Commissioner Burnett
Sent to Regular Mailing List

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
744 Broad Street, Newark, N. J.

BULLETIN NUMBER 122. June 5, 1936

1. SOLICITORS' PERMITS -- SALESMEN EMPLOYED BY FOREIGN DEALERS NOT HOLDING NEW JERSEY WHOLESALE OR MANUFACTURERS' LICENSES MAY NOT OBTAIN SOLICITORS' PERMITS -- DELEGATION TO COMMISSIONER OF AUTHORITY TO PROMULGATE RULES AND REGULATIONS IS ACCOMPANIED BY PROPER STANDARD SET FORTH IN THE CONTROL ACT -- COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IS INAPPLICABLE TO INTERSTATE LIQUOR TRANSACTIONS.

May 27, 1936.

Messrs. Pitney, Hardin & Skinner,
Newark, New Jersey.

Gentlemen: Re: Premier Pabst Sales Co.

The evidence pertaining to the activities within this State of Premier Pabst Sales Co. and the arguments and authorities contained in your brief on its behalf have been carefully considered.

Premier Pabst Sales Co. is a sales organization of Premier Pabst Corporation operating breweries in midwestern States. The sales company has no office or warehouse in New Jersey. However, it sells malt alcoholic beverages in New Jersey to licensed wholesalers and its salesmen visit such wholesalers regularly. Premier Pabst Sales Co. concedes that on occasion these salesmen have taken orders from licensed wholesalers and transmitted them by telephone to the New York office of Premier Pabst Sales Co. for confirmation, but denies that such orders were solicited. However, it is evident that the salesmen solicited, on behalf of Premier Pabst Sales Co., the purchase of malt alcoholic beverages in conjunction with other activities. Thus, it satisfactorily appears that they have suggested that deficiencies in stock on hand be filled and have, in general, "boosted" the products of their employer. In addition, they have visited licensed retailers and solicited their purchase of Pabst products. Orders received by them from retailers have been turned over to licensed wholesalers acting as distributors of Pabst products within this State.

The sales company was duly advised by the Department that its salesmen were not permitted to solicit within this State in the absence of solicitors' permits and that such permits could not be obtained unless the sales company held a New Jersey limited wholesale license. Thereupon, the sales company applied for and obtained a limited wholesale license without prejudice, however, to its right to contend that the Commissioner could not properly require a license from the sales company under the facts presented. After the issuance of the limited wholesale license, solicitors' permits were duly obtained by the solicitors employed by the sales company.

The sales company contends that the Commissioner's ruling restricting the issuance of solicitors' permits to agents and employees of duly licensed manufacturers or wholesalers is void on the following grounds:

"(A) The effect of it is to add to and change the Act of 1935 requiring and providing for the issuance of solicitors' permits.

"(B) It exceeds the limits laid down by the Legislature in the 1935 Act or the 1933 Act to which this is a supplement, in the delegation of power to the Commissioner. Insofar as no limits are set by the Legislature in delegating this power, the delegation is void and the ruling adopted by the Commissioner thereunder is void.

"(C) It is unreasonable and therefore void.

"(D) It and the Act of 1935, under which it was adopted, bear directly on interstate commerce and both are therefore void."

A.

An examination of the provisions of the Control Act, as amended and supplemented, clearly displays that the Commissioner's regulation restricting the issuance of solicitors' permits to employees and agents of New Jersey licensed manufacturers and wholesalers does not in anywise add to the express legislative provisions. Section 1(v) of the Control Act provides that "the solicitation or acceptance of an order for an alcoholic beverage" shall constitute a sale. When the sales company solicits wholesalers within this State or accepts orders from them within this State, it engages in conduct unlawful unless licensed. Similarly, when its salesmen, acting on its behalf, solicit or accept orders from retailers it engages in conduct which is unlawful unless licensed. The fact that the orders are turned over to wholesalers, who in turn purchase from the sales company, would seem to be of no significance. We are concerned with the substance of the transactions and not the form.

In the light of the foregoing, the issuance of a solicitor's permit to an employee of an unlicensed company would be equivalent to the authorization of conduct expressly prohibited by the Act. See Bulletin #89, item #5. Consequently, rule #4 of the Rules Governing Solicitors' Permits (Compiled Rules, Regulations and Instructions, p. 17), in restricting the issuance of solicitors' permits to agents or employees of duly licensed manufacturers or wholesalers in no sense adds or changes the Control Act; it merely effects observance of its explicit provisions.

B.

We are not disposed to dispute the authorities cited under Point II of your brief to the effect that delegated power to make rules and regulations must be accompanied by a proper standard. We disagree, however, with your contention that the Legislature has failed to provide any standard in so far as the delegated authority to promulgate rules and regulations governing solicitors' permits is concerned. The Control Act itself (P.L. 1933, c. 436, as amended) contains an adequate standard within the principles announced in the numerous cases culminating in State of New Jersey ex rel. State Board of Milk Control vs. Newark Milk Company, 118 N.J. Eq. 504 (E. & A. 1935). Section 3 provides that "it shall be the duty of the Commissioner to supervise the manufacture, distribution and sale of alcoholic beverages in such manner as to promote temperance and eliminate the racketeer and bootlegger". Section 36 provides that "the Commissioner shall have power to make such rules and regulations as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages and the enforcement of the act" and enumerates various subjects which may be regulated. The supplement pertaining to solicitors' permits (P.L. 1935, c. 436) provides that such permits may be issued "subject to rules and regulations". This phrase is directly referable to the foregoing provisions of the Act and contemplates

that the Commissioner shall have power to promulgate rules and regulations governing solicitors' permits subject to the standards and provisions set forth in the Control Act. The supplement is not only calculated to afford to the Commissioner control over the individual solicitors, but also furnishes an effective means of insuring full compliance by unlicensed dealers with the provisions of the Act. Even in the absence of a regulation, the Commissioner would be under a duty to prevent solicitation within this State by employees of companies not licensed in New Jersey. This being so, the promulgation of a regulation prohibiting solicitors' permits to such employees is obviously a proper exercise of the Commissioner's powers.

C.

The third point of your brief is devoted to the contention that the restriction against the issuance of solicitors' permits to employees of unlicensed dealers is unreasonable. This contention rests expressly upon the premise that there is nothing in the Act requiring an employer who sends employees into this State to solicit the purchase and sale of alcoholic beverages to be licensed. The discussion under the preceding points amply discloses that the premise is erroneous. The contention based thereon is consequently entirely without foundation.

D.

Your last contention seems to be that the statutory requirement prohibiting solicitation by individuals without solicitors' permits is unconstitutional in so far as interstate transactions are concerned. This contention is in complete disregard of the Webb-Kenyon Act of 1913 (37 Stat. 699) and the Second Section of the 21st Amendment. See Bulletin #102, Item #7. In effect, the Webb-Kenyon Act renders the commerce clause of the United States Constitution inapplicable to interstate shipments of liquor. See Clark Distilling Co. vs. Western Maryland Railway Co., 242 U.S. 311 (1917), where the court said:

> "The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in expressed terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that Act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce laws of the Constitution."

The Act was sustained (see also Seaboard Airline Railway vs. North Carolina, 245 U.S. 298 (1917))and it is still in effect. Cf. McCormick & Co. vs. Brown, 286 U.S. 131 (1932); Premier Pabst Sales Company vs. Grosscup, infra. Several recent decisions have recognized that under the Webb-Kenyon Act and the Second Section of the 21st Amendment State laws pertaining to the sale of alcoholic beverages may be applied to interstate transactions without infringing upon the commerce clause of the United States Constitution. See Premier Pabst Sales Company vs. Grosscup, 12 F. Supp. 970 (D.Pa. 1935); aff'd on another ground by the United States Supreme Court on May 18, 1936; General Sales & Liquor Co. vs. Becker, (D.C.E.D. Mo. 1936), not yet reported; Philip Blum & Co. Inc. vs. Henry, (D.C.E.D.Wis. 1936), not yet reported; Premier Pabst Sales Co. vs. McNutt, (D.C.S.D.

Ind. 1935), not yet reported; Fry vs. Rosen, 207 Ind. 409, 189 N.E. 375 (1934); appeal dismissed, no substantial federal question involved, 293 U.S. 526.

In the Becker case, the court said:

"Congress has from time to time enlarged its control over interstate commerce and occasionally it seems to have withdrawn its control over such commerce. The Webb-Kenyon Act is such an instance. So far as intoxicating liquors are concerned, when transported in interstate commerce they cease to be under national control to the extent that the states have enacted statutes governing the transportation, sale and use within their boundaries."

Your brief cites no authorities inconsistent with any of the foregoing. The case of State vs. Coleman, 80 N.J.L. 15 (Sup. Ct. 1919) upon which you place almost complete reliance was decided several years prior to the passage of the Webb-Kenyon Act and long prior to the adoption of the 21st Amendment. The case of Real Silk Hosiery Mills vs. Portland, 268 U.S. 325 (1925) did not pertain to alcoholic beverages and consequently has no application to the present issue.

Your application for modification of the Commissioner's rule restricting the issuance of solicitors' permits to employees and agents of licensed wholesalers and manufacturers is denied.

Very truly yours,

D. FREDERICK BURNETT,
Commissioner.

By: Nathan L. Jacobs,
Chief Deputy Commissioner
and Counsel.

2. TRANSPORTATION OF ALCOHOLIC BEVERAGES - THE LAW AND ITS APPLICATION TO REPUTABLE CITIZENS UNAWARE OF THE LIMITATIONS IMPOSED BY THE LAW - HEREIN OF THE HISTORY OF THE EXCEPTION CONCERNING PERSONAL CONSUMPTION.

In the Matter of the Seizure on May 22, 1936 of a Motor Vehicle and its Contents Belonging to JOHN POLLY.

On Application for Return of Seized Property

CONCLUSIONS.

Appearances: John Polly, Pro Se.

BY THE COMMISSIONER:

On May 22nd, 1936, John Polly of Linden purchased 36 quarts of whiskey from a licensed retailer; placed the liquor in his machine and was transporting it when arrested by Department Investigators. His vehicle and liquor were also seized.

He now makes application for the return of the seized property.

Polly is a fireman and resides with his wife and children next door to his mother who conducts a licensed tavern. Attracted by the current price "war" Polly came to Newark; purchased first two cases and, then reflecting on the bargain, bought a third case, all for his personal use and not for his mother; paid for it out of his own monies; and then went out of bounds in transporting more than the permissible maximum quantity which is 12 quarts.

The original Alcoholic Beverage Control Act (P.L. 1933, Ch. 436) made it unlawful to manufacture, sell or transport liquor "except for personal consumption". The exception was inserted in the effort to avoid the hypocrisy and secret evasion of law so prevalent during Prohibition Days and so often justified in private conscience by the entire absence of profit motive.

Experience, however, soon showed abuse. The exception furnished a convenient "out" to every illicit still operator, bathtub rectifier and transporter whose virtuous and practically impregnable defense was always "I am doing this only for my own personal consumption!"

There was no good reason, since Repeal, why anybody should manufacture for personal consumption. The only exception since allowed has been to make light wine. The personal exception was therefore stricken out by the Amendment of 1934 (P.L. 1934, Ch. 85). As regards transportation, the law was amended to permit transportation of alcoholic beverages intended in good faith to be used solely for personal consumption but maximum permissible quantities were limited so that police and all other enforcement agencies would have a regulative test instantly determinable by inspection. The maximum fixed by the Legislature is reasonable, at least from the standpoint of personal consumption, viz: 12 quarts of "hard" liquor and 5 gallons of wine and 1/2 barrel of beer, "within any consecutive period of twenty-four hours". If any person desires to transport quantities in any one day in excess of those mentioned, the State Commissioner, upon being satisfied of the good faith of the applicant and payment of $5.00 may issue a special permit, limited to the temporary particular occasion with appropriate safeguards and conditions. The fact that a permit can be obtained shows that the objective was to make the transportation of excess quantities open and aboveboard rather than a legislative fiat that there was something intrinsically wrong in it.

It is obvious from this survey that the objective of the amendment was, as regards transportation, to keep it within bounds and under control rather than to make malefactors out of good citizens as if they were commercializing violations of the law.

The transportation by Polly of 36 quarts was, therefore, a technical violation. His arrest and the seizure were, therefore, justified.

While the law must be enforced to maintain its self-respect and while, for the sake of public policy, ignorance excuses no one, the penalty of confiscation of vehicle and contents is exceedingly drastic when applied to a reputable citizen transporting legitimate liquor utterly unaware of the limits imposed by the law.

No connection is shown by Polly with his mother's liquor business. His reputation is good. His appearance and demeanor

confirmed, as he testified, that he acted in good faith and was honestly mistaken as to the law. I so find. Technical provisions of the law filter in slowly to any citizen, unless especially interested, or an event like this occurs to focus attention.

I direct that both his vehicle and his liquor be returned to him upon payment of $5.00 for a special permit and upon the payment of the reasonable costs incurred in connection with the seizure.

D. FREDERICK BURNETT,
Dated: May 27, 1936. Commissioner.

3. APPELLATE DECISIONS - BEEKWILDER vs. WAYNE.

HARRY BEEKWILDER,)
Appellant,)
-vs-) ON APPEAL
)
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WAYNE (PASSAIC COUNTY),) CONCLUSIONS
Respondent.)

Donald G. Collester, Esq., Attorney for Appellant.
C. Alfred Wilson, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail consumption license at Mountain View, Wayne Township, N. J.

The respondent's answer declares that the application was denied for two reasons: (1) Because the local ordinance provides that no such license shall be granted for any building or premises "not operated as an established restaurant or dining place"; (2) that the premises sought to be licensed are a "lunch wagon" and the granting of a license to a lunch wagon is socially undesirable.

The premises are a building 60 feet long by 27 feet wide on a plot 175 feet front by 125 feet depth. The super-structure is of the type colloquially known as "lunch-wagon". It rests on a concrete foundation and is approached by brick and stone stairways on three sides. Fifty feet of the cellar is excavated and contains a hot water heating plant and air conditioning unit, as well as the store room. The entire furnishings are of the most modern and expensive type. The place is equipped to render a complete dining service. A daily printed menu is used. There are separate toilet facilities for men and women connected to a septic tank. There are the usual connections with the utilities. The appellant testified that the premises represent an investment of about $25,000. I don't doubt it. The appellant has been operating this "lunch wagon" as a "diner" for approximately six months.

It is the opinion of the issuing authority that a lunch wagon does not comply with the requirement of their local ordinance that the place sought to be licensed for on-premises consumption shall be an "established restaurant or dining place".

This ordinance confining licenses to restaurants, was sustained as wholly reasonable in Zuck v. Wayne, Bulletin 73, item 7. See to the same effect DeBono v. Bridgeton, Bulletin 30, item 9; Barber v. Bridgeton, Bulletin 31, item 1; MacCracken v. Belvidere, Bulletin 38, item 18. In the Zuck case, the premises

were not a restuarant and the appellant admitted that he did not intend to conduct a restaurant. The denial of that application was therefore affirmed.

The instant case requires a determination of what is meant by "established" restaurant or dining place.

"Establish" means to make, erect, or found permanently, MacDonnell v. International & G.N. Ry. Co., 60 Tex. 590, 595; to make stable and firm, to fix or settle unalterably, Appeal of Ambler (Pa.) 2 Walk. 287, 289; to permanently locate, Yazoo & M.V.R. Co. v. Baldwin, 78 Miss. 57, 29 So. 763. An "establishment" is the place in which one is permanently fixed for residence or business; any office or place of business with its fixtures. Benjamin Rose Inst. v. Myers, 92 Ohio St. 252; 110 N.E. 924, 927, L.R.A. 1916 D 1170. "Established" signifies stability, firmness, non-movability, set in place, recognized as set or secured on a firm basis - accepted as true.

The primary idea of a wagon is a vehicle used on land to transport or convey persons or things - a means of conveyance - a vehicle that moves from place to place on wheels and commonly thought of as horse-drawn.

If appellant's premises were a wagon in nature as well as name, I should unhesitatingly declare that, although a dining place, it was not "established". But this "lunch wagon" is no chariot, for all the king's horses and all the king's men could not budge it from its concrete foundation where, sans wheels, sans whiffletree, sans everything, it has apparently come, like the Ark, permanently to rest.

Even if it had wheels, this "wagon" became a building by its attachment to the soil by water, gas and sewer pipes. United Dining Car Co. v. Camden, 103 N.J.L. 232; 136 Atl. 600 (Sup. Ct. 1927). See also Montclair v. Amend, 68 Atl. 1067 (Sup. Ct. 1908); aff'd. 76 N.J.L. 625; 72 Atl. 360 (E. & A. 1909).

It was argued that appellant's premises were not "established" because the super-structure was purchased on a conditional sales agreement for $14,000 with a down payment of $4,000, the balance over a period of four years, which reserved the usual right of removal if payments were defaulted. The argument goes too far for it is just as true of conventional restaurants. Every type of restaurant fixture and equipment, however permanent may seem the character of annexation, can be purchased today on conditional sales agreement similarly reserving the right of removal. After all, the big thing that counts about any fixture is the absence of a present intention to remove it. Even a house can be moved. The removal of appellant's lunch wagon, in the event that he defaults in his payments, will not break the local speed limits. The legal reservation of the right to remove, necessary to the protection of the conditional vendor, does not impart mobility or convert the building into a vehicle or destroy its character as an established restaurant or dining place.

It was argued that appellant's premises were not "established" because the land on which the building is erected is leased by the applicant for a period of five years with an option to purchase. While the applicant for a license must

have a legal interest in the premises sought to be licensed, Procoli v. Trenton, Bulletin 28, item 6 (no interest of any kind); Caplan v. Trenton, Bulletin 29, item 11 (loss of all interest because of adjudication in bankruptcy); Re: Sakin, Bulletin 67, item 13 (termination of applicant's interest after favorable decision on appeal but before actual issuance of the license); White Castle, Inc. v. Clifton, Bulletin 97, item 13 (neither legal nor equitable interest whatsoever), there is no requirement as to the quantum of such interest. Yanuzis v. Camden, Bulletin 37, item 1 (arrangements for leasing on monthly basis); Re: Pierson, Bulletin 38, item 12 (possession as tenant at will subject to tax sale certificate). A lease is sufficient. Re:Pennsauken, Bulletin 48, item 8. The possibility that the appellant may remove the super-structure if he does not exercise the option, in nowise detracts from the conclusion that the premises are an established restaurant or place of business so long as the lease lasts.

The second objection, to wit, that a liquor license for a lunch wagon is socially undesirable appears to have been based on two considerations: (1) that a number of commercial vehicles stop at the lunch wagon; (2) "so that the minors would have a place they could stop in to have lunch without being connected with liquor".

As to the first thought: In Reed v. Way, Bulletin 78, item 2, the issuing authority refused a license for premises located at the apex of heavily traveled concrete highways meeting at an acute angle. Both the State Highway Commission and Motor Vehicle Commissioner Magee had opposed issuance of a liquor license there because of the traffic hazard. The issuing authority denied the license because the inherent danger, resulting from the intersection, would be greatly increased if the sale of alcoholic beverages were permitted at the spot. I affirmed on appeal saying:

> "While there has been no accident at this intersection for a period of some seven years, nevertheless the magnet of a tavern at this apex may well attract the parking of cars on or parallel or near the two converging highways, with consequent congestion and narrowing of the traffic lane and increased dangers attendant upon the alighting and reloading of passengers pulling out of line, followed by the effort to pull out from a closely parked line into open traffic, often difficult under normal conditions and conceivably more so after sojourn at the oasis, all of which imperils life and limb as well as impedes the fast moving through traffic. An ounce of prevention here is worth pounds of cure. Parking grounds in the rear do not eliminate the dangers. The American public is usually in too much of a hurry to use them."

No dangerous traffic conditions are here suggested. The objection that the premises are patronized by commercial drivers is untenable. There is nothing wrong with the breed. It is equally applicable to other restaurants.

As to the second thought. Solicitude for minors is highly commendable, but any policy, however salutary, must be uniformly applied in order to be valid. Vonella v. Long Branch, Bulletin 71, item 12, and cases cited. Lunch wagons

are not to be singled out to care for the needs of minors at the expense of being deprived of licenses which other restaurants may have.

The action of respondent is reversed.

D. FREDERICK BURNETT,
Commissioner.

Dated: May 27, 1936.

4. STATE BEVERAGE DISTRIBUTORS -- PROHIBITED INTERESTS IN OTHER BUSINESS - SALE OF BAR SUPPLIES, RODS, BUNGS AND BEER BOXES PROHIBITED AT PRESENT.

May 12, 1936.

Dear Commissioner:

The question has been asked quite frequently whether or not a beer distributor can come into our store and buy bar supplies, such as, glassware, rods, bungs, and occasionally small beer boxes, and then take these items down to his place of business and resell them at a profit. The reason we are writing is that occasionally they will come into our store after driving thirty or forty miles and take back with them numerous items for that customer who buys beer from them. They turn that merchandise over to their customer for the same price that they paid us. However, they feel that they should be reimbursed with at least a small profit for their trouble. Not wishing to violate any state laws, we are taking the liberty to write for them and ask whether it will be permissible for them to carry some stock on hand for the purpose of making an additional profit for their business.

We also carry a large beer box, the type that is used in all saloons. While some of them would like to job these items, they are still in fear of a violation.

We trust that you will give us an answer on the above matter,

Yours very truly,

CAMDEN BAR SUPPLIES COMPANY.

May 25, 1936.

Camden Bar Supplies Company,
Camden, New Jersey.

Dear Sirs:

I have before me yours of May 12th.

Section 12, sub. 2c, of the Control Act provides with respect to State Beverage Distributors' licenses that such a license shall not be issued to anyone engaged in or interested, directly or indirectly, in any retail business other than the sale of malt alcoholic beverages and non-alcoholic beverages. Hence, as the law now stands, a State Beverage Distributor who sells bar supplies, glassware, rods, bungs and beer boxes at retail would be engaging in other retail business. He would, therefore, be violating the Act,

There is now before the Legislature a Bill (Senate 301) to amend Section 12, sub. 2c, so as to provide, instead, that State Beverage Distributors' licenses shall not be issued for premises in which any retail business (except the sale of malt al-

coholic beverages or non-alcoholic beverages) is carried on. If enacted into law, it would permit State Beverage Distributors to sell bar supplies at retail provided that such sales were made on other premises than those from which their licensed alcoholic beverage business was conducted.

Very truly yours,

D. FREDERICK BURNETT,
Commissioner.

5. LICENSES - LIMITATION OF NUMBER - THE POWER AND RESPONSIBILITY RESTS WITH EACH MUNICIPAL GOVERNING BODY.

May 25, 1936.

Rev. John W. McKechnie,
R. 2, Pemberton, New Jersey.

Dear Mr. McKechnie:

I have before me yours of May 11th.

Three plenary retail consumption licensees in the Village of Pointville where you say the population does not exceed one hundred persons does seem like a lot. I can well appreciate the arguments which could be made against the issuance of more. One would wonder how they all could make an honest living.

But the problem of limiting the number of retail licenses is one which the local municipal authorities in the first instance must decide. The statute confers upon the governing body of each municipality the power to limit the number of licenses within its municipality either by resolution or by ordinance. The statute places upon them the primary responsibility and rightfully so as they, being in a position to know fully the local situation, can best tell just exactly how many licenses the community needs. That is consistent with the recognized principles of Home Rule.

So you should go directly before the Township Committee with your petition that no further licenses be issued. Such questions would not come before me except by way of an appeal from the action of the Township Committee by someone who considered himself aggrieved thereby. Local regulations limiting the number of licenses are not subject to the Commissioner's approval first obtained. Until an appeal is made and both sides have been given full and equal opportunity to be heard, it would be improper for me to express any opinion one way or the other upon the propriety of issuing any particular retail license. I am sure that the Township Committee will give your petition careful consideration.

Licenses have been denied by municipal license issuing authorities on the ground that there were a sufficient number of licensed premises in the vicinity. I have affirmed such denials where such was shown to be in fact the case and the conclusion was eminently proper. See Young v. Pennsauken, Bulletin 114, item 2; Crisonino v. Bayonne, Bulletin 101, item 6; Rajca v. Belleville, Bulletin 101, item 1. See also re Renton, Bulletin 115, item 8.

Very truly yours,

D. FREDERICK BURNETT,
Commissioner.

6. CONSUMPTION LICENSES - IN CONNECTION WITH MERCANTILE BUSINESS - ROLLER SKATING CONTEST IS NOT PROHIBITED.

May 9, 1936.

Dear Sir,

Please be good enough to inform me whether or not a negative ruling has been handed down by your department in the instance where the holder of a Plenary Retail Consumption License desires to conduct a roller skating contest on the premises.

Your immediate attention will be deeply appreciated.

Very truly yours,

Benj. M. Perlstein.

May 25, 1936.

Benj. M. Perlstein, Esq.,
Atlantic City, New Jersey.

Dear Sir:

I have before me yours of May 9th.

The Control Act, Section 13, sub. 1, prohibits the issuance of consumption licenses for premises upon which any mercantile business (except the sale of cigars and cigarettes at retail as an accommodation to patrons, or the retail sale of non-alcoholic beverages as accessory beverages to alcoholic beverages) other than the sale of alcoholic beverages is carried on. The term "mercantile business", in its generally accepted sense, refers to the buying and selling of goods or merchandise or the dealing in the purchase and sale of commodities.

Hence, I have ruled that the statutory provision does not apply to bowling alleys. Re Hillery and Young, Bulletin 47, item 6. Nor to shuffle boards and pool tables. Re Renton, Bulletin 57, item 17. Nor to prize fights and boxing matches. Re Keansburg, Bulletin 114, item 7.

It follows that roller skating contests will also be permitted.

But caution your client to conduct his roller skating contests with order and propriety. I presume the contestants will not do their training at the bar. A real contest is one thing. A pitiable exhibition is another. I shall not allow any licensed premises to be conducted in such a manner as to become a nuisance.

Outside of the Control Act and State rules and regulations, there may be some local municipal resolution or ordinance which may control. As to this, inquire of the Municipal Clerk of the municipality in which the licensed premises is situated.

Very truly yours,

D. FREDERICK BURNETT,
Commissioner.

7. REVOCATION PROCEEDINGS - MITIGATION OF PENALTIES - POWERS AND POLICIES.

May 22, 1936

Gentlemen: Re: Dorothy Light

Edward Light, Manager for Dorothy Light, whose Plenary Retail Consumption License has been suspended, has been pleading with the Mayor and Council for a commutation of sentence.

I have been directed to place the matter before you with the request that you kindly advise whether or not you would object to the Governing Body taking any action at this time.

Yours very truly,
Adele McDermott,
Borough Clerk.

May 28, 1936

Adele McDermott,
Borough Clerk,
Ridgefield, N.J.

Dear Miss McDermott: Re: Dorothy Light

I have yours of the 22nd and note that pleas have been made with your Mayor and Council for commutation of sentence.

In re Bischoff, Bulletin #53, Item #5, I ruled that the issuing authority, while it may not conduct a rehearing after a final adjudication of guilt, may in its discretion modify the punishment or remit the penalty previously inflicted, saying:

> "It often lends to the cause of enforcement to remit a part of the penalty after the violator has been sufficiently punished and has shown genuine repentance and convinces the issuing authority by his acts as well as his words of his sincere determination thenceforth to comply with the law in all respects. Of course, if mercy is overplayed it may generate disrespect for the law and a belief that penalties imposed are mere gestures to be remitted after nominal punishment. On the other hand, justice is often accomplished by a wise and kindly mercy to first offenders, especially after partial atonement."

I appreciate that your specific question is not addressed to the existence of the power to commute but rather whether I would object to its exercise in this case.

The question is, therefore, one of policy.

Speaking generally: For the reasons expressed in re Morris, Bulletin #98, Item #10 and in re Stein, Bulletin #106, Item #6, I believe that the minimum penalty for possession of illicit liquor should be at least thirty days, and that such minimun should be stepped up if it does not prove a sufficient deterrent. Some municipalities have gone further and revoked outright for possession of illicit beverages, for instance, in re Krupin, Bulletin #117, Item #2; in re D'Alessandro, Bulletin #117, Item #10; in re D'Auria, Bulletin #119, Item #7. I applaud strict

enforcement but have no objection if the above minimum is observed. I am informed it has been in the instant case, because the license has been suspended since March 28th, which is well beyond the minimum. Hence mitigation from now on would not be contrary to the policy of the State Department if such is the wish of your governing body.

Speaking specifically on the Light case: I am in no position fairly to express any opinion or make any objection simply because I have no knowledge either of the aggravating circumstances, if any, or of the mitigating matters, if any, on which to base a fair and sound conclusion as to the penalty. As pointed out in re MacLeod, Bulletin #112, Item #4:

> "The question of whether or not the punishment should be mitigated is a matter which rests in the sound discretion of the issuing authority. It is they who inflicted the penalty and it is their sole responsibility to decide if it should be moderated. It is they who have firsthanded knowledge of the facts necessary to such a decision."

It is true that in re MacLeod, that revocation matter had not come before me on appeal, whereas the Dorothy Light case did (Bulletin #116, Item #8). In the decision in the Light case, however, as will appear by my written conclusions, I was not at all concerned with the penalty administered, but only with the legal points raised on the facts found and the legal principles applicable thereto.

Hence, I am in no position fairly to express any opinion on the merits of the proposed commutation of penalty.

Please convey my respects to your Mayor and Council and tell them that the matter is wholly in their hands.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

8. RULES CONCERNING LICENSEES AND THE USE OF LICENSED PREMISES - "MONTE CARLO" PARTIES - NO PROHIBITION AGAINST GAMBLING IMPERSONATORS.

May 27, 1936.

Dear Commissioner:

The young lady members of the Junior League of Morristown, N. J. have requested permission to give a "Monte Carlo Party" at the Morris County Golf Club, on Friday evening, May 29th, 1936.

The charge for this event will be $5.00 per person, which will include dancing, supper and $2,500.00 in imitation money. The imitation money to be used for the privilege of dancing and playing at the various games and devices.

Prizes are to be auctioned off at the end of the evening to the highest bidder. The bidding to be done with the said imitation money and prizes distributed accordingly.

The proceeds from this party are to be distributed among the Morristown Charities.

Your ruling is requested, as to whether this party would in any way jeopardize the license at Morris County Golf Club.

Thanking you for an expression in this matter, I am,

Yours very truly,
(Signed) John G. Bates, President.

May 29, 1936.

John G. Bates,
President, Morris County Golf Club,
Morristown, New Jersey.

Dear Mr. Bates:

I have yours of the 27th re "Monte Carlo" party. Assuming that "the various games and devices" provided by the Junior League will be a closer imitation, if not a Chinese copy, of the prototypal divertissement than the stage money they furnish resembles the coin of the realm, nevertheless, so far as inhibited gambling is concerned, they are as second cousins twice removed. Certainly, nobody will have to walk back home bemoaning losses or vowing "never again"!

There are so many man-sized problems of liquor control confronting me which go to the very roots of order, sobriety and decency that I have no inclination to joust at windmills or indulge in shadow boxing, or create new and unnecessary prohibitions. Hence, there are no regulations against gambling impersonators. Neither the League nor your Club has anything to fear.

Wishing the Morristown Charities a profitable evening, and the young ladies a very pleasant one with plenty of flutter and fun, I am,

Cordially yours,
D. FREDERICK BURNETT,
Commissioner.

9. RETAIL LICENSEES - ADVERTISING - PASTING STICKERS OF NAMES AND ADDRESSES ON BOTTLES.

RETAIL LICENSEES - ADVERTISING - USE OF DUMMY BOTTLES FOR WINDOW DRESSING.

Dear Sir:

Please advise this office whether there is any ruling by your Department prohibiting the pasting of retail Liquor Dealers' names and addresses on bottles of alcoholic liquors. The stickers being used for advertising purposes. Also advise whether it is irregular to use dummy bottles for window dressing purposes, since the same bear no Tax Stamps.

W. S. Corker,
Boro Clerk.

May 28, 1936.

W. S. Corker,
Borough Clerk,
Fort Lee, N.J.

Dear Sir:

There is no provision of the Control Act or any State regulation bearing on the point you raise.

As regards the Federal regulations, I have letter from W. L. Ray, District Supervisor, reading:

"You are advised that the use of an empty liquor type bottle bearing no tax stamp, provided the bottle is not an indicia bottle, is not forbidden. The use of indicia bottles by anyone but the person who purchases the bottle with the liquor in it is prohibited and even that person cannot refill the bottle with distilled spirits.

"We know of nothing to prohibit a retail liquor dealer from pasting a sticker bearing his name upon a bottle of distilled spirits so long as it does not obscure any of the information on the said bottle."

Yours very truly,
D. FREDERICK BURNETT,
Commissioner.

10. REVOCATION PROCEEDINGS - VIOLATION OF LOCAL CLOSING HOURS - A LICENSEE IS RESPONSIBLE IF HIS PLACE IS OPEN DURING PROHIBITED HOURS - HEREIN OF THE IMPERFECTIONS OF WRITTEN ALIBIS.

June 4, 1936.

Louis L. Lowe, Secretary,
Municipal Board of Alcoholic Beverage Control,
City Hall,
Orange, N. J.

Dear Mr. Lowe:

I am informed that Gordon Neill, licensee, of the Nut Club, was tried on charges of selling during prohibited hours on Sunday; found guilty, and his license suspended for three days beginning Friday, June 5th.

Wholly reserving consideration of the merits in case the licensee should appeal, as is his right, I have no hesitancy in saying that, if he was properly adjudicated guilty, the suspension inflicted is a measurable step in the right direction, especially so if followed by a long term suspension for a second offense.

The remarks credited to Mr. Frank Codey, Chairman of your Board, to the effect that "the licensee is responsible if his place is open during prohibited hours" are worthy of repetition, in view of the contention made, probably with tongue in cheek, that the licensee should be exonerated because he had given written instructions to his bartender not to open the tavern before 1:00 P. M. If he had instantly, though verbally, "fired" the barkeep for rank disobedience of orders, the alibi would have been entitled to more credence. Employees usually "catch on" when the boss means business, just as licensees will soon know that the Excise Board means what it says when it declares that Sunday selling during prohibited hours will not be tolerated in Orange.

Please extend to Mr. Codey and the members of his Board my appreciation of their cooperation.

Cordially yours,
D. FREDERICK BURNETT,
Commissioner.

11. APPELLATE DECISIONS - ZIOMEK v. HADDON TOWNSHIP.

JOHN ZIOMEK,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
TOWNSHIP COMMITTEE OF HADDON TOWNSHIP (CAMDEN COUNTY),)
Respondent.)

Frank M. Lario, Esq., Attorney for Appellant.

BY THE COMMISSIONER:

Appellant is the holder of a plenary retail consumption license in Haddon Township. He was convicted by the Township Committee of having sold beer to an intoxicated customer in violation of a local ordinance and his license was suspended for one week. Hence this appeal.

At the hearing, only appellant and his son appeared. Both denied that the customer was intoxicated at the time of the sale in question. In corroboration, a transcript of the testimony given by two witnesses at a preliminary hearing in this matter was received in evidence.

Respondent, by its Attorney, advised me, prior to the hearing, that newly acquired information made it appear doubtful that the conviction was warranted; that it had no further desire to prosecute the appellant; and requested that the penalty imposed be lifted. Respondent did not appear at the hearing.

No evidence in support of the charge having been produced, I have no choice but to reverse the action of the Township Committee.

The action of respondent in suspending the appellant's license is reversed.

Commissioner.

Dated: June 5, 1936.