Parcells 271-38

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

BULLETIN 271 SEPTEMBER 28, 1938

1. GAMBLING -- PROJECTED CASINO WITH IMITATION GAMBLING, CROUPIERS IN FULL DRESS AND ATTENDANTS WITH WHITE CORK HELMETS -- HEREIN OF THE DIVERSIONS SUPPOSED TO ATTRACT A HIGH CLASS CLIENTELE.

My dear Mr. Burnett:

A client has conceived the idea of a novelty casino in imitation of Monte Carlo. The plan embraces three tables, one of baccarat, one of trente et quarante, and one of roulette. The games would be played for stage money. Each person, on entering the casino would receive a specified amount, in various denominations. The money would have no cash surrender value and might be taken home by the various people, as souvenirs. The money might be regarded as novelty advertising, since it will bear the name of the casino, with advertising matter thereon.

The games will be played purely for the fun in playing and no attempt whatsoever will be made to permit any person to derive any monetary benefit therefrom, nor will gambling, by way of side bets be permitted, in any way, shape or manner. The object in playing will be to try to break the "bank at Monte Carlo". The one who breaks the bank will receive a write-up in the following day's newspaper, with the attendant publicity therein. The articles will probably be written in humorous fashion and the business of the persons will be mentioned, thereby affording him some advertising publicity. If your approval could be obtained therefor, a dinner would be given to the person who "broke the bank at Monte Carlo".

In order to avoid any possible misunderstanding, we repeat again that there will be no prizes, unless you approve of some nominal prizes, nor will there be any hope of reward, other than the pure enjoyment of playing the various games and trying to devise new systems to "break the bank".

Our purpose in writing you is, of course, to receive your approval for the sale of liquor on such premises, under a plenary consumption license. The place, in addition to the bar, will be run on a regular restaurant-night club basis; the games being merely a novelty attraction, to bring the crowd in. This enterprise will feature good food primarily, catering to a high-class clientele, and will, accordingly, be operated in a most decorous and dignified manner.

Respectfully yours,

HOLLANDER, LEICHTER & KLOTZ

BRIEF PROSPECTUS

PROPOSED: Replica of "Monte Carlo Casino" as a unique cafe.

AMUSEMENTS: "Baccarat" -- "Trente-et-Quarante" and "Roulette".

OPERATIONS: Games will be played with moneys of the stage type variety, in various denominations. A set amount of this stage money will be given to each patron at no cost to him. The object will be to "break the bank of Monte Carlo".

REMARKS: The basic idea of this unique set-up and the games chosen are as follows:

1 - The three mentioned games (the only games that will be used) are understood and played only by the better class of person and have an unlimited amount of systems, requiring more than the average persons skill. Results: A better class of clientele.

2 - With the hundreds of systems used against these games at Monte Carlo, Monaco, the banks have been broken but twice in sixty years. Moral: It's a losing game.

3 - By such an arrangement, these various systems can be tried and proven under exact conditions without any loss to the players. Results: A desired type of entertainment that will hold the patrons at the least possible cost to us and yet conform with the better class of persons interest.

Complete operations to be 100% amusement, in a decorous and dignified manner.

REVENUE: Full course dinners will be served as well as lunches from the best type of operated kitchens, also, select wines and liquors. A minimum charge of one dollar on week-days and two dollars on Saturdays and Holidays, will be applied to foods only.

CONTROL: Invitations to be mailed from which "Guest Cards" will be issued. This will control the unwanted type of person.

The attendants will be in uniforms of white cork helmets, blue coats and white trousers, they will take care of all outside operations, with inspectors and croupiers in full-dress, for the game operations.

S O L E - R I G H T S, will be strictly protected.

APPRECIATIONS: Having applied every means of research for its proper operations, the writer wishes to take this opportunity to express his sincere thanks and appreciation to all concerned for any consideration shown him in relation to this matter.

Very truly yours,

September 7, 1938. CAPT. JOSEPH A. SCHELF.

September 20, 1938.

Hollander, Leichter & Klotz,
Union City, N. J.

Gentlemen:

I have before me your interesting and persuasive letter of the 7th.

You make the project look like an innocent, even instructive, divertissement, with both management and patrons naïvely handling

stage money and never a notion of gambling, or side bets -- perish the thought -- entering their guileless minds.

But, I do not share your optimistic view. When the wheels begin to spin and excitement runs high, it does not take much imagination to foresee what will happen. Precious few will be interested in breaking the bank with stage money. The "high class" clientele you are seeking is not so childish. Nor would it be over-allured with the offer of a write-up and a dinner if it seeped out that the bank has been broken but twice in 60 years.

While the educational values that the prospectus sets out are not to be lightly glossed over, I am not in favor of making a tavern a "prep school" for Monte Carlo.

Regulations 20, Rule 7, prohibit licensees from allowing gambling of any sort or having any device or apparatus designed for the purpose on the premises.

The project is disapproved.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

2. CLUB LICENSES - HOURS OF SALE - REGULATION PERMITTING CLUBS TO SELL ALCOHOLIC BEVERAGES DURING THE HOURS OTHER LICENSEES ARE PROHIBITED FROM DOING SO, DISCOURAGED.

MUNICIPAL REGULATIONS - HOURS OF SALE - FORM OF REGULATION TRANSPOSING EASTERN STANDARD AND DAYLIGHT SAVING TIME WHERE THE HOURS ARE ESTABLISHED BY ORDINANCE AND THE CHANGE IN TIME ADOPTED BY RESOLUTION.

MUNICIPAL REGULATIONS - LIMITATION OF LICENSES - FORM OF ORDINANCE - THE CRITERION IN DETERMINING WHETHER OR NOT THE QUOTA IS FILLED SHOULD BE THE NUMBER OF LICENSES OUTSTANDING AND NOT THE NUMBER THAT HAS BEEN ISSUED.

MUNICIPAL REGULATIONS - DISTANCE BETWEEN LICENSED PREMISES - APPLICATION TO PARTICULAR TYPES OF LICENSES - MEASUREMENT SHOULD BE MADE IN ACCORDANCE WITH THE PROCEDURE ESTABLISHED WITH RESPECT TO CHURCHES AND SCHOOLS, PURSUANT TO R. S. 33:1-76 (CONTROL ACT, SEC. 76).

September 20, 1938

Sigurd A. Emerson, Esq.,
Attorney, Township of Hillside,
Elizabeth, N. J.

My dear Mr. Emerson:

I have your letter of September 9th and proposed alcoholic beverage ordinance for the Township of Hillside.

Section 1, amending Section 8 of ordinance adopted June 26, 1935, provides:

> "No alcoholic beverages shall be sold, served, or delivered, nor shall any licensee suffer or permit the sale, service or delivery of any alcoholic beverages, directly or indirectly, upon the licensed premises prior to

> 6 A.M. weekdays or prior to 12 o'clock noon on Sundays, or after 2 A.M. The restrictions contained in this paragraph, however, shall not apply to Club Licensees. The hours referred to in this paragraph shall be either Eastern Standard Time or Daylight Saving Time, whichever is in effect in the Township of Hillside."

Strictly speaking, municipal regulations limiting hours of sale are not subject to the Commissioner's approval first obtained. See Bulletin 43, Item 2. They are, instead, as provided in R. S. 33:1-41 (Control Act, Sec. 38), subject to review on appeal, after which they may be amended, superseded or otherwise modified as the Commissioner may order. I deem it proper, however, because of the nature of the regulations you are proposing, to give you my present reactions.

I have discouraged the enactment of municipal regulations granting longer hours to club licensees than to others because I have grave doubts as to their desirability. It may well be that the power to do so exists. As a matter of policy, however, I am convinced that it should be most cautiously and sparingly exercised. See Re Beakley, Bulletin 254, Item 9. If it is the thought of the Township Committee that club licensees should be allowed to sell during the hours sales by others are prohibited, I shall tentatively, albeit reluctantly, allow it, subject as aforesaid to appeal. But I cordially recommend to the Township Committee reconsideration of the exception, in the light of the comments in the Beakley ruling.

The section provides in conclusion that the hours shall be Eastern Standard or Daylight Saving Time, whichever is in effect in the Township. I note that by resolution of April 20, 1938, Daylight Saving Time was adopted as the official time for the Township for the period April 24, 1938 until the last Sunday in September, coinciding with the period Daylight Saving Time is generally observed. The question in my mind is whether the adoption of Daylight Saving Time by mere resolution can effectively change the hours which have been specified by ordinance. Generally speaking, an ordinance can be amended or otherwise superseded only by another ordinance. To remove all doubt, I suggest that you revise the last sentence of Section 1 to read:

> "The hours referred to in this paragraph shall be Eastern Standard Time, except during the period from the last Sunday in April until the last Sunday in September when they shall be Daylight Saving Time, provided Daylight Saving Time has been adopted by resolution or ordinance of the Township Committee as the official time for the Township."

Sections 2 and 3, which limit the number of club and plenary retail distribution licenses, appear to be in proper form with one exception.

They limit the number of licenses to be issued. If you have a quota on the number to be issued, then as soon as that number is issued, none further may be granted, despite the fact that in the meantime some may have been surrendered or revoked. In other words, if the quota has been filled and some drop out none could be granted in their place. It would be better, instead of limiting the number to be issued, to limit the number which may be outstanding in the Township at the same time. See Re Sahl, Bulletin 198, Item 11. I suggest that both sections be revised to read:

"The number of _____ licenses outstanding in the Township of Hillside at the same time shall not exceed _____."

I suggest that in Section 4, second line, you strike out "person" and in its place insert "premises" and in the third line, that you strike out "an existing licensed premises" and in its place insert "a premises for which a similar license is outstanding." The section will then read:

"No Plenary Retail Consumption License shall be issued for or transferred to any premises within 1500 feet of a premises for which a similar license is outstanding, providing, however, that this shall not prevent the renewal for the same premises of similar licenses outstanding at the time this ordinance is adopted."

I take it that your thought is that henceforth plenary retail consumption licenses shall not be within 1500 feet of each other but that there is no objection to a plenary retail consumption license being within 1500 feet of premises for which a distribution or club license has been issued. If you leave the section as at present, the Township Committee would be barred from issuing or transferring any consumption licenses for premises within 1500 feet of any other premises licensed to sell liquor, regardless of the type of license held.

Section 4 provides, in conclusion, that the 1500 feet shall be measured in a straight line from the nearest point of the building which is licensed to the nearest point of the building for which the license is sought. I think it would be much better to change this so that it provides that the distance shall be measured in the same manner that has been established with respect to churches and schools pursuant to Section 76 of the Act. I offer for your consideration:

"The said 1500 feet shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of the licensed premises to the nearest entrance of the premises sought to be licensed, in conformity with the procedure established pursuant to R. S. 33:1-76."

I make this suggestion because the statute has provided a simple, well-defined method of measurement which over the course of years has been worked out in rulings and interpretations to such an extent that we now have a procedure that will cover any situation that may arise. If you adopt this and make your rule of measurement the same as the State rule, it will have the advantage not only of uniformity, thereby giving you one rule to apply instead of two, but also of providing in every case a rule that any layman can apply by merely measuring along the public highway and without climbing over buildings or trespassing on others' property or going to the expense of having the distance computed by engineers.

With these revisions, Section 4 will be approved.

Very truly yours,

D. FREDERICK BURNETT,
Commissioner.

3. ELECTION DAY RULE -- NOT APPLICABLE TO RETAIL TRANSIT LICENSE.

September 20, 1938

In response to a telephone inquiry from the attorney of the Reading Railroad, I held that the Election Day Rule, (Regulations 20, Rule 2), which forbids the sale by any licensee in any municipality where an election is being conducted while the polls are open does NOT apply to retail transit licenses such as dining cars on railroads, steamers or airplanes, while in transit.

Aside from the fact that it is highly technical to envisage a Pullman diner traveling at 50 miles an hour as being "in any municipality", the underlying factor is that the reason for the rule has no application to transit licensees.

D. FREDERICK BURNETT,
Commissioner.

4. DISCIPLINARY PROCEEDINGS -- SALES AFTER HOURS -- HEREIN OF WHAT CONSTITUTES A RESTAURANT.

In the Matter of Disciplinary Proceedings Against HERMAN NEIDENBERG 266 Market Street Newark, New Jersey Holder of Plenary Retail Consumption License No. C-125 Issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	CONCLUSIONS AND ORDER

Charles Basile, Esq., Attorney for the State Department of Alcoholic Beverage Control.
Joseph Zemel, Esq., Attorney for the Defendant-Licensee.

BY THE COMMISSIONER:

The defendant, a Newark licensee, is charged (1) with selling and serving liquor at his licensed premises at 3:30 o'clock on Sunday morning, August 14, 1938, and (2) with being open for business at that hour, in violation of Newark Ordinance #6579, which forbids the sale or service of alcoholic beverages between 3 a.m. and 12 noon on Sundays and which further forbids licensed premises, except (inter alia) those principally used as a restaurant, to be open during the prohibited hours.

On the Sunday morning in question, Officers Vetter and Beachem of the Newark Police Department went to the defendant's licensed premises to investigate a complaint that sales were there occurring after hours. They arrived at the premises at 3:30 a.m. and observed one of the defendant's countermen selling and serving a round of whiskey to 2 patrons.

The defendant admits these facts, but pleads "mitigating circumstances". He asserts that the sale and service of the whiskey occurred without his knowledge or consent and while he was away from the premises.

BUT, as I said in Re Kneller, Bulletin 49, item 4:

> "A licensee, when apprehended for violation of the law, may not hide behind the cloak of his employees. The license is his. So is the business. It is his duty to see to it that the business is conducted in accordance with the law. If unable to do so because of other interests, that is his personal lookout. It does not exonerate him from full responsibility for what goes on upon the licensed premises."

And so in Re Pombo, Bulletin 238, item 5:

> "The licensee pleads for leniency on the ground that he is being held accountable, irrespective of his personal innocence, for the violation of another. Liquor regulations are made to eliminate undesired conditions at which they are aimed. The present regulation is designed to prevent sales of liquor in Totowa Borough during certain hours on Sunday. From the viewpoint of public interest in prohibiting such sales, it matters little whether a violation which occurs at a liquor establishment was committed by the licensee himself or by a helper. The identity of the actual offender matters little to the law-abiding licensees who, in return for their scrupulous adherence to the law, are eminently entitled to protection against the unfair competition resulting from illegal Sunday sales at other liquor establishments."

For the defendant's guilt on the first charge (selling and serving liquor after hours), his license will be suspended for five (5) days.

As to the second charge (being open after hours), I find that the defendant's place is principally a restaurant. His premises are deep and narrow, and contain a long counter (and also 2 tables at the rear) where food and drinks are served. He holds a municipal restaurant license for these premises, serves regular meals, and maintains a daily menu. He states that sales during the summer are equally divided between food and beer but are mostly of food during the remainder of the year. When the police officers entered his place on the occasion in question, 20 to 25 patrons were seated at the counter being served food. One of these officers, assigned to the defendant's district for the last 12 years, considers the place to be primarily a restaurant. The Hearer by consent of counsel viewed the premises and accords with this opinion, reporting that a restaurant similar to a so-called "diner" is there conducted.

However, the defendant's application for his current license states the premises are principally to be used as a tavern. This, he claims, was an unnoticed error made when filling out the body of the application. His claim is sustained by the fact that the applications for his 4 previous licenses since July 1934 consistently state that the premises are principally to be used as a restaurant. Fairness dictates that the character of the premises be determined by the actual facts and not by the innocent mistake in the defendant's last application.

The place being principally a restaurant, the Ordinance expressly exempts it from being closed during those hours when sales of alcoholic beverages are prohibited.

The second charge is, therefore, dismissed.

Accordingly, it is, on this 24th day of September, 1938,

ORDERED, that plenary retail consumption license No. C-125, heretofore issued to Herman Neidenberg by the Municipal Board of Alcoholic Beverage Control of the City of Newark shall be and the same is hereby suspended for a period of five (5) days, commencing September 28, 1938, at 3 a.m.

D. FREDERICK BURNETT,
Commissioner.

5. DISCIPLINARY PROCEEDINGS -- SALES AND KEEPING PLACE OPEN AFTER HOURS AND EMPLOYING FEMALES TO TEND BAR -- HEREIN OF A REFRIGERATED MEDICINE CABINET.

In the Matter of Disciplinary Proceedings against JOHN ZENDA 157 Frelinghuysen Avenue Newark, N. J. Holder of Plenary Retail Consumption License #C-169, issued by the Newark Municipal Board of Alcoholic Beverage Control.	CONCLUSIONS AND ORDER

Charles Basile, Esq., and Richard E. Silberman, Esq., Attorneys for the Department of Alcoholic Beverage Control;
Sidney Brass, Esq., Attorney for the licensee.

BY THE COMMISSIONER:

The licensee was charged with (1) service of alcoholic beverages, and (2) being open, after 3:00 A. M., which acts are prohibited by Section 1 of Newark Ordinance #6579, adopted December 23, 1936; (3) employing a female to tend bar and sell and serve alcoholic beverages to patrons over such bar in violation of a resolution of the Municipal Board of Alcoholic Beverage Control of the City of Newark, adopted August 29, 1934.

(1) On July 22, 1938, Jones and Fogarty of the Newark Police noticed a light in the sitting room next to the barroom of the licensed premises. Peering under a Venetian blind, the officers saw seven persons gathered around a table, among whom were the licensee and his wife. While they watched, Mrs. Zenda left the sitting room and returned with a tray on which there were three glasses of beer and three whiskies and soda. As she placed the drinks on the table, one of the officers pounded on the door demanding admittance, and as the other continued his observation through the window, the licensee grabbed the glasses and ran out of the room. Meanwhile, Mrs. Zenda had come to the door but appeared unable to open it. Finally the licensee admitted the officers.

The licensee freely admitted both the presence of the persons in the sitting room at 4:00 A. M. and the service of the alcoholic beverages to them. It seems that the licensee was going fishing. The party was to meet at his place and thence depart for Brielle. It also seems that it was raining and the party was merely sitting around waiting for the rain to stop.

As it drew close to four o'clock, Mrs. Zenda conceived the idea of serving a round of drinks. Without asking their pleasure or disclosing her intention, she translated thought into action and brought in the beer and whiskey as observed.

The only substantial conflict in testimony occurs with respect to the source of supply. The police testified that they observed her going into the barroom whereas she maintained that she had obtained the beer and the whisky and soda from her kitchen refrigerator. Pressed why she kept liquor in her refrigerator, she explained that the children sometimes had stomachache at night and she kept the liquor there to give them a little to drink. Presumably, the beer was there for the children's chaser.

The ultimate truth on this issue is of little moment. Whether the liquor was obtained from the barroom, the natural and obvious place, or from the refrigerated annex to the family medicine cabinet, is immaterial. The licensee is charged with service of alcoholic beverages after 3:00 A. M. The sitting room, barroom and kitchen are all part of the licensed premises. The licensee admits the service. I find him guilty.

(2) As to the charge of keeping the premises open after 3:00 A. M., there is but one conclusion that I can reach. The fishing party, marooned by the rain, was indubitably on the licensed premises during prohibited hours. Proof of the charge of "keeping open" requires only proof that the licensee continues to entertain the public. Richards vs. Bayonne, 61 N.J.L. 496 (Sup. Ct.) 1897, Re Casarico, Bulletin 268, Item 1. I find the licensee guilty on the second charge.

(3) On August 25, 1938, Officers Helmstaedter and Nunn, of the Newark Police, visited the licensed premises. Officer Helmstaedter testified:

> "Mr. Zenda was behind the bar. He was up at the front and she was down toward the back. We walked up to the center of the bar and Mrs. Hughes walked up and asked us what we were going to have and we each ordered a glass of beer and she drew the beer and served us and we paid her ten cents each and drank the beer."

Neither Mr. Zenda nor Mrs. Hughes (who is his first or second cousin) dispute this testimony. The licensee, however, claims that Mrs. Hughes has been employed by him since February as a waitress and not as a bartender; that Mrs. Hughes had never before served a drink at the bar; that he did not know she was making the service to the policemen because he was talking to customers at the other end of the bar. That's strange, for most of us would keep at least one eye on the cops. Most licensees are naturally customer-conscious. If not, it behooves them to be. Mrs. Hughes testified that she was employed as a waitress; that she had never before served beer over the bar, and that the licensee did not know of the service to the policemen until after it had been made. Mrs. Zenda, wife of the licensee, testified that Mrs. Hughes was hired as a waitress and that she had never seen Mrs. Hughes tending bar.

The attorney for the licensee argues that, in order to show a violation, it is necessary to prove that the female was employed as a bartender or in some fashion whereby the employment entails service of drinks over the bar as part of the employment. He contends there is no such evidence. If this construction were sound, the Newark regulation would be rendered impotent for it would invariably result that all local licensees would at once gain immunity by simply declaring to their female

waitresses that service of drinks from the bar is not any part of their employment. The learned attorney forgets that secret limitations on authority are good only as against the servant and in nowise protect the master. He is responsible for what his servants do. The argument also loses sight that what the servant does to further the master's business is part of his employment; that whenever one utilizes the services of another to accomplish his business he is employing that other; that ostensible authority is equivalent to actual authorization. However, it is not necessary to dwell on this point or to demonstrate that the Newark regulation doesn't mean any such thing as the licensee's attorney contends, for, in a statement given to the Newark Police on August 25, 1938, Mrs. Hughes says:

> "***I have been employed by John Zenda who conducted a tavern at 157 Frelinghuysen Avenue since the first week of February 1938 as bartender and waitress. ***sometimes I would tend bar ***I started to work this afternoon Thursday August 25th 1938 at about 5:00 P.M. to tend the bar and I was there until tonight."

At the hearing Mrs. Hughes testified that she did not mean to say she tended bar but admitted that the rest of her statement was true. I think her statement taken at the time, on August 25, 1938, is true rather than her testimony given at the hearing. Her admission, together with the evidence of the policemen, is sufficient to show she was employed as a bartender.

The licensee is therefore guilty as charged.

This is the licensee's first conviction. Accordingly, his license will be suspended for five days on each charge, making a total of fifteen days.

Accordingly, it is on this 24th day of September, 1938, ORDERED that Plenary Retail Consumption License #C-169, issued to John Zenda for premises 157 Frelinghuysen Avenue, Newark, N. J. by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and hereby is suspended for fifteen days, commencing 3:00 A. M., September 28, 1938.

D. FREDERICK BURNETT,
Commissioner.

6. TIED HOUSES -- THE STATUTE NOT APPLICABLE TO A MALT COMPANY WHICH ACQUIRES STOCK IN A BREWERY IN REORGANIZATION UNDER SECTION 77B OF THE BANKRUPTCY ACT.

My dear Commissioner:

May I request of your department a ruling upon the following question: A certain corporation engaged in the brewing of beer and ale has undergone reorganization, under section 77B of the Bankruptcy Act. The Plan of Reorganization provides that certain of the creditors are to receive stock in the reorganized brewery.

One of such creditors is a malt company which manufactures and sells the malt used by the brewery in the making of beer.

Query: Is there anything in the law or the ruling of your department which would prohibit ownership of stock by the malt company in the brewery, which ownership results from a bona fide reorganization of the brewery?

Yours very truly,
WILLIAM HARRIS

September 24, 1938

William Harris, Esq.
Newark, N. J.

Dear Mr. Harris:

I have yours of September 21st. There is nothing in the law or in my rulings which prohibits ownership of stock by a malt company in a brewery.

The tied house provision of the Control Act, Section 40 (R.S. 33:1-43), pertains to the interlocking or tie-up of manufacturing or wholesaling interests on the one side with the retailing of alcoholic beverages on the other side.

Hence, so far as the brewery is concerned, it has no application to a malt company which I assume is in nowise interested in the retail end of the alcoholic beverage business.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

7. DISQUALIFICATION -- APPLICATION TO LIFT -- GRANTED.

In the Matter of an Application to Remove Disqualification because of Convictions, Pursuant to the Provisions of R.S. 33:1-31.2, as Amended by Chapter 350 of the Laws of 1938.	CONCLUSIONS AND ORDER
Case No. 33.	

Arthur J. Connelly, Esq., Attorney for Petitioner.

BY THE COMMISSIONER:

In 1916, petitioner was convicted of burglary and released on 3 years' probation. In 1917, he was recommitted for an indefinite term because of complicity in a "breaking and entering" case, and was paroled after 15 months. In 1930, he was convicted of grand larceny, sentenced to State Prison for 7 years, and released on parole on June 9, 1933.

Since his release in 1933, the petitioner, a married man, has continuously resided with his family in Newark. During that period, he has been employed as a truck driver and helper for various trucking concerns in that city, being in the employ of W. T. Cowan, Inc. (a liquor transportation licensee) from 1934 until April 1938, when he was ruled to be disqualified from such employment by reason of his convictions. Re Case #218, Bulletin 241, item 2.

Petitioner produced 6 character witnesses at the hearing - viz., the business manager of the Truck Owners Association of New Jersey, who mediates in labor disputes between the truck drivers and their employers, and who has known petitioner for 10 or 11 years; the secretary and "trouble-shooter" of the Truck Drivers and Chauffeurs Union in Newark, Local 478 (containing 3000 members), of which petitioner has been a member for the last 12 years; his immediate superior while he was at W. T. Cowan, Inc., who has known him for 7 years; the owner of a trucking concern, who has known him for 12 or 15 years and for whom he has done

occasional work; a shopkeeper, who lives in his neighborhood and has known him for 5 years; and a neighbor, his landlady for the past 2 years, who has nevertheless known him for 14 years.

These witnesses uniformly testified that the petitioner, since his release from State Prison in June 1933, has led an honest and law-abiding life; that his reputation in the Truck Owners Association, in the Truck Drivers and Chauffeurs Union, and in his community is good; that, in their opinion, removal of his disqualification will not be prejudicial to the public interest or to the liquor industry in this State.

Petitioner's fingerprint record reveals that he has not been convicted or arrested for any offense since his release in 1933. The parole officer in whose custody he was released on that occasion states that petitioner satisfactorily served his parole and was discharged therefrom on June 9, 1934; that, according to their records, petitioner has never been in any trouble since his release. He further recommends that petitioner's present application be granted.

From all the foregoing, I conclude that the petitioner has led a sober and law-abiding life since his release in 1933, and that his association with the alcoholic beverage industry in this State will not be prejudicial to that industry or to the public interest. Accordingly, his disqualification will be removed.

It is, therefore, on this 24th day of September, 1938, ORDERED that the petitioner's disqualification from holding a license or being employed by a licensee because of the convictions above set forth, be and the same is hereby removed in accordance with R.S.33:1-31.2, as amended by Chapter 350 of the Laws of 1938.

D. FREDERICK BURNETT,
Commissioner.

8. ELECTION DAY RULE -- NOT PERMISSIBLE TO ACCEPT LIQUOR ORDERS BY TELEPHONE WHILE POLLS ARE OPEN EVEN THOUGH DELIVERY IS NOT TO BE MADE UNTIL AFTER THE POLLS CLOSE.

September 26, 1938

Gold's Drug Stores
Jersey City, N. J.

Gentlemen:

Replying to your letter of the 22nd: R.S. 33:1-1 (Control Act, Section 1-v) defines the sale to include an acceptance of an order for an alcoholic beverage. Rule 2 of State Regulations No. 20 provides, in effect, that no licensee shall sell any alcoholic beverages on an election day while the polls are open for voting at such election. Hence, it would not be permissible to accept liquor orders over the telephone on an election day while the polls are open, even if delivery is not to be made until after the polls close.

Very truly yours,

D. FREDERICK BURNETT,
Commissioner.

9. APPELLATE DECISIONS -- HOLLAND VS. BLOOMFIELD.

PHILIP HOLLAND,)
Appellant,)
-vs-) ON APPEAL
MAYOR and COUNCILMEN of the TOWN OF BLOOMFIELD, ESSEX COUNTY,) CONCLUSIONS
Respondent.)
. . . . . .)

John J. Meehan, Esq., Attorney for Appellant
Edward C. Pettit, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from denial of transfer of a plenary retail consumption license issued for the fiscal year ending June 30, 1938, from person to person and place to place, namely, from Club Evergreen, Inc. to himself and from 7 Belleville Avenue to 16 Myrtle Avenue, Bloomfield. Appellant appeals also from denial of his application for a license for the present fiscal year for 16 Myrtle Avenue, Bloomfield.

On June 14, 1938 appellant filed with respondent both the application to transfer the license first mentioned and his application for a license for the present fiscal year. At that time he was told by the Town Clerk that an application was then on file by Bolgru, Inc. for a consumption license for the present fiscal year for premises known as 7 Belleville Avenue, which was the old Club Evergreen premises as aforesaid. Appellant published his notice of intention as to both his applications on June 17th and June 24th. On June 20th respondent issued thirty-two licenses for the present fiscal year including the license applied for by Bolgru, Inc. These thirty-two licenses, together with a similar license issued by me to the Elks Club, exhausted the quota for such licenses as fixed by an ordinance adopted on June 20, 1937. The pertinent parts of said ordinance are as follows:

> "SECTION 1. Limitations are hereby fixed for the issuance of the following classes of licenses:
> (a) Plenary Retail Consumption Licenses shall not exceed 33.
> *****
> "SECTION 2. No licenses shall be issued for any of said classes in excess of the number mentioned for each class of license specified."

On July 5, 1938 respondent denied both applications filed by appellant.

As to appellant's application for transfer, no effective order could be entered herein because the license sought to be transferred expired by its terms on June 30, 1938. Appellant, however, contends that, under the facts of this case, a license for the present fiscal year should have been granted to him for the premises at 16 Myrtle Avenue rather than to Bolgru, Inc., a new licensee, for the premises previously licensed at 7 Belleville Avenue. The action of respondent will, therefore, be reviewed to determine whether on general equitable principles the filing of the application to transfer the old license entitled appellant to a preference in issuing licenses for the present fiscal year. If

so, the refusal to transfer could be reversed merely for the purpose of preserving appellant's right to renew.

It is true that on June 14, 1938, when appellant obtained a consent to the transfer of the Club Evergreen license from the receiver in bankruptcy of said corporation, this license was one of the thirty-three consumption licenses then authorized by the ordinance. The mere consent to transfer, however, was not a transfer of the license itself. The right to transfer is not inherent in a license. VanSchoick vs. Howell, Bulletin #120, Item 6. Despite said consent, respondent nevertheless had the power to refuse to transfer the license for good cause. Stolz vs. Newark, Bulletin #254, Item 11. The evidence shows that respondent denied the transfer because, among other reasons, three consumption licenses were outstanding within close proximity to 16 Myrtle Avenue. Councilman Huck testified that, in his opinion, there are sufficient licensed places in that section of the Town of Bloomfield. Eleven persons residing nearby testified that there are already too many saloons in that neighborhood. Appellant argues that the transfer should have been granted because 16 Myrtle Avenue was licensed from the time of Repeal until June 30, 1936. At or about the latter date, however, respondent denied a renewal of a license for said premises to Sarah Holland, mother of appellant herein, because of the manner in which the premises had been conducted. Holland vs. Bloomfield, Bulletin #142, Item 7. It has not been licensed since. As to the history of licensing in Bloomfield shortly after Repeal, Councilman Huck testified that, at first, licenses were granted "rather liberally, intending to check up and determine upon a permanent policy of spotting these licenses throughout the town, in accordance with the reasonable needs of the neighborhood." He testified further that "In this particular neighborhood we never would have allowed four permanent licenses if we were to know what we were being let in for. These four licenses are so closely located that you could stand in the center of the group and, without any difficulty, throw a stone and hit anyone of them."

This evidence is sufficient to show that the action of respondent in refusing to transfer the license for the prior fiscal year, was proper because of the existence of three licensed places in the neighborhood to which the transfer was sought.

As to appellant's application for a new license for the present fiscal year, the fact that respondent had issued its quota of consumption licenses at its meeting held on June 20 is sufficient reason for its denial unless appellant was equitably entitled to a preference or the ordinance is determined to be unreasonable in itself or as applied to him. The question of the equitable right of appellant to be preferred has already been decided against him. There is no contention that the Town of Bloomfield requires more than thirty-three consumption licenses. The evidence set forth above as to the existence of three licensed places in the neighborhood is sufficient to show that the ordinance is not unreasonable as applied to appellant.

The action of respondent in denying both applications referred to herein is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: September 26, 1938.

10. SOLICITORS' PERMITS -- MORAL TURPITUDE -- FACTS EXAMINED -- CONCLUSIONS.

September 23, 1938

Re: Case #231

This is to determine applicant's eligibility to obtain a solicitor's permit.

The law provides that no person convicted of a crime involving moral turpitude shall hold a liquor license or be employed by a liquor licensee in this State. R.S. 33:1-25,26 (Control Act, Secs. 22,23).

In 1922, the applicant, then 16½ years old, broke into a riding-stable at night and stole several bridles. In consequence he was convicted of "breaking, entering and larceny" and was sentenced to the Reformatory, where he remained for a year.

In explanation, the applicant states that he had been employed by the owner of the stable for several weeks before this crime; that the owner had discharged him with three months' salary unpaid; that he joined two other boys in breaking into the stable and stealing the bridles in retaliation for his lost salary.

Ordinarily, the crime of "breaking, entering and larceny" involves moral turpitude. Re Case #179, Bulletin 206, item 12; Re Case #186, Bulletin 209, item 6; Re Case #200, Bulletin 226, item 10. However, when committed by a person under 18 years of age, the offender's tender youth may be considered as a vital circumstance in determining whether that element is present. Re Case #36, Bulletin 149, item 1; Re Case #192, Bulletin 215, item 3. Considering the facts in this case in the light of the applicant's immature age (16½ years), I do not believe that his crime in 1922 involves moral turpitude.

In 1925, the applicant, then 19 or 20 years old, deserted from the navy a few months after having enlisted for a 4-year term of service. In 1928, he was convicted by court-martial for this desertion, and was sentenced to 18 months' imprisonment, being released, however, after a 10-months' term. See Articles for Government of the Navy, 34 U.S.C.A. Sec. 1200, art. 8, par. 21. He states that he deserted because he felt that he was being given inadequate medical care.

It must first be noted that, although conviction of wartime desertion results in the deserter's loss of American citizenship, peacetime desertion has no such effect. 8 U.S.C.A. Sec. 11.

There is grave doubt whether conviction of desertion by a court-martial is conviction of a "crime" within the meaning of R.S. 33:1-25 (Control Act, Sec. 22). That section may fairly be construed to include only those criminal offenses which fall within the jurisdiction of our civil courts, and not violations of the military code (such as desertion from the army or navy) which fall exclusively within the summary jurisdiction of that executive branch of the government known as the court-martial. Cf. Kurtz vs. Moffitt, 115 U. S. 487, 500 (1885); State ex rel. Madigan vs. Wagener, 74 Minn. 518, 77 N.W. 424 (1898).

However, even if this conviction be considered as conviction of a "crime" within the meaning of R.S. 33:1-25 (Control Act, Sec. 22), I do not believe that the applicant's offense reveals moral turpitude. Peacetime desertion from the army or navy by a minor who believes that he has been mistreated does not indicate that baseness of character which inheres in moral turpitude.

In 1929, the applicant was convicted of driving an automobile in this State without a driver's license, and (on default of paying a $100.00 fine) was sentenced to 30 days in the County Jail. However, such violation of the motor vehicle and traffic laws of the State is not a crime within the meaning of R.S. 33:1-25 (Control Act, Sec. 22). Re Case #133, Bulletin 170, item 7; Re Case #22, Bulletin 236, item 11.

In 1930, the applicant was convicted in a Recorder's Court of larceny of a pair of automobile license-plates, and fined $10.00. He states that at the time of this offense, he was working for an automobile-wrecking concern; that his employer had sold a car to him; that the foreman of the shop gave him permission to use certain dealers' license-plates (which were lying in the shop) to drive his car home; that he had just driven the car home when his employer angrily came up and retrieved the plates and had him arrested; that at the Recorder's hearing, the foreman, apparently fearful of his job, denied that he had given the applicant permission to take the plates.

As evidenced by the $10.00 fine, the applicant's offense on this occasion was apparently treated by the Recorder as representing no more than a petty larceny. Such a crime does not involve moral turpitude per se, but may or may not involve that element, dependent upon the facts in each case. Re Case #213, Bulletin 232, item 6; Re Case #228, Bulletin 265, item 12. I do not believe that moral turpitude exists in the present case.

However, although the applicant has never been convicted of a crime involving moral turpitude, there yet remains the question whether he should be deemed a fit person, within the Commissioner's discretion, for a solicitor's permit.

The applicant is married and has 2 children. While his record through 1930 is not good, his finger-print record since that time, being clear, indicates that seemingly he has been leading a sober, serious and law-abiding life for the past 8 years, thus rendering him a fit person for a solicitor's permit. However, he has put serious doubt upon the accuracy of such a conclusion since, in his application and questionnaire, he readily denied under oath that he had ever been convicted of any crime. He states that he made this deliberately false oath in order to improve his chances for a permit.

Accordingly, it is recommended that the applicant, although meeting the mandatory qualifications of the statute, nevertheless be declared to be presently unfit, within the Commissioner's discretionary judgment, to receive a solicitor's permit, with leave, however, reserved to the applicant to apply for a hearing to show by competent evidence and character witnesses that he has led a sober, serious, and law-abiding life since 1930 and hence, despite his previous record, merits a solicitor's permit.

Nathan Davis,
Attorney.

Approved as to result. In view of applicant's record and his deliberately false oath, no application will be entertained from him until at least one year after date.

Dated: September 25, 1938.

Duncan Burnett
Commissioner.