempt a peddler of produce because he had a music store or a photograph gallery would be arbitrary in the extreme. Whether or not such suggested requirement would meet this defect is not up for decision.

"The payment of real estate taxes on a residence or place of business affords no basis for exemption from an occupation tax; the two imposts are entirely unrelated. A non-resident might own and pay taxes on all the real estate in the Borough and still be required to pay this occupation tax.

"The grounds of exemption being thus arbitrary and illusory, the ordinance fails to support the conviction, which is set aside with costs."

The ordinance in question was passed in pursuance of the power conferred by the Legislature in Section 28 of the Borough Act of 1897 (C. S. Vol. 1, page 239). This section authorizes the Borough Council to pass and enforce, alter or repeal ordinances for the following purposes among others: to license and regulate common criers, hawkers and peddlers * * * * itinerate venders of medicines, remedies and merchandise and to fix the license fees to be paid therefor, which may be imposed for the purpose of revenue; provided that no person or persons shall be required to take out a license in order to sell at wholesale nor to sell any produce of his farm.

The grounds of appeal from the order of the Supreme Court are:

First: *The ordinance upon which the conviction was founded was passed in exercise of the licensing and revenue-raising power of the Borough and was a valid and effectual exercise of that power.*

Morgan vs. Orange, 50 N. J. L. 389;
Muhlenbrinck vs. Long Branch, 42 N. J. L. 364;
Cooley on Const'l. Lim., p. 201;
Dillon on Municipal Corp., Sec. 291;
North Hudson, &c., Rway. vs. Hoboken, 41 N. J. L. 81;
State of Wyoming vs. Willingham, 9 Wyo. 290;
Titusville vs. Clark, 46 Atl. Rep. 286;
St. Louis vs. Coal Co., 20 S. W. Rep. 699;
Kolb vs. Boonton, 64 N. J. L. 163.

It is well settled that distinction between inhabitants of our State based upon no other ground than the place of actual residence are illegal. Morgan vs. Orange, 50 N. J. L., page 389. Muhlenbrinck vs. Long Branch, 42 N. J. L., page 364.

The ordinance in question makes no distinction in favor of residents but only in favor of those who pay taxes upon the property owned by them in the Borough. It exempts from the license fees only residents who also are taxpayers. The distinction in this case, therefore, is not based entirely upon the ground of actual residence. The plain purpose of the ordinance is to avoid discrimination against taxpayers in the Borough. It is an ordinance to raise revenue. It aims to place upon an approximate basis, as contributors to the public funds, persons doing business in the district and paying

taxes therein and persons doing business in the district who do not pay taxes therein. The municipality has no power under the General Tax Act to reach those whose persons or property have not a situs within its jurisdiction. But clearly it has the power to enforce a contribution to its revenues from those who do business within its jurisdiction but who cannot be reached under the processes of the Tax Act.

> The imposition of a license fee for revenue is clearly an exercise of the power of taxation and may be sustained where the Legislature plainly shows an intent to confer that power. Cooley on Constitutional Limitations, page 201; Dillon on Municipal Corporations, Section 291.

The purpose of the ordinance in exempting resident taxpayers from the license fee imposed upon non-resident peddlers was to avoid a species of double taxation upon the former. While the Borough Council might not be authorized under the police power to make such a classification as the ordinance attempts, it is submitted that it may do so in the exercise of a power conferred for revenue purposes. As was pointed out in *North Hudson County Railway vs. Hoboken,* 41 N. J. L., page 81, the distinction between the power to license as a police regulation and the same power when conferred for revenue purposes is of the utmost importance. In the exercise of the last named power the local legislative body imposes what amounts to a tax and its acts are to be tested by the same rules which apply to the exercise of the power of taxation.

In *State of Wyoming vs. Willingham,* 9 Wyo. 290, the defendant was convicted before a justice of the peace of violating an ordinance of the City of

Cheyenne, entitled "An Ordinance concerning city licenses," and sentenced to pay a fine of $50.00 and costs. This ordinance required merchants to secure license from the City but provided an exemption in favor of merchants who pay an annual tax upon their merchandise assessed according to the revenue laws of the city.

In that case the Court said:

> "We are unable to perceive that the ordinance conflicts with the clause of the Constitution in question. There is nothing unequal in classifying differently merchants who pay an annual tax upon their stock of goods under the revenue laws of the city and those who pay no such tax. But, upon the contrary, it seems to be an attempt to secure entire equality as nearly as may be by requiring each class to contribute its proportion to the fund necessary to defray the expenses of the city government. Nor is there anything unreasonable or unequal in exempting from this tax the traveling salesmen, who supply the regular merchants, in whole or in part, with their stocks of goods upon which they pay taxes to the city. The distinctions between the two classes are apparent. The latter are, in a sense, the assistants and purveyors of the regular merchants, the goods sold by them pass at once into the stocks of the merchants to be assessed for taxation, and any license fee required of them would operate in a measure as a double tax upon the merchants who buy from them; while the goods sold by the other class become at once the personal belongings of their customers, and inevitably, in a great measure escape taxation."

In the case of *City of Titusville vs. Clark,* 46 Atl. Rep. 286, it was held that,

> "Provisions of an ordinance imposing a license tax on persons dealing in the selling of merchandise according to the amount of their sales, that no manufacturer who is a citizen of the City shall be considered a dealer or vender of merchandise unless he sells goods not of his own manufacture, is a proper classification."

It was held further in this case that the ordinance did not deny the equal protection of the law in violation of U. S. Constitution Amendment 14 or contravene Article 9, Section 1, of the Pennsylvania Constitution, providing that, "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

It will be seen that this provision of the Pennsylvania Constitution agrees substantially with New Jersey's Constitutional requirements on the same subject. Therefore, both from the similarity of the provisions of the ordinance in dispute and the provisions of the State Constitution in question, this case is very much in point.

The case of *St. Louis vs. Consolidated Coal Co.,* 20 S. W. Rep., page 699, involved an ordinance similar in principle to that under review although it was decided upon a different question.

This ordinance provided that a reduction of 40 per cent. from the rates of license shall be allowed to vessels owned by residents of St. Louis and returned and assessed for taxation there within a prescribed time.

It was held that such license fee being a tax within the meaning of the Missouri Constitutional provision and defendant's boats having been taxed the same as those of resident owners, it was entitled to the same reduction.

The Court said in this case,

> "If the City in this case is permitted to collect *ad valorem* tax on a value of the boats and in addition thereto exact the whole amount of the license fees without deduction, the tax thus levied and collected would be in excess of taxes levied on other property of the same class, confessedly coming within the purview of the ordinance and this the Constitution prohibits."

It was precisely upon this theory that the ordinance under review was framed and it is respectfully submitted that in principle and practical operation the ordinance is a valid exercise of the revenue raising power of the Borough and should be sustained.

An ordinance similar in its terms to that involved in this case was reviewed by the Supreme Court in *Kolb vs. Boonton,* 64 N. J. L. 163. Speaking for the Court in that case the present Chief Justice said: "The first reason presented for the setting aside of this conviction is the alleged invalidity of the ordinance under which it was had. Such invalidity is said to result from the fact that the ordinance necessarily regulates interstate commerce and from the further fact that, after imposing a license fee upon hawkers, peddlers, canvassers and auctioneers, it then proceeds to exempt from its provisions farmers who bring the produce of their farms into town and dispose of it there and also persons selling wood or charcoal and persons having stores or other places

of business in the town." The Court held that neither of these grounds was tenable, disposing of the second objection in the following language: "A municipality which seeks to exercise the powers conferred by the Act of 1890, respecting licenses, is not bound to impose a license fee upon every business mentioned in the statute. It may select such of them as it deems proper subjects for license, and so long as there is no discrimination in the imposition of the license fee, its action cannot be successfully challenged."

Second: *The provisions of said ordinance held by the Supreme Court to be invalid are independent and separable from the remainder of the ordinance and, therefore, do not invalidate the entire ordinance.*

Doran vs. The City of Camden, 64 N. J. L. 666;
Kolb vs. Mayor, &c., of Boonton, 64 N. J. L. 163;
Haynes vs. The City of Cape May, 52 N. J. L. 180;
Staats & Hoagland vs. Boro. of Washington, 45 N. J. L. 318.

It will be conceded that without the exempting provisions the ordinance in question is valid. If that provision were not there the conviction, undoubtedly, would have been sustained. The conviction, therefore, should not have been set aside unless it rested for support upon the invalid provision. The prosecutor-appellee was not found guilty of violating a provision of the ordinance which the Supreme Court held to be faulty but he was found

guilty of peddling without the license required by the ordinance.

In the case of *Doran vs. City of Camden,* 64 N. J. L. 666, the Court of Errors and Appeals held:

> "It is settled in this Court that separable provisions of a municipal ordinance or by-law may be ignored, if invalid, and the residue stand. Staats vs. Washington, 16 Vroom, 318, affirmed 17 Id. 209. Later instances of upholding ordinances, notwithstanding such invalid provisions are Haynes vs. Cape May, 23 Id. 180; Morgan vs. Orange, 21 Id. 389; Kolb vs. Boonton, ante p. 163.
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> "The test of inseparability is the same as in a statute, viz., the dependence of the whole legislation upon the invalid provision. If independent, that provision only will fall. Rader vs. Township of Union, 10 Vroom, 509; approved in this Court 12 Id. 617. The latest cases on this subject are Johnson vs. State, 30 Id. 535; Iowa Life Insurance Company vs. Eastern Mutual Life Insurance Company, ante p. 340."

In *Kolb vs. Boonton,* 64 N. J. L. 163, the Court said:

> "It is observed that the ordinance imposes a license fee upon canvassers as well as upon hawkers, peddlers and auctioneers. The Act of 1890 does not, in terms, include the former in the enumeration of businesses which may be licensed but it is unnecessary to consider whether this provision is void, for ordinances like acts of the Legislature may be good in part though bad in other separable and independent provisions. Hershoff vs. Beverly, 16 Vroom, 288; Morgan vs. Orange, 21 Id. 389."

In *Haynes vs. Cape May,* 52 N. J. L. 180, the plaintiff attacked an ordinance because it made, he insisted, an unjust distinction between hotel keepers and others by permitting the former to run omnibuses without licenses. The Court of Errors and Appeals held: "If the injustice of this discrimination were established it would defeat only so much of the ordinance as requires the licensing of omnibuses." In the syllabus of this case it is stated: "Although one provision of a municipal ordinance be bad, a distinct and independent provision is not thereby defeated."

The case of *Staats vs. Washington,* 45 N. J. L. 318, brought before the Supreme Court for review an ordinance of the Borough of Washington concerning inns and taverns and the proceedings of the Borough in adopting the same. It was there held that an ordinance will not fail because there is annexed a separable illegal mode of procedure. If a part of a by-law be void other essential and connected parts are also void. *State, Chamberlain, Pros., vs. Hoboken,* 9 Vroom, 110. But where that part which is bad is independent and not essentially connected with the remainder, the latter will stand. Dillon on Mun. Corp., Section 354 and cases.

It is, therefore, respectfully submitted that even though the provision of the ordinance held by the Supreme Court to be invalid is, in fact, invalid, the conviction brought up by the writ of certiorari should nevertheless have been affirmed because supported by valid and effectual provisions of the ordinance which were distinct and separable from the provision held to be ineffectual.

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NEY JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL P. HUNT, *Prosecutor-Appellee,* vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF HADDON HEIGHTS, *Respondent-Appellant.*	ON APPEAL.

APPELLEE'S BRIEF.

The ordinance, under which the conviction was made, is unconstitutional because it discriminates against non-residents in favor of residents.

Morgan vs. Orange, 21 Vroom, 389;
Thompson vs. Ocean Grove, 55 N. J. L. 507;
Muhlenbrinck vs. Commissioners, 12 Vr. 364;
U. S. Constitution, 14th Amendment.

The Haddon Heights ordinance compels a non-resident hawker to take out a license and exempts from the license a hawker having a regular place of business or residence in Haddon Heights and paying taxes thereon.

(1) A non-resident hawker could not have a residence in Haddon Heights and is therefor discriminated against in favor of a resident hawker who is exempt from the license.

(2) A resident hawker who pays tax for the privilege of owning a moving picture parlor is exempted by this ordinance from paying tax for privilege of being a peddler although they have absolutely no connection.

(3) A non-resident hawker who owns the adjoining moving picture parlor and pays tax on it is not exempt from the peddler's tax because he is a non-resident and peddling his own goods.

Morgan vs. Orange, 21 Vroom, 389,
holds an ordinance fixing $25.00 peddler's fee for non-residents and $10.00 fee for residents is a discrimination against non-resident peddlers.

Thompson vs. Ocean Grove, 55 N. J. L. 507,
following *Morgan vs. Orange,* held a $25 license fee against non-resident hawkers and nothing against residents who rent from the Ocean Grove Association is a discrimination.

Muhlenbrinck vs. Commissioners, 13 Vr. 364,
a license fee of $3 for peddlers who were residents for six months and a fee of $10 for those not residents six months or non-residents is a discrimination against non-residents.

U. S. Constitution, 14th Amendment.
"No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States, nor shall any state deprive any citizen of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wyoming vs. Wellingham, 9 Wyo. 290, cited by appellant, involved the consideration of an ordinance that did not require a storekeeper who paid taxes on the goods in his store to pay tax for running that store—it did not discriminate between residents and non-residents—a non-resident storekeeper who paid tax on his store was classed the same as a resident.

City of Titusville vs. Clark, 46 Atl. 286, held that manufacturers should not be classified and pay tax required of venders of merchandise.

St. Louis vs. Consolidated Coal Co., 20 S. W. 699.

This ordinance provided that if a tax was paid on the barges in question by a resident in addition to a license tax, he was entitled to a reduction of 40% from rates of license. The Court held that the defendant, a foreign corporation whose barges were taxed by St. Louis, was entitled to the reduction even though a non-resident, saying, "The rule requiring uniformity of taxation extends to all property within the territorial limits of the authority levying taxes without regard to the residence of the owner."

Kolb vs. Boonton, 64 N. J. L. 163.

In reviewing an ordinance including canvassers, not mentioned by state statute, in a peddler's ordinance, it holds with the other cases above decided that there can be no discrimination.

The appellant in sub-division second, page ten of his brief suggests that the Court, if it found the ex-

emption clause void, should separate it from the portion of the ordinance requiring the license and hold that portion legal and the conviction good.

A borough council, if it wants to, can pass an ordinance requiring that no peddler shall take out a license and another ordinance as well requiring that every peddler shall take out a license. That is what they did here but they put it in the same ordinance.

(1) The ordinance is a nullity because it first requires everybody to take out a license, and then exempts residents. The U. S. Constitution and New Jersey State decisions both give residents and non-residents the same rights, not allowing any discrimination between them: therefore a non-resident has the right to the exemption provision. In effect the ordinance says everybody must take out a license and then excuses everybody from doing so. The prosecutor was convicted of selling without a license when under the exemption clause, he being entitled to the same constitutional rights as a resident, did not have to have a license.

(2) Section 1 of the ordinance must be read as a whole to get the intention of the legislator and the exemption clause cannot be called independent. The wording of the ordinance and the admission of the attorney for respondent (last six lines and first two lines pages 5 and 6 of respondent's brief) show there never was any intention to make a resident or a taxpayer of Haddon Heights take out a peddler's license. To hold these to be independent provisions would be read into the entire ordinance something that was never intended. There is nothing to show whether a majority of the councilmen want to tax Haddon Heights residents or not—apparently by in-

serting the exemption clause, they showed they did not want to tax Haddon Heights residents and this Court, if it separates the exemption, would in effect legislate contrary to the wishes of the borough council.

It is, therefore, respectfully submitted that the ordinance is illegal as discriminating; that it must be considered as a whole and cannot be separated into valid and void parts and that the conviction of the prosecutor must be set aside.

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