

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

BULLETIN 309

APRIL 10, 1939.

1. REFERENDA - "BONE DRY" MUNICIPALITIES - EFFECT OF VOTE ON RETAIL SALES BY LIMITED WINERIES AND STATE BEVERAGE DISTRIBUTORS - RETAIL SALES UNDER STATE LICENSES AFFORDING RETAIL PRIVILEGES NOT SUBJECT TO REFERENDUM HELD PURSUANT TO R. S. 33:1-46 (CONTROL ACT, SEC. 43) - HEREIN OF THE PROPER TIME FOR OBJECTIONS TO SUCH SALES EXPRESSING LOCAL SENTIMENT AND THE CONDITIONS WHICH MAY BE IMPOSED.

Dear Mr. Burnett:

The official Board of the Central M. E. Church of the City of Linwood, representing three hundred (300) members, protest the granting of a license to manufacture any alcoholic beverages in the City of Linwood, Atlantic County.

Several years ago on a referendum vote this city voted dry for retail license and we believe the people are opposed to the application of Mr. Wm. Krum.

Very truly yours,
Franklin T. Buck, Pastor

April 4, 1939

Rev. Franklin T. Buck,
Linwood, N. J.

Dear Mr. Buck:

There is no license to manufacture alcoholic beverages in the City of Linwood in the name of William Krumm, as mentioned in your letter. A limited winery license was issued on September 14, 1938 to David C. Krumm, t/a Krumm's Winery, rear of 563 Central Avenue, Linwood. The licensed premises, according to the application, were leased by the licensee from William Krumm, his father. I take it, therefore, that it is the license of David C. Krumm that is the subject of your letter.

At the time that David C. Krumm applied for this license he duly published a notice of application in the Pleasantville Press and Ventnor News, on August 19th and 26th, 1938, respectively. If the people of your municipality objected to the issuance of this license, their objections should have been made at that time, whereupon the case would have been set down to give both sides full opportunity to be heard. No objections whatsoever were filed and since the applicant completed all statutory requisites and the investigation disclosed nothing against person or place, the license was issued.

A limited winery license such as that held by Mr. Krumm is issued by the State Commissioner and not by any municipality. It authorizes the holder to manufacture for sale naturally fermented wines and fruit juices, in the quantity specified therein, and to distribute and sell his products to wholesalers and retailers licensed in accordance with the Act, and to consumers. It is classified by the Act as a Class A or manufacturer's license (R.S. 33:1-10; Control Act, Section 11).

Now, it is true that on November 5, 1935, referendum was held in the City of Linwood, pursuant to Section 43 of the

Alcoholic Beverage Law (now R. S. 33:1-46) on the question "Shall the sale of all alcoholic beverages at retail, except for consumption on railroad trains, airplanes and boats, and the issuance of any retail licenses, except as aforesaid, pursuant to the 'Act concerning alcoholic beverages' be permitted in this municipality?" A majority voted in the negative.

The question submitted conforms with the question prescribed by the statute. As phrased, it asks if retail sales are to be permitted. It would seem, therefore, at first blush, that a negative vote by the electorate would thenceforth prohibit all retail sales, including those authorized by limited winery licenses as well as by the regular municipal retail licenses. But the statute does not provide for any such result. It declares (R. S. 33:1-46, third paragraph) that "If a majority of the legal voters.....shall vote 'No,' then the clerk.....shall forthwith in writing notify the commissioner.....and thereupon it shall be unlawful for the other issuing authority of said municipality, having authority to issue plenary retail consumption, plenary retail distribution and limited retail consumption licenses (sic), to issue any such licenses in respect to such municipality, and all such licenses therefor (sic) issued in respect to such municipality shall become void and inoperative thirty days after the date of said vote,....."

The section is not happily worded in the licenses to which it refers. There is no such thing as a limited retail consumption license. Aside from the reference to such license, it adverts only to plenary retail consumption and plenary retail distribution licenses, which are merely two of the five classes of retail licenses municipalities are authorized to issue. I am not, however, troubled on that score. At the time of adoption of the original Act, plenary retail consumption and plenary retail distribution were the only municipal retail licenses authorized. The addition of the erroneously named "limited retail consumption" license was nothing more than an attempt, when seasonal retail consumption, limited retail distribution and club licenses were added to Section 43, to extend to them the effect of Section 43. In the course of the legislative process, the terms became confused. It is apparent that it was the intention of the Legislature that Section 43 apply to all municipal retail licenses.

Sections 41, 42 and 44 (R. S. 33:1-44, 45 and 47), which also authorize referenda, each provide that if a majority shall vote "no," the sale of alcoholic beverages in such municipality contrary to the terms of the referendum shall be unlawful and constitute a violation of the Act. So Section *44A (R. S. 33:1-47.1), authorizing referenda on hours of sale, provides that if a majority shall vote in the affirmative, the hours shall be fixed in the manner set forth in the question and sales at any other time shall be unlawful and in violation of the Act. But that, however, is not the effect of Section 43; for it prohibits the further issuance of municipal retail licenses, voids those previously issued and then stops short. There is no prohibition of sales - in fact no reference at all to sales in the third paragraph of Section 43 which prescribes the effect of a referendum held thereunder.

Undoubtedly the reason for the omission of any reference to sales in Section 43 is that the Legislature deemed that if no retail licenses could be issued in the municipality, then automatically there could be no retail sales. This is borne out by comparison with the other four referenda which are provided for by statute and which contemplate limited prohibitions such as the sale only of beer and light wines, the sale of package goods only, or the prohibition

of sales on Sundays. If, under these other referenda, the electorate voted for one of such partial forms of prohibition, then sales pursuant thereto would be lawful whereas sales contrary to the referendum would be unlawful. Hence, the necessity for mention of certain sales in the other referenda sections declaring the effect of a vote pursuant thereto. The contrast to a referendum held under Section 43 is that if the latter is successful, no sales of alcoholic beverages of any kind are permissible and, in such event, the municipality becomes, in common parlance, "bone dry." And so it does so far as sales by retail licensees are concerned!

At the time that the original referenda sections were drawn, the only retail sales in contemplation, aside from those on trains, etc., were those to be made by retail licensees, which licenses were to be issued exclusively by the municipalities.

When, however, the terms of a Limited Winery License, as originally drawn, were expanded, before enactment, to include sales to consumers, the effect on the referenda sections did not come to mind.

So again the following year, when a State Beverage Distributor's License was created and which allowed sales to consumers as well as retailers, there was no thought of the effect of such retail sales upon the referenda sections.

Thus two exceptions have crept into our statutes with the result that a municipality which has voted negatively on a referendum pursuant to Section 43 aforesaid, is, nevertheless, not absolutely "bone dry," one exception being the sale of packaged wine, the other the sale of bottled beer. On-premises consumption is entirely out. The excepted sales for off-premises consumption may still be made but only by these two classes of state licensees.

In short, it is apparent from the foregoing that a referendum held under Section 43, in which a majority vote in the negative, while it has the effect of stopping all retail sales made by municipal licensees in such municipality, does not, as the statute is presently worded, have any effect upon the privileges afforded either to a limited winery licensee or to a State Beverage Distributor licensee. So far as the holders of such licenses are concerned, they may continue to sell to consumers in that municipality notwithstanding such a referendum.

Question remains as to what should be the attitude of the State Commissioner in issuing a limited winery license in such municipality where objection is raised. If the objection had been made seasonably, e.g., before the Krumm license was issued, I should have listened attentively to any reasonable, well founded objection based on substantial local sentiment and should have carefully considered whether if such manufacturing license were issued it should be subject to a condition that no sales to consumers should be made in that municipality. Cf. Re Sacca, Bulletin 190, Item 5, and Re Lewis, Bulletin 235, Item 17.

But, as aforesaid, there was no objection whatsoever to the issuance of his license. It wouldn't be fair now, after his money is paid, his plans made and expenses incurred on the faith of the license issued to him to tack on a special condition denying a privilege which the other holders of the same kind of license possess. I therefore reserve opinion on that point until Krumm's license

comes up again for renewal. His present license is limited to the manufacture and sale of 1,000 gallons but can in no event extend beyond June 30, 1939. When that quota is exhausted or the license expires, whichever first occurs, then if he wishes to continue he must apply for a new license. At that time you will be given notice of any new application by him, and upon receipt of written objections a hearing will be scheduled and all interested parties will be afforded the opportunity of presenting their respective sides of the case.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

2. APPELLATE DECISIONS - SOBOCIENSKI and FRANKLIN STORES CO. v. NEWARK and INTERNATIONAL LIQUOR CO.

EDWARD S. SOBOCIENSKI and)
FRANKLIN STORES CO.,)
a corporation,)

Appellants,)

-vs-

ON APPEAL

CONCLUSIONS

MUNICIPAL BOARD OF ALCOHOLIC)
BEVERAGE CONTROL OF THE CITY OF)
NEWARK, and INTERNATIONAL LIQUOR)
CO., a corporation,)

Respondents)

(Two cases)

-----)
Louis B. Englander, Esq., Attorney for Appellants.
Joseph B. Sugrue, Esq., Attorney for Respondent Board.
Cohen & Klein, Esqs., by Philip Klein, Esq. and Lawrence N.
Rosenbaum, Esq., Attorney for
Respondent-Licensee, International
Liquor Co.

BY THE COMMISSIONER:

During the last fiscal year, the Municipal Board of Alcoholic Beverage Control of the City of Newark issued a plenary retail distribution license to the International Liquor Co. for premises at 77-79 Jones Street, Newark. The Franklin Stores Co., a nearby plenary retail distribution licensee, and Edward S. Sobocienski, one of its officers, took appeal from that issuance on the grounds (1) that it was contrary to the Newark Board's resolution of September 9, 1937; (2) that the vicinity was already overcrowded with retail liquor places; (3) that the Newark Board arbitrarily overruled appellants' objection against granting the license; and (4) that the persons named as stockholders, officers and directors of the International Liquor Co. are not the real parties in interest but "are acting on behalf of unnamed persons" - i.e., that they are "fronts" for others.

I found the first three grounds to be without merit. I found, however, that certain testimony had been ruled out by the Hearer, which I deemed should have been admitted as well as an adjournment granted to produce further evidence. I therefore directed

that further hearing should be held to afford appellants an opportunity to present such testimony as might fairly and properly come within the issues raised by the fourth ground of appeal. Sobocienski and Franklin Stores Co. v. Newark and International Liquor Co., Bulletin 239, Item 8.

In addition to such testimony, there was also admitted in evidence at the additional hearings the entry books of the International Liquor Co. reflecting its daily business activities. The Hearer ruled, however, that appellants could not examine these entry books of a rival licensee at will, but permitted them to ask pertinent questions of the International Liquor Co.'s officers or accountant to be answered by those witnesses from the books, such answers to be verified by the Commissioner against the books.

The Newark Board renewed the International Liquor Co.'s license for the current fiscal year. Appellants appealed from the renewal, setting forth, in effect, the same grounds as urged in their original appeal, plus the additional ground that the holders of the stock of the International Liquor Co. (each holding more than 10% of said stock) were not residents of the state "for at least five years continuously immediately prior to the submission of the application" of that company for license, as required by R. S. 33:1-12.1, 25.

Both these appeals are now before me for decision.

At the hearing on the second appeal, the evidence produced at the first appeal was admitted by consent and additional testimony taken.

No reason appears for varying the determination, heretofore made, that the first three grounds of appeal are without merit. Sobocienski and Franklin Stores Co. v. Newark and International Liquor Co., supra.

As to the fourth ground: The appellants assert that the money which supports the International Liquor Co. comes from outside persons who are really running the business, and that the stockholders and officers are merely "dummies" or "fronts" for those persons.

It appears that the International Liquor Co. was incorporated, with a capital of \$3,000.00, in September 1937, upon the initiative of Fred Nieburg and Lewis Nislick (who are also stockholders and officers in the Blue Mirror, Inc., a plenary retail consumption licensee in Newark). Ten shares of International Liquor Co. stock were issued (although not torn from the stock certificate book), as follows:

Fred Nieburg, President and Manager, 4 shares, for \$1200.00;

Lewis Nislick, Vice-President and Treasurer, 4 shares, for \$1200.00; and

Leonard Rosenstein, Secretary, 2 shares, for \$600.00.

These stockholders and officers testified that Nieburg, on behalf of the three, paid the \$3,000.00 into the company, and that Nislick and Rosenstein are still indebted to him for payment of their share. The money was furnished in the form of two checks (one for \$750.00 and the other for \$2,250.00) made out to Nieburg by his attorney and endorsed over.

The International Liquor Co.'s store was thereafter opened on December 4, 1937. Nieburg testified, from the books, that of the original capital, \$750.00 was spent in rent and obtaining of license, and all but about \$350.00 of the remainder in payment on account of the purchase of \$7500.00 worth of fixtures and the like. He further testified that the store, at its opening, had on hand a liquor stock of approximately \$12,000.00 which had been purchased from various wholesalers on credit; that, thereafter, various substantial purchases of liquor were made from these wholesalers and payments given on account; that no fresh money had been put into the company, and no earnings or profits distributed or made by it; that his credit is good because of his connection with the Blue Mirror, Inc.

Nieburg also testified that he was in the real estate business between 1925 and 1930, and purchased land on various occasions in partnership with one Joseph H. Reinfeld (apparently connected with J. H. Reinfeld & Co., Inc., an export wholesale and warehouse receipts licensee) and with one Emanuel Kremer (apparently at one time the Newark Manager of McKesson Liquor Co., an export wholesale licensee); that between 1930 and 1936 he had an interest in race tracks in Texas and New Hampshire; that he became connected with the Blue Mirror in January 1936.

Nislick testified that he became connected with the Blue Mirror in 1933 or 1934; that he was engaged, theretofore, in the diamond business and in various restaurant ventures.

Rosenstein testified that, before his connection with the International Liquor Co., he was employed as a salesman by Weston & Co., a retail distribution licensee in Newark, and, previous thereto by "Charles & Co." (apparently The Charles Liquor Stores, Inc.), another retail licensee in Newark, and by his brother.

While recognizing that considerable latitude should be given to appellants in seeking to support their charge of a "front" situation, which here is essentially one of fraud, I can sustain that charge only on the basis of clear, cogent and convincing evidence. Summerill v. Summerill, 83 N. J. Eq. 3 (Ch. 1914), aff'd Id. 350 (E. & A. 1914); Firemen's Fund Ins. Co. v. Nicholson, 103 N. J. Eq. 32 (Ch. 1928), aff'd Id. 375 (E. & A. 1928); Newark Live Poultry Co. v. Fauver, 118 N. J. L. 556 (Sup. Ct. 1937), aff'd 120 N. J. L. 187 (E. & A. 1938).

No such evidence appears. All I may reasonably find is that the International Liquor Co. is apparently dominated by Mr. Nieburg and Mr. Nislick, and that it has been given great credit although as yet producing no profit. This is insufficient to warrant a finding that its stockholders and directors are "fronts" for "unnamed persons."

I may further state that this Department has conducted an investigation of the company's books and affairs and has found nothing more.

Nor is there merit to appellants' last contention that the stockholders of the International Liquor Co. (each of whom holds more than 10% of the company's stock) were not continuous residents of the State for five years immediately prior to the company's application for license.

Nieburg testified that, apparently in 1934, he spent time in Texas "on and off about a year" to visit the race track there in which he was then interested. Nislick testified that, in 1933, he

went to California for some eight or nine months to visit his parents, and thereafter returned to New Jersey. There is no indication that either intended to abandon his domicile in this State. Their mere temporary absence, without evidence that they intended the place of their sojourn to be their actual home, did not break the chain of their domicile in this State, which is otherwise unassailed. Re Case No. 53, Bulletin 175, Item 3; Re Potter, Bulletin 186, Item 3; Lilly v. Way, Bulletin 220, Item 1.

No question is raised as to the residence of Rosenstein.

In view of the foregoing, the action of the Municipal Board of Alcoholic Beverage Control of the City of Newark in both of the present appeals is hereby affirmed.

Dated: April 3, 1939.

D. FREDERICK BURNETT,
Commissioner.

3. EXTENSION OF LICENSES - DISTRICT COURT RECEIVER - LICENSE MAY NOT BE EXTENDED TO SUCH A RECEIVER.

Dear Sir:

Judgment was taken in the District Court against a plenary retail consumption licensee. An execution was thereafter issued and a Receiver was appointed to take the rights and credits levied upon under execution. The Receiver so appointed made application to the Board of Commissioners to extend to him the plenary retail consumption license of the judgment debtor.

Will you kindly advise me whether the Board of Commissioners can legally extend the license to such a Receiver, in view of the language of the Alcoholic Beverage Control Act which exempts licenses from seizure under execution.

As this matter is coming up before the Board at its next meeting to be held April 4th, I shall be very much obliged to you if you can find time to advise me as soon as possible.

Very truly yours,
John F. Lee,
City Clerk.

April 3, 1939

Mr. John F. Lee,
City Clerk,
Bayonne, N. J.

Dear Sir:

The Legislature has provided (1) that a liquor license shall be free from levy, execution or similar seizure by creditors of the debtor licensee, and (2) that where, through the bankruptcy or receivership of the licensee, his business becomes vested in a trustee or receiver, the license may be extended to such trustee or receiver. See Control Act, Section 23 - now R. S. 33:1-26. Trustees in Bankruptcy and Receivers in Chancery are considered to be within the classes contemplated by the statutory provision; the inquiry is whether the same is true with respect to receivers appointed by State District Courts.

Examination of the pertinent statutory provisions (see R. S. 2:32-175, et seq.) discloses that the functions of a State District Court receiver are limited in nature. He acquires title to "rights and credits" which have been levied upon by the creditor of the licensee and is under a duty to liquidate them by sale, collection or otherwise. He is not authorized to operate the business nor does he acquire title to any of the licensee's property other than the aforementioned. Under these circumstances it would seem that his appointment does not connote any general "receivership" of the licensee within the meaning of the Control Act; rather, his appointment is merely a special statutory method for enabling a creditor to effect liquidation of the personal property upon which the creditor has levied.

You are therefore advised that the Commissioner is of the opinion that R. S. 33:1-36 does not contemplate the extension of a liquor license to a receiver appointed pursuant to R. S. 2:32-175 by a State District Court.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

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

4. DISCIPLINARY PROCEEDINGS - SALES AFTER HOURS - UNWARRANTED
DISMISSAL OF CHARGES.

April 3, 1939

Robert V. Peabody,
Pennsauken Township Clerk,
Merchantville, N. J.

My dear Mr. Peabody:

I have before me staff report and your letter of March 20th re disciplinary proceedings conducted by the Township Committee against Paul Gafke, 7904-06 River Road, and Walter Winslow, 6907 Maple Avenue, both charged with sale of alcoholic beverages during prohibited hours, and note that while Gafke's license was suspended for five days, Winslow was found not guilty and the charges dismissed.

Please express to the members of the Township Committee my appreciation for their conduct of these proceedings and the penalty imposed in the Gafke case.

I am much disturbed, however, by the Committee's action in dismissing the Winslow charges.

According to the staff report, Winslow continued to do business until 3:45 A.M., long past the time when sales must cease. My men ordered and were served drinks by a waitress at 2:05, 2:30, 2:48, 3:05, and 3:25 A.M., and by the bartender at 3:45 A.M. The defense testimony of the orchestra leader, a patron, and another waitress that they had not seen any alcoholic beverages served was of course not a refutation of the testimony of my men that they had been served. The most significant aspect of the defense testimony was that the waitress and bartender who had served my men were not produced as witnesses for the alleged reason that they "could not be located."

In this posture of the testimony - on the one side the direct testimony of the investigators that they had been served alcoholic beverages after 2:00 A.M., and on the other a mere statement that no service of alcoholic beverages had been seen by people who conceivably might not be looking to see whether any service was made - the dismissal of the charges was clearly unwarranted.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

5. DISCIPLINARY PROCEEDINGS - REFUSAL OF PROFFERED SURRENDER FOLLOWED BY REVOCATION OF LICENSE.

April 5, 1939

John L. Haney,
City Clerk,
Trenton, N. J.

My dear Mr. Haney:

I have before me staff report and your letter of March 30th re disciplinary proceedings conducted by the City Council against Calogero Drago, 216 North Clinton Avenue.

I note that Drago, charged with permitting a known criminal on the licensed premises, employment of a person disqualified because of conviction of a crime involving moral turpitude, and failure to notify the issuing authority that he had sold an interest in the licensed business, sought to surrender the license, but his offer was rejected, and thereupon his license was revoked effective immediately.

Please express my thanks to the members of the City Council for their prompt and effective handling of these proceedings

Good work!

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

6. RETAIL LICENSES - APPLICATION BY WIFE OF RECORDER OR POLICE OFFICER - IF THE RECORDER OR POLICE OFFICER HAS ANY INTEREST THEREIN, THE APPLICATION SHOULD BE DENIED.

April 4, 1939

John Melillo,
Township Clerk,
South Hackensack, N. J.

My dear Mr. Melillo:

Technically, it would be permissible for the wife to hold a retail license, notwithstanding that the husband was Recorder or a police officer in the same Township, provided the husband had no interest whatsoever in the wife's business. The mere relationship of husband and wife does not create such interest per se. See Re Rosenberg, Bulletin 125, Item 1.

A Recorder or a police officer himself may not hold a license or be employed by a licensee. It would not be right for a Magistrate to be called upon, in his official capacity, to pass judgment upon other licensees who are his direct competitors. And it is obviously inappropriate and indelicate that a police officer, charged with the duty of enforcing the beverage law against all licensees, should himself be one. He can't serve two masters. The duty of licensees is to obey the law - of the Police to make others obey it. Whenever there is a potential conflict between self-interest and duty, the latter has the right of way. The rulings on this point are collected in Re Kerner, Bulletin 298, Item 9, on Sheet 15.

Consequently, an application by such a wife should be scrutinized with the utmost care to ascertain the true status of the parties. See Re Rosenberg, Bulletin 203, Item 5. If investigation discloses that the husband has an interest in the business or that the wife is applying merely as a front for the husband, undoubtedly the application should be denied. See Schwartz v. Bellmawr, Bulletin 145, Item 9 and Shupack v. Paterson, Bulletin 248, Item 5. If the license has already been issued, and it appears that it is held by the wife as a front for the husband, or that the husband has any interest therein, it should be suspended for the balance of the term or revoked. See Re Priest, Bulletin 235, Item 2; Re May, Bulletin 246, Item 10.

An application for a liquor license by the wife of a Police Recorder or a police officer may, of course, be wholly bona fide especially where the parties are separated and the wife is independent and entirely on her own. But, when they are living under the same roof, appearances are against it and, on that ground alone, I should have no hesitancy in upholding the decision of any license issuing authority in refusing such an application.

It is not only his wife but Caesar himself who must be beyond suspicion in these liquor license matters.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

7. APPELLATE DECISIONS - BEAM v. CALDWELL.

ALBERT J. BEAM,)

Appellant,)

-vs-

ON APPEAL
CONCLUSIONS

THE MAYOR AND BOROUGH COUNCIL)
OF THE BOROUGH OF CALDWELL,)

Respondent)
-----)

Nathan A. Whitfield, Esq., Attorney for Appellant.

Philip D. Elliot, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from revocation of plenary retail consumption license No. C-5 issued to him by respondent for premises known as 455 Bloomfield Avenue, Borough of Caldwell.

The license was revoked after a hearing duly held, when appellant was found guilty on charges alleging that, on February 24, 1939 and on divers days prior thereto, he allowed, permitted and suffered on his licensed premises gambling on shuffleboards, in violation of Rule 7 of State Regulations No. 20.

On February 24, 1939, Investigators Thievon and Arts, of this Department, visited the licensed premises. When they entered, appellant was tending bar on the main floor. The investigators proceeded to the basement where a second bar is located which was in charge of George Schiabor, one of appellant's employees. Twenty-five or thirty patrons were in the basement and games were in full swing on both of the shuffleboards. When the first and second games ended, the investigators saw the bartender, Schiabor, take money from under a cigar box, which was on the bar near the cash register, and distribute the money to certain persons. Before the third game began, money was passed to the bartender, who placed it under the cigar box. The investigators each placed one dollar on the bar, and the bartender called out, "Here is two dollars uncovered; anybody want to cover it?", whereupon the money was covered and also placed under the box. As the third game ended, the investigators identified themselves and seized the sum of eighteen dollars in bills, which was the total amount that had been placed under the box by the bartender.

On behalf of appellant, George Schiabor testified that he had placed the seized money on the back bar at the request of some gentleman who came over there and left the money.

Councilman Armstrong's questions went to the core of this matter, viz.:

"BY COUNCILMAN ARMSTRONG:

Q What were you running down there, a safe deposit vault? What would you keep this money for, safe-keeping, or what? What would you keep this money for?

A Well, now, when there is such a crowd, they always do it.

Q I have never seen it. I would like to know why you would keep that money?

- "A Just for safe-keeping. There was about fifty or sixty people down at this particular time, they keep jumbling around, it gets confusing, and to save headaches --
- Q It is something new to me. I would like to know why you should keep the money there. A Just for safe-keeping.
- Q That is a swell place to put money, in a saloon for safe-keeping. A I have done it time and time again, and I have been in the business a long time."

Schiabor's testimony that he did not pay off any bets on the evening in question, and that the seized money was handed to him by a total stranger for safe keeping, is wholly unbelievable.

The licensee is responsible for the acts of his employees (Re Antico, Bulletin 195, Item 9). The evidence is ample to support respondent's decision in finding appellant guilty as charged.

Appellant contends, however, that the punishment imposed shows bias and prejudice, or, if not, that the punishment is unreasonable and disproportionate to the offense committed.

Nothing appears in the transcript of the hearing below, on which the case was submitted, which would tend to show bias or prejudice. At the hearing on appeal, however, appellant's counsel contended that bias and prejudice appears by reason of the fact that the resolution revoking the license was prepared in advance of the respondent's decision. This, however, is explained by the attorney for respondent, who has stated that two resolutions were drafted in advance of the hearing, one of which suspended the license and the other of which revoked the license; that, when the Mayor and the Borough Council, in executive session, decided to revoke the license the resolution providing for revocation was read by the Clerk and adopted. I do not find anything to support the conclusion that the penalty administered was the result of bias and prejudice.

As to the reasonableness of the penalty: Licensee testified that he was not in the basement at the time the bets were placed, and that he had issued instructions to all of his employees not to permit gambling. That of itself is no defense. If it were, immunity would be gained by the simple device of telling others to obey the law and let it go at that. Moreover, it appears that, while the third game was in progress, the licensee was on the stairway leading to the basement and that, while he was there, one of the patrons spoke to him about some game that had been postponed the night before, which was referred to as a twenty-five dollar game. This evidence, coupled with that of Investigator Kane, of this Department, that, on January 16, 1939, he had played a game of shuffleboard on the licensed premises in the presence of the licensee, in which there was also a pay-off to winners by losers, and his further testimony that, on January 23rd, he had observed shuffleboard games being played for drinks in the presence of the licensee, is convincing that the appellant-licensee had knowledge that the shuffleboards were being used for gambling purposes.

The question of the penalty to be inflicted for any violation rests in the reasonable discretion of the issuing authority. In Bressler v. Conover, Bulletin 45, Item 1, I sustained the action of Judge Conover in revoking a license for permitting gambling on licensed premises. In Katz v. Plainfield, Bulletin 169, Item 3, the action of respondent, in revoking a license for permitting gambling and selling to minors, was affirmed. The fact that I imposed only a

five day penalty for permitting gambling on licensed premises in Re Schwartz, Bulletin 241, Item 1, and other similar cases, is in no way binding on other issuing authorities. It is one thing to gamble - another to lie about it. Offenses are aggravated by defensive testimony such as was offered in this case. Issuing authorities may well come to a conclusion in such cases that licensees who cannot abide by the rules are not worthy of having a license at all. It is clear from their actions in previous cases that the Mayor and Borough Council of Caldwell intend to make its licensees comply strictly with the law and state regulations. Thus they refused to renew the license of Louis Greenberg, who had been convicted of selling liquor on Sunday, which action was affirmed on appeal. Greenberg v. Caldwell, Bulletin 141, Item 7.

I think, however, that the penalty was unnecessarily severe in view of the fact that this is the first conviction against appellant, who has been in business in Caldwell for about two years. The penalty inflicted would prevent appellant from obtaining a license in any other municipality or being employed by any liquor licensee for a period of two years. A first offense of this kind, although aggravated as aforesaid, is not of such a nature as to warrant outright revocation. I shall, therefore, modify the punishment to provide for suspension of the license for the term of ninety days.

Accordingly, the action of respondent, in finding the licensee guilty as charged, is affirmed. The penalty imposed is hereby modified by reducing said penalty from revocation of the license to suspension of said license for the term of ninety days, effective April 8, 1939 at 1:00 A.M.

D. FREDERICK BURNETT,
Commissioner.

Dated: April 5, 1939.

8. APPELLATE DECISIONS - PETRULIO v. CALDWELL.

CARMINE PETRULIO,)	
Appellant,)	
-vs-)	ON APPEAL
)	CONCLUSIONS
THE MAYOR AND BOROUGH COUNCIL OF)	
THE BOROUGH OF CALDWELL,)	
Respondent.)	

Nathan A. Whitfield, Esq. and W. B. Brandley, Esq., Attorneys for Appellant.
Philip D. Elliot, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant, owner of premises known as 455 Bloomfield Avenue, Borough of Caldwell, appeals from respondent's order rendering said premises ineligible to become the subject of any further license during a period of two years from the effective date of the revocation of the license considered in Beam v. Caldwell, Bulletin 309, Item 7.

It appears from the transcript of the hearing held below that it was stipulated at said hearing that appellant herein leased his premises to Albert J. Beam and, further, that appellant herein had no knowledge of any betting of any sort on the licensed premises. Since it does not appear that the tenant, Beam, had any prior record, it does not appear that appellant herein was careless in leasing his premises to an unworthy tenant. In the absence of any evidence of knowledge that violations were being committed upon the premises, or that appellant was careless in not making due inquiry as to the character of his tenant before leasing the property, there is no evidence to sustain the resolution adopted by respondent.

The action of respondent in declaring the premises mentioned herein ineligible to become the subject of any further license of any kind or class for a period of two years from the effective date of the revocation of the Beam license is, therefore, reversed.

D. FREDERICK BURNETT,
Commissioner.

Dated: April 5, 1939.

9. SPECIAL PERMITS - SOCIAL AFFAIRS - HOURS MUST COINCIDE WITH MUNICIPAL REGULATION - NO DISPENSATION TO BEAT THE GUN.

March 30, 1939

Dear Sir:

Every year Old Neighbors Club, Inc. hold their annual outings in New Jersey.

On Sunday, August 6, 1939, the organization is holding their fourth annual outing at Blasberg Grove, Hawthorne, New Jersey. The attendance at these outings always amount to five hundred or more people. We always start early from lower Manhattan and would like to start having our lunch about 12 o'clock noon. The great disadvantage is that according to your rules, we cannot start any beer drinking until 1 P.M.

Perhaps at this time you could be kind enough to allow us a special ruling - with an hour's grace - to enable all to get started at 12 o'clock noon and by doing so, we can get home a little early at the end of our festivities.

Most sincerely,
Peter A. Barthelenghi,
Old Neighbors Club, Inc. President.

April 6, 1939

Old Neighbors Club, Inc.,
257 William Street,
New York, N. Y.

Gentlemen:

I have before me yours of March 30th re proposed outing on August 6th. You have certainly taken time by the forelock!

In New Jersey, each municipality regulates its own hours of sale and closing. The Borough of Hawthorne prohibits the sale, service or giving away of alcoholic beverages on Sundays between 3:00 A.M. and 1:00 P.M. These hours apply to all without exception.

The same rule is applied where special permits for one-day social affairs are issued by this Department.

There are some municipalities wherein sales are permitted after 12:00 noon on Sunday. If it is felt that an hour's head start on the beer will really get the Old Neighbors back to Manhattan in good condition and before sundown, you still have time to look around a bit.

But no special dispensations!

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

10. SOLICITORS' PERMITS - NOT ISSUABLE TO MUNICIPAL CLERKS.

April 6, 1939

Thomas Quinn,
Clerk of Deptford Township
R. D. Westville, N. J.

My dear Mr. Quinn:

I have before me yours of March 30th, inquiring if you, as Municipal Clerk, are eligible to obtain a solicitor's permit.

I have ruled that solicitors' permits may not be issued to members of municipal governing bodies or license issuing authorities, or to any person charged or entrusted with the enforcement of the Alcoholic Beverage Laws. Rules Governing Solicitors' Permits, Rule 8, Pamphlet Rules, pages 53-54. The rulings are collected and the reasons restated at length in Re Kerner, Bulletin 298, Item 9, on pages 14-15.

Strictly speaking, a Municipal Clerk is neither a member of a municipal governing body or license issuing authority, nor is he charged or entrusted with the enforcement of the Alcoholic Beverage Laws. A Municipal Clerk's duties bring him, nevertheless, into close contact with the administration of the Alcoholic Beverage Laws within his municipality. It is the Clerk with whom applications for licenses and transfers are filed, who makes prorations, collects the fees, and generally guides the applications through the devious procedures, and who handles charges, serves notices, and in a ministerial way participates generally in disciplinary proceedings. While his duties are ministerial, nevertheless, many of them involve the exercise of considerable discretion. Furthermore, it is the Clerk who often serves as intermediary between this Department and the retailers within his municipality. He is called upon, at times, to serve notices on municipal licensees. It is also his duty to apprise licensees, upon request, as to municipal regulations governing their conduct.

It is not a question of your personal integrity. But what one may do, all may do. Because of the close relationship, affording, as it does, the opportunity for influence and favoritism, I

would look with disfavor upon an application for solicitor's permit by a person who was also a Municipal Clerk. The participation of the Clerk in the issuance of licenses to retailers in one capacity, and the solicitation of the same retailers to buy his line of beer or liquor in another, is not conducive to proper administration of the law.

If you must solicit for a brewery, you will first have to give up your position as Clerk.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

11. MUNICIPAL REGULATIONS - SUNDAY HOURS OF SALE - SALES SHOULD NOT BE ALLOWED ON SUNDAYS BEFORE NOON.

April 6, 1939

Karl B. Biesel, *in*
Clerk of Mullica Township,
Elwood, N. J.

My dear Mr. Biesel:

I have before me yours of March 30th, certifying the adoption of a resolution on February 1, 1939 by the Township Committee as follows:

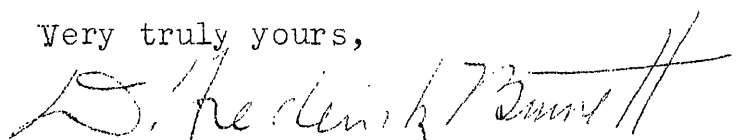
"RESOLVED, that section 7 of a resolution adopted June 8, 1934 which reads, 'No alcoholic beverages shall be sold for consumption in or upon licensed premises except on week days between the hours of 7 o'clock A.M. to 1 o'clock A.M. and on Sundays between the hours of 1 o'clock P.M. to 1 o'clock A.M.' be rescinded and that section 7 of said resolution shall read as follows-

'No alcoholic beverages shall be sold for consumption in, or upon licensed premises, except between the hours of 7 o'clock A.M. to 3 o'clock A.M. week days, including Sundays.'"

I recall writing you on February 9, 1939, in reference to a proposed extension of Sunday morning hours of sale, and recommending that the 1:00 P.M. Sunday opening hour be not moved back beyond 12:00 o'clock noon. I regret that the Township Committee has allowed taverns to open on Sundays as early as 7:00. For the reasons in my letter of February 9th, I feel that it is not only a step backward, but also a grave mistake.

I sincerely hope that the Township Committee will reconsider their action and soon bring Mullica Township back into the ranks of those municipalities having sane Sunday hours of sale regulations.

Very truly yours,



Commissioner.