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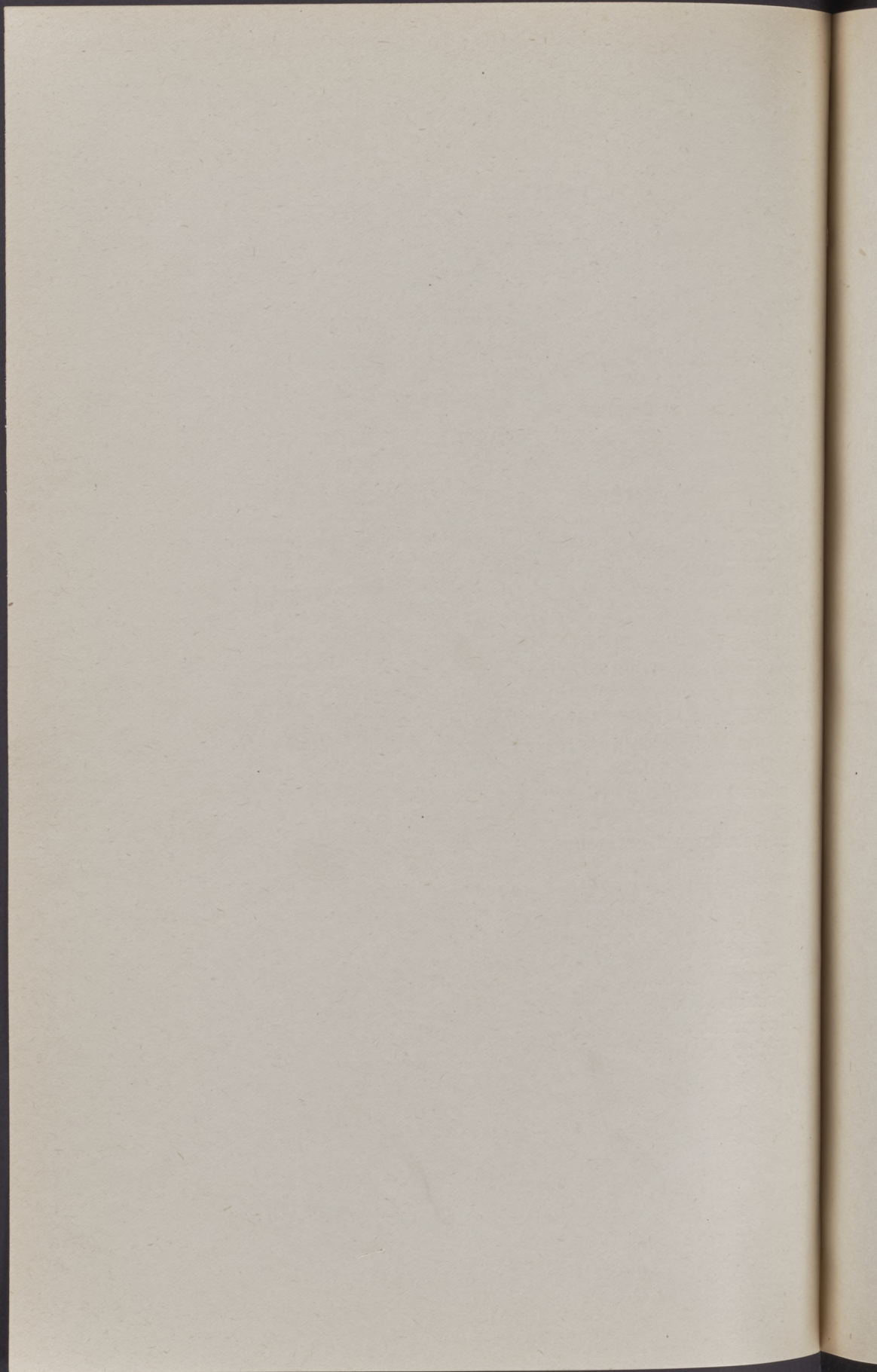
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WRIT OF CERTIORARI.

NEW JERSEY, SS.

*The State of New Jersey to the City of Ocean City,
and Harry A. Morris, clerk of said city,*

GREETING:

We being willing for certain reasons to
be certified of and concerning a certain 10
(SEAL) ordinance of the City of Ocean City,
adopted March 7, 1904, entitled "An
ordinance relating to the election, quali-
fication and term of office of a building inspec-
tor, and to regulate and control the manner of build-
ing dwelling houses and other buildings in Ocean
City, New Jersey," and also of and concerning a cer-
tain other ordinance of Ocean City, adopted October
23, 1913, entitled "An ordinance respecting public 20
garages in Ocean City," do command that you cer-
tify and send to our Justices of our Supreme Court
at Trenton, on the eighteenth day of October instant,
nineteen hundred and sixteen, the said ordinances,
together with all proceedings had thereon touching
the introduction and passage of the same, or relating
thereto in any way, as fully and entirely as they re-
main before you, together with this writ, that we may
cause to be done what of right and according to law
and justice ought to be done.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of 30
our said Supreme Court, this 10th day of October,
nineteen hundred and sixteen.

WILLIAM C. GEBHARDT,
Clerk.

C. L. COLE,
BABCOCK & CHAMPION,
Attorneys.

[ENDORSED]

Allocatur. Oct. 10, 1916.

On Condition to be Argued at
November Term, 1916.

Samuel Kalisch
J. S. C.

Service of this writ duly acknowl-
edged this 10th day of October, 1916.

10

Andrew C. Boswell,
Solicitor for the City of Ocean
City, N. J., and City Clerk.

RETURN.

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

20 In obedience to the command of this writ, directed
to me, Harry A. Morris, City Clerk of the City of
Ocean City, and to the City of Ocean City, I hereby
certify and send under the official seal of the said
City of Ocean City, to the Honorable Judges of the
Supreme Court of Judicature of the State of New
Jersey, the ordinances and proceedings touching the
same as fully appear in the offices of the said City of
Ocean City, as is commanded.

30 IN WITNESS WHEREOF, I, HARRY A. MORRIS, City
Clerk of the City of Ocean City, a municipal corpora-
tion of New Jersey, do affix my seal, being the same
seal as the City of Ocean City, and my hand this 17th
day of October, 1916.

HARRY A. MORRIS,
*City Clerk of the City of
Ocean City, a Municipal
Corporation of New
Jersey.*

MINUTES AS TO BUILDING ORDINANCE.

Jan. 29, 1904, page 467.

“Building Ordinance Introduced by Headley and read on first reading.”

March 7, 1904, pages 482 and 483.

“Motion Graham Sec Headley that Building Ordinance be accepted on its first reading and passed to Second; so ordered.

Ordinance then read.

10

Motion Headley, Sec J. C. Steelman ordinance be accepted on its second reading and passed to third; so ordered.

Ordinance then read.

Motion H. Steelman, Sec Godfrey, ordinance be referred back to Second reading; so ordered.

Motion Headley Sec Godfrey, that in Section 7 line 7 after the word buildings add ‘or additions thereto.’ Sec 7th, line 8th, strike out the words ‘to and’ and ‘face’ and insert after the word moved, on 8th line ‘on any lot facing.’ So ordered.

20

Motion Graham Sec J. C. Steelman that in 6534—BABCOCK & CHAMPION—TWO L.F.4 Sec 10 Line 7 the word ‘eighteen’ be stricken out, and the word ‘Sixteen’ be inserted. so ordered

Motion Graham Sec Godfrey, that the ordinance as amended pass second reading and be ordered to third; so ordered.

30

Ordinance then read.

Motion H. Steelman Sec J. C. Steelman, ordinance be accepted on its third and final reading and take usual course of passed ordinance.

M. Adams, Aye, Godfrey, Aye, H. Steelman, Aye, W. S. Graham, Aye, J. C. Steelman, Aye, H. Headley, aye, G. O. Adams, eye.

AN ORDINANCE

Relating to the Election, Qualification and Term of
Office of a
BUILDING INSPECTOR
And to Regulate and Control the Manner of Building
Dwelling Houses and Other Buildings in
OCEAN CITY, N. J.

10

AN ORDINANCE

Relating to the Election, Qualification and Term of
Office of a Building Inspector, and to Regulate
and Control the Manner of Building Dwelling
Houses and Other Buildings in Ocean City, New
Jersey.

Section 1. (Relates to appointment of Building
Inspector, &c.)

20 Section 2. (Duties of Inspector.)

Fees

Section 3. The Building Inspector shall receive
his fees for his services within at least three days
from the time of his making his monthly report to
the City Clerk. Such fees shall be apportioned him
according to the scale as mentioned in Section 1 of
ordinance.

30 Section 4. (Visits of Inspector.)

Hearths, etc.

Section 10. All brick hearths of brick set ranges
shall be supported by trimmer arches of brick, stone,
iron or concrete; the brick jambs of every fireplace
or grate openings shall be at least eight inches wider

than the openings, and the backs of all such openings shall be at least eight inches thick. All hearths and trimmer arches shall be at least eight inches longer on either side than the width of such openings, and at least sixteen inches wider in front of face of openings. No brick-set or portable range, or heating apparatus of any kind shall be set against a wood or lath partition, all ranges and heating appliances set against any frame wall shall be backed up with at least four inches of brickwork or other non-combustible material at least the full width of and height of the range or heater. No stovepipe in any building with combustible floors and ceilings shall enter any flue nearer than twelve inches from the floor or ceiling, and in all cases where smokepipes pass through studding or wooden partitions, floor or roof whether plastered or not, they shall be guarded by either a double collar of metal, with at least two inches of air-space all around, or by an earthenware collar, same to be set all around with at least four inches of brickwork or held in place with metal fastenings.

Boiler Smoke Pipes

Section 11. No boiler to be used for any steam or motive power shall be set on any floor or any building or buildings unless same shall be set on an incombustible platform. In all cases where steam or hot water boilers are used, the furnace smoke-pipe must be at least fifteen inches below the bottom of floor joists over same, unless such pipe is protected with a metal shield or hood, said shield or hood to be at least three inches from the bottom of joists and the pipe at least three inches below the shield or hood to allow for the free circulation of air above and below pipe.

Hot Air Registers

Section 12. All hot-air registers set in the floor of any building that is directly over the furnace shall have an open space between any woodwork, and the register, of at least two inches all around, and extending from the under side of floor beams to top of joists, and the outside of this air space shall be covered with a metal casing, made tight on all sides.

- 10 No metal flue-pipes or register-boxes of a single thickness hereafter built in any building intended to convey heated air shall be allowed unless same shall be wrapped with asbestos covering, or covered with some other equally non-combustible material, and the studding about the outlet covered with metallic lath, so as to be thoroughly fire-proof.

Piling

- 20 Section 13. All buildings hereafter erected on piling in said city, the piling shall be of such length, depth in the ground and thickness as the Building Inspector shall determine or approve at time of granting permit.

Sills

- 30 Section 14. The sills of all houses or buildings, of three stories or less in height and not over twenty-eight feet in front or width, shall not be less than four inches by six inches, and in all buildings of a larger size they shall be of such dimensions as the Building Inspector shall approve at time of granting permit.

Joists

Section 15. All joists for stairways and chimneys shall be framed, and all joists supporting partitions and all headers and trimmers shall be doubled. All

joists shall be set at a not greater distance apart than sixteen inches from center to center, and in all cases shall be bridged in all spans exceeding eight feet. All floor joists shall be of sizes as follows: Basement joists shall not be less than 2 inches by 6 inches, and in all spans exceeding fourteen feet they shall have a stud wall or other means of support under the middle of same. No first-floor joists of spans over 14 feet shall be less than 2 inches by 10 inches; all other floor-beams shall be not less than 2 inches by 8 inches for all spans not over 14 feet; in all cases floor-joists shall be of dimensions to be determined by Building Inspector. No floor beams shall in any case be less than 2 inches in thickness. 10

Posts

Section 16. All corner posts of any building not over three stories in height shall be at least 4 inches by 6 inches, and all enclosed studding used in buildings of not over three stories shall be not less than 2 inches by 4 inches set 16 inches center to center. All windows and door studding shall be either 3 inches by 4 inches or 2 inches by 4 inches doubled. All buildings of more than three stories in height, the materials above designated shall be of a size approved by the Building Inspector. 20

Section 17. (Relates to Surveys.)

Buildings on Boardwalk

30

Section 18. Any and all buildings hereafter erected fronting on the Boardwalk within eight feet of any adjoining or existing building shall have the sides adjacent to the adjoining building or buildings covered with galvanized iron, or some other equally non-combustible material. Further, in event of any

building or buildings erected, constructed or moved to and facing the Boardwalk, the sidewalls of such building or buildings shall be covered with galvanized iron, or some other non-combustible material, and the roofs shall be of either slag, metal or any other non-combustible material; and where the side walls of any two buildings meet there shall be a battlement wall, said battlement wall shall run up and project to a height of not less than eighteen inches above the line of the roof of building on which same is erected. This battlement wall shall be covered entirely with galvanized iron or other non-combustible material, to the satisfaction of the Building Inspector.

Cutting Beams for Pipes

Section 19. No gas, water or other pipes introduced into any house or building shall be let into any joist or beam unless same is let in at a not greater distance than three feet from a supporting partition or girder; and in no case shall said pipe or pipes be let into beams, girders or joists to a greater depth than two inches.

Mortar

Section 20. It shall be unlawful to mix mortar in streets that are paved with brick, or macadamized, except in tight boxes.

Obstruction of Highway

Section 21. It shall be unlawful to place or to maintain any building materials, boxes or debris of any kind upon the street without first having obtained a permit for such purpose from the Building Inspector. Such permit shall state the location of the building, the amount of space to be occupied;

which in no case shall exceed the width of the property and twenty-five feet in addition thereto, and not exceed one-half of the width of driveway, and in no case shall any material be placed within two and one-half feet of any railroad track, or within ten feet of any fire-plug, or within six feet of any street crossing; and the gutter shall be in all cases left open and clear of any obstruction for a width of fifteen inches from the curb. The height of any pile of material shall in no case exceed twelve feet; provided, that a sufficient passageway shall be at all times left unencumbered between said building materials and the opposite curbstone on all streets for the passage of vehicles. 10

Moving Buildings

Section 22. No permit shall be issued for the use of any street, alley, avenue or public passageway for moving purposes from the fifteenth day of June to the first day of September of any year, unless upon special request and permission of City Council. 20

Danger Signals

Section 23. Danger signals shall be placed on and about any building which may be in any street, alley, avenue, or public passageway after sundown, which said building may be in progress of moving; also they shall be placed upon any piles of building material, debris, etc., and at any excavations made in any street, alley, avenue or public passageway for the protection of any person or persons passing the same. 30

Encroachments

Section 24. It shall be the duty of the Building Inspector to examine and inspect and ascertain if

- any building or appendage, or any portion of same, or fence being erected under any permit issued by him shall be within the line of street, alley or public passageway. If any portion of any such improvement shall be found to encroach upon the boundaries of such alleys, streets or public passageways, except as heretofore provided in this ordinance, it shall be the duty of the Building Inspector to order their removal, by written notice, served on the contractor, owner or occupant thereof, specifying that if such encroachment is not removed within ten days of such notice, then in such cases, and after the expiration of that time, the same will be removed by the city under the process of law.

Violation of Ordinance

- Section 25. Be it ordained that any person or persons violating any of the provisions of this ordinance shall, upon conviction thereof, be subject to a fine of not exceeding two hundred (\$200.00) dollars, and imprisonment not exceeding thirty days, or both, at the discretion of the magistrate or judicial officer trying the offense, for each and every offence.

Section 26. (Rates for Permits.)

Section 27. And be it further ordained that any previous ordinance relating to the Building Inspector be and is hereby repealed, and that this ordinance take effect immediately.

- 30 Passed at an adjourned regular meeting of Common Council this seventh day of March, A. D. 1904
Adopted March 8th, 1904.

President of Council

T. LEE ADAMS,

City Clerk.

JOS. G. CHAMPION,

Mayor.

Minutes as to Amendment of Ordinance.

March 2, 1908, page 360

“An ordinance Amending the building ordinance was presented and read.

Motion Steelman Sec Campbell ordinance be accepted on first reading. So ordered.”

March 6, 1908, page 366

10

“Motion Headley Sec Steelman, Ordinance Amending Building Ordinance be taken up on Second reading so ordered

Ordinance then read

Motion Headley Sec Smith ordinance be accepted on second reading and passed to third so ordered Ordinance then read

Motion Smith Sec Steelman ordinance be accepted on third reading and take usual course of passed ordinances. So ordered

20

All voting Aye.”

Amending an Ordinance entitled, “An Ordinance relating to the election, qualification and term of office of a Building Inspector, and to regulate and control the manner of building dwelling houses and other buildings in Ocean City.

Section 1. Be it ordained by the Common Council of Ocean City that the Ordinance entitled “An Ordinance relating to the election, qualification and term of office of a Building Inspector, and to regulate and control the manner of building dwelling houses and other buildings in Ocean City, be amended by striking out the words, “Who shall be a master builder,” in line ten, Section 1. 30

Sec. 2. And be it further ordained that Section 27 be amended to read as follows: That all machines for moving pictures or illustrated songs, shall be enclosed in a booth or room. Said booth or room shall be constructed of tin or sheet iron, and lined with asbestos paper and so constructed as to confine the fire within the limits of said booth and room.

- 10 Sec. 3. And be it further ordained that the section that was numbered 27, shall be numbered 28, and that this Ordinance shall take effect immediately.

Adopted April 6, 1908.

President of Council

City Clerk

20

Mayor

GARAGE ORDINANCE.

Minutes as to the passing of the ordinance.

Oct. 16, 1913, page 409

30

“Ordinance No. 57. An Ordinance respecting Public Garages in Ocean City was introduced by Mr. Thorn and taken up on first reading.

Motion by Mr. Thorn seconded by Mr. Fisher that Ordinance No. 57 be adopted on first reading and taken up on second reading.

Vote:—Headley, Thorn, Fisher, Yea.

Ordinance No. 57 taken up on second reading.
 Motion By Mr. Thorn seconded by Mr. Fisher that
 Ordinance No. 57 be adopted on second reading and
 further consideration be deferred until October 23rd.
 Vote:—Headley, Thorn and Fisher, Yea.

October 23, 1908, page 442.

“Ordinance No. 57 an ordinance respecting Public
 Garages in Ocean City, was taken up on third
 and final reading

10

Motion by Mr. Fisher that Ordinance No. 57 be
 adopted on third and final reading and take the usual
 course of passed ordinances.

Vote:—Thorn and Fisher, Yea.”

Ordinance No. 57.

An Ordinance respecting Public Garages in Ocean
 City.

The board of Commissioners of the City of Ocean
 City do ordain:

20

Section 1. That it shall be unlawful to erect any
 building, or alter, rebuild, extend or add to any
 building southeasterly of Asbury avenue, in Ocean
 City, for the purpose of carrying on the business of
 a Public Garage.

Section 2. That any person or persons who shall
 violate any of the provisions of this ordinance, shall,
 upon conviction thereof before a proper officer hav-
 ing jurisdiction, be subjected to a fine in any sum
 not exceeding two hundred (200.00) Dollars at the
 discretion of such officer before whom any such per-
 son or persons may be tried, and in default of the
 payment of said fine, be imprisoned in the City or
 County jail for a term not exceeding thirty days at

30

the discretion of said officer, and any repetition of any act therein prohibited on any day following such conviction shall be deemed a new offence.

Section 3. And be it ordained that this ordinance shall take effect immediately.

Harry Headley,
R. Howard Thorn,
Robert Fisher.

10

The above ordinance was duly adopted at a meeting of the Board of Commissioners, held October 23, 1913.

Commissioners.
John E. Adams,
City Clerk.

20

30

TESTIMONY.

NEW JERSEY SUPREME COURT.

<p>NINTH STREET IMPROVE- MENT COMPANY, a Corpo- ration,</p> <p style="text-align: center;">vs.</p> <p>OCEAN CITY,</p>	}	<p style="text-align: center;"><i>Prosecutor,</i></p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>ON CERTIORARI.</p>	<p>10</p>
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Taken before C. W. MYROSE, Supreme Court Examiner, on Thursday, October twenty-sixth, 1916, at 7.15 P. M., at the City Hall, Ocean City, New Jersey. 20

APPEARANCES :

For prosecutor: HON. C. L. COLE, MESSRS. BABCOCK AND CHAMPION.

For respondent: ANDREW C. BOSWELL, Esq.

30

It is stipulated and agreed that the testimony shall be taken stenographically and afterwards reduced to typewriting and the signatures of the respective witnesses waived.

It is stipulated and agreed by and between the parties hereto and without formal proof as follows:

1. Ninth Street Improvement Company, the prosecutor, is the owner of a lot of land situate in Ocean City, New Jersey, at the northwest corner of Ninth Street and Ocean Avenue, the lot being one hundred feet along Ocean Avenue by one hundred and thirty-seven and one-half feet along Ninth Street to an alley, being lots numbers 846 and 847 in Section C, on plan of lots of the Ocean City Association, by virtue of unrecorded deed dated August first, 1916, made to it by John R. Groves and wife and Edward M. Sutton and wife.
2. There is pending in the Court of Chancery of New Jersey, an injunction proceeding brought by Ocean City against John R. Groves, Edward M. Sutton and Lewis Miller, to restrain them from constructing a building to be used as a public garage upon said lot of land, and that a rule to show cause was allowed; that upon the return of the same a preliminary injunction was allowed, restraining the defendants from proceeding with the work of the construction of said building; that answer has been filed to the bill of complaint, to which there has been a formal replication.
3. That the suit by the city is based upon the two ordinances involved in this proceeding, the contention being that the building is in violation of the garage ordinance, and that it is also being constructed without a permit.
4. That Ocean City is a city having less than twelve thousand population and is operating under

an act approved March twenty-fourth, 1897, entitled, "An act relating to and providing for the government of cities in this state containing a population of less than twelve thousand inhabitants," P. L. 1897, page 46 and has adopted the Walsh Act.

5. The Ninth Street Improvement Company was incorporated May thirty-first, 1916, the certificate being recorded in the clerk's office of Cape May County on June 8th, 1916.

10

6. The building code, in addition to what is shown by the return, contains the following: "Passed at an adjourned regular meeting of the Common Council this seventh day of March, A. D. 1904, George O. Adams, President of Council, certified to this seventh day of March, A. D. 1904, T. Lee Adams, City Clerk, Approved this eighth day of March, 1904, Joseph G. Champion, Mayor;" and the amendment to the code contains the following: "Adopted this sixth day of April, A. D. 1908, Harry G. Stanton, President of Council, Certified to this sixth day of April, 1908, T. Lee Adams, City Clerk, approved this seventh day of April, 1908, I. M. Cresse, Mayor."

20

SAMUEL SCULL, a witness produced on behalf of the respondent, being first duly sworn, testified as follows:

30

Direct examination.

By Mr. Boswell:

Q. Mr. Scull, you are an official of the City of Ocean City?

A. Yes, sir.

Q. What position do you hold?

A. Chief of police.

Q. How long have you been such?

A. About twenty years.

Q. As chief of police have you and do you observe the City of Ocean City generally as to its buildings and other matters?

A. Yes, sir.

10 Q. Have you made any investigation as to the character of certain buildings now erected in the City of Ocean City, and if so, did you make any memorandum of those?

A. I did.

Q. Have you the memorandum with you?

A. I have.

Q. Refer to it, please.

A. Read it?

20 Q. Yes, I would like you to read the memorandum that you have as to railroad depots, railroad tracks, ice plants, freight depots, baseball parks, lumber yards and places of such character and where they are located in the City of Ocean City.

A. Electric light plant, water plant, sewer plant, disposal plant, gas plant, two depots, baseball park, four lumber yards, two ice cream factories, two coal yards, three milk dairies, livery stables, storage houses, two planing mills, two cement block factories, two fish houses, two publishing establishments, four automobile garages; all on the northwest side of Asbury Avenue.

30 Q. Mr. Scull, what is the business street of the City of Ocean City?

A. Business streets?

Q. Yes, the business street, known as the business street?

A. Asbury Avenue.

Q. Have you had occasion to observe the various garages, public garages in the City of Ocean City as a duty of yours as an officer?

A. I have.

Q. Will you say whether or not the public garages, how they are constructed as to entrances for automobiles, how the automobiles pass in and out those garages?

A. They are constructed so they have to pass over the sidewalks.

10

Q. Are these garages built, that is, the entrance to the garage, built nearly flush or to the sidewalk itself?

A. I don't just understand that.

(Question repeated.)

A. Flush with the sidewalk.

Q. Have you had occasion to observe people passing by on the sidewalk near or in front of those garages, whether they have met with obstructions or not, caused by automobiles going in and out of these garages?

20

A. Automobiles going in and out of those garages, the people have to stop for them.

Q. You have noticed that, have you?

A. I have noticed that.

Q. Have you made an inspection of the public garages in Ocean City and ascertained what they sell?

30

A. Yes, sir.

Q. What do they sell?

A. Gasoline and oil.

Q. Do you know whether or not the people getting oil and gasoline in the garages, how it is delivered to the automobiles?

A. Gasoline is generally from the tanks right at the curb.

Q. How about the oil?

A. The oil is generally carried out of the garage in measures.

Q. Carried across the sidewalk to the automobile?

A. Yes.

Q. There is another automobile garage on the southeasterly side of Asbury Avenue, is there not?

10 A. Yes, sir.

Q. And where is that automobile garage located?

A. Ninth and Boardwalk.

Q. Have you observed this particular garage as to whether or not there are automobiles going in and out?

A. Same conditions prevail down there.

Q. That the people were prevented —

A. Had to stop when they go in and out.

20 Q. Do you have occasion, Mr. Scull, to be on the Boardwalk in the evenings or during the day very much?

A. Yes.

Q. What is the characteristic of the Boardwalk in Ocean City? Is it a promenade or what is it?

A. Promenade, I should call it.

Q. Do I understand by that that people during the day and in the evening use that as a walk, a promenade walk?

A. They do.

30 Q. And have you noticed their dress?

A. I have.

Q. Do they attire more lavishly during these periods of walking on the Boardwalk?

A. That seems to be the place to go to show their good clothes.

Q. Now, then, observing that as you have, these

people that go to show their good clothes, where do they come from mostly, from what district?

A. Uptown. Good many goes out various streets.

Q. From what places, from the northeasterly or northwesterly side of Asbury Avenue?

A. More southeasterly side of Asbury Avenue. More residential section, hotel section.

Q. As a police officer or otherwise has your attention ever been directed to any mishaps of automobiles going in and out of these public garages? 10

A. I don't think so.

Q. With any other automobiles in any way at all?

A. I don't remember.

Q. Don't know that there has been anything called to your official attention?

A. No.

Cross-examination.

By Mr. Babcock:

20

Q. I suppose the Boardwalk is used by people who also live on the north side of Asbury Avenue, isn't it?

A. Yes, sir.

Q. And I suppose also that this characteristic of garages having an entrance of the character that you have mentioned is true of garages, irrespective of their location?

A. Yes.

30

Q. The garage which you have mentioned on the south side of Asbury Avenue, is located within a square of the property of the Ninth Street Improvement Company, isn't it?

A. Yes, I should call it a square.

Q. On the same street?

A. Yes.

Q. That is, the Ninth Street Company's property is at Ocean Avenue and Ninth Street?

A. Yes.

Q. And this public garage referred to is located nearly a square nearer the ocean on Ninth Street?

A. Right.

Q. That is a very large garage, isn't it?

A. Yes.

Q. Accommodates a hundred or more machines?

10 A. I would imagine about a hundred.

Q. Do you know how long that garage has been there?

A. 1910, I think.

Q. Do you know of any effort having been made on the part of the city to stop the business of the public garage on Ninth Street?

Mr. Boswell: Which one?

20 Mr. Babcock: This one he has been referring to as having existed there since 1910.

A. Don't remember.

Q. Never heard of anything of that kind?

A. Don't remember.

By Mr. Boswell:

30 Q. Mr. Scull, speaking of the Ninth Street, will you tell me whether or not Ninth Street is one of the principal streets leading to the Boardwalk for people to reach the Boardwalk?

A. I should call Eighth Street and Ninth Street the principal streets to the Boardwalk.

Q. And the two streets principally traveled?

A. Yes.

Q. Toward the Boardwalk?

A. Yes.

ALBERT FOGG, a witness produced on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Boswell:

Q. Mr. Fogg, reference has been made to a garage on Ninth Street near the Boardwalk. Do you know 10 anything of this garage, as to the time it was built?

A. Yes, sir.

Q. Will you please state what year it was built in?

A. I think the first was built in 1910 or 1911.

Q. Remodeled after that, was it?

A. Yes, sir, remodeled the next year.

Q. What year was the last remodeling?

A. 1912, I think.

Q. Did you ever erect any houses in the City of Ocean City? 20

A. Yes, sir.

Q. Did you erect a house on the corner of Ninth and Ocean Avenue?

A. Yes, sir.

Q. What did that house cost?

A. The house alone cost somewhere between fifteen and sixteen thousand dollars.

Q. Was there any garage at that time on any of the corners opposite?

A. No, sir. 30

Q. Has there been an attempt recently, in the year 1916, to build a garage opposite your property?

A. There has.

Q. Would a garage erected and completed on the corner where one has now started and stopped be of a benefit or detriment to your property?

A. I would just sell it for four thousand dollars less tonight than what it cost me if a garage is to be completed there.

Q. What effect would it have on other property as to residences in the neighborhood?

A. It would reduce them from twenty to twenty-five per cent. There was a piece of property offered for sale just within one hundred feet from there, sixty days ago, and they couldn't get a bid on it over 10 nine hundred dollars. I paid three thousand for a piece just one hundred feet on the other side.

Q. Mr. Fogg, at the time of this sale that you are speaking of, was that a public sale?

A. It was.

Q. Did you hear conversations, or were there conversations had about that time as to the sale being made, as to why those lots would not bring more than nine hundred dollars? Was there any question as to the garage mentioned?

20 A. Only the question was by the people that were there talking.

Q. Yes, I mean at that time.

A. Yes, sir.

Q. Did they say anything about the garage having its effect upon the value of the lots?

A. They did.

Q. And those were people who were attending the sale?

A. They were.

30 Q. Mr. Fogg, you have been a resident of Ocean City for how long?

A. I have been a man that came here for the summer for twenty-two years. I have been a resident—my regular residence here has been a little over four years.

Q. You have had occasion to observe generally the

layout of Ocean City as to its buildings, have you not?

A. I thought so.

Q. Upon the easterly side of Asbury Avenue what do you find as to character of buildings as to value and substantiability?

A. Best in the city.

Q. On the northwesterly side of Asbury Avenue what do you find there as to comparison on the other side?

10

A. About seventy per cent. less.

Q. As to value?

A. Yes, sir.

Q. And do I understand that on the southeasterly side of Asbury Avenue is the residential section of the costly houses?

A. They are.

Cross-examination.

20

By Mr. Babcock:

Q. The garage on Ninth Street near the Ocean is known as the Fogg Garage, isn't it?

A. That is its name.

Q. Is that your son or is it your garage?

A. My son.

Q. Ocean Avenue runs parallel with the ocean, doesn't it?

A. Yes, sir.

30

Q. And Ninth Street is a cross-town street?

A. Yes, sir.

Q. And your home is at the corner of Ninth Street and Ocean Avenue, one square distant from the ocean?

A. Nearly a square and a half.

Q. But there is no other street south of Ocean Avenue running parallel?

A. Yes, sir, Atlantic Avenue.

Q. Does Atlantic Avenue extend westward across Ninth Street?

A. No, sir.

Q. Well, that is what I say.

A. It does on the north side.

Q. But not on the westerly side?

10 A. No.

Q. And when the garage was built down near the Boardwalk, were there any dwelling houses alongside of it on the same side of the street?

A. No, sir.

Q. Did you build the houses between the garage and your home?

A. I did, sir.

Q. So that you bought and built up property right alongside of this public garage?

20 A. No, sir; I owned it before.

Q. But instead of selling it at a discount, you put dwelling houses on it?

A. I put dwelling houses on it, yes, sir, to my detriment.

Q. And you built the garage, didn't you?

A. Yes, sir.

Q. Do you regard that the garage at the ocean end of Ninth Street is a detriment to your property?

A. Yes, sir.

30 Q. Have you made any efforts to stop the garage conducted by your son?

A. No, sir.

Q. Why not, if it is an injury to your property?

A. Simply because I built the property there, didn't think at the time it would be the detriment it is at the present time. It is a detriment to any property close to a garage.

Q. Well, it is never too late to change if you can change for the better.

A. That is very true.

Q. Why not discontinue it?

A. I am willing to discontinue it.

Q. But the fact is that it is in full operation and accommodates over a hundred machines, isn't it?

A. Somewheres about that; small machines.

Q. Does it only take small machines?

A. No, sir, it takes large machines, too. You said 10 over a hundred. It wouldn't hold over a hundred large machines. It would hold over a hundred small ones.

Q. So that you built in a neighborhood in which you had previously built a public garage?

A. Yes, sir.

By Mr. Boswell:

Q. Mr. Fogg, you say it has operated to your det- 20 riment. In what way?

A. After I had built the houses I found that they wouldn't bring the price that I thought they would before the garage was there.

Q. Have you had any experience as to the question of renting them?

A. Yes, sir.

Q. Please state what has been your experience as to securing rents for those properties or either one of them or any of them. 30

A. Mr. Stanton rented this cottage this summer and he can tell you more about it than I can. I had to throw off some on account of the noise.

HARRY STANTON, a witness produced on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Boswell:

Q. Mr. Stanton, you are a real estate agent in the
10 City of Ocean City?

A. Yes.

Q. Did you have occasion to rent any properties
for Albert Fogg?

A. 714 Ninth Street.

Q. And is that particular property near the ga-
rage?

A. The nearest one to the garage.

Q. What was your experience with the tenant in
renting this particular property, as to securing a
20 price?

Mr. Cole: I think we ought to object to this line
of testimony as being irrelevant and incompetent, so
that you will take it and print it at your peril.

(Question repeated.)

A. There was the matter of collecting the rent
after the property was rented.

30 Q. Please state just what that was, as far as you
recall.

A. Well, the tenant claimed to have been suffering
from nervous trouble when he rented the house; did
not realize what the conditions would be, and said
his condition had grown worse and used that as an

argument to endeavor to secure a very considerable reduction in the rent.

Q. Was the rent reduced?

A. A concession was made to him.

No cross-examination.

WILLIAM F. JOHNSON, a witness produced on behalf 10
of the respondent, being first duly sworn, testified as
follows:

Direct examination.

By Mr. Boswell:

Q. Mr. Johnson, are you an official of the City of
Ocean City?

A. Supposed to be.

20

Q. Well, are you?

A. Yes.

Q. What?

A. Building inspector.

Q. As building inspector was an application made
to you for the erection of any building on lots 846
and 847 in Section C?

A. Yes.

Q. Have you the application to you or the permit
that was rendered at that time?

30

A. I have the permit. I haven't the application,
I guess.

Q. Who was the permit granted to?

A. Andrew Scull.

Q. Just read the permit.

A. This permit wasn't granted.

Q. This is the one that was granted?

A. This is the first that was asked for. This one we rejected.

Q. Well, I want the one that was granted. Just read the permit that was granted, Mr. Johnson.

A. "May 23rd, 1916: I hereby make application for a building permit to erect a new brick and frame building on lot 846, Section C, located Ninth and Ocean Avenue, on the southwest corner, for Ninth Street Improvement Company, owner. Owner's Address, Ocean City. Width, 32 x 61 foot six. Number of stories, one. Height of building 13 feet. Kind of roof, slag. Ward, two. Purpose, store. Number of rooms, one. Estimated cost, two thousand dollars. Andrew R. Scull, builder."

Q. At the time, Mr. Johnson, the application was made and the permit granted, was there exhibited to you a plan?

A. Yes.

Q. Have you the plan with you?

A. I think so.

Q. State whether or not on this particular plan that was exhibited at the time the word "store" appeared.

A. The word what?

Q. The word "Store". Just read the reading matter upon the plan.

A. "Plan for a store building to be erected at Ocean City, New Jersey, Andrew R. Scull, builder, Ocean City, New Jersey."

Q. And that is the plan —

A. That is the plan that the permit was given for.

Q. Now, then, before this permit was given to Andrew R. Scull, did he make application previous to this permit?

A. Yes.

Q. What application did he make at that time?

A. He made an application for a building ninety-two by a hundred and twenty-one on the same lot, for a garage.

Q. Did you grant him any permit?

A. No.

Q. Why?

A. Well, because we have an ordinance here that prohibits a garage being built south of Asbury Avenue.

Q. South or southeasterly of Asbury Avenue?

A. Well, south, I call it. Southeasterly, it is.

Q. Then, after the first permit was granted, was there another application made to you by Mr. Scull?

A. After this building was built, I think they was using it to keep cars in and store them, for a garage.

Q. Did you see automobiles in there?

A. Saw automobiles in there and sign up on the building.

Q. What did the sign up on the building say?

A. Well, it said garage.

Q. Was there another application after that first permit was granted, made by Mr. Scull, Andrew Scull?

A. Yes, there was an application given by Mr. Scull or applied for August fourth, 1916, "I hereby make application for a building permit to erect an addition to building on lot 846, Section C, located at Ninth and Ocean Avenue, for the Ninth Street Improvement Company, Ocean City, New Jersey; thirty-two by fifty-eight; number of stories, one."

Q. What date was the application?

A. August fourth. "Proposed use, store."

Q. At that time, Mr. Johnson, did Mr. Scull present to you a plan?

A. I think he did.

Q. Have you it with you?

A. Yes.

Q. Before he made application or after the store was completed under the first permit, you observed it had been converted into a garage?

A. Well, used it for a garage.

10 Q. Now, with the plan that he makes application for the second permit, does he mention the word garage on the plan, or what does he say as to this particular wording on the plan?

A. He says, "Sketch to an alteration and an addition to a store building located on Ninth Street and Ocean Avenue."

Q. The store building —

A. Is this.

Q. Did you grant him a permit at that time?

A. No, sir.

20 Q. At the time he made application, you knew then that the building that had been constructed was being used as a garage?

A. Well, yes, I supposed it was. I seen cars in there and it had a sign on it.

Q. And why didn't you grant him the permit to make the alteration and addition?

A. Well, the reason I didn't was because I done it because the ordinance says I can't grant it, it was against the law to grant it, and this addition practically shows more of a garage than what that first building does.

30 Q. In what way does the second plan show more of a garage than the first?

A. Well, it has a set of big double doors here, Batten doors, glass in the top on the front. I don't know what goes on the end. It don't say.

Q. Do you know whether or not Andrew Scull attempted to erect a building on the lot irrespective of not having a permit?

A. Well, yes, he did start to erect one there. He got a whole lot of it up, I guess.

Q. You mean he was held up?

A. I say he got a whole lot of the building up.

Q. Was he stopped or prevented?

A. Why, I think so, by the city.

Q. Do you know whether or not the building that he was attempting to construct there even conformed to the plan of the building which he had exhibited under his second plan? What does this plan call for? 10

A. Well, the building that he is constructing there now as far as this plan shows is the side elevation on Ninth Street, that is all it shows, and thirty-two feet across the back.

Q. What size building is he constructing on those lots?

A. Well, I don't know as I can give the exact figures, but I should judge about ninety-two by a hundred and twenty-one. 20

Q. So that he is constructing a building on those two lots sixty feet more in width than really he asked for on his second plan, is that so?

A. Yes, I think so.

Cross-examination.

By Mr. Babcock:

Q. Mr. Johnson, the first application was made to you on May first, 1916, by Mr. Scull, builder? 30

A. Yes.

Q. For permission to build a garage on the lot in question?

A. Yes, sir.

Q. And you refused it on the ground that such a

building would be in violation of the garage ordinance of Ocean City?

A. Yes, sir.

Q. That was your reason for refusing the permit?

A. Yes, sir.

Q. On May twenty-third you granted to this same builder a permit to construct a store of the dimensions which you have given upon the immediate corner of that lot?

10 A. Yes.

Q. And later an application was made to you, the date being August fourth, 1916, for a permit to build an addition to this building which had previously been built under your permit?

A. Yes, sir.

Q. And you refused your permit on the ground that the building contemplated was intended for a garage?

A. Yes, sir.

20 Q. You say you saw the building that they undertook to construct there before they were stopped by the injunction proceedings?

A. This building?

Q. Yes.

A. I walked by it once or twice.

Q. I suppose you noticed that the walls were constructed of brick?

A. Yes.

30 By Mr. Boswell:

Q. Didn't inspect the building in any way at all?

A. No, only walked by it.

ARTHUR D. BARROWS, a witness produced on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Boswell:

Q. Mr. Barrows, are you an official of the City of Ocean City? 10

A. I am.

Q. What is that position?

A. Police justice.

Q. As police justice of Ocean City, has there been any complaint made to you or have you issued any warrant or summons against the Ninth Street Land Company or against the Ninth Street Land Company, Incorporated, or against John R. Groves or against Edward M. Sutton or against Lewis Miller for the violation of any ordinance in the City of Ocean City for the erecting of any building? 20

A. I have not.

Q. Has any complaint ever been made to you as to any violation of any ordinance by any of the persons or corporations named?

A. There has not.

Q. How long have you been police justice of the City of Ocean City?

A. Nearly a year and a half. 30

J. L. HEADLEY, a witness produced on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Boswell:

- 10 Q. Mr. Headley, where do you reside?
A. 1016 Asbury.
Q. Where?
A. Ocean City.
Q. How long have you been a resident of Ocean City?
A. Twenty-eight years.
Q. Did you build any houses on Asbury Avenue or did you build the house where you now reside?
A. Two.
- 20 Q. What is on the corner of—where do you live in Ocean City?
A. 1016 Asbury.
Q. What building is on the corner of Tenth and Asbury Avenue?
A. Garage.
Q. Did you build your buildings on Asbury Avenue before the garage was built?
A. Yes.
- 30 Q. Are your buildings on the same side as the garage?
A. Same side.
Q. What effect has the garage had upon your property as to its rental?
A. Well, I would say about thirty per cent.
Q. Increase or decrease?
A. Decrease.

Q. The garage on the corner of Tenth and Asbury Avenue, how are the openings as to entrance of automobiles?

A. To the sidewalk.

Q. Have you had occasion to observe automobiles going in and out of the garage?

A. I have.

Q. Have you had occasion to observe people passing by on the same side of the street where this garage is?

10

A. I have.

Q. Just state what happened and what conditions you found, whether there has been any interference with people on the sidewalk passing by and the automobiles going in and out of the garage.

A. Well, they always have to be on their guard and watch.

Q. Watch for what?

A. Automobiles going in and out.

Q. Fearful of being struck by them?

20

A. Yes.

No cross-examination.

CLINTON H. BRICK, a witness produced on behalf of the respondent, being first duly sworn, testified as follows:

30

Direct examination.

By Mr. Boswell:

Q. Mr. Brick, where do you reside?

A. Ocean City, New Jersey.

Q. Have you any official position in the City of Ocean City?

A. I have not.

Q. Do you hold any position as to the head of any organization in the City of Ocean City?

A. I do.

Q. What is that?

A. I am president of the Board of Trade.

10 Q. Mr. Brick, have you had occasion to observe the automobile garage on Ninth Street near the Boardwalk owned by Mr. Fogg?

A. I have.

Q. Will you state whether or not you have observed any interference with people passing down Ninth Street to the Boardwalk and automobiles going in and out of this garage?

A. I have.

Q. Have you noticed as to the position of the sidewalk there as to the oil and dirt?

20 A. I have seen it very oily and obnoxious to traffic.

Q. On the northwesterly side of Asbury Avenue, Mr. Brick, how many avenues running parallel to Asbury Avenue are there?

A. How many streets?

Q. Yes. Just name them.

A. West Avenue, Simpson, Haven, Bay, Pleasure.

30 Q. The value of the real estate on the northwestern side of Asbury Avenue is about what as to the price of lots?

A. From two hundred and twenty-five dollars a lot as low and I would say five hundred and six hundred dollars high, with the exception of directly on the Bay front, bulkhead front, which would be a waterfront lot.

Q. What as to valuations of land on the southeasterly side of Asbury Avenue?

A. Between two given points, for instance, from Twentieth Street north to Fourth Street, six hundred to seven hundred low and from that up to sixty-five hundred and ten thousand high.

Q. Now, the character of the houses on the northwesterly side of Asbury Avenue as erected in the City of Ocean City as to their value?

A. They are materially cheaper on the northwestern side. It is more or less of a tenement nature. Of course, south of Tenth Street I would say it was much better than between Tenth and Seventh, Tenth and Sixth. That is the colored section to a certain degree, and Italians. 10

Q. Then, do I understand, Mr. Brick, that the character of buildings correspond with the value of lots on the northwesterly side?

A. I should say so, yes, sir.

Q. Now, as to the character of the buildings on the southeasterly side of Asbury Avenue, and as to their values. 20

A. The southeasterly side represents the residential section mainly and the summer colonies.

Q. Can you state any values as to houses on the southeasterly side in the residential section?

A. Yes, I think many individual values and collectively —

Q. Name some individual values.

A. Well, for instance, the Alexander Lawrence house, I presume, cost approximately nineteen thousand dollars for the structure alone. In my presence, of course, Mr. Fogg testified that his house cost sixteen. Then, there are other houses ranging in price from thirty-five hundred to eight and ten and twelve thousand dollars. 30

Q. That is the range in value —

A. I should say that thirty-five hundred was a

fair low-priced house, there are some few cheaper houses, of course, but very few of the new ones. Some of the old houses, of course, that age has depreciated some and are not modern.

Q. Mr. Brick, you have made these statements as to valuation of land and houses. Are you in any business that would warrant you making such a statement?

A. I am in the real estate business.

10 Q. And you are conversant with real estate values in the City of Ocean City?

A. Fairly well.

Q. Do you have occasion, Mr. Brick, or have you ever had, to observe the Boardwalk in the City of Ocean City?

A. I have.

Q. What character of a walk is it?

A. Second only to Atlantic City. It is a very nice promenade.

20 Q. Is it a promenade?

A. It is.

Q. For people generally to go to the beach to promenade on the Boardwalk?

A. That is its purpose, yes, sir.

Q. Have you noticed the character of dress of people on this Boardwalk?

A. Yes. I am rather observing.

30 Q. Would you state what it was? Was it the dress of a person who was attired for evening or just happened to go there?

A. Why, I would say that it was an evening attire.

Q. Now, those people that are dressed in their evening attire, as you have observed, on the Boardwalk, I suppose you knew many of them?

A. Yes, sir.

Q. What section of the City of Ocean City did they come from?

A. They came mostly from the summer section, southeast of Asbury Avenue.

Q. And from residences and larger hotels?

A. From residences and hotels.

Cross-examination.

By Mr. Cole:

10

Q. I suppose there is not as much danger of these ladies who have the evening attire getting their dresses soiled as there was three or four years ago, when they wore their dresses longer, is there?

A. I hardly think so.

B. FRANK SMITH, a witness produced on behalf of 20
the respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Boswell:

Q. Mr. Smith, do you reside in the City of Ocean City?

A. I do, yes.

30

Q. How long have you been a resident?

A. Why, about twenty-five years. I am just guessing at that. Maybe a little longer.

Q. Do you hold any official position in the City of Ocean City?

A. Postmaster at the present time.

Q. Have you had occasion to buy real estate recently in the City of Ocean City?

A. Yes, sir, I have.

Q. Did you buy a piece of real estate on Asbury Avenue about six months ago in the City of Ocean City, with others?

A. I did, yes.

Q. What piece of real estate did you buy?

A. I bought the adjoining lot to my residence.

10 Q. Did you have any particular reason why you bought the adjoining lot?

A. Why, I should say yes. Do you want me to go ahead?

Q. Yes. Just tell what it was.

A. Mr. Fox, the owner of the lots at that time, had started a garage on that property, on the two lots.

Q. What kind of garage, private or public?

A. A public garage, and he came to me and asked about buying the lots some time before he started
20 the garage —

Mr. Babcock: How does that touch this case at all?

Mr. Boswell: I think it does from a legal standpoint. Not any conversation he had.

Q. Not any conversation you had. As to what you did, why you purchased this lot, not any conversation you had with any one.
30

A. Well, I purchased the lot because a garage was being built upon the premises and when the foundation was started my next door neighbor and myself got an injunction or we were going to get an injunction, and had started proceedings when we got together with Mr. Fox and bought the ground to keep

the garage from going there, because I believed it would be a detriment to our property, and I know it would have been a detriment to the property. I figured it would at least decrease the value of my property five hundred dollars if that had gone up there.

Q. Were there any other people in the neighborhood that helped join in with you, property holders in the immediate neighborhood contribute to help buy that? 10

A. Yes, the agreement was ——

Q. Not the agreement, but the people in that neighborhood.

A. Yes, a number of people subscribed and paid their good money over to keep that garage from going there.

No cross-examination.

20

OTIS M. TOWNSEND, a witness produced on behalf of the remonstrant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Boswell:

Q. Mr. Townsend, you are a resident of Ocean City and a contractor? 30

A. Yes, sir.

Q. Do you recall the name of the owner who owned a lot on the corner of Seventh and Ocean Avenue in the City of Ocean City?

A. On the southwest corner, Mr. Cornelius Clark.

Q. Did you have a contract with Mr. Cornelius Clark to erect a building on that lot?

A. I did.

Q. Do you know what year it was?

A. In April, 1913.

Q. What kind of a building were you going to erect?

A. A public garage.

Q. Did you erect it?

10 A. I did not.

Q. Why?

A. Mr. Clark asked the privilege of canceling the contract because he had been—somebody had bought his ground to keep him from erecting it there.

Q. What section is that in as to Ocean City, on the northwesterly side of Asbury Avenue or on the southeasterly side of Asbury Avenue?

A. Southeasterly.

Q. That is in the residential section?

20 A. Yes, sir.

Q. And the people in that neighborhood purchased this property to keep from having the garage built?

A. Yes, sir.

Q. Mr. Townsend, have you observed the building at the corner of Ninth Street and Ocean Avenue, a building that has been erected as a public garage?

A. Yes, sir.

Q. Have you noticed the openings in this particular building as to the entrances for automobiles?

30 A. It looked as if it might be planned for that purpose.

Q. And these entrances would be where, in relation to the sidewalk?

A. Up along the sidewalk, and the machines would have to cross them to get in.

Q. Do you know whether there were any of these entrances on Ninth Street?

A. Yes.

Q. How about the other street as well, Ocean Avenue?

A. On Ocean Avenue, yes.

Q. Are you familiar with the various localities in the City of Ocean City, Mr. Townsend?

A. Fairly well.

Q. How long have you resided here?

10

A. Fifteen years.

Q. You have built many houses?

A. Several houses.

Q. Will you state the difference between the character of house that is built on the northwesterly side of Asbury Avenue and that house that is built on the southeasterly side of Asbury Avenue?

A. Those built on the southeasterly side, no doubt, cost in excess of fifty per cent. more than those on the other side in every instance.

20

Q. Mr. Townsend, have you had any experience as to building houses on contracts other than this, other contract you are speaking of, where you have been prevented from erecting a building because of the contemplation of building a public garage?

A. Not that I remember.

No cross-examination.

30

GEORGE O. ADAMS, a witness produced on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Boswell:

Q. Mr. Adams, you are a contractor in the City of
10 Ocean City?

A. Yes, sir.

Q. And what sort of a contractor?

A. Bricklaying and plastering, concrete, cement work.

Q. Did you ever have a contract to erect a building for a man by the name of Brannen?

A. Not directly, no.

Q. Do you know of any building that was being built on Central Avenue between Ninth and Tenth
20 Streets, attempted to be built as a garage?

A. Supposed to be, yes, sir.

Q. Who was that to be built by, do you know, at that time?

A. Mr. Townsend.

Q. You were doing the brick work for it, were you?

A. Yes, sir.

Q. Did you finish it?

A. No, sir.

Q. Do you know why the building wasn't finished?

30 A. It was understood that the adjacent property owners bought it.

Q. And was that on the northwesterly side or the southeasterly side of Asbury Avenue?

A. Southeasterly side.

No cross-examination.

JOSEPH I. SCULL, a witness produced on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Boswell:

Q. Mr. Scull, where do you reside?

A. Ocean City.

10

Q. And you have been a resident quite a number of years in Ocean City?

A. I have.

Q. You are familiar with the corner lot that was owned by Mr. Clark on the corner of Tenth and Ocean Avenue?

A. I am.

Q. And you were at that time?

A. Yes, sir.

Q. Who were the persons who purchased the property from Mr. Clark about April, 1913?

A. Mr. John R. Groves purchased it.

Q. Were there any others that contributed to the purchase of that property at that time?

A. I don't know. There was two or three that agreed to, but I don't think there was but one that paid; twenty-five dollars.

Q. What was going to be built on the property at that time?

A. Oh, I don't think there was anything very much, because the lot was only forty by fifty.

30

Q. You didn't think there was anything going to be built, but there was an agitation about building a public garage there?

A. Yes.

Q. And that was the reason the lot was purchased, to prevent that?

A. Yes.

Q. Mr. Scull, about that time or shortly after that the City of Ocean City had an ordinance passed, did they not, preventing the building of garages?

A. Some time after that. I don't know just when.

No cross-examination.

10

RESPONDENT RESTS.

PROSECUTOR'S TESTIMONY.

JOSEPH I. SCULL, recalled.

20

Direct examination.

By Mr. Babcock:

Q. Mr. Scull, how long have you resided in Ocean City?

A. I think I came here in 1896.

Q. Engaged in the real estate and insurance business here?

30 A. Yes, sir.

Q. Are you familiar with the property of the Ninth Street Improvement Company at Ninth and Ocean Avenues?

A. I am.

Q. Does Asbury Avenue run parallel with the ocean?

A. It does.

Q. What streets are there northward of Asbury Avenue that run parallel with that street?

A. Well, there is West Avenue, Haven Avenue, Simpson Avenue, Bay Avenue and then there are certain sections, Pleasure Avenue and Prospect Avenue.

Q. Won't you give the streets which parallel Ocean Avenue southward or oceanward of that street?

A. Central Avenue, Wesley Avenue, and Ocean Avenue and Atlantic Avenue. 10

Q. How long is Asbury Avenue?

A. Asbury Avenue, I should say, was seven miles or eight miles long.

Q. Is it built up on the southward or ocean side of it?

A. Not much. There is no street below Thirty-fifth Street on Asbury Avenue until you get to Fifty-first Street, I think. Then from Fifty-first Street Asbury Avenue is built, I think, to Fifty-fifth Street.

Q. Are there locations southward of Ocean Avenue where a garage could be constructed without being near any dwelling house or other building? 20

A. Yes, lots of places I think they could get a good part of a mile either way.

Q. The fact is, isn't it, that in some locations land is undeveloped, there is wild brush land?

A. Yes, sir.

Q. Do you know where Fogg's Garage is located?

A. I do.

Q. That is on Ninth Street, isn't it? 30

A. Yes, sir.

Q. How near is that to the property of the Ninth Street Improvement Company?

A. It is, I should say, about three hundred and seventy-five feet or probably four hundred.

Q. Nearer the ocean?

A. Yes.

Q. On the same side of Ninth Street?

A. On the same side.

Q. Do you know of any other public garage in that immediate neighborhood? Do you know where Goff's Garage is located?

A. Well, yes, I know where Mr. Goff's building is located.

Q. Does he maintain a public garage?

A. He has a laundry there.

10 Q. How near is the laundry to the Ninth Street Improvement Company's property?

A. I should say a hundred and fifty feet.

Q. Between Ocean Avenue and the ocean?

A. Yes.

Q. How near is that to Mr. Fogg's fine residence?

A. About the same distance, a hundred and fifty feet. I think it is a hundred and fifty. It may be two hundred, but it isn't over that.

20 Q. Isn't there a caroussel also right down near that other garage?

A. Yes, sir.

Q. Are there homes northward of Asbury Avenue?

A. Yes, sir.

Q. Many of them?

30 A. Quite a good many. The upper section, north of North Street, there are some very fine homes, and there are also some very fine homes south of Twelfth Street down as far as Fifteenth, near the bay. There are some very nice summer homes there.

Q. Your public buildings, your yacht club building and buildings of that character, high-class character, are they northward or southward of Asbury Avenue?

A. They are northward of Asbury Avenue.

Cross-examination.

By Mr. Boswell:

Q. Mr. Scull, you were speaking about some very nice houses, where? On the northwesterly side of Asbury Avenue?

A. Yes, sir.

Q. Where?

A. There is one that cost at least fourteen thousand dollars right on the bay front there between Fourth and Fifth, and you go up a little further and you will find one that Mr. Robert Scott built that cost six or seven thousand dollars or eight. I think he is asking eight thousand dollars for the house. 10

Q. Those are on the bay front?

A. Yes. They are on the north side of Asbury Avenue. You take Mr. Parrish's home and a number of those built on the Gardens Tract, they are nice houses. They compare favorably. 20

Q. Does Asbury Avenue run north of North Street?

A. Yes.

Q. Is it Asbury Avenue?

A. It is called Asbury Road up there.

Q. I say Asbury Avenue, does it run above North Street?

A. It runs right straight —

Q. Asbury Avenue as it is known in Ocean City?

A. I never know it as Asbury Road except when I look at the map. 30

Q. Asbury Avenue runs to North Street, doesn't it?

A. There is two maps. One prints an Asbury Avenue and the other Asbury Road.

Q. The Garden Tract is above North Street?

A. Yes, sir.

Q. And these houses that you have enumerated as being owned by these people are on this tract, are they not?

A. A great many of them, yes.

Q. Is Asbury Road a straight road or is it a winding road?

A. Asbury Road, I think, runs straight.

Q. Now, you have referred to maps that you have looked at.

10 A. I haven't got them here.

Q. Do you know whether or not Asbury Road is a straight road above North Street or whether it is a winding road?

A. My impression is that it is straight.

Q. If the map showed that it was a winding road you would be mistaken, then?

A. I would say one was Asbury Road and one was Asbury Avenue.

Q. If it was ——

20 A. No, I say one map will show Asbury Road and another map will show Asbury Avenue.

Q. Recalling the last time you saw the map of the Gardens Tract, can you recall whether it was a straight road or a winding road, Asbury Avenue, the last time you looked at it?

A. I couldn't say.

Q. So you can't say whether it is a straight road north of Asbury Avenue or what it is?

30 A. My impression is that it is straight. I will stick to that.

Q. The southern part of Ocean City, where you said northwesterly of Asbury Avenue there was a club house, a yacht club?

A. Yes.

Q. Is there a yacht club there now?

A. Yes.

Q. I say, is there a yacht club there now?

A. Where?

Q. On the northwesterly side of Asbury Avenue down about Twelfth Street?

A. No.

Q. And there has not been one there for how long?

A. I don't know. I think the sheriff sold it about a year ago.

Q. In this locality you are speaking of, the houses that you have enumerated as valuable houses, will you kindly tell us where the pest house was located by the City of Ocean City at the last quarantine of infantile paralysis? 10

A. It is located, I think, at Seventeenth and Bay Avenue.

Q. In and around that locality?

A. No, that is not. That is Seventeenth Street and the houses I speak of are between Twelfth —

Q. The pest house is in that direction, on the northwesterly side of Asbury Avenue? 20

A. Yes, and Mr. Wilson's house is there, worth about ten thousand dollars, but Stockwell's house is worth ten thousand dollars.

Q. Those are on the Bay Front?

A. Yes.

By Mr. Babcock:

Q. North of Asbury Avenue?

A. Yes. 30

Q. Mr. Scull, what is the character of the buildings between Mr. Fogg's home and the other garage?

A. Why, they are very nice, fine residences.

Q. Medium character?

A. Good character, yes.

Q. Not particularly expensive buildings, are they?

A. No, not especially expensive. Cost thirty-five hundred to four thousand dollars apiece to build.

By Mr. Boswell:

10 Q. Mr. Scull, you have given some information as to values. The Ninth Street Land Company not only owns land on the northwesterly side of Asbury but on the southeasterly side of Asbury Avenue, does it not?

A. The Ninth Street Land Company, to the best of my knowledge, owns none on the southeasterly side of Asbury Avenue.

Q. I don't think you quite understood the question.

A. You asked me did the Ninth Street Land Company own land on the north side of Asbury Avenue.

20 Q. Northwesterly side as well as southeasterly side.

A. I said the Ninth Street Land Company owned no land, to my knowledge, southeasterly of Asbury Avenue.

Q. Well, Mr. Scull, the Ninth Street Land Company did own land northwesterly of Asbury Avenue?

A. They did and do.

30 Q. And you are familiar with the values of the property that the Ninth Street Land Company own northwesterly of Asbury Avenue?

A. Yes.

Q. You are familiar also with the value of the property on the corner of Ninth and Ocean Avenue, are you not?

A. I am.

Q. What is the width of the lots on Ninth Street or on Ocean Avenue?

A. Fifty feet.

Q. And two would make one hundred.

A. Yes.

Q. Will you kindly state the value of that lot on Ninth Street and Ocean Avenue one hundred feet, and also the value of one hundred feet owned by the Ninth Street Land Company, say, on Haven Avenue and Ninth Street, which is on the northwesterly side? 10

A. There is no comparison.

Q. What do you mean by "There is no comparison"?

A. You can buy two lots on Haven Avenue and Ninth Street for fifteen hundred dollars if you want them.

Q. Haven Avenue and Ninth Street for fifteen hundred dollars?

A. Yes.

Q. One hundred feet front? 20

A. Ninety feet front.

Q. What would they cost over on Ocean and Ninth Street, ninety feet front or about a hundred feet front?

A. Well, the quotation we have had on the price of ground would be about the same, but when there is any of them sold they don't buy for that. These people that own this land —

Q. What did they pay for it?

A. They paid ten thousand dollars for three lots. 30
That was for a hundred and fifty feet.

Q. A hundred and fifty feet?

A. Yes.

Q. And the other would be fifteen hundred dollars for ninety feet?

A. Yes.

Q. About two thousand dollars, then, for a hundred and fifty feet? Would you say that?

A. What?

Q. About two thousand dollars for a hundred and fifty feet on Ninth and Haven Avenue?

A. I don't know about that.

Q. What would it be?

A. We sold two hundred and forty feet for forty-five hundred dollars.

10 Q. Two hundred and forty feet on Haven and ——

A. No, that was on West Avenue. Practically the same thing.

Q. Now, Mr. Scull, the property that was sold by you for forty-five hundred dollars on the northwesterly side of Asbury Avenue, is it not?

A. Yes.

Q. And the property that you say brought ten thousand dollars is on the southeasterly side of Asbury Avenue?

20 A. Yes.

Q. Do not the same values run in the same proportion northwesterly and southeasterly of Asbury Avenue in the City of Ocean City?

A. I don't know about that. It is the same thing all places, I should say.

Q. In other words, on the northwesterly side of Asbury Avenue the real estate is considerably cheaper than on the southeasterly side?

A. Yes.

30

JOHN R. GROVES, a witness produced on behalf of the prosecutor, being first duly sworn, testified as follows:

Direct examination.

By Mr. Babcock:

Q. Mr. Groves, are you one of the officers of the Ninth Street Improvement Company? 10

A. I am.

Q. Now, the Ninth Street Land Company has been mentioned here. That is a different corporation, isn't it?

A. It is.

Q. Were you named as one of the defendants in the injunction suit?

A. Yes.

Q. And are Mr. Sutton and Mr. Miller the other defendants named in that suit officers of the Ninth Street Improvement Company? 20

A. They are.

Q. As a result of that injunction proceeding against the offices of the company, was the Ninth Street Improvement Company prevented from going on and completing its building on the lot in question?

A. It was.

Cross-examination.

30

By Mr. Boswell:

Q. Mr. Groves, you are one of the incorporators of the Ninth Street Improvement Company, a corporation, are you not?

A. I am.

Q. And you, with Mr. Sutton, were the owners of the land on the corner of Ninth and Ocean Avenue, were you not?

A. I was.

Q. And at the time of the proceedings of the injunction against you and Mr. Sutton, you were still the owners of the land at the corner of Ninth —

A. Not to the best of my knowledge. I believe that property was deeded to the improvement company before any injunction proceedings.

Q. What did you say?

A. I am very certain that the property was deeded before any injunction proceedings.

Q. Don't you know, Mr. Groves, that the deed made by you to the Ninth Street Improvement Company, a corporation, was made in August, 1916?

A. It was made on the date that is on the deed, whatever that may be.

Q. August first, 1916?

20 A. August first.

Q. And you and Mr. Sutton made this deed and delivered it over to yourselves as part of the corporation, did you?

A. We did.

Q. And you have never recorded it? And as far as the title to the property at Ninth and Ocean is concerned, as far as public records go, it is still in your name?

A. The deed is not recorded, as far as I understand.

30 Q. The title to the property, as far as public records are concerned, is still in your name? Are you an officer of the company?

A. I am.

Q. What office have you?

A. Treasurer.

Q. Was the deed turned over to you?

A. It was not.

Q. As an officer of the company when the deed was made by you and Edward Sutton to the company, did you not feel it was your duty to see that this instrument was recorded to protect the company?

A. I didn't think it was necessary.

Q. You didn't think it was necessary?

A. No.

10

IT IS ADMITTED that the bill for injunction filed by the city was filed after August first, 1916.

PROSECUTOR RESTS.

BOTH SIDES REST.

20

I certify that the foregoing is a true and correct transcript of the testimony taken before me in the above-entitled cause.

C. W. MYROSE,
Supreme Court Examiner. 30

REASONS.

NEW JERSEY SUPREME COURT.

<p>10 NINTH STREET IMPROVE- MENT COMPANY, a Cor- poration, <i>Prosecutor,</i></p> <p style="text-align: center;">vs.</p> <p>CITY OF OCEAN CITY, <i>Respondent.</i></p>	}	<p>ON CERTIORARI.</p> <p>REASONS.</p>
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20 Come now the prosecutor, by C. L. Cole and Babcock and Champion, its attorneys, and assigns the following reasons why a certain ordinance of the City of Ocean City, adopted March 7, 1904, entitled, "An ordinance relating to the election, qualification and term of office of a building inspector, and to regulate and control the manner of building dwelling houses and other buildings in Ocean City, New Jersey," which ordinance is hereinafter referred to as

30 "Building Code") and why a certain other ordinance of Ocean City adopted October 23, 1913, entitled, "An ordinance respecting public garages in Ocean City" (which ordinance is hereinafter referred to as "Garage Ordinance") should be declared invalid and set aside.

The Building Code Is Void.

(a) Ocean City operates under the act of 1897 (P. L. 1897, p. 46). The ordinance was introduced and passed on first, second and third reading at the same meeting of council.

(b) The ordinance was amended and passed at the same meeting of the amendment. 10

(c) It gives the magistrate or officer hearing complaints for alleged violations the right to impose a fine or imprisonment or both at his discretion and is, therefore, in contravention of the charter act of Ocean City.

(d) Ocean City was without lawful right to pass the ordinance. 20

The Garage Ordinance Is Void.

(a) It is unauthorized by law and is *ultra vires*.

(b) It is unreasonable.

(c) It deprives the owner of property by circumscribing the use of it without giving just compensation secured in such case by the organic law. 30

(d) Its effect is to deprive the landowner of the ordinary use for a lawful business purpose of a portion of his land and is a taking within the meaning the meaning of paragraph 16, of Article 1, of the Constitution of the State of New Jersey, as amended.

(e) It is unjustly discriminatory, unreasonable and tends to create a monopoly to the public garages in the same location and in existence at the time of its passage.

(f) It is in violation of the 14th amendment of the Constitution of the United States in that it denies equal protection of the law and has the effect of taking property without due process of law.

10

(g) It does not disclose on its face the reason for its passage and attempts the exercise of a control over private rights in excess of the authority of the city to legislate under the statute or under its general police power.

C. L. COLE,
BABCOCK & CHAMPION,
Attys. for Prosecutor.

20

[ENDORSED]

Service of copy of within reasons
duly acknowledged.

Andrew C. Boswell,
Atty. for City of Ocean City.

30

OPINION.

(Filed Mar. 21, 1917)

NEW JERSEY SUPREME COURT.

NOVEMBER TERM, 1916

10

NINTH STREET IMPROVE-
 MENT COMPANY,
Prosecutor,
 vs.
 CITY OF OCEAN CITY,
Respondent.

20

Argued November Term, 1916; decided February Term, 1917. On certiorari removing ordinances of Ocean City. C. L. Cole and Babcock & Champion, for prosecutor. Andrew C. Boswell and W. Holt Apgar, for respondent. Argued before Justices Swayze, Minturn and Kalisch.

The opinion of the Court was delivered by
 MINTURN, J:

30

The case presents the following state of facts as contained in the stipulation of counsel.

Ocean City is a city having less than twelve thousand population and is operating under an act approved March twenty-fourth, 1897, entitled "An act

relating to and providing for the government of cities in this state containing a population of less than twelve thousand inhabitants," P. L. 1897, page 46. The city has also adopted the Walsh act.

The Ninth Street Improvement Company was incorporated May thirty-first, 1916, the certificate being recorded in the clerk's office of Cape May County on June 8th, 1916.

The building code, in addition to what is shown by
10 the return, contains the following: "Passed at an adjourned regular meeting of the Common Council this seventh day of March A. D. 1904, George O. Adams, President of Council, certified to this seventh day of March, A. D. 1904, T. Lee Adams, City Clerk, approved this eighth day of March, 1904, Joseph G. Champion, Mayor;" and the amendment to the code contains the following: "Adopted this sixth day of April, A. D. 1908, Harry G. Stanton, President of Council, certified to this sixth day of April, 1908, T.
20 Lee Adams, City Clerk, approved this seventh day of April, 1908, L. M. Cresse, Mayor."

The reasons filed by the prosecutor are intended to attack the validity of the ordinances in question, as well as their reasonableness. The building code was passed on March 7th, 1904, in pursuance of the provisions of the charter of the city. The Walsh act was passed in 1911. (P. L. 1911 p. 462). Its adoption by the city of Ocean City resulted in confirming and validating such local legislation as the city
30 governing body had passed, and which was then operative in the municipality. Whatever formal defects may have existed in the procedure necessary to pass such ordinance, were cured by the adoption, *ipso facto*, of the new legislation. Section 8 L. 1911 p. 471.

But aside from that consideration, it cannot be

overlooked that the attack upon the ordinance in question was not undertaken until over twelve years had elapsed since the date of its adoption. During that interval it is reasonable to assume that the citizens of the municipality affected by the provisions of this ordinance, regulating as it specifically expresses "the manner of building dwelling houses, and other buildings," have expended their means and conformed their building operations to comply with its provisions, and have fixed their status as property owners accordingly. 10

In such a situation, this prosecutor is too late to be heard to complain of alleged informalities and irregularities in the procedure, which led to its adoption.

State, *Noe vs. West Hoboken*, 37 Atl. 439;
State, *Zabriskie vs. Hudson City*, 29 L. 115;
Budd vs. Camden, 69 L. 193;
Hopewell vs. Flemington, 69 L. 597.

20

We think these considerations dispositive of the objections urged against the ordinance. The attack upon the garage ordinance is based upon the contention that it is *ultra vires*.

The provisions of the Walsh act, it is assumed, presented the basic law for the adoption of this ordinance. Section 8 of that act provides that the city adopting the act shall have power to enact and enforce "all ordinances necessary for the protection of life, health and property": to declare, prevent and abate nuisances, and to preserve and enforce "the good government, general welfare, order and security of the city," by the passage of ordinances consonant with "the laws applicable to all cities of this state," and the "provisions of the constitution." 30

These provisions manifestly convey in unmistak-

able terms, a liberal concession of governmental authority in aid of the reasonable and constitutional exercises of the police power, by the municipalities adopting the provisions of the act.

The definition and limitation of that power under our constitutions, state and federal, have presented such a prolific subject for judicial investigation and discussion, that no more need be said upon the topic here, than that in our judgment the erection and management of a garage, with all its incidental dangers and inconveniences to adjoining property and public travel, are manifestly matters properly cognizable by the municipal governing body, as a subject for regulation in the public interest, under the police power expressly conferred, as in this instance, or reasonably implied *ex necessitate* in aid of the general welfare against dangers recognized and obvious, to persons and property.

10
20 Slaughter House Cases, 16 Wall 36;
 Cooley's Const. Lim. 227.

We think that the ordinances under review should be affirmed, with costs.

JUDGMENT.

NEW JERSEY SUPREME COURT.

NINTH STREET IMPROVE-
MENT COMPANY, a corpo-
ration,

Prosecutor,

vs.

CITY OF OCEAN CITY,

Respondent.

ON CERTIORARI.
JUDGMENT.

10

The Court having inspected the transcript and proceedings of the city of Ocean City relative to an ordinance, entitled, "An ordinance relating to the election, qualification and term of office of a building inspector, and to regulate and control the manner of building dwelling houses and other buildings in Ocean City, New Jersey," and an ordinance entitled, "An ordinance respecting public garages in Ocean City," returned with the certiorari in this cause, and the reasons why said ordinance should be declared invalid and set aside and heard the argument of counsel therein, and having duly considered the same;

20

30

It is on this 15th day of May, 1917, ordered that the two ordinances, as above entitled be in all things affirmed with costs.

On motion of

ANDREW J. BOSWELL,
Attorney for Respondent.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

10	NINTH STREET IMPROVE- MENT COMPANY, <i>Prosecutor-Appellant,</i> vs. CITY OF OCEAN CITY, <i>Respondent-Appellee.</i>	}	ON CERTIORARI. NOTICE OF APPEAL.
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To Andrew J. Boswell, Esq.,
 Attorney for city of Ocean City:

20 Take notice that the prosecutor-appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The building code is void for the following reasons:

- a. Ocean City operates under the act of 1897 (P. L. 1897, p. 46). The ordinance was introduced and passed on first, second and third reading at the same meeting of council.
- 30 b. The ordinance was amended and passed at the same meeting of the amendment.
- c. It gives the magistrate or officer hearing complaints for alleged violations the right to impose a fine or imprisonment or both at his discretion and is, therefore, in contravention of the charter act of Ocean City.

d. Ocean City was without lawful right to pass the ordinance.

2. The garage ordinance is void.

a. It is unauthorized by law and is *ultra vires*.

b. It is unreasonable.

c. It deprives the owner of property by circumscribing the use of it without giving just compensation secured in such case by the organic law.

d. Its effect is to deprive the land owner of the ordinary use for a lawful business purpose of a portion of his land and is a taking within the meaning of paragraph 16 of article 1 of the constitution of the state of New Jersey, as amended. 10

e. It is unjustly discriminatory, unreasonable and tends to create a monopoly to the public garages in the same location and in existence at the time of its passage.

f. It is in violation of the 14th amendment of the constitution of the United States in that it denies equal protection of the law and has the effect of taking property without due process of law. 20

g. It does not disclose on its face the reason for its passage and attempts the exercise of a control over private rights in excess of the authority of the city to legislate under the statute or under its general police power.

Yours respectfully,

Dated June , 1917.

C. S. COLE.

CHAS C. BABCOCK.

*Attorneys for Prosecutor-
Appellant.*

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

NINTH STREET IMPROVE-
MENT COMPANY, a cor-
poration,

(Prosecutor)
Appellant,

VS.

CITY OF OCEAN CITY,

(Respondent)
Appellee.

ON APPEAL FROM SU-
PREME COURT.

BRIEF OF PROSECUTOR-APPELLANT.

The writ brings up for review two ordinances of Ocean City; one relating to the control and manner of building dwelling houses and other buildings, adopted March 8, 1904, and hereinafter referred to as the "building code," and the other entitled "An ordinance respecting public garages in Ocean City," and hereinafter referred to as the "garage ordinance."

The Ninth Street Improvement Company, the prosecutor, is the owner of a lot of land in Ocean City located at the northwest corner of Ninth Street and Ocean Avenue, the lot being 100 feet along Ocean Avenue by 137½ feet along Ninth Street to an alley, and desiring to construct a brick building on the lot to be used as a public garage, applied to the build-

ing inspector for a permit and was refused on the ground that a building for the purpose of a public garage was in violation of the garage ordinance. The prosecutor began the erection of the building without a permit and in the middle of August the city filed a bill in the Court of Chancery asking that the prosecutor be restrained from proceeding with the building for the reason that the same was being constructed without a permit as required by the building code and in violation of the garage ordinance. A preliminary injunction was allowed. Answer has been filed by the prosecutor and the suit is still pending.

Ocean City is operating under the act of 1897 (P. L. 1897, p. 46) and has also adopted the Walsh act.

The Building Code was not Regularly Passed.

The minutes of a meeting held January 29, 1904, show: "Building ordinance introduced by Headley and read on first reading." No action was taken and on March 7, 1904, the ordinance was accepted on its first reading, passed on second reading, amended and then passed and adopted on third reading. The action of the council in introducing and passing the ordinance at the same meeting was in direct violation of section 15 of the charter act, which provides: "* * * * every ordinance shall be read three times before its final passage; no ordinance shall be finally passed until a subsequent meeting to that at which it may be introduced* * * *."

**The Building Code is Void for Want of Lawful
Penalty.**

Section 20 of the charter act provides:

“The common council shall have authority to pass ordinances on any subject, they may prescribe a penalty or penalties for the violation thereof, either by imprisonment in the city or county jail not exceeding thirty days, or by a fine not exceeding two hundred dollars, and imprisonment in the city or county jail not exceeding thirty days in default of the payment of such fine.”

Section 26 of the ordinance provides:

“Be it ordained that any person or persons violating any of the provisions of this ordinance shall, upon conviction thereof, be subject to a fine of not exceeding two hundred (\$200) dollars, and imprisonment not exceeding thirty days, or both, at the discretion of the magistrate or judicial officer trying the offense, for each and every offense.”

The city had no power to delegate to the magistrate the discretion of imposing a fine or imprisonment or both.

Doran vs. Camden, 64 Law, 666; 46 Atl. 724; *Shill Rolling Chair Company vs. Atlantic City*, 94 Atl. 314, affirmed 96 Atl. 293; *Rosencrans vs. Eaton*, 77 Atl. 88; 80 L. 227; *Schwarz vs. Jersey City*, 84 L. 736, 87 Atl. 463, and *Blake vs. Pleasantville*, 95 Atl. 113 (affirmed on opinion below) all hold in effect that where ordinances provide for both a lawful and unlawful penalty, the unlawful penalty may be dis-

regarded and the ordinance permitted to stand.

The ordinance in question would appear to be distinguishable from the ordinances reviewed in the above cases. The charter act gives the council the power to provide either for a fine or imprisonment. Either of the penalties would be a lawful penalty but whether the penalty is to be by way of fine or by imprisonment is a legislative discretion and right to be exercised by the council and there is no power to delegate that discretion and right to a magistrate.

It is obvious that both penalties cannot be inflicted and it is for the legislative body to say whether the penalty shall be by way of fine or imprisonment.

The ordinance is not a mere rule of procedure as in *Blake vs. Pleasantville* but on the contrary it professes to impose a penalty and the enforcement of the ordinance by its terms is dependent upon the penalty prescribed.

The Garage Ordinance is Ultra Vires.

The first section of the ordinance is:

“Section 1. That it shall be unlawful to erect any building, or alter, rebuild, extend or add to any building southeasterly of Asbury Avenue in Ocean City for the purpose of carrying on the business of a public garage.”

Asbury Avenue runs parallel with the ocean and is about seven miles in length. The streets running parallel with Asbury Avenue and beginning on the bay side are as follows: Pleasure, Bay, Simpson, Haven, West, Asbury, Central, Wesley, Ocean and Atlantic Avenues.

The ordinance does not on its face disclose the reason for its adoption but the city has endeavored by its proofs to justify it on the sole ground that the dwellings on the southerly side of Asbury Avenue are more expensive and of a higher class than those on the northerly side of that street and that for aesthetic reasons a public garage should not be allowed in the prohibited district.

Mr. Justice Swayze speaking for the Court of Appeals in *Passaic vs. Paterson Bill Posting Company*, 72 L. 285, said:

“We think the control attempted to be exercised is in excess of that essential to effect the security of the public. It is probable that the enactment of section 1 of the ordinance was due rather to aesthetic considerations than to consideration of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.”

The Building Code is Unreasonable, Unjustly Discriminatory and has the Effect of Depriving a Land Owner of his Land for a Lawful Business Purpose, and is a Violation of both the State and Federal Constitutions.

There is no expressed authority in the charter act for the ordinance and it does not amount to a reasonable exercise of the police power. Asbury Avenue is several miles long and much of the land

on the southeasterly side is undeveloped and it would be possible to construct a garage in some locations so that it would be almost a mile from the nearest building. The business is a lawful one, *Diocese of Trenton vs. Toman*, 74 Equity, 702 (70 Atl. 606), and there is no suggestion either in the ordinance or in the proofs why it should not be permitted on the south side of Asbury Avenue as well as on the north side of that street.

The ordinance does not declare the business to be a nuisance and it does not contain a prohibition against the business. The prohibition is against the construction of a building to be used for the purpose of a garage. Whether the building is actually used for that purpose is of no consequence, as the offense under the ordinance is made out when the owner constructs a building having in contemplation a public garage. Should a building be thus constructed and never used, the owner would be liable, while, on the other hand, an existing building could be used for the business without the slightest offense to the ordinance.

It is not contended on the part of the city that there is any justification for the ordinance as a protection to persons and property or as a health measure. The only excuse offered for this most unusual piece of legislation is that the residents on the south side did not want any more garages and desired to have them limited to the north side, where the dwellings are not quite so expensive and the residents are not quite so high-toned. The division of the city into districts is arbitrary and fanciful and the ordinance is unreasonable.

This Court, in *State vs. Jersey City*, 29 Law, 170, at page 173, said:

“Did the legislature intend to confer absolute power upon the common council? Can it declare every four-story brick dwelling house a nuisance, and direct and provide for its removal? Can it declare every covered carriage standing upon any lot in the city, or passing along the streets at a greater speed than one mile per hour, or stopping in any street of the city for one moment, a nuisance? And yet it is not perceived that any sound distinction can be made which will permit the exercise of the power in the cases provided in the ordinance, and not in those supposed.”

In the statute under consideration in that case the city had power to declare what should be nuisances and the Court held:

“The common council, in the exercise of the power to declare nuisances, may not declare anything such which cannot be detrimental to the health of the city, or dangerous to its citizens, or a public inconvenience.”

The Court also said, on page 176:

“Whether an ordinance, confined by its terms to a particular part or street of the city, can be said to be a general law may admit of some doubt. If it may be limited to one street, why not to one house?”

* * * *

At the time of the adoption of the ordinance there was in operation a large garage located south of Asbury Avenue, and about 375 feet from prosecutor's property. That garage has a capacity of over 100 machines and has been in operation continuously

since the passage of the ordinance without the slightest objection on the part of the city, and most of the dwellings in the immediate neighborhood were built after the erection of the garage building. The ordinance is clearly discriminatory and gives a monopoly to the garages in existence at the time it was passed.

* * * *

Public garages are necessary to meet a public demand and it cannot be said that they are always a nuisance. Every city of any size has about as many such places as the patronage will support. Ocean City is not an exception. It permits garage buildings northeasterly of Asbury Avenue and allows, without any objection whatever, all of the garages, which were in existence at the time of the adoption of the ordinance, to continue in business on the south side. The ordinance is not one of regulation but is one of positive prohibition. Notwithstanding a building may be entirely fireproof and constructed in such manner as to create no injury to persons, property or health, it may not be built under this ordinance, as the prohibition is that "no building" shall be constructed, etc., and the city has arbitrarily decided that under no circumstances can an owner make a certain use of his property, although that use may be lawful and consistent with every public interest. The ordinance is entirely too sweeping in its character and the effect of it is to deprive an owner of the lawful use of his property.

Mr. Justice Van Syckel, speaking for this Court, in *Bill Posting Sign Company vs. Atlantic City*, 58 Atl. 342, said:

"There is nothing in the sections of the Atlantic City ordinance subsequent to the one

above set forth which shows that it was passed to guard against any public danger or injury which may be suppressed in the exercise of a police power, nor is there anything to show that the prohibited sign could in any respect be dangerous to the public. The ordinance is too sweeping, and must be set aside as unreasonable and void, in so far as it authorizes interference with the prosecutor's property in this case."

The Court of Errors and Appeals, in *Passaic vs. Paterson Bill Posting Company*, 72 Law, 285, states the law as follows:

"It is obvious that the effect of the ordinance is to deprive the landowner of the ordinary use for a lawful business purpose of a portion of his land. Such deprivation is a taking within the meaning of the constitutional provision (*Trenton Water Power Co. vs. Raff*, 7 Vroom, 335, approved by this Court in *Pennsylvania Railroad Co. vs. Angel*, 14 Stew. Eq. 316), and where no compensation is given to the landowner the taking can only be justified if it is done in the exercise of the police power of the state.

"Upon this question the legal rule is accurately stated in the opinion of the Supreme Court in this case, as follows: 'The true rule to be extracted from the cases, and the one abundantly supported by them, is that when the statutes are obviously intended to provide for the public safety, and the ordinances prescribed under them are reasonable and in compliance with their purposes, both the statutes and the ordinances are lawful and must be given due effect. When the control attempted to be ex-

exercised over private rights is in excess of that essential to effectuate such legitimate authority, it deprives the owner of his property by circumscribing the use of it, without giving him the just compensation secured to him in such case by the organic law.' "

Respectfully submitted,

C. L. COLE,

BABCOCK & CHAMPION,

Attorneys for Prosecutor.— *Appellants*

NEW JERSEY COURT OF ERRORS AND
APPEALS

NINTH STREET IMPROVE-
MENT COMPANY, a cor-
poration,

Prosecutor,

vs.

CITY OF OCEAN CITY,

Respondent.

ON APPEAL FROM

SUPREME COURT.

BRIEF FOR RESPONDENT

The evidence and facts show:—

That public garages, in the city of Ocean City, have their entrances flush with the sidewalks, and automobiles entering or leaving, pass over the sidewalks;

Scull p. 19; Brick p. 38; Headley p. 37;
Townsend p. 44.

That automobiles going to or from these garages interfere with persons going over the sidewalks;

Scull p. 19; Brick p. 38; Headley p. 37.

That these garages sell oil and gasoline.

Scull p. 19.

That these garages depreciate the value of property, and in three instances owners of property have

been compelled to purchase land, where a garage was contemplated to be erected, in order to save their property from depreciation.

Fogg pp. 23 and 24; Headley p. 36; Adams p. 46; Townsend p. 44; Smith pp. 41 and 42.

That in one instance a proposed erection of a garage was used to sell real estate in April, 1913.

Scull pp. 47 and 48.

That prosecutor has not been convicted for violating ordinances.

Barrows p. 35.

That in the section lying northwesterly of Asbury Avenue, Ocean City, are located: Electric light plant, water plant, sewer plant, disposal plant, gas plant, two depots, baseball park, four lumber yards, two ice cream factories, two coal yards, three milk dairies, livery stables, storage houses, two planing mills, two cement block factories, two fish houses, two publishing establishments, four automobile garages.

Scull p. 18.

That the section lying southeasterly of Asbury Avenue, in Ocean City, is the residential and hotel section.

Brick pp. 38 and 39.

That persons in the hotel and residential section use the sidewalks to reach the public promenade or boardwalk.

Brick p. 40; Scull pp. 20 and 21.

That automobiles going to and from these public garages, over the sidewalks, make it dangerous to pedestrians.

Headley p. 37.

That the prosecutor is the owner of land in the restricted district, having purchased the property August 1, 1916, by unrecorded deed.

P. 16.

That Andrew R. Scull, contractor, made application to the building inspector of Ocean City, for a permit to erect a public garage on the land of prosecutor in the restricted district, but the permit was refused by the building inspector, because of the ordinance regulating public garages. The same contractor, subsequently, made application to the building inspector for a permit to erect a store on the same premises, and exhibited to the building inspector a plan of the building showing the words "plan for a store building to be erected at Ocean City, New Jersey, Andrew R. Scull, builder, Ocean City, New Jersey," imprinted thereon, and permit was granted.

After the completion of this building, designated as store, it was immediately occupied as a public garage. The same contractor again made application to the building inspector to erect on same premises an addition to the building, as erected, and he exhibited another set of plans, to the building inspector, showing the first building and the addition with the words, "sketch to an alteration and an addition to a store building located at Ninth Street and Ocean Avenue."

The building inspector discovered, that the plans indicated the addition to be a building for garage

purposes and the contractor was refused the permit.

The contractor, without permit, began to erect the addition not only to the extent of the dimensions covered by the plans but covering an additional space for a building of about 60 feet by 90 feet.

Johnson pp. 29 to 34, inclusive.

That the Court of Chancery, of this state, granted a restraining order against John R. Groves, Edward M. Sutton, Louis H. Miller, and the contractor, Andrew R. Scull; the first three named being the same as the Ninth Street Improvements Co., a corporation, and in this chancery suit answer and replication have been filed. P. 16. The bill was filed after August 1. P. 59.

That the city of Ocean City has adopted Walsh Act. P. 17.

That the building code ordinance was passed March 7, 1904. P. 10.

That the garage ordinance was passed October 23, 1913, by board of commissioners, page 14.

That gasoline at public garages is sold at curb from tanks; and oil sold by measure carried from garages.

Scull p. 20.

That on sidewalk at garage, Ninth and Boardwalk, oil being on sidewalk and the condition obnoxious to travel.

Brick p. 38.

That public garage at Ninth and Boardwalk was built 1910 and the last alteration 1912.

Fogg p. 23.

AS TO THE BUILDING CODE.

Reason (a) "Ocean City operates under the act of 1897 (P. L. 1897, p. 46). The ordinance was introduced and passed on first, second and third reading at the same meeting of council."

Reason (b) "The ordinance was amended and passed at the same meeting of the amendment."

The return does not show that the ordinance was introduced and passed on first, second and third reading at the same meeting of council. The minutes show (p. 3), that the building ordinance was introduced and read on first reading, January 29, 1904, and passed on second and third reading on March 7, 1904.

The law of 1897 only requires an ordinance to be read at a meeting previous to its adoption.

Sec. 15, law 1897, p. 46 at p. 50 reads:

"* * * * * Every ordinance shall be read three times before its final passage; no ordinance shall be finally passed until a subsequent meeting to that which it may be introduced. * * * * *"

While the minutes of March 7 show ordinance being accepted on first reading on same date as its final passage, yet, this acceptance was superfluous as three readings, only, being the statutory requirement; and the first reading to be, as was done in this case, at a meeting previous to its final passage.

It is true, that the ordinance was amended on its second reading, but the amendments were trivial and the amendments did not substantially change the ordinance as it was first presented and first read.

The ordinance contains twenty-six sections and the only amendments made were to insert in sec. 7, after the words "buildings," the words "or additions thereto"; and in the same section, by striking out the words "to and" and "face" by inserting "on any lot facing"; and in sec. 10 by changing the word "eighteen" to read "sixteen," that open hearths should be at least 16 inches open instead of 18 inches. (p. 3.)

"An ordinance will not be invalidated because when finally passed it is not in exactly the same form as when introduced, provided the changes are not material, but any material or substantial difference between the ordinance originally introduced and that passed will render the passage void if the ordinance in the form in which it was finally passed has not been before the council for the required time."

Am. & Eng. Ency. of Law, Vol. 21, p. 962.
State vs. Jersey City, 26 N. J. L. 444 at 448;
Cowen vs. Wildwood, 60 N. J. L. 365.

If these two sections were illegally amended this does not make the ordinance void *in toto*.

If, however, the ordinance at the time of its passage was void because of the irregularity of its passage, yet, such irregularity was cured when the city of Ocean City adopted the commission form of government act, which was in this instance a curative statute. And in this particular the Supreme Court said:

"The reasons filed by the prosecutor are intended to attack the validity of the ordinances in question, as well as their reasonableness. The building code was passed on March 7th, 1904, in pursuance of the provisions of the charter of

the city. The Walsh Act was passed in 1911. (P. L. 1911, p. 462.) Its adoption by the city of Ocean City resulted in confirming and validating such local legislation as the city governing body had passed, and which was then operative in the municipality. Whatever formal defects may have existed in the procedure necessary to pass such ordinance, were cured by the adoption, *ipso facto*, of the new legislation. Section 8, L. 1911, p. 471."

The ordinance was passed in 1904; and the Walsh Act was passed by the legislature in 1911.

The last portion of sec. 8, p. 471, laws of 1911 (though sec. 8 has been amended but not in this particular) reads:

"All ordinances or resolutions heretofore passed in any such cities, not inconsistent with the rights and powers herein granted shall remain in full force and effect until altered or repealed by the commissioners in the manner herein provided."

Reason (c) "It gives the magistrate or officer hearing complaints for alleged violations the right to impose a fine or imprisonment or both at his discretion and is, therefore, in contravention of the charter act of Ocean City."

Section 25 of the building ordinance gives the magistrate or judicial officer the right to impose "a fine not exceeding two hundred (\$200.00) dollars, and imprisonment not exceeding thirty days, or both, at the discretion of the magistrate or judicial officer trying the offence, for each and every offence."

The law of 1897, p. 46 at 58, section 20, reads:

“* * * * they may prescribe a penalty or penalties for the violation thereof, either by imprisonment in the city or county jail not exceeding thirty days, or by a fine not exceeding two hundred dollars, and imprisonment in the city or county jail not exceeding thirty days in default of the payment of such fine, and it shall be lawful for the common council to authorize and empower the officer before whom any person or persons offending may be tried, on conviction, to impose any fine, in the discretion of such officer, to the maximum fixed in such ordinance, or to imprison for any term less than the term fixed therein; * * * *”

The penalty clause is without doubt in excess of the authority under the statute, but such does not render the ordinance void.

The early case of *Staats vs. Borough of Washington*, 44 N. J. L. 605 (1882), declared an ordinance void because a provision of penalty was in excess of statute. The following year in *Staats vs. Washington*, (another case), 45 N. J. L. 319, Court held, that an ordinance providing a penalty in excess of statute was void only as the part unlawfully enacted because of the penalty being independent and separable; the case was affirmed, 46 N. J. L. 209. In the case of *Tomlin vs. City of Cape May*, 63 N. J. L. 429, an ordinance was declared void because of a penalty in excess of the one prescribed by statute and giving discretionary power to the magistrate, but the question as to the penalty being separable was not brought to the attention of the Court.

The Court of Errors and Appeals in *Doran vs. City of Camden*, 64 N. J. L. p. 666, said as to an ordinance with penalties in excess of statute:

“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.”

And from later cases it seems that the question as to the validity of an ordinance, when the penalty is excessive of the statute, does not make the ordinance void and the only question to be raised is whether or not the magistrate imposed a penalty not authorized by law. If the penalty imposed for violating a municipal ordinance is the penalty stated in the ordinance, and authorized by law, although in the ordinance there is an unlawful penalty the conviction and sentence are valid.

Rosencrans vs. Eatontown, 80 N. J. L. 227;
Skill Rolling Chair Co. vs. Atlantic City,
94 Atl. Rep. 314, affirmed 96 Atl. Rep.
293.

The penalties in the ordinance are separable as the plain reading of the penalty clause indicates. A “*comma*” is used to separate the penalty of fine from the penalty of imprisonment, and the words “*or both*” are used.

As the prosecutor has not been convicted for the violation of the ordinance the writ should be dismissed and then test the validity of the ordinance, upon a review of a conviction.

Hamblet vs. Asbury Park, 61 N. J. L. 502;
Neumann vs. Hoboken, 82 N. J. L. 275 at
278.

The above cases follow the Court of Errs. & Appls., *Penna. R. Co. vs. Jersey City*, 47 N. J. L. 286 at 289, wherein the Court said:

“If the complaint of the plaintiff-in-error be well founded therein, the remedy is to object to the validity of the ordinance in the penal suits for the obstruction of the streets referred to, and in that mode place before the Courts the limited question whether the ordinance be not a nullity with respect to that particular locality.”

Reason (d) “Ocean City was without lawful right to pass the ordinance.”

The ordinance known as the building code was passed in the year of 1904. By the charter act of Ocean City, laws of 1897, p. 46, by Sec. 18, XXXII, reads:

“To regulate and control the manner of building dwelling houses and other buildings,”

and this taken in connection with Sec. 19 of the same act, being the general welfare clause, gives the city of Ocean City ample authority to pass the ordinance.

State, Hubbard vs. Patterson, 45 N. J. L. 310.

GARAGE ORDINANCE.

The reasons (a), (b), (d), (e), and (f), can be grouped and one answer made thereto.

(a) “It is unauthorized by law and is ultra vires.”

(b) “It deprives the owner of property by circumscribing the use of it without giving just compensation secured in such cases by the organic law.”

(d) "Its effect is to deprive the landowner of the ordinary for a lawful business purpose of a portion of his land and is a taking within the meaning of paragraph 16 of article 1 of constitution of the state of New Jersey, as amended."

(e) "It is unjustly discriminatory, unreasonable and tends to create a monopoly to the public garages in the same location and in existence at the time of its passage."

(f) "It is in violation of the 14th amendment of the constitution of the United States in that it denies equal protection of the law and has the effect of taking property without due process of law."

If the ordinance is within the police power, the above reasons are of no avail.

Police power is a "law of overruling necessity" and defined when applied to constitutional law as —

"Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires."

8 Cyc. P. 863.

"The term police power as understood in American constitutional law, means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all."

State vs. Wogener, 46 L. R. A. 442 at 445.

As to the limitations of police power of municipalities, Dillon on municipal corporations Sec. 660, says:

“ * * * * the limitations of the police power has never been defined, and it is probable that no general limit can be placed upon it other than the requirement that its exercise must be confined to those matters which have a real and substantial relation to the public welfare.”

The exercise of police power is not confined to matters strictly relating to public health, morals and peace.

“And in the exercise of its police powers a state is not confined to matters relating strictly to the public health, morals, and peace, but, as has been said, there may be interference whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature, to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.”

State vs. Wagener, 46 L. R. A. 442 at 445.

The police power as apposed to the United States constitution, 14th amendment, the Supreme Court of the United States in *Barbier vs. Conolly*, 113 U. S. 27, said:

“But neither the amendment—broad and comprehensive as it is nor any other amendment, was designed to interfere with the powers of the state, sometimes termed its police powers.”

In New Jersey the exercise of the police powers is defined by the Court of Errors and Appeals, in *City*

of *Passaic vs. Paterson Bill Posting Co.*, 62 Atl. Rep. 267 at 268, as:

“The true rule to be extracted from the cases, and the one abundantly supported by them, is that when statutes are obviously intended to provide for the public safety, and the ordinances prescribed under them are reasonable and in compliance with their purposes, both the statutes and the ordinances are lawful, and must be given due effect. When the control attempted to be exercised over private rights is in excess of that essential to effectuate such legitimate authority, it deprives the owner of his property, by circumscribing the use of it, without giving him the just compensation secured to him in such case by the organic law.”

The question resolves itself whether the garage ordinance comes within the police power of city of Ocean City.

The case of *Summerville vs. Pressley*, 8 L. R. A. 854, (S. C.) is a case in point where a municipal corporation passed an ordinance, under its general welfare clause, restricting the cultivation of land, and the ordinance was upheld.

Municipal corporations only exercise police power as may be expressly delegated to it by the state, or by implication.

28 Cyc. 693.

The law of 1897, p. 46 at p. 57, XXXII, reads:

“ * * * * * to regulate or prohibit the manufacture, sale or use of fireworks and the use of firearms in said city; to regulate or prohibit the keeping or conveying gunpowder, comphene, benzine, naphtha, *gasoline*, coal oil, spirit gas, petro-

leum and other dangerous materials and the use of candles in barns, stables and other buildings.”

The public garages in Ocean City, by the evidence, sell *gasoline*, and the garage ordinance regulates the keeping thereof, although the municipality could prohibit.

Sec. 18, XXXII of law 1897, refers to the regulation and control of dwelling houses and other buildings, and also to keeping gasoline. The case of *Neumann vs. Hoboken*, 82 N. J. L. 276, where an ordinance prohibited the manufacture, repair or renovating of mattresses or bedding within twenty-five feet of any building of first grade, or hotel, tenement or dwelling or office, is not unlike the present case. One case makes restriction of land, of twenty-five feet, by the use of certain buildings, by name, as boundaries, while in the ordinance, under review, an avenue is used as boundary.

The garage ordinance regulates the use of the sidewalks. That an ordinance is not invalid because of a sidewalk regulation as to certain localities, within a municipality, was so declared in *Billington vs. Miller*, 67 Atl. Rep. 935 (N. J. Sup. Ct.) and the Court held the ordinance to be reasonable. And in *Ivins vs. Trenton*, 68 N. J. L. 561, affirmed 69 N. J. L. 451, the Court sustained an ordinance regulating signs across sidewalks by prohibiting them in a certain locality. By the evidence automobiles pass over the sidewalks to enter or leave the public garages; persons are in danger of accidents; gasoline is stored in tanks at the curb and there sold; oil is sold by delivery over the sidewalks. And the prohibition of garages in the southeasterly section of Asbury Avenue (the residential and hotel section where persons use the streets in such section, to

reach the boardwalk) is a regulation for safety of persons.

Public garages, in Ocean City, are subject to municipal regulation because of being under the head of nuisances.

“Any trade or business, however lawful, which, from the place or manner in which it is carried on, materially injures the property of others, or affects their health, or renders the enjoyment of life physically uncomfortable, is a nuisance, which it is the duty of this Court to restrain.”

Attorney-General vs. Taylor, 20 N. J. E. 415 at 417.

And on same page the Chancellor further said:

“I have no doubt but that a slaughter house or other unquestionable nuisance erected so near lots held for sale as building lots would very much affect the sale of them, and therefore would, in fact, be an injury to the owner; but whether it is an injury which the law would redress, must be settled by the courts of law.”

The various harms, by the evidence, attributed to the public garages, in Ocean City, make public garages, in Ocean City, nuisances; the garage must be responsible.

“One who creates a nuisance on the highway cannot shelter himself behind the claim that someone else is under a legal liability to remove it.”

Joyce on Nuisances, Sec. 217.

“A nuisance is public where it affects the rights enjoyed by citizens as part of the public,

that is the rights to which every citizen is entitled."

29 Cyc. 1152.

Nuisances may be classed:

1. "Those which in their nature nuisances per se and are so denounced by the common law or by statute;"

2. "Those acts and things including certain trades and occupations, such as slaughter houses, livery stables, laundries, soap and glue factories, &c., which in their nature may fairly be regarded as tending to prejudice the public health and comfort, when carried on in populous centres, and about which, while impartial minds may differ, yet they may honestly be regarded as noxious and hurtful to the public interests, and as nuisances in fact."

3. "Those which in their locality, surroundings, or the manner in which they may be maintained, managed, conducted, &c.

Dillon on Municipal Corporations, Sec. 690.

" * * * * The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance * * * *"

Dillon on Municipal Corporations, Sec. 689.

The garage ordinance is well within the power granted to Ocean City under the Walsh act, "to declare and to prevent and summarily to abate nuisances; to preserve and enforce the good government

and general welfare, order and security of such city." Sec. 8.

The public garage is a new condition but not beyond the police power.

"The police power is sufficient and comprehensive to embrace new subjects as conditions demand."

McQuillon on Municipal Corporations, Sec. 665.

What more could be comprehended under the term inherent right of the state, as to police power, than to pass legislation, *to declare and prevent and to summarily abate nuisances; to preserve and enforce the good government and general welfare, order and security of the state?* The above would affect, especially, *under the term of general welfare, all the rights of a person as to his liberty or his property.* This being true the city of Ocean City, under section 8 of the Walsh act, secured from the state of New Jersey all the police power which the state had by virtue of its inherent right.

Ruling Case Law Vol. 6, 204, says:

"The police power extends to the enactment of laws which promote public welfare, as distinguished from the interests of a particular class. The power of the legislature in this respect is very great, and its discretion, in the employment of means to that end is very large, and it may enact laws to preserve and promote the public welfare, even at the expense of private rights."

In the case of *Storer vs. Downey*, 102 N. E. 321 (Mass.), relative to the locating of a garage, by municipality, under authority of law of Mass., R. L.

c. 104, the Court in speaking of automobiles and garages said:

“Oil and gasoline, almost inevitably stored and used in them, are so highly inflammable and explosive that they may increase the danger of fire, no matter how careful the building being constructed nor how non-combustible its materials, although lawful and necessary buildings, they are of such a character that regulation of the place of their erection and use are well with settled principles as to the police power.”

See also *O'Hara vs. Nelson*, 63 Atl. 836 (N. J. E.).

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The latest case of the Supreme Court, *Cusack vs. City of Chicago U. S.*, 242 (No. 7 page 527 advanced sheets) sustained an ordinance prohibiting the erecting of any bill board or sign board in any block on any public street in which one-half of the buildings on both sides of the street were used exclusively for residential purposes, without first obtaining the consent of the owners or duly authorized agents of the property on both sides of the street in the block, in which street bill boards or sign boards were to be erected.

The Supreme Court ^{vs.} said relative to this ordinance as follows:

“The provision of the Walsh act, it is assumed, presented the basic law for the adoption of this ordinance. Section 8 of that act provides that the city adopting the act shall have power to enact and enforce ‘all ordinances necessary for the protection of life, health and property,’ to declare, prevent and abate nuisances, and to preserve and enforce ‘the good government,

general welfare, order and security of the city,' by the passage of ordinances consonant with 'the laws applicable to all cities of this state,' and the 'provisions of the constitution.'

"The provisions manifestly convey in unmistakable terms, a liberal concession of governmental authority in aid of the reasonable and constitutional exercises of the police power, by the municipalities adopting the provisions of the act.

"The definition and limitation of that power under our constitutions, state and federal, have presented such a prolific subject for judicial investigation and discussion, that no more need be said upon the topic here, than that in our judgment the erection and management of a garage, with all its incidental dangers and inconveniences to adjoining property and public travel, are manifestly matters properly cognizable by the municipal governing body, as a subject for regulation in the public interest, under the police power expressly conferred, as in this instance, or reasonably implied *ex necessitate* in aid of the general welfare against dangers recognized and obvious, to persons and property."

The regulation as to locality of a business, or building, which without restriction depreciates value of property is of vital importance to any municipality. It is of public importance. In years past not much consideration was given by municipal officers, or the public, to that branch of municipal affairs, the financial. Without money from taxation fire departments cannot be maintained; the health department cannot give protection against diseases; streets cannot be cleaned; garbage cannot be col-

lected; education cannot be supported; the county cannot successfully conduct and manage its affairs.

In fact, the very existence and prosperity and welfare of a municipality depends upon money from taxation, to the same extent as any business depends upon money for success. Anything which depreciates the value of property, in a municipality, means less money for municipal affairs. And in order for the city of Ocean City, or any other municipality, to have property within its jurisdiction valuable, and not depreciating, it is the duty of the municipal officers to pass such ordinances, from a public standpoint, as will preserve valuations and to prevent anything which would tend to impair valuations.

As to reasons

(b) "It is unreasonable."

(g) "It does not disclose on its face the reason for its passage and attempts the exercise of a control over private rights in excess of the authority of the city to legislate under the statute or under its general police power."

If the ordinance is within the police power of the city of Ocean City its reasonableness is presumed, and the burden is on the prosecutor to show it unreasonable.

Neuman vs. Hoboken, 82, N. J. L. 275 at 278.

The ordinance not disclosing on its face the reason for its passage, its reasonableness is considered by the facts and circumstances surrounding it.

In 1910 a public garage, known as "Fogg's Garage," was erected in the now restricted district; in 1912 was the last alteration. The evidence of Scull and Brick, indicates the obstruction to travel on the sidewalk caused by this garage. In April, 1913,

another garage was contemplated in the now restricted district. And it is but reasonable to presume that the commissioners of Ocean City learned of these conditions, and also took in consideration how public garages would depreciate property, and consequently passed the ordinance.

While the ordinance, in form, could be improved, (not any solicitor of Ocean City being chargeable for its form), yet, in face of the objection as to form it is within the legal principles of police power.

The ordinance was not aimed at the prosecutor as it was passed in 1913 and prosecutor secured title in 1916.

The appellant (prosecutor below) claims the garage ordinance deprives it of the use of property and is in violation of the appellant's constitutional right. This contention would be well founded if the use to which the property was to be made did not interfere with the public right. In the present case the private right of the appellant combats the public right and either one of these rights must fall. Because of the city of Ocean City depending upon money from taxation, which is for the general public, as measured by the individual private right of which the appellant is deprived, under the ordinance, is so small as to appellant's loss and so great as to respondent's benefit, that the private right of appellant must give way to the public right of respondent.

The opinion of the Supreme Court should be affirmed with respondent's costs.

Respectfully submitted,

ANDREW C. BOSWELL,

Attorney for Respondent.

W. HOLT APGAR,

Of Counsel.



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