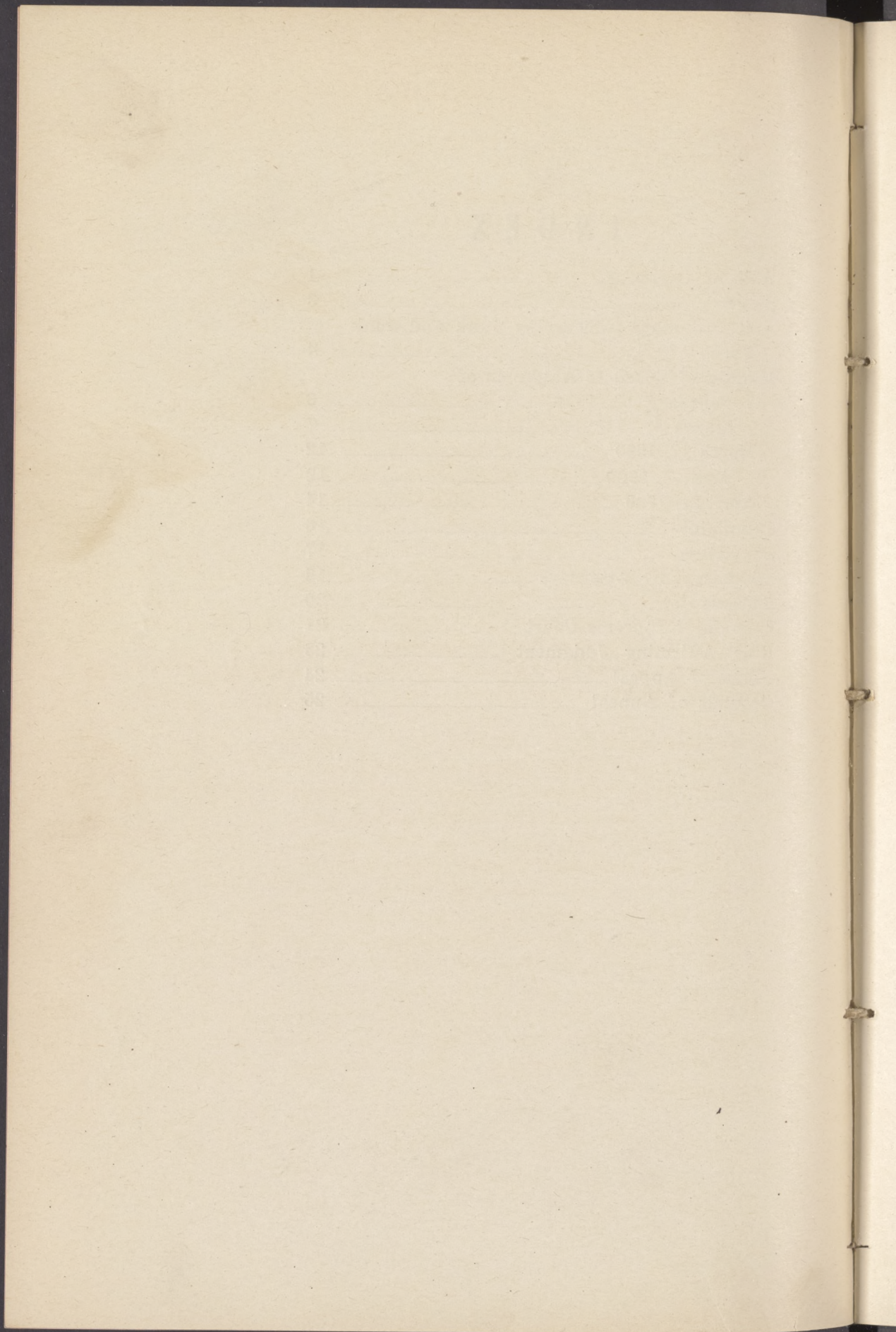


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(L. S.)

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New Jersey State Library

Writ of Certiorari

Witness, William S. Gummere, Chief Justice of the Supreme Court at Trenton this twenty-fifth day of June, 1930.

Edward F. Merrey,
Attorney of Prosecutor.

Fred L. Bloodgood, Clerk.

10 I allow this Writ. Let it be sealed. Both parties hereto have leave to take depositions for use on the argument.

Dated: June 25, 1930.

Peter F. Daly,
Justice of the Supreme Court.

NEW JERSEY SUPREME COURT

Prosecutor, } On Certiorari

vs.

Max Politinsky,

Defendant.

On Certiorari

10

RETURN

To the Honorable the Justices of the Supreme
Court of Judicature of New Jersey:

The City of Paterson, a municipal corporation of the State of New Jersey, by its City Clerk Edward DuPree, in obedience to the command of the writ hereto annexed, to it directed, does hereby certify and send to you, the said Justices, all excerpts from the minutes of the Board of Aldermen of the City of Paterson relative to an ordinance concerning Junk and Junk Yards, with all things touching and concerning the same, as fully and entirely as the same remains, as by the said writ is commanded to do, and as appears by the schedule hereto annexed.

Signed, this day of July, A. D., 1930. 30

City of Paterson,

By Edward DuPree,
City Clerk.

AN ORDINANCE

An Ordinance entitled, "An Ordinance Concerning Junk and Junk Yards."

The Board of Aldermen of the City of Paterson do ordain as follows:

10 Section 1. That no person or persons, firm or corporation, shall engage in the business of keeping a Junk Yard that is, no person or persons, firm or corporation, shall keep and maintain a yard, covered or uncovered, space or place, in the City of Paterson, for the purpose of buying and selling, exchanging or storing rags, old metal, old bottles, old glassware, old tin-ware, old paper or any other old material commonly called Junk, without being licensed so to do by the Board of Aldermen of the City of Paterson, provided, however, this shall not
20 prohibit the storage of old material to be used by the person or persons, firm or corporation, storing the same for manufacturing purposes.

Section 2. That the fee for such license shall be \$50.00, which fee shall be imposed for revenue, and that such license shall be valid for one year from the date of its issue. No person or persons shall be licensed unless such person or persons are citizens of the United States and a resident of the City of Paterson for at least two years next
30 preceding the filing of the application. When the applicant is a corporation at least one of its officers shall be a citizen of the United States and a resident of the City of Paterson for at least two years next preceding the filing of the application.

Section 3. Application for such license shall be made to this Board in writing and such application shall be signed by at least two thirds of the prop-

Return

erty owners within two hundred feet of the property lines of such junk yard, provided, however, that this section shall not affect junk yards already established, and provided, further, that owners of existing or established junk yards who fail to renew their license for a period of one year, shall not be considered established junk yards and shall proceed in a manner provided for in this section before obtaining a junk yard license and provided further that all applications for the extension, or enlargement of any existing or established junk yard shall contain the signatures of at least two-thirds of the property owners within two hundred feet of the property lines of such junk yard. 10

Section 4. No place shall hereafter be licensed as a junk yard unless the premises for which a license is sought shall have a suitable fence or enclosure and the licensee shall at all times maintain said premises in a safe and sightly manner with due regard to the health and safety of the vicinity in which the junk yard is located. 20

Section 5. Every keeper of a junk yard shall provide and keep a book in which shall be written at the time of each purchase a description of the articles so purchased, the name and residence of the person or persons, firm or corporation from whom such purchase was made and the date of such purchase. The said book shall at all reasonable times be opened to the inspection of the Mayor, the Chief of Police, City Attorney, of the City of Paterson, or any of them, or of any person who shall be duly authorized in writing for that purpose by any of them, who shall exhibit such written authority to such keeper of a junk yard. 30

Return

Section 6. Any applicatoin for a license may be declined and any license may be revoked for sufficient cause appearing to the Board of Aldermen, for so doing. No license shall be revoked until such license shall be afforded a hearing before the Board of Aldermen. Pending such hearing license may be suspended until final determination by the Board of Aldermen.

Section 7. Any person or persons, firm or corporation, violating any provision of this ordinance shall be subject to a penalty of \$150.00 to be recovered before the Recorder of the City of Pater-son.

Section 8. All ordinances or parts of ordinances, inconsistent with this ordinance are hereby repealed.

Section 9. This ordinance shall take effect im-
20 mediately.

Passed: April 21, 1930.

J. F. Brady,

President of Board of Aldermen.

Approved: April 23, 1930.

John V. Hinchliffe, Mayor.

Attest: Edward DuFree, City Clerk.

Excerpts from the Minutes of the Board of Aldermen Relative to an Ordinance Concerning
30 Junk and Junk Yards.

Regular Meeting, February 17th, 1930.

An Ordinance entitled, "An Ordinance Concerning Junk and Junk Yards" was read by City Clerk DuFree.

Alderman Harrison said before making his motion, (he noticed a number of persons present interested in this ordinance, that there would be a public hearing after the second reading, March

Return

3rd, and he did not think the license fee of \$50.00 was too much for the protection they got).

Alderman Harrison made a motion, seconded by Ald. Simpson that the ordinance pass first reading. Roll call vote resulted as follows:

Ald. Botbyl, Eckert, Harrison, Kearney, King, Lazarra, Loftus, Simpson and President Brady.

Alderman King said before casting his vote on this ordinance he reserved the right to offer a further amendment when the ordinance comes up on second reading, increasing the new license fee to \$100.00. This he said, will depend largely upon information he expects to secure relative to junk yard license fees in other cities.

President Brady said, "I want to congratulate the Board and members of the ordinance committee for efficient work in reporting on this ordinance."

20

Regular Meeting, March 3rd, 1930.

An Ordinance entitled, "An Ordinance Concerning Junk and Junk Yards" was read for the second time.

President Brady asked if there were any objections to the ordinance.

Mr. Edward F. Merrey appeared and said, "I appear for the association of twenty two junk yard owners in objection to this ordinance. Their objection is not against the regulations, it is against the principle of imposing a fee larger than I think this Board has a right to impose. A fee of \$50.00 is objected to as being beyond the cost of any regulation that is imposed or can be imposed by this Board. Now when I say that this Board cannot impose a fee of \$50.00 I speak from actual experience. At one time a fee of \$25.00 was charg-

30

Return

ed the Public Service for the operation of trolley cars. I was City Counsel at the time and attempted to defend and justify the imposition of that penalty, and we argued that the extra cost of traffic policemen justified this fee. There were not as many automobiles at that time, but a good many more trolley cars and they caused quite a bit of
10 congestion. So our argument was based on the cost of traffic policemen. The Supreme Court ruled that we could not charge a fee of \$25.00 on that account, because the traffic policemen were there and had other duties, and the ordinance was set aside. At that time the Board had the right to license trolley cars. So if the Board imposed a fee of \$50.00 for Junk Yard Licenses there is no reason why you can't fix a fee of \$50.00. If you can go as high as \$50.00 you can go as high as
20 \$500.00. For that reason the men who are in the business are going to object to it and attempt to set it aside if such an ordinance is passed. They are not objecting to your regulations, they don't want to do anything that is wrong, so far as keeping books are concerned or inspections by city officers, for they are not objecting to that. They are not objecting to your stringent regulations, but they do feel that since they are advised that a fee of \$50.00 cannot be legally imposed they
30 might just as well meet the situation at the threshold.

"For that reason I come here to tell the Board that we feel that the Board has no authority to impose a fee of this amount. The fee is \$10.00. There is no objection to that. You know this fee is a money raising fee. It doesn't raise much money, but it raises some. (To Clerk Brennan) How many licensed Junk Yards are there? Mr.

Return

Brennan—22. Mr. Merrey—That would bring in a little over a thousand dollars.

"It wouldn't mean much to some of them, but to others a fee of \$50.00 is an item. But as I say, their objection is that it is the beginning. We start out with a small tax and the first thing we know it is jumping up. The same way with the gasoline tax, it started at one cent, now it is five or six cents per gallon in some states. There is a tendency to increase these things. In a year or so there may be new members on the Board, and if the men consent to this fee, they may feel that they should raise it, and they will have to consent to that. And they maintain a most amicable relationship with the Board of Aldermen. 10

"They are sorry they must make this statement—they feel you may probably see yourselves what may happen in the future if they don't object now. It is too much, I feel that it is too much. I say that the entire association of twenty-two members object strenuously to it. 20

"I don't know whether you have had advice from your legal officers as to the legality of this ordinance. As I said I had a similar experience. We tried hard to put it across. But the Supreme Court said 'No' and I can't see any difference in that case and this. I thank you."

Alderman King—Mr. Merrey, may I ask you a few questions? 30

Mr. Merrey—Why certainly, Alderman King.

Alderman King—You refer to the Supreme Court decision, have you a copy of that decision?

Mr. Merrey—No, I haven't.

Alderman King—How long ago was it?

Mr. Merrey—I would say about 15 or 20 years ago.

Return

Alderman King—I assume that the decision would cover all parts of the state.

Mr. Merrey—I would say it would establish a precedent, in any City or Municipality. The principle of it would apply in most cases.

10 Alderman King—I just wanted to say that I have information that Paterson, outside of Elizabeth has the lowest fee for Junk Yard license in the State, \$25.00. In Trenton the license fee is \$100.00. In Newark, \$500.00 with bond; no bond in Camden and none in Elizabeth. I was just wondering in view of the decision why Trenton would go ahead and charge a larger fee than is legal.

20 Mr. Merrey—I don't know either, unless they are just paying the fee and don't object to it. However, unless you know the whole story you can't compare it. I don't know the situation in Trenton.

Alderman King—Mr. Merrey, isn't it also a fact that the location of Junk Yards has a tendency to influence the tax assessors to reduce assessments on adjoining properties?

30 Mr. Merrey—I don't know. Of course if you put it in a beautiful neighborhood, with beautiful homes it would; but if you put them in the vicinity of mills it would not. That is the way the zoning law once went bad. The court said it was up to the Board of Aldermen or Zoning Board not two-thirds of the property owners who lived nearby.

Alderman King—On the original Junk Yard Ordinance, do you recall that you drew its clauses?

Mr. Merrey—I don't think so, I imagine the original ordinance was passed in 1870.

Alderman King—I believe the date was 1870

Return

or 1895. It was \$25.00 with the privilege of using one wagon.

Mr. Merrey—Well, you see it was always considered that peddlers were a class that ought to pay a larger fee. They compete with people who have stores and pay taxes. At that time when there was one wagon, they were in the same position as peddlers and a fee was charged on that business. 10

Alderman King—I tried to ascertain from Junk Yard Dealers whether or not they had peddlers.

Alderman Harrison—In view of the remarks of former City Counsel Merrey, I think that before we pass this ordinance we should ask our Legal Department whether or not we are acting within the scope of our power. I wouldn't like to see this Board pass an ordinance and see a certiorari or have it held unconstitutional by the Supreme Court. I would not venture to give my opinion until we receive an opinion from the Legal Department and would suggest that the Clerk communicate with them and ask if the ordinance will stand. 20

Pres. Brady—You make that as a motion.

Alderman Harrison—Yes.

Alderman King—I desire to offer an amendment that the City Attorney appear at the next regular meeting.

President Brady—Alderman Harrison, do you withdraw your motion in favor of Alderman King? 30

Alderman Harrison—Yes.

Alderman Loftus seconded the motion and it was adopted by the full vote of the members present, and the Clerk was instructed to communicate with the City Attorney and request him to appear at the next regular meeting of the Board to be held March 17th.

Return

Regular Meeting March 17th, 1930.

An Ordinance Concerning Junk and Junk Yards was introduced and on motion of Alderman Harrison, seconded by Alderman Lazzara, the ordinance was read for the first time, on roll call vote.

10 Alderman King moved that the ordinance be passed to second reading. Alderman Simpson seconded the motion and on roll call vote it was adopted.

Alderman Harrison—Mr. President, our City Attorney, Mr. Roemer, is present and I think we should ask his opinion on this ordinance, especially the license fee.

20 Mr. Roemer, Alderman King called his attention to the ordinance, with the remarks of Former City Counsel Merrey that the Board could not impose such a fee for the license, the fee must be reasonable and what it actually costs to regulate the license.

Mr. Roemer said, "I think Mr. Merrey was one of the parties who wrote the Home Rule Act, and this Board can use its own discretion in making the license fee, the ordinance is valid and I am sure it would sustain any court attack."

Alderman King—Would it be the same if the license fee was \$100?

30 Mr. Roemer—Absolutely.

Regular Meeting, April 7th, 1930.

President Brady said: "We will now take up the ordinance concerning Junk Yards, for second reading."

City Clerk DuPree read the following communication from City Attorney Roemer:

April 2nd, 1930.

Mr. Edward DuPree, City Clerk,
City Hall, Paterson, N. J.

Dear Sir:

Mr. Merrey has requested me to have the Board of Aldermen postpone the consideration of the proposed junk yard and dealers' ordinance until the next meeting of the Board of Aldermen, for the reason that he will be in Washington on Monday, next. 10

Will you inform the Board of Aldermen that I have no objection to this postponement and I shall personally appreciate the postponement requested by Mr. Merrey.

It will, of course, be necessary for you to re-advertise the ordinance if the same is laid over.

Very truly yours,

Charles H. Roemer,

20

City Attorney.

Alderman King—Mr. President, may I ask through you, when this communication was received?

City Clerk DuPree said he received it.

Alderman King said it seemed rather late for a postponement but that he would vote for Mr. Merrey's request with the understanding that no new applications would be granted at the next meeting of the Board, that is by resolution, as is sometimes done by this Board. He would ask that all applications take the regular course. 30

Alderman Harrison—I realize the thought of Alderman King. I don't see how we can bind any condition on any application.

President Brady said he did not think that any member of the Board would attempt to take advantage of the adjournment.

On motion of Alderman Harrison seconded by Alderman King, the ordinance was laid over until the next regular meeting of the Board, April 21st, by the full roll call vote of the Board.

Return

Regular Meeting, April 21st, 1930.

An ordinance entitled, "An Ordinance Concerning Junk and Junk Yards," was read for the second time by City Clerk DuPree.

President Brady asked if there was any citizen present in favor or against the passage of this ordinance.

- 10 Lawyer Edward F. Merrey said he represented the owners of various junk yards and since the introduction of this ordinance the words "For Revenue" had been inserted, thereby making it a direct tax on this business and that this Board has no power to tax any branch of business. Instead of a fee for regulation, it was now under the classification of a tax and it was discriminatory.

"I respectfully submit these facts to the Board and ask you gentlemen, not to pass this ordinance.

- 20 I thank you."

President Brady—Are there any other citizens present who are interested in this ordinance?

City Attorney Charles Roemer—I have a very high regard for Mr. Merrey's opinion, but in this ordinance, I disagree. The Home Rule act of which Mr. Merrey was co-author, empowered the Board to license certain trades and professions, and the fact that the license fee is being increased and imposed as revenue, does not make it a tax.

- 30 President Brady—Mr. Roemer, are we within our power to pass this ordinance?

Mr. Roemer—Yes, the ordinance is valid in its entirety.

Alderman Harrison—It may surprise the members of the Board on the stand I am going to take. When this ordinance was first introduced I was in favor of it, since that time I have given serious thought and have talked with the various Junk Yard Keepers who are paying property and personal taxes and at this time I do not think it fair to increase the license fee and I would ask the

Return

other members of the Board to feel as I do and not pass the ordinance.

Alderman King—At the time I suggested a repeal of the Junk Yard Ordinance, it was in mind of the \$25. license fee paid by Junk Peddler (the retail man) which I did not think was a fair comparison, Junk Yards being more or less of a fire hazard and a nuisance to a neighborhood. I have obtained figures from about eighteen cities and towns in this State and find Paterson has the lowest license fee. 10

Mr. Merrey held the comparison with other cities to be unfair because conditions are not the same everywhere.

President Brady said Junk Yards are undesirable to the other property. We have plenty of Junk Yards in the City and the ordinance may discourage others from opening up in the future.

Alderman Harrison said a \$50.00 fee would not keep any new one out. 20

A motion by Alderman King seconded by Alderman Simpson that the ordinance pass second reading was carried by the following roll call vote.

Aye: Alderman Botbyl, Close, Eckert, Kearney, King, Loftus, Osborne, Simpson and President Brady.

Nay: Alderman Harrison.

The ordinance was then read for the third time by title by City Clerk DuPree. 30

A motion by Alderman King, seconded by Alderman Simpson that the ordinance pass third and final reading was adopted by the following roll call vote:

Aye: Aldermen Botbyl, Close, Eckert, Kearney, King, Loftus, Osborne, Simpson and President Brady.

Nay: Alderman Harrison.

President Brady declared the ordinance finally passed and adopted by the Board.

Return

3080-1606

9:00

No.

Verdict G

Bail \$

Fine \$1.00 Costs \$

or

Trial June 24th Term Paid L. S. June 24th
 RECORDER'S COURT, CITY OF PATERSON
 State of New Jersey

10 Passaic County

ss.

Before me, H. Joelson, Recorder of the City of
 Paterson,

Personally appeared Registrar of Licenses A.
 E. Brennan of City Hall (Paterson) who being
 duly sworn according to law, deposeth and saith
 that on the 19th day of June, 1930, Max Politinsky,
 operating at No. 14-16 Hudson Street, Paterson,
 N. J., did keep, maintain and engage in keeping
 20 and operating a junk yard, covered and part un-
 covered, at No. 14-16 Hudson Street, in the City
 of Paterson, for the purpose of buying, selling,
 exchanging and storing of rags, old metal, old bot-
 tles, old paper and other old material commonly
 called junk, without being licensed so to do, in
 violation of Sec. one of an ordinance of the Mayor
 & Board of Aldermen of the City of Paterson
 aforesaid, entitled, "An Ordinance concerning
 Junk and Junk Yards," approved April 23, 1930.

30 Therefore, this complainant prays that the said
 defendant may be apprehended and held to an-
 swer said complaint and dealt with as Law and
 Justice may require.

Andrew E. Brennan, Complainant.

, H. Joelson, Presiding Judge.

Sworn to and subscribed before me this 19th day
 of June, A. D. 1930.

John P. Grossi, Clerk,
 Paterson Recorder's Court.

CERTIFICATE OF CONVICTION

RECORDER'S COURT, CITY OF PATERSON

State of New Jersey
County of Passaic

} ss.

Be It Remembered, That on this 24th day of June, 1930, Max Politinsky of No. 14 and 16 Hudson Street in the City of Paterson, was brought before me, Harry Joelson, Recorder of the City of Paterson, in the County of Passaic aforesaid, charged with violating on the 19th day of June, 1930, at the City of Paterson, in said County aforesaid, section One of an ordinance of the Mayor and Aldermen of the City of Paterson, entitled "An Ordinance concerning Junk and Junk Yards," approved April 23, 1930, in that the said defendant did on the day and year last aforesaid, to wit: at the City of Paterson, Max Politinsky did keep, maintain and engage in keeping and operating a junk yard, covered and part uncovered, at No. 14-16 Hudson Street, in the City of Paterson, for the purpose of buying, selling, exchanging and storing of rags, old metal, old bottles, old paper and other old material commonly called junk, without being licensed so to do;

And it is adjudged that said defendant is guilty of having violated the aforesaid ordinance and that the said defendant pay a fine of (\$1.00) One Dollar.

Given under my hand and seal at the City of Paterson in the County aforesaid, this 24th day of June, 1930.

H. Joelson, Recorder.

(Seal)

Stipulation

NEW JERSEY SUPREME COURT

X
7

Max Politinsky,	}	On Certiorari
Prosecutor,		
vs.		
Andrew E. Brennan, Register		
of Licenses, and the City of		
Paterson,		
	Defendants.	

STIPULATION

It is hereby stipulated by the attorneys of the respective parties as follows:

- 20

1. The prosecutor was engaged in the business of collecting, storing and shipping waste paper at a yard located at No. 14-16 Hudson Street in the City of Paterson on June 24th, 1930, and had been so engaged for many years previous to that date.
2. After the passage of the ordinance under review, the prosecutor applied for a junk yard license and the same was granted by the Board of Aldermen, subject to payment of the license fee imposed by the ordinance under review.
- 30

3. The prosecutor tendered Ten Dollars (\$10.00) as the fee for said license to the Register of Licenses and it was refused. The Register then made the complaint before the Recorder shown in the return, and the Recorder convicted the prosecutor as shown in the conviction.
4. There exists a Board of Aldermen in the City of Paterson under the provision of an act to provide for the more efficient government of the City of Paterson (P. L. 1870, page 808).

Stipulation

5. Since the passage of an act entitled, "An Act Concerning the Government of Certain Cities in this State and Constituting a Board of Finance therein and defining the Powers and Duties of such Boards and Vesting in Such Boards Certain Powers of Management and Appointment" (P. L. 1907, page 89), there has existed in the City of Paterson a Board of Finance which has functioned under the provisions of said act and has exercised without question (except as challenged in the case of Wilson vs. McKelvey, 78 N. J. Law, page 621), all the power conferred on a Board of Finance by said statute and amendments thereto. 10

Edward F. Merrey,
Attorney of Prosecutor.
Charles H. Roemer,
Attorney of Defendants. 20

Reasons

NEW JERSEY SUPREME COURT

	Max Politinsky,	} On Certiorari
	Prosecutor,	
	vs.	
10	Andrew E. Brennan, Register of Licenses, and the City of Paterson,	
	Defendants.	

REASONS

The prosecutor's reasons for setting aside the provisions of the ordinance under which he was convicted and said conviction are as follows:

1. The provisions of the ordinance under review imposing a license fee for revenue were invalid in that the Board of Aldermen of the City of Paterson had no power to impose a fee for revenue.

2. All the power of imposing fees for revenue in the City of Paterson is vested in the Board of Finance which did not join in passing the ordinance under review.

3. The conviction of prosecutor for failing to pay the fee illegally imposed was invalid and void.

Edward F. Merrey,
Attorney of Prosecutor.

NEW JERSEY SUPREME COURT

Max Politinsky,

Prosecutor,

vs.

Andrew E. Brennan, Register
of Licenses and the City of
Paterson,

Defendants.

10

OPINION

Sub. Oct. 17, 1930
 Board of Aldermen of Paterson
 has power to license junk yards
 and to impose license fees for
 revenue under Home Rule Act. 20

Before Justices Parker, Campbell and Bodine.

For the prosecutor, Edward F. Merrey.

For the defendants, Charles H. Roemer.

Per Curiam:

The first point made against this conviction is that the imposition of a license fee of \$50 in the ordinance is invalid because it is avowedly imposed for revenue. It is argued that such a license fee cannot be imposed for revenue but the point seems not seriously pressed, and we think it unsubstantial in view of recent statutes, and especially of the Home Rule act of 1917. 30

The next proposition is that assuming the power exists, it is not vested in the board of aldermen of Paterson under the somewhat peculiar constitution of that city, but that it is vested in

Opinion

the board of finance so far as relates to the imposition of a license fee for revenue. The prosecutor seems to concede that if such license fee was not imposed for revenue, the board of aldermen would have jurisdiction, but that because the revenue element is involved, the matter falls into the hands of the board of finance, a statutory
10 body created by the act of 1907, page 89, and whose powers seem to be prescribed in section 26 of the "act to provide for the more efficient government of the City of Paterson." Pamph. L. 1871, p. 808. The only powers that seem to approach the matter of licensing are: No. 1, general management of the city finances, and No. 5, levy and collection of taxes. We do not think that either of these powers should be interpreted as ousting the board of aldermen of its former juris-
20 diction of licensing junk yards which, in a general way, is peculiarly within its province. We also take the view that when the Home Rule act enlarged the powers of the governing body in the matter of licensing to impose license fees for revenue, this did not have the effect of shifting the jurisdiction over junk yard licenses from the board of aldermen to the board of finance.

Consequently, the conviction will be affirmed.

Rule Affirming Judgment

NEW JERSEY SUPREME COURT

Max Politinsky,	} On Certiorari	10
Prosecutor,		
vs.		
Andrew E. Brennan, Register of Licenses and the City of Paterson,		
Defendants.		

RULE AFFIRMING JUDGMENT

The Court having inspected the transcript and proceedings of the Recorder's Court of the City of Paterson, returned with the Certiorari in this cause, and the reasons for reversing the judgment below, and heard the argument of counsel therein, and having duly considered the same: 20

It is on this 31st day of January, 1931, ordered that the judgment of the Recorder's Court of the City of Paterson be in all things affirmed, with costs, and the record be remitted to the Court below to be proceeded with according to law and the practice of said court.

Entered: January 31st, 1931.

On motion of Salvatore D. Viviano, Esquire, Attorney for defendants. 30

Notice of Appeal

Filed, March 4, 1931.

NEW JERSEY SUPREME COURT

	Max Politinsky,	Prosecutor,	} On Certiorari
		vs.	
10	Andrew E. Brennan, Register of Licenses and the City of Paterson,	Defendants.	

NOTICE

To: Salvatore D. Viviano, Esquire, Attorney of
Defendants:

Sir:

20 Take Notice that the prosecutor appeals to the
Court of Errors and Appeals from the whole of
the judgment entered in this cause.

Dated: March 2nd, 1931.

Edward F. Merrey,
Attorney of Prosecutor.

Grounds of Appeal

Filed, March 13, 1931.

NEW JERSEY COURT OF
ERRORS AND APPEALS

Max Politinsky,	} On Certiorari	10
Prosecutor-Appellant,		
vs.		
Andrew E. Brennan, Register		
of Licenses and the City of		
Paterson,		
Defendants-Respondents.		

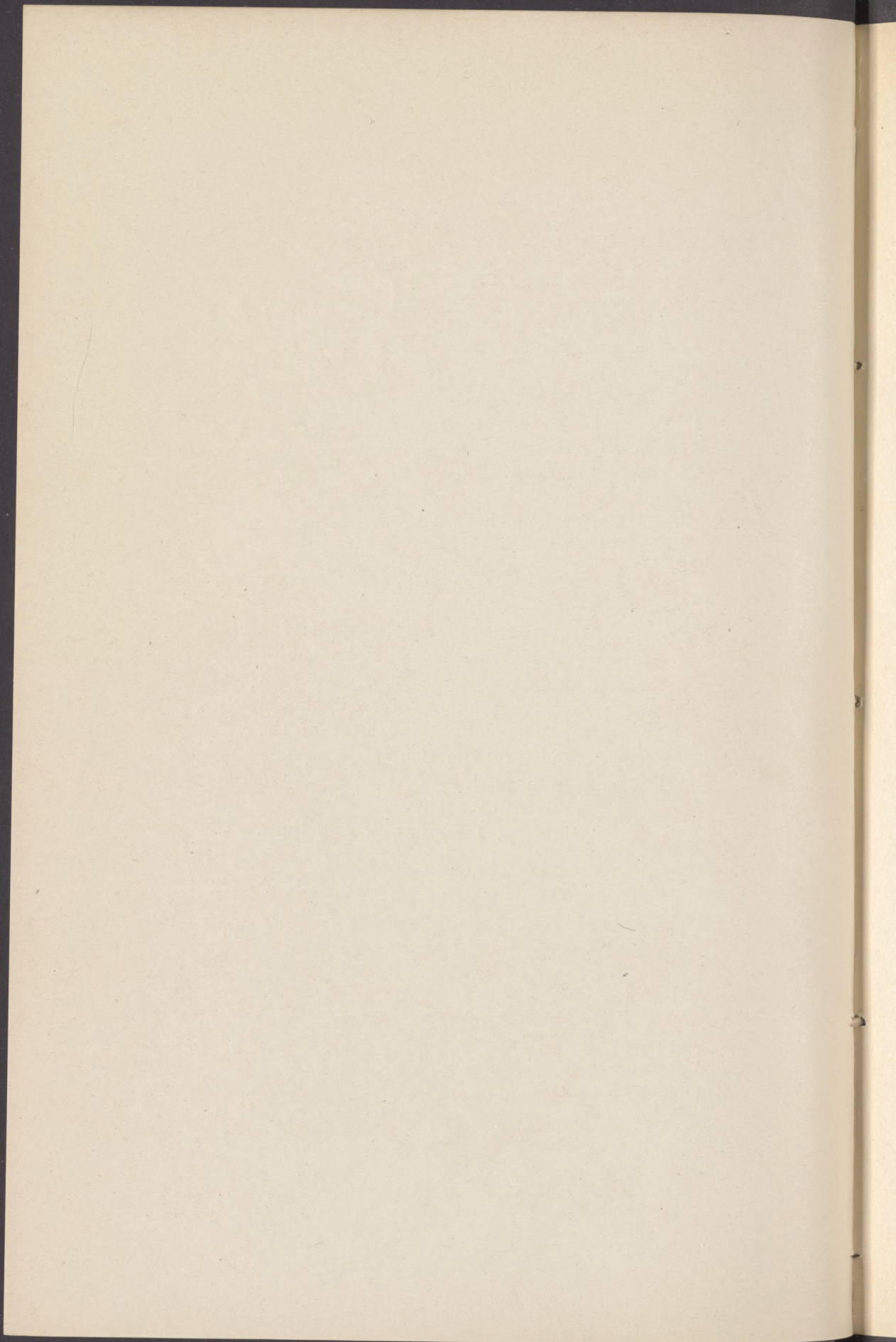
GROUNDS OF APPEAL

The following are the grounds of appeal:

The Supreme Court affirmed the judgment of the Recorder's Court of the City of Paterson 20 against the prosecutor below whereas it should have reversed the same for one or more of the reasons filed in the Supreme Court.

Dated: March 10th, 1931.

Edward F. Merrey,
Attorney for Prosecutor-Appellant.



New Jersey Court of Errors & Appeals

Max Politinsky,	}	On Appeal from Supreme Court
Prosecutor-Appellant,		
vs.		
Andrew E. Brennan, Register of		
Licenses, and the City of Pat-		
erson,		
Defendants-Respondents.		

Brief of Edward F. Merrey, of Counsel with Prosecutor-Appellant:

I.

STATEMENT OF THE CASE

The question presented for decision involves the powers of two of the governing bodies of the City of Paterson.

The question is as to where lies the power to fix a license fee when imposed for revenue; with the Board of Finance or the Board of Aldermen.

The Board of Aldermen had before it in February, 1930, an ordinance providing for the licensing of Junk Yards. (Case, page 6.) This ordinance was introduced February 17, 1930, and was read a second time on March 3rd, 1930. A protest was made and the ordinance was dropped. This ordinance provided a Fifty Dollar fee, but did not provide that it should be imposed for revenue. On March 17th, 1930, a new ordinance was introduced. (Case, page 11.) This ordinance was the same as the first, except for a new provision, "the fee shall be imposed

for revenue" (Case, page 14). The ordinance was passed April 21st, 1930. The prosecutor applied for a license and it was granted. He refused to pay the Fifty Dollar fee and a complaint was made before the City Recorder who convicted him of a violation of the ordinance and imposed a fine upon him. The prosecutor then sued out a writ for the review of the conviction and the ordinance.

We do not contend that the Board of Aldermen has not the power to license but only that if the fee is to be imposed for revenue, the fee must be fixed by the Board of Finance. In other words, that the statute under consideration which gives to the governing bodies of municipalities the power to license junk yards and to impose a license fee for revenue had two objects—one, to permit the regulation of junk yards and the other the raising of revenue.

We insist that the first was the function of the Board of Aldermen and the second that of the Board of Finance.

II.

SPECIFICATION

We claim that the Supreme Court erred in upholding the conviction and that it should have reversed the conviction for one or more of the reasons filed in the Supreme Court.

These reasons were:

1. The provisions of the ordinance under review imposing a license fee for revenue were invalid in that the Board of Aldermen of the City of

Paterson had no power to impose a fee for revenue.

2. All the power of imposing fees for revenue in the City of Paterson is vested in the Board of Finance which did not join in passing the ordinance under review.

3. The conviction of prosecutor for failing to pay the fee illegally imposed was invalid and void.

III.

ARGUMENT

A.

THE IMPOSING OF A LICENSE FEE FOR REVENUE IS BEYOND THE POWER OF THE BOARD OF ALDERMEN OF THE CITY OF PATERSON.

The Supreme Court opinion states that we made the point which was not seriously pressed that a license fee could not be imposed for revenue. This was not our point as examination of the reason will show. We insisted simply as we do now, that the Board of Aldermen had no such power, but that any such power was in the Board of Finance.

The Board of Aldermen of Paterson was created by P. L. 1871, page 808, entitled, "An Act to provide for the more efficient government of the City of Paterson." This statute is commonly referred to as the City Charter of Paterson. It provides in section 21, "that the legislative power of the corporation shall continue to be vested in a Board of Alder-

men"; and section 26 confers on the Board of Aldermen various powers listed under 25 heads.

The parts of this section which seem pertinent to this inquiry are:

And be it enacted, That the Board of Aldermen shall have power to make, continue, modify and repeal such ordinances, regulations and resolutions as may be necessary to carry into effect any and all of the powers vested by law in the corporation, and shall have power to enforce obedience thereto and observance thereof by the imposition of fines not exceeding fifty dollars or by imprisonment not exceeding thirty days, or by both; and shall have power within the said city to make, establish, publish, modify amend and repeal ordinances, resolutions, rules, regulations and by-laws, in the matters and for the purposes following, in addition to other powers elsewhere specially granted, viz:

1. To manage, regulate and control the finances and the real and personal property of the city:

18. In relation to the licensing and business of public cartmen, truckmen, hackmen, cabmen, omnibusmen, express men, pawnbrokers, junk dealers, hawkers, peddlers, bootblacks, common criers and scavengers.

Section 27 of the Charter confers on the Board of Aldermen power to raise money for defraying the expenses of the City. This organization of the city government of Paterson continued under this charter without substantial change until 1907 when

three new boards were created, called a Board of Finance (P. L. 1907, page 89), a Board of Public Works (P. L. 1907, page 114), a Board of Fire and Police Commissioners (P. L. 1907, page 79). These three acts stripped the Board of Aldermen of practically all its power. The only substantial power left was the power to license inns, taverns, saloons, porter-houses, restaurants, victualling-houses and cellars as provided in the Charter, section 26, subdivision VI. This power was substantially lost by the prohibition amendment.

The power of regulating junkmen and their business was not transferred. We believe that that power still exists in the Board of Aldermen; but only as to the right of regulation, which does not include the power of imposing a special tax for revenue purposes on such men or their business. We find that the Board of Finance Act took from the Board of Aldermen all power of raising revenue. The pertinent language of the Act is as follows:

The said board shall be in the place of and be substituted for, and shall be invested with all the powers and duties now exercised by any board of finance, finance committee of any board of aldermen or common council, or by any board of aldermen or common council in any such city in virtue of any law of this State in regard to the control and management of the finances of such city, the levying of taxes and fixing the annual tax or tax levy or tax ordinance of such city, and the collection of taxes and assessments. They shall on or before the second

Monday in June of each year, by ordinance, declare the amount of money necessary for defraying the expenses of such city for the current year and for all other objects and purposes authorized by law, which sum shall be assessed and collected according to law. They may make temporary loans in anticipation of taxes and assessments, but the amount thereof shall not exceed the anticipated taxes and assessments for such current year. They shall prescribe the forms of keeping all city accounts, the manner in which all salaries shall be drawn and the mode in which all creditors, officers and employees of such city shall be paid, and shall settle and adjust all claims in favor of or against such city and all accounts in which the city is concerned as debtor or creditor. No bill incurred by any department or officer under the direction and control of any other board, committee, department, board of aldermen or common council, except by the department of public instruction, shall be paid without the approval of the said Board of Finance hereby created. The intention of this provision is that there shall be a Board of Finance constituted as herein provided in place of any and every other board or authority in such city in the control, care and general management of the finances thereof, and that such *Board of Finance in such city shall have the sole power to borrow money, issue bonds or scrip, provide for the payment of the interest and principal thereof, and to do and perform every power and duty here-*

tofore performed by any other board, department or authority in regard to the raising and borrowing of money, or any other of the financial affairs of such city. (P. L. 1907, page 91.)

Note particularly in the last part of the section, the Board of Finance was given the "sole power" to borrow money, &c. and "to do and perform every power and duty heretofore by any other board, department or authority in regard to the raising, &c. of money."

We claim this section took away from the Board of Aldermen any power it may have had to impose a license fee for the purpose of revenue. The legislature stripped it entirely of any such power, and that any ordinance passed by it for that purpose is invalid. How can it be said that if the Board of Finance has sole power to raise money that another board may impose a fee for revenue.

The so-called Home Rule Act, P. L. 1917, page 319, contains the present provisions conferring on municipalities the power to regulate junk yards. The provisions are found in Article XV, Section 1 as last amended P. L. 1929, page 406, as follows:

1. The governing body of every municipality shall have power to make, enforce, amend or repeal ordinances to license and regulate.

- (b) Cartmen, expressmen, baggagemen, porters, auctioneers, common criers, hawkers, peddlers, pawnbrokers, employment agencies, junk shop keepers, junk dealers, motor vehi-

cle junk dealers, street sprinklers, bill posters, bill tackers, sweeps, scavengers, transient merchants or itinerant vendors of merchandise, medicine and remedies, and the place or places or premises in which or at which the different kinds of business or occupations mentioned herein are carried on or conducted; provided, nothing herein contained shall be construed as modifying or repealing any of the provisions of an act entitled "An act to license and regulate the business of transient merchants or itinerant vendors in this State," approved April seventh, one thousand nine hundred and twenty-one; but shall confer additional powers upon the municipality.

2. Such governing body shall have power to fix the fees for such licenses, which may be imposed for revenue and to prohibit all persons and places and all vehicles unlicensed from acting, using or being used in said capacities and for such uses and purposes. (P. L. 1917, page 548.)

Now we find here the power to impose a license fee for revenue conferred on some board of every municipality. The section refers to such board as "the governing body." This term is defined in article I, section 2 of the Act as follows:

The term "governing body," where used in this act, shall be construed to mean the board or body in each municipality designated by statute effective in such municipality as the board or body having control over the subject matter in connection with

which such term is used, and having the power and authority to legislate thereon, whether designated as "board of aldermen," "common council," "borough council," "township committee," "village trustees," "improvement commission," "board of street and water commissioners," "board of public works," "board of finance," "board of health," "park commissioners," "recreation commissioners," or otherwise.

No provision of this act shall be construed to transfer from any officer, board or body in any municipality any power or authority which he or it may now have. In case any additional power is conferred upon any municipality by this act, and by the statutes effective in such municipality no board or body is designated as the one to exercise such power, then the term "governing body" shall be construed to mean the board or body exercising general legislative power in such municipality.

P. L. 1917, p. 319, Article I, section 2.

It will be noticed that the Home Rule Act was not intended to interfere with the structure of government of any municipality or to change the power of any board. At the time of the passage of the Home Rule Act, (1917) the Board of Finance was the sole board with power to impose a fee for revenue or to ordain any revenue raising measure. An ordinance containing any provision for raising municipal revenue in Paterson is invalid without the sanction of the Board of Fin-

ance. Where there are more than two governing boards in a City as there happens to be in Paterson where the legislature confers power, part of which is the function of one board and part another, both must act. In this case the Board of Aldermen could have passed an ordinance licensing junk yards and imposed a nominal fee, but in the event that a fee for revenue was to be imposed, such should have been fixed by the Board of Finance.

The ordinance under review is invalid, and the conviction under it void.

B.

THE FEE IMPOSED IS FOR PURPOSE OF REVENUE.

It cannot be contended that the Fifty Dollar fee can be justified except for the purpose of revenue. The distinction between the power to license as a police regulation and the same power as a revenue measure is pointed out in *North Hudson County Railway vs. Hoboken*, 41 N. J. L., page 71. Chief Justice Depue said:

“What license fee may be exacted under the power of licensing, as a mere police power, is a subject on which there is a diversity of views. Chief Justice Cooley places it within the limit of the necessary or probable expense of issuing the license, and of inspecting and regulating the business the license covers. Cooley on Taxation 408. Judge Dillon makes a distinc-

tion between useful trades and employments and amusements, exhibitions, &c.; with regard to the former, he says, under a power to license the limit is a reasonable fee for the license and the labor attending its issue; but with respect to the latter, the authority of the corporation as to the amount of the charges, has been regarded as greater than in relation to trades and occupations. 1 Dillon on Mun. Corp., 291. But both these eminent jurists agree that a fee exacted under a grant of power to license, which exceeds in amount the limitation they adopt, is unwarranted and illegal, unless there be superadded words evincing a legislative intent that the power may be applied as a mode of taxation."

37 C. J., page 179 reads as follows:

"The power of a municipal corporation to impose a license tax for revenue purposes exists only where it is plainly granted, and since the only justification for charging a license fee is that a fund may be raised to defray the expenses of issuing the license and the enforcement of such police inspection or superintendence as may be lawfully exercised, as a general rule a grant of police power to a municipal corporation to license any business or occupation within its corporate limits as a means of regulation does not include power to impose a license tax for revenue purposes,

and if in such a case a license tax is imposed for revenue only, it is invalid."

This fee is expressly imposed for the purpose of raising revenue.

IN CONCLUSION

It matters not if through a misunderstanding of the law that in probably four other instances the Board of Aldermen have imposed license fees for revenue. The question now presented is whether or not they have the power to do so. We concede their power to make the other regulations set forth in the ordinance. We concede their power to impose a nominal license fee to cover cost of issuing the same &c. as referred to in the authorities above cited, but we deny the right of the Board of Aldermen to impose a fee for revenue. Such a fee is a tax and this board if it has the power to impose a license fee for revenue may increase such fee until it reaches a point where it might be prohibitory.

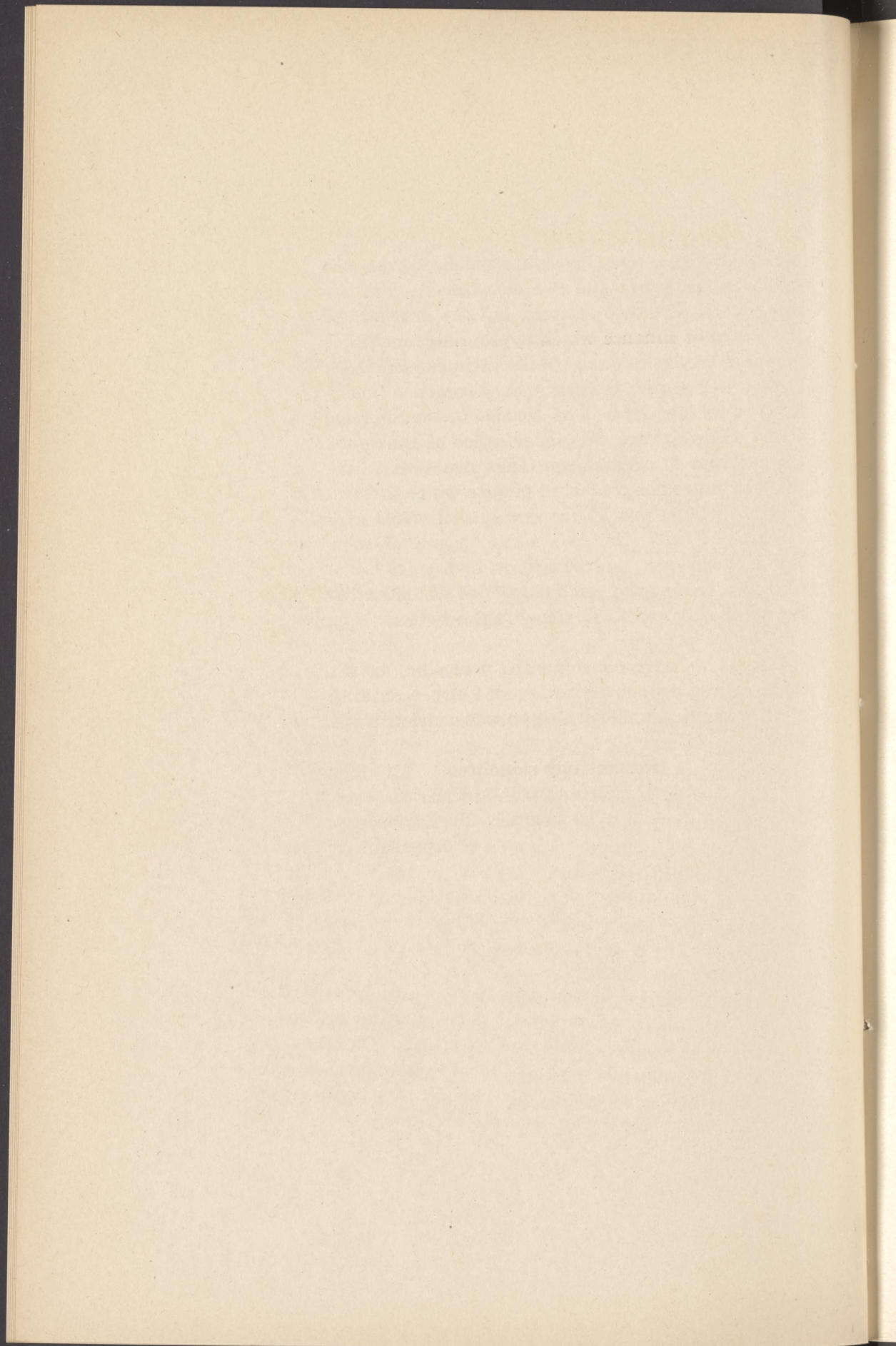
It could not have been the intention of the legislature to have two governing bodies in a municipality each with independent power to raise revenue. Under our system, this power can only be consistently vested in one body. With the powers of each board understood, there would be no conflict. The part of the ordinance imposing a fee for revenue is void and we ask that it be set aside. If this necessarily voids the whole ordinance, then we ask the whole ordinance be set aside.

This matter is one of extreme importance to the City of Paterson. A scheme of government for that City has been laid out consisting of several inde-

pendent boards. One constructs public works, one manages the police and fire departments, another has control of health matters, but the keyboard is the Board of Finance which appropriates money to all the other boards and checks their expenditures. To transfer power of raising money from it seriously impairs its functions. The decision of the Supreme Court will affect not only the question of junk yard licenses, but also numerous other instances where the legislature has conferred powers which are two fold in their nature. The same reason would give other boards the right to fix the amount of their own expenditures. In other words, the whole scheme of the Paterson system of government would be disarranged and upset and made unworkable.

We ask that the conviction of prosecutor be set aside on the ground the ordinance either entirely or as to the part under which he was convicted was void.

Respectfully submitted,
EDWARD F. MERREY,
Of Counsel with Prosecutor-
Appellant.



New Jersey Court of Errors and Appeals

MAX POLITINSKY, Prosecutor-Appellant,	}	On Appeal from Supreme Court.
vs.		
ANDREW E. BRENNAN, Register of Licenses and the CITY OF PATERSON, Defendants-Respondents.		

BRIEF OF COUNSEL FOR DEFENDANTS-RESPONDENTS.

The Facts.

The Prosecutor-Appellant was convicted by the Recorder of the City of Paterson for violation of an ordinance of the City of Paterson entitled "An Ordinance concerning Junk and Junk Yards" approved April 23, 1930.

The Supreme Court affirmed the conviction. (Case, page 29).

The appeal presents for decision whether or not the Board of Aldermen of the City of Paterson has the power to impose a license fee for the purpose of revenue.

The Prosecutor-Appellant made application to the Board of Aldermen for a junk dealer's license, which application was granted. The license in question was never obtained by the Prosecutor-Appellant because of his refusal to pay the license fee of \$50.00 fixed by the ordinance. His refusal

to pay is based upon the contention that the Board of Aldermen of the City of Paterson is without power to impose a license fee for the purposes of revenue.

The Defendants-Respondents respectfully contend that such power is vested by law in the Board of Aldermen.

POINT I.

The power to impose a license fee for revenue is vested in the Board of Aldermen and not the Board of Finance.

The Board of Aldermen was created by P. L. 1871, page 808, entitled "An Act to provide for the more efficient government of the City of Paterson," commonly referred to as the City Charter of Paterson.

The said charter among other things confers upon the Board of Aldermen the power to regulate "*the licensing and business of junk dealers.*" Section 26 Article 18 of said charter further provides "That the Board of Aldermen shall have power to make, continue, modify, and repeal such ordinances, regulations and resolutions as may be necessary to carry into effect any and all of the powers vested by law in the corporation, and shall have power to enforce obedience thereto and observance thereof, by the imposition of fines.

Prior to 1907 the Board of Aldermen was the sole and exclusive governing body of the City of Paterson. In that year the Legislature enacted three laws which substantially stripped the Board of Aldermen of most of its power theretofore enjoyed under the City Charter. A Board of Finance was organized in the City in accordance with the

provisions of P. L. 1907, page 89. A Board of Public Works and Board of Fire and Police Commissioners were also created by P. L. 1907, page 114 and P. L. 1907, page 79, respectively. In the instant case we are only concerned with the legal effect of the creation of the Board of Finance.

There can be no question that the power to license junk yards and junk dealers was never removed from the Board of Aldermen.

Chapter 46, (P. L. 1907, page 89) creating a Board of Finance in the City of Paterson, insofar as the same is pertinent to the present inquiry is as follows:

Section 2. The Board of Finance "shall be in the place of and be substituted with all the powers and duties now exercised by any Board of Finance, finance committee, or any Board of Aldermen or Common Council in any city in virtue of any law of this state in regard to the control and management of the finance of such city, the levying of taxes and fixing the annual tax or tax levy or tax ordinance of such city, and the collection of taxes and assessments. The legislative intent behind this statute was specifically mentioned in the act as follows:

"The intention of this provision is that there shall be a Board of Finance constituted as herein provided in place of any and every other board or authority in such city in the control, care and general *management of the finances* thereof and that such *Board of Finance in such city shall have sole power to borrow money, issue bonds or scrip, provide for the payment of interest and principal* thereof, and to do and perform every power and duty theretofore performed in any board, department or authority in regard to the raising and bor-

rowing of money or any other of the financial affairs of such city." (P. L. 1907, page 91).

The powers of the Board of Finance therefore may be enumerated as follows:

1. Control, care and general management of the finances of city.
2. Borrow money.
3. Issue bonds or scrip.
4. Provide for payment of interest and principal thereof.
5. Levy taxes, and supervise collection thereof.
6. Adopt the annual budget.

To claim that the foregoing act deprived the Board of Aldermen of power to impose a license fee would in effect make it impossible for the Board to exercise its unquestioned jurisdiction unless it saw fit to require a license without the payment of any fee whatever. We are certain that no such construction can be sustained. If such a construction is possible, then scores of ordinances enacted by other governing bodies of the City of Paterson, imposing license fees, are likewise invalid. The *test that we have applied* and which the court must apply in arriving at a conclusion is:

Which board has the right to license junk dealers in the City of Paterson? We are certain and there is apparently no dispute on this point in the brief of the prosecutor, that the Board of Aldermen is the proper governing body.

The prosecutor contends that when the Board of Aldermen imposed a license fee for purpose of revenue, it thereby lost all power to legislate in the premises.

This being the burden of the prosecutor's attack, we shall proceed to demonstrate how clearly erroneous such a conclusion is.

The Home Rule Act, P. L. 1917, page 319, confers upon municipalities the power to regulate junk yards. The pertinent provisions of this act are Article XV, as amended. (P. L. 1929, page 406).

1. The governing body of every municipality shall have the power to make, enforce, amend or repeal ordinances to license and regulate * * * * junk dealers.

3. *Such governing body shall have power to fix fees for such licenses which may be imposed for revenue * * * .*

Governing Body is defined in Article 1, Section 2 of the Home Rule Act as follows: "The term governing body where used in this act shall be construed to mean the board or body in each municipality designated by statute effective in such municipality as the board or body having control over the subject matter in connection with which such term is used, and having the power and authority to legislate thereon * * * ."

It must be plain that since the act creating the Board of Finance did not remove or curtail the power of the Board of Aldermen to legislate concerning junk yards and junk dealers that it is necessarily the governing body within the meaning of the Home Rule Act. *We wish to emphasize the fact that an examination of the Board of Finance Act will disclose no mention of the right to license anything.* The act may be searched in vain for such purpose. Such a meaning cannot be implied. The power to impose license fees must

be clearly and positively conferred by the Legislature.

"The right to license must be plainly conferred or it will not be held to exist." (Dillon, Municipal Corporations, Volume 2, Section 667, page 1009, Fifth Edition.)

It is a significant fact that the Board of Finance which has been in existence in Paterson since 1907 has *never* passed any ordinance or resolution to license any trade or occupation, not only for purpose of regulation but for the purpose of revenue. (Case, Second Stipulation)

On the other hand the Board of Aldermen, Board of Public Works, the Board of Fire and Police Commissioners, and the other governing bodies of the City of Paterson have repeatedly enacted ordinances to license trades and occupations for purposes of regulation as well as revenue, and properly so because such power was specifically conferred by various acts of the Legislature.

To say that an ordinance regulating junk yards is an ordinance relating to finances, amounts to stretching the imagination to the breaking point.

"In the classification of corporate powers, the distinction between the power of taxation, and the usual police powers, which are granted for the maintenance of peace and good order in the City, and the administration of its internal affairs, is well settled. The functions of the latter are not primarily the raising of revenue. Incidentally, the public treasury may be benefited, as by * * * license fees, when the power is specifically to license and exact license fees." *Bensen vs. Hoboken* (33 N. J. L. 282).

"The fact that the license fee is payable into the treasury of the municipality, provided the fee be a reasonable one, does not impress it with the character of a tax." *Muhlenbrinck vs. Hoboken*, 42 N. J. L. 368).

"It may not be easy, in every case, to determine with precision, from the amount of the fee charged whether it is intended as a regulation or a tax, and all reasonable intendment should be in favor of its fairness and justness as a fee." (*Idem.* page 369).

"*Some occupations are inherently dangerous and dangerous and annoying to the community, or pertain to the public service, or are affected by a public use. Such occupations are exercised as a privilege and not as a matter of right.*" (*Dillon on Municipal Corporations*, Section 606).

Chapter 197, P. L. 1905, which enacted that license fees for junk yards may be imposed for revenue, was sustained in *Buck vs. Douglas*, (74 N. J. L. 300).

The New Jersey *Constitution*, Article IV, Section VII, sub-division 12, requiring property to be assessed for *taxation* by uniform rules, according to its true value, *does not apply* to the legislative power of *indirect taxation* on franchise trades, and occupations, by exactly license fees for the privilege of transacting business, though such power be exercised for revenue purposes. *Johnson vs. Asbury Park*, 58 N. J. L. 604, affirmed 60 N. J. L. 427.

Conclusion.

For the reasons cited, we respectfully submit that the power to impose a license fee for revenue is vested in the Board of Aldermen and not in the Board of Finance.

The ordinance under review having been legally enacted, the conviction of the prosecutor-appellant should be sustained.

Respectfully submitted,

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Attorneys of Defendants-Respondents.

Charles F. Lynch,
of Counsel

