STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, 2, N. J.

BULLETIN 628 JULY 17, 1944.

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ITEM

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, 2, N. J.

BULLETIN 628 JULY 17, 1944

1. SEIZURES - STORAGE OFF LICENSED PREMISES - ALCOHOLIC BEVERAGES PURCHASED BY RETAIL LICENSEE ON "BLACK MARKET" AT OVER-THE-CEILING PRICES DECLARED FORFEITED.

In the Matter of the Seizure on December 2, 1943 of 72 - 4/5th quart bottles of "Three Feathers V. S. R." whiskey in William A. Pellington's dwelling on East Crescent Avenue, in the Borough of Ramsey, County of Bergen and State of New Jersey	On Hearing CONCLUSIONS AND ORDER

William A. Pellington, Pro Se.
Harry Castelbaum, Esq., Appearing for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

This matter comes before me pursuant to the provisions of Title 33, Chapter 1, of the Revised Statutes, to determine whether 72 - 4/5 quart bottles of taxpaid "Three Feathers V.S.R." whiskey seized at the residence of William A. Pellington, in the Borough of Ramsey, N. J., constitute unlawful property and should be forfeited.

William A. Pellington has been the holder of a plenary retail consumption license for premises located on Route 17 in the Borough of Ramsey for about five years. The six cases of whiskey in question, purchased by Pellington for resale at his licensed premises, were seized by A.B.C. agents on December 2, 1943 because they were unlawfully stored in the attic of Pellington's dwelling (which is about a mile from his licensed premises).

A retail liquor licensee must keep his stock of alcoholic beverages on the licensed premises. If he stores alcoholic beverages intended for resale at his tavern at a place other than his licensed premises, without a permit from this Department, it constitutes a violation of the Alcoholic Beverages Law. See R. S. 33:1-2,50. Also see Seizure Case No. 6356, Bulletin 544, Item 6 and Seizure Case No. 6575. Pellington did not have any permit to store the whiskey in his residence. Hence, the whiskey, although taxpaid, is nonetheless illicit, subject to seizure and forfeiture. R. S. 33:1-1(i) and (y); R. S. 33:1-2; R. S. 33:1-66.

Where a retail licensee stores alcoholic beverages off the licensed premises in ignorance of the law and without any fraudulent intent in other respects, the Commissioner may accept an application for a validating permit in lieu of forfeiture of the alcoholic beverages. The basis for this action is the discretionary authority which I have, under R. S. 33:1-66(e), to return property subject to forfeiture to a person who has established to my satisfaction that he acted in good faith and unknowingly violated the law. See Seizure Case No. 6575, supra.

In the instant case, Pellington purchased the six cases of whiskey from William Oper, a licensed solicitor, for about $20.00 per case above the listed wholesale price, as fixed in the price list which was filed with this Department pursuant to Rule 4 of State Regulations No. 34. It was a "black market" transaction, fraudulent in design, and in violation of the aforementioned rule.

When the matter came on for hearing, pursuant to R. S. 33:1-66, Pellington appeared and sought return of the whiskey. His claim is that he had stored the whiskey in his dwelling merely as a matter of convenience and without any intent to evade the law.

It appears that Pellington regularly placed orders for alcoholic beverages with Oper, as solicitor for the wholesaler by whom he is employed, and that Oper personally delivered such orders at the licensed premises and collected payment therefor. On November 20, 1943 Pellington advised Oper that he needed some whiskey. Later that day, Oper came to Pellington's home, informed Pellington that he had six cases of whiskey in his truck, but that Pellington would have to pay more than the listed wholesale price for the whiskey. Pellington agreed, whereupon Oper brought the six cases of whiskey into Pellington's home. The serial numbers on the cases, by which the whiskey could be traced back to the wholesaler, had been obliterated. Pellington did not receive any invoice for the whiskey, nor obtain any receipt when his wife paid for the whiskey the next day. Pellington customarily received invoices for purchases of whiskey made in the regular course of business from the wholesaler.

Oper, in a written statement which is in evidence, declares that his employer gave him the whiskey in question to deliver to various customers and that, upon their refusal to accept the same, he retained the whiskey, accounted for its value in settling his accounts with his employer and sold it to Pellington on his own behalf.

While these circumstances indicate that Pellington may have been warranted in assuming that he purchased the whiskey from Oper's employer and not Oper, Pellington admits that he was fully aware that he was paying a "black market" price for the whiskey. I am satisfied that he stored the whiskey in his home because the serial numbers on the cases had been removed and, further, because he had no invoice therefor, and not, as he says, because he was afraid it might be stolen from his tavern.

The Department of Alcoholic Beverage Control will not tolerate "black market" transactions in alcoholic beverages. Licensees who engage in transactions of that nature will be penalized to the full extent of the law.

In this connection, it is to be noted that disciplinary proceedings were instituted by this Department against Oper for exceeding the terms of his solicitor's permit in making the sale of the whiskey to Pellington, and against Pellington for storing the whiskey off his licensed premises. Both have pleaded guilty to the respective charge against them and separate conclusions will be entered in those proceedings.

Pellington, in storing in his home the whiskey purchased on the "black market" obviously did not act in good faith. Furthermore, he actively and knowingly participated in an over-the-ceiling price violation. His request for the return of the whiskey must therefore be denied.

Accordingly, it is DETERMINED and ORDERED that the 72 - 4/5th quart bottles of "Three Feathers V. S. R." whiskey seized in this case constitute unlawful property and that the same be and hereby is forfeited in accordance with the provisions of R. S. 33:1-66, and that such alcoholic beverages be sold, in whole or in part, at public sale for the use of the state, subject to the rules and regulations governing such sale, or be destroyed or retained for the use of hospitals and state, county or municipal institutions, whichever the Commissioner may hereafter determine to be for the best interest of the state.

ALFRED E. DRISCOLL
Commissioner

Dated: June 27, 1944.

2. DISCIPLINARY PROCEEDINGS - POSSESSION OF ILLICIT LIQUOR IN VIOLATION OF R. S. 33:1-50(e) - BOTTLING ALCOHOLIC BEVERAGES IN VIOLATION OF R. S. 33:1-78 - AGGRAVATING CIRCUMSTANCES - LICENSE REVOKED.

In the Matter of Disciplinary Proceedings against THE CONCOURSE GRILL CORP. 12 Tube Concourse Jersey City, 6, N. J. Holder of Plenary Retail Consumption License C-356, issued by the Board of Commissioners of the City of Jersey City.	CONCLUSIONS AND ORDER

Meehan Brothers, Esqs., by John J. Meehan, Esq., and Charles Hershenstein, Esq., Attorneys for Defendant-Licensee.
Harry Castelbaum, Esq., Appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The defendant pleaded non vult to charges alleging that, on April 21, 1944, it possessed, and bottled for sale, 119 bottles of variously labeled brands of whiskey, all of which contained alcoholic beverages not genuine as labeled.

As a result of a subsequent check of the defendant's premises on April 29, 1944, supplemental charges were brought against the defendant alleging that it possessed, and bottled for sale, 15 additional bottles of whiskey labeled "Carstairs White Seal Blended Whiskey - 86.8 Proof", all of which contained alcoholic beverages not genuine as labeled. To these supplemental charges, the defendant also pleaded non vult.

During the course of an undercover investigation at the defendant's tavern, ABC agents detected the presence of rum in several drinks of rye whiskey served to them. Thereafter, on April 21, 1944, all of the defendant's open stock of 165 bottles of liquor was gauged, of which 119 assorted bottles of rye and bourbon whiskey were seized and delivered to the Department's chemist for analysis. All of the seized bottles, contrary to the legend on the labels, apparently contained a high proportion of rum.

The president of the corporate defendant, who was present while the inspection was being made, admitted to the agents that, in refilling the bottles, he would "remove about 12 oz. out of every bottle, and then add about 7 oz. of rum and 5 oz. of water, and then sell it as a legitimate whiskey over my bar."

At the hearing afforded to the defendant to present alleged mitigating circumstances, it contended that the economic stress of disposing of its unusually large stock of rum, which it allegedly was compelled to purchase in order to obtain its allotment of other types of whiskey, motivated the violation. This explanation, of course, presents no valid defense and, moreover, even if true, does not account for the addition of 5 ozs. of water to each of the 119 bottles.

Nor does it explain why, only eight days after this inspection, Federal agents found 15 additional bottles, all labeled

"Carstairs White Seal Blended Whiskey - 86.8 Proof" which, upon analysis, disclose an abnormally high content of solids and low content of acids. The president's explanation that "as one bottle on the bar became practically empty, they would pour what was left into another bottle of the same brand" finds no support in the analysis made by the Federal chemist in the light of the extreme difference in acid and solid content from that of an original sample of the product in question.

The vicious and reprehensible practice of palming off "refilled" liquor on the public has not been, and will not be, tolerated in the State of New Jersey. The scale upon which this practice was conducted by the defendant, aggravated by its callous persistence as evidenced by its continuance immediately after being first appehended, leaves me no alternative other than to impose the extreme penalty of a revocation of its license. It will be so ordered.

Accordingly, it is, on this 27th day of June, 1944,

ORDERED that Plenary Retail Consumption License C-356, heretofore issued by the Board of Commissioners of the City of Jersey City to The Concourse Grill Corp., for premises 12 Tube Concourse, Jersey City, be and the same is hereby revoked, effective immediately.

ALFRED E. DRISCOLL,
Commissioner.

3. APPELLATE DECISIONS - ASBURY PARK LICENSED BEVERAGE ASSOCIATION v. ASBURY PARK AND SIRGANY.

ASBURY PARK LICENSED BEVERAGE ASSOCIATION,
Appellant,
-vs-
CITY COUNCIL OF THE CITY OF ASBURY PARK AND JOSEPH N. SIRGANY,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Durand, Ivins & Carton, Esqs., by Robert V. Carton, Esq. and Vincent S. Haneman, Esq., Attorneys for Appellant.
Charles Frankel, Esq., Attorney for Respondent, City Council of the City of Asbury Park.
J. Stanley Herbert, Esq., Attorney for Respondent, Joseph N. Sirgany.

BY THE COMMISSIONER:

This is an appeal from the action of respondent granting a plenary retail consumption license to Joseph N. Sirgany, for premises 312 Cookman Avenue, in the City of Asbury Park.

The appellant is an incorporated association of persons licensed to sell alcoholic beverages in the City of Asbury Park.

The petition of appeal sets forth that the license was erroneously issued by respondent because (a) the granting of the application by the City violated an ordinance in effect since "April 30,

1942", wherein the number of plenary retail consumption licenses had been limited to sixty; (b) that the principal business of the licensee was not the operation of a bona fide restaurant and therefore did not come within the exception specified in the ordinance; (c) that there was no public necessity for the issuance of an additional plenary retail consumption license and it was therefore detrimental to the general public welfare of the City of Asbury Park and its inhabitants; and (d) that the Mayor and Council of the City of Asbury Park did not grant a fair opportunity to the appellant* to present objections to the issuance of said license.

The appeal was heard de novo. Accordingly, it is not necessary to consider appellant's fourth ground of appeal.

It is admitted that on the date when the license in question was issued, Section 7 of an Asbury Park alcoholic beverage ordinance, adopted May 12, 1942, provided as follows:

> "Section 7. Not more than sixty plenary retail consumption licenses shall be outstanding in the City of Asbury Park at the same time, provided, however, that this shall not prevent the renewal of such licenses outstanding upon the adoption of this ordinance or the transfer of such licenses and the renewal of licenses which have been transferred. Nothing herein contained shall prevent the issuance of plenary retail consumption licenses in excess of the above quota to bona fide hotels of fifty (50) rooms or more, bona fide restaurants or bona fide recreation centers, provided, however, such licenses shall be conditioned that the premises for which they are issued shall continue to be operated as bona fide hotels of fifty (50) rooms or more, bona fide restaurants or bona fide recreation centers and that said licenses shall not be transferred to other premises which are not operated as bona fide hotels of fifty (50) rooms or more, bona fide restaurants or bona fide recreation centers. All licenses issued to bona fide hotels of fifty (50) rooms or more, bona fide restaurants or bona fide recreation centers shall be included in determining whether or not the quota of sixty plenary retail consumption licenses hereinabove referred to has been reached or exceeded."

While the ordinance remains in effect, respondent, City Council, has no jurisdiction to grant a license in violation of the terms of the ordinance. Bachman v. Phillipsburg, 68 N.J.L. 552; Atlantic City Licensed Beverage Association v. Atlantic City and Adelman, Bulletin 296, Item 6; Elizabeth Beverage Dealers Association, Division #2 v. Elizabeth, Bulletin 514, Item 3.

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* R.S. 33:1-22 provides: "If the *** issuing authority shall issue a license, any taxpayer or other aggrieved person opposing the issuance of such license may within thirty days after the issuance of such license appeal to the commissioner from the action of the issuing authority.***"
R.S. 33:1-1 defines "person" as "any natural person or association of natural persons, association, trust company, partnership, corporation, organization, or the manager, agent, servant, officer, or employee of any of them."

It further appears that when the Sirgany license was issued there were then outstanding more than sixty plenary retail consumption licenses in the City of Asbury Park. Respondents contend that the license in question comes within the exception in favor of "bona fide restaurants", set forth in Section 7 of the ordinance, and, hence, the action of the municipal issuing authority should be sustained.

The ordinance does not define the word "restaurant". In 1882, Judge Brown, in Lewis v. Hitchcock, 10 F. 4, 6, declared:

> "The term 'restaurant' has no definite legal meaning. In Webster's dictionary it is not even recognized as a word yet anglicized. As currently understood, it doubtless means only, or chiefly, an eating house. But not unfrequently a bar forms a part of it; sometimes lodgings in addition; ***"

In the 2d edition of the Merriam-Webster Dictionary "restaurant" is defined as:

> "An establishment where refreshments or meals may be procured by the public; a public eating house."

In the absence of a definition of the word "restaurant" in the ordinance, it is necessary to refer to the Alcoholic Beverage Law, pursuant to which section seven of the ordinance was adopted. See R. S. 33:1-40.

R. S. 33:1-1(t) defines "restaurant" as follows:

> "An establishment regularly and principally used for the purpose of providing meals to the public, having an adequate kitchen and dining room equipped for the preparing, cooking and serving of foods for its customers and in which no other business, except such as is incidental to such establishment, is conducted." (underscoring ours)

This definition of the word "restaurant" is controlling.

Sirgany's premises have an approximate interior width of 19 feet and an over-all depth of 72 feet. The dimensions of the single room devoted to the service of food and liquor are approximately 19 feet by 44 feet. On the left, as one enters this room from the street, there is a public bar 18 feet in length. This bar, together with a back bar and the space for the bartenders, occupies about 7 feet of the width of the room. Twelve or more stools are located in front of the public bar and take up additional floor space. In the center of the room there are six small tables. On the right hand side of the room there are five booths and two tables. Two additional small tables are located between the end of the bar and the front wall. Fifty-two persons may be seated at the tables and in the booths. In the rear of the room there is a small band stand, a music box and a storage closet for alcoholic beverages. In the back of the premises and separated from the front room by an archway, there is a kitchen occupying a space 10 feet square, equipped with a gas range, electrical refrigerator, electrical meat grinders, sink, dishes, etc.

Respondent licensee asserts that his place is equipped for the operation of a restaurant and is capable of serving a substantial number of persons. He claims to employ two waitresses

who serve food and liquor, and admits to having had two bartenders. He also testified that he employs a cook, a dishwasher and a helper.

It appears from the record that the respondent's "restaurant and bar" was fully equipped for the service of meals for five or six weeks prior to the issuance of his liquor license, but that he delayed his opening until about the time he received the latter license because he "wanted to open everything together".

Although the City of Asbury Park apparently requires those engaged in the restaurant business to obtain a restaurant license, the respondent Sirgany had not obtained such a license prior to the taking of this appeal.

The licensed premises are opened sometime before noon and remain open until sometime between midnight and 2:00 A. M., the time when all licensed premises in Asbury Park (with certain exceptions, including bona fide restaurants) are required to be closed to the public. Although Sirgany testified that food was served from 12 o'clock noon until 10:00 P.M. and that thereafter a few sandwiches were occasionally sold, it is apparent from the testimony that the bulk of the meals are served between the hours of 6:00 P.M. and 8:00 P.M.

The facilities at the bar and the tables and booths are admittedly used for the sale and service of alcoholic beverages. Between 10:00 P.M. and closing time, the booths and tables appear to be devoted almost exclusively to that purpose.

It is not to be doubted that meals have been and are apparently being served on the licensed premises and that, to some extent, Sirgany has been carrying on a restaurant business. That, however, is not the test to be applied. The difficult questions to be determined are (1) is respondent's establishment "principally used for the purpose of providing meals to the public", and (2) is respondent's establishment used for any other business "except such as is incidental" to the service of meals to the public. If respondent's principal business is that of serving meals and if no other business except that incidental to the service of meals is conducted on the premises, then the licensee is conducting a restaurant within the meaning of R. S. 33:1-1(t); if not, the licensee is conducting a taproom or saloon. This is so irrespective of the number of meals he may be serving.

After having carefully studied the testimony, I have reached the conclusion that, on the record presented to me, Sirgany's liquor business may not be characterized as "incidental" to his "providing meals to the public". It is quite probable that during the hours between 6:00 P.M. and 8:00 P.M. the service of alcoholic beverages by respondent may be merely incidental to the service of meals. Thereafter, however, and particularly from 10:00 P.M. to closing time, the testimony indicates that the principal business carried on in the establishment is the liquor business and that the service of food (if any) is merely incidental.

The prominent position occupied by the public bar, the amount of space devoted to the same (together with the stools, it occupies almost 50% of the width of the room), the presence of two bartenders in a relatively small establishment, and the fact that the licensed premises are not closed when the kitchen closes but frequently remain open until all other taprooms in Asbury Park are required to close, leads me inescapably to the conclusion that the respondent, far from considering his liquor business as merely

incidental, regards it as a major and independent operation. This conclusion is confirmed by respondent's choice of a business name, "St. James Restaurant and Bar". Respondent's failure to promptly obtain a restaurant license and his delay in operating his premises until he had obtained a liquor license are perhaps significant.

The intent of the legislature, as evidenced by its definition of the word "restaurant" is apparent. The definition may not be stretched to cover a nocturnal tavern merely because during the day and early evening meals are served to patrons. It is not sufficient that the service of meals should be the principal business part of the time. It is the over-all picture that counts. The presence of the public bar raises a strong presumption that the respondent's liquor business is something more than incidental to the providing of meals. I find that the premises in question did not come within the exception in Section 7 of the Asbury Park ordinance in favor of bona fide restaurants and, hence, the respondent municipality had no jurisdiction to grant the license in issue on this appeal.

The salutary purpose of Section 7 in the Asbury Park ordinance limiting the number of licenses should not be frittered away by a too liberal interpretation of the designated exceptions. Our courts have repeatedly held that provisos and exceptions to general enactments are to be strictly construed. See Clark Thread Co. v. Kearny Township, 55 N.J.L. 50, 54; State Board v. S.S.Kresge Co., 113 N.J.L. 287, 296.

In view of the foregoing, it is not necessary for me to consider the remaining related grounds of appeal. Suffice it to point out that, even after making due allowances for the substantial increase in the summer population, Asbury Park, with a reported population of 14,617 according to the 1940 census, would appear to have an abundance of premises licensed for the sale of alcoholic beverages.

Pending decision on this appeal and within two weeks of the hearing, respondent municipality renewed the license of Joseph N. Sirgany for the current license year. No appeal was taken from the granting of that renewal. Under these circumstances, it would not be appropriate to enter a mandatory order at this time.

Respondent municipality will be guided by the opinion herein expressed and will be expected to take such prompt and appropriate action to fully enforce the provisions of its ordinance as construed herein as may be necessary. Due consideration must, of course, be given to the facts as they may appear at the present time. Since these facts are not presently before me, no opinion is expressed with respect to the same. It is noted, however, that Section 7 of the Asbury Park ordinance provides that licenses issued in excess of the quota, as in the instant case, shall be conditioned "that the premises for which they are issued shall continue to be operated as bona fide hotels of fifty (50) rooms or more, bona fide restaurants, or bona fide recreation centers".

Accordingly, it is, on this 28th day of June, 1944,

ORDERED that the action of the respondent, City Council of the City of Asbury Park, in issuing plenary retail consumption license C-65, expiring by its terms June 30, 1943, to Joseph N. Sirgany, for premises 312 Cookman Avenue, Asbury Park, be and the same is hereby reversed.

ALFRED E. DRISCOLL
Commissioner

4. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES DURING PROHIBITED HOURS, IN VIOLATION OF LOCAL ORDINANCE - PERMITTING PREMISES TO REMAIN OPEN DURING PROHIBITED HOURS, IN VIOLATION OF LOCAL ORDINANCE - PERMITTING IMMORAL ACTIVITIES ON THE LICENSED PREMISES, IN VIOLATION OF RULE 5 OF STATE REGULATIONS NO. 20 - SALE OF ALCOHOLIC BEVERAGES TO A PERSON ACTUALLY OR APPARENTLY INTOXICATED, IN VIOLATION OF RULE 1 OF STATE REGULATIONS NO. 20 - PERMITTING A FEMALE EMPLOYEE TO ACCEPT BEVERAGES AT THE EXPENSE OF A CUSTOMER, IN VIOLATION OF RULE 22 OF STATE REGULATIONS NO. 20 - EMPLOYING A FEMALE BARTENDER, IN VIOLATION OF SECTION 2 OF LOCAL ORDINANCE - LICENSE REVOKED.

In the Matter of Disciplinary Proceedings against)

ANNA ZUCK
T/a ANNA'S TAVERN
312 Lexington Avenue
Clifton, N. J.,)

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-127, issued by the Municipal Council of the City of Clifton.)

Michael Andrus, Esq., Attorney for Defendant-Licensee.
Milton H. Cooper, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Licensee pleads non vult to the following charges, with the exception of that portion of charge (3), which relates to allowing, permitting or suffering arrangements for sexual intercourse to be made on the licensed premises:

"1. On Saturday, February 19, 1943, at about 3:15 A.M., and on Saturday, February 26, 1944, at about 3:15 A.M., you sold, served, delivered and allowed, permitted and suffered the sale, service and delivery and allowed the consumption of alcoholic beverages on your licensed premises, in violation of Section 1 of an Ordinance adopted by the Municipal Council of the City of Clifton on December 19, 1939, approved by the City Manager on December 20, 1939, which Section prohibits any such activity after 3:00 A.M. on Saturday.

"2. On the occasions aforesaid, you permitted your licensed premises to remain open, in violation of Section 3 of the aforesaid Clifton Ordinance, which Section prohibits your licensed premises from remaining open on Saturday after 3:00 A.M.

"3. On the night of March 8, 1944, and on the afternoon and night of March 9, 1944, you allowed, permitted and suffered lewdness and immoral activities in and upon your licensed premises in that you allowed, permitted and suffered the use of vile and indecent language and also allowed, permitted and suffered arrangements to be made for sexual intercourse, in violation of Rule 5 of State Regulations No. 20.

"4. On the night of March 8, 1944, and on the afternoon and evening of March 9, 1944, you sold, served and delivered and allowed, permitted and suffered the service and delivery of alcoholic beverages to Mary ----, a person actually or apparently intoxicated, and allowed, permitted and suffered the consumption of alcoholic beverages by such person, in violation of Rule 1 of State Regulations No. 20.

"5. On the afternoon of March 9, 1944, you allowed, permitted and suffered Elmira ----, a female employed on the licensed premises, to accept beverages at the expense of and as a gift from a customer, in violation of Rule 22 of State Regulations No. 20.

"6. On March 9, 1944, you had in your employ a female bartender, in violation of Section 2 of the aforesaid Clifton Ordinance, which Section prohibits any such employment."

With respect to that portion of charge (3) to which a not guilty plea is entered, counsel for the licensee agrees that the reports made by the agents of the Department of Alcoholic Beverage Control, as well as the statement of the alleged prostitute, be considered by the Commissioner in rendering a decision.

From the reports of the ABC agents and the statement obtained by them from Elmira ----, it is apparent that Elmira ---- arranged with one of the agents, then in the licensed premises, to accompany him to a hotel for the purpose of having sexual intercourse. The agents allege that the licensee was then behind the bar; that she took part in the conversation, saw money being handed to Elmira --- by the agent, heard Elmira ---- telephone to the hotel and heard the arrangements being made to call a cab. The licensee, in her statement, admits she was behind the bar but states that the only conversation she heard concerned the calling of the cab. I am satisfied, from the evidence, that defendant is guilty as to charge (3).

By her plea, defendant admits, in effect, that she conducted her business during prohibited hours on two occasions; that she sold liquor to an intoxicated person; that she employed Elmira ---- as a bartender in violation of a local ordinance and that she permitted this female bartender to violate Rule 22 of State Regulations No. 20. These offenses, considered in connection with the finding of guilt as to charge (3), demonstrate that defendant has conducted her licensed premises in a highly improper manner.

Licensee has no prior record and counsel urges that in mitigation of the offenses. However, the record convinces me that the licensee is not a fit person to hold a license and the fact that she pleads non vult to most of the charges in the hopes of avoiding a merited penalty of revocation will avail her nothing. I will, therefore, revoke the license.

Accordingly, it is, on this 28th day of June, 1944,

ORDERED, that Plenary Retail Consumption License C-127, heretofore issued by the Municipal Council of the City of Clifton to Anna Zuck, t/a Anna's Tavern, for premises 312 Lexington Avenue, Clifton, be and the same is hereby revoked, effective immediately.

ALFRED E. DRISCOLL
Commissioner.

5. APPELLATE DECISIONS - CODINGTON AND SEIFRIED v. WARREN TOWNSHIP.

HORACE CODINGTON AND GERTRUDE E. SEIFRIED, Appellants, -vs- TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WARREN, Respondent.	ON MOTION CONCLUSIONS AND ORDER DISMISSING APPEAL

Horace Codington, Appellant Pro Se.
Barney Asarnow, Esq., Attorney for Warren Township Tavern Owners Association, Intervener.
No appearance on behalf of Respondent, Township Committee of the Township of Warren.

BY THE COMMISSIONER:

This matter is before me on a motion to dismiss the appeal of Horace Codington and Gertrude E. Seifried from the action of the Township Committee of the Township of Warren on November 27, 1939, limiting "the hours between which the sale of alcoholic beverages at retail may be made."

On the date mentioned, the Township Committee duly adopted an ordinance pursuant to the power conferred by R. S. 33:1-40, wherein the sale of alcoholic beverages was limited to the hours "between 7:00 A.M. and 2:00 A.M. the following morning, except that on December 24th of each year said hours shall be between 7:00 A.M. and 3:00 A.M. the following morning, and on December 31st of each year said hours shall be between 7:00 A.M. and 5:00 A.M. the following morning." Appellants complain that the permissive hours for the sale of alcoholic beverages are not sufficiently restricted and they further urge that the sale of alcoholic beverages should not be permitted on Sunday prior to 12:00 o'clock noon.

The motion to dismiss is made by the Warren Township Tavern Owners Association, permitted to intervene in these proceedings. Counsel for the intervener urges (1) that the Commissioner of Alcoholic Beverage Control has no jurisdiction over the subject matter of the appeal; and (2) that the appellants have no standing to prosecute the said appeal. At the hearing, a third ground was urged, namely, (3) that the appeal had not been prosecuted within a reasonable time following the adoption of the ordinance.

The petition of appeal was filed approximately two years and one month after the adoption of the ordinance in question. The sections of the Alcoholic Beverage Control Law, Chapter 1 of Title 33, which may be applicable, are:

R. S. 33:1-3 - which establishes the office of State Commissioner of Alcoholic Beverage Control and provides, "it shall be the duty of the commissioner to supervise the manufacture, distribution and sale of alcoholic beverages in such a manner as to promote temperance and eliminate the racketeer and bootlegger";

R. S. 33:1-22 - authorizing an appeal to the State Commissioner from the action of the municipal issuing authority issuing or refusing to issue a license, and providing that said appeal shall be taken "Within thirty days", as therein defined;

R. S. 33:1-31 - authorizing an appeal to the State Commissioner from the action of the municipal issuing authority suspending or revoking any license "within thirty days after the date of service or of mailing of said notice of suspension or of revocation ***";

R. S. 33:1-40 - providing, "The governing board or body of each municipality may, as regards said municipality, by ordinance, ** limit the hours between which the sale of alcoholic beverages at retail may be made, prohibit the retail sale of alcoholic beverages on Sunday, and, subject to the approval of the commissioner first obtained, regulate the conduct of any business licensed to sell alcoholic beverages at retail and the nature and condition of the premises upon which any such business is to be conducted. The aforesaid limitations *** of hours of sale shall be subject *** to appeal to the commissioner, as hereinafter provided."

R. S. 33:1-41 - providing, inter alia, "If any person affected or who might be affected by any limitation of the number of licenses or of the hours between which sales of alcoholic beverages at retail may be made shall consider himself aggrieved thereby, he may appeal to the commissioner in respect thereto and thereupon the commissioner, after public hearing, may set aside, vacate and repeal the limitation complained of or change, alter, amend or otherwise modify the same."

R. S. 33:1-38 - empowering the State Commissioner to hear and conduct all appeals provided for in Chapter 1 of Title 33 and to render decisions and orders binding on all persons.

R. S. 33:1-39 - providing, "The Commissioner may make such general rules and regulations and such special rulings and findings as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages and the enforcement of this chapter, in addition thereto, and not inconsistent therewith, and may alter, amend, repeal and publish the same from time to time."

R. S. 33:1-44 - providing for a municipal referendum on retail sales of alcoholic beverages except brewed malt and fermented wine;

R. S. 33:1-45 - providing for a municipal referendum on retail sales of all kinds of alcoholic beverages;

R. S. 33:1-46 - providing for a municipal referendum on retail sales of alcoholic beverages except for consumption on trains, air planes and boats;

R. S. 33:1-47 - providing for a municipal referendum on Sunday sales;

R. S. 33:1-47.1 - providing for a municipal referendum on hours of retail sales.

The first two reasons assigned in support of the motion do not warrant the dismissal of the appeal. R. S. 33:1-41 clearly establishes the jurisdiction of the Commissioner over the subject matter of the appeal in a proper case. The same section empowers "any person affected or who might be affected" to prosecute an appeal to the Commissioner. This section must be liberally construed in favor of the right of citizens to appeal to the Commissioner. See R. S. 33:1-73. The third reason raised at the hearing, without objection by counsel for appellants, requires more serious consideration.

It will immediately be noted that whereas an appeal from the action of a municipal issuing authority issuing or refusing to issue, suspending or revoking, a license must be taken within thirty days, no time limit is prescribed in R. S. 33:1-41 providing for an appeal by a person alleged to be affected by a limitation of the hours between which the sale of alcoholic beverages at retail may be made. Nonetheless, it is my considered judgment that the appeal provided for in R. S. 33:1-41 must be brought within a reasonable time after the adoption of the ordinance containing the alleged objectionable limitation. What constitutes a reasonable time may vary according to the circumstances in each case. To hold otherwise and to permit appeals to be taken from the action of a municipal issuing authority after an unreasonable lapse of several years would produce an absurd result, clearly not contemplated by the legislature. The soundness of this conclusion is demonstrated by a reference to the fact that the limitation sought to be reviewed is incorporated in an ordinance (the municipal equivalent of legislative action), solemnly passed in accordance with statutory authority. The appellants, one or both of whom were citizens of the Township when the ordinance was adopted, have waited too long before taking this appeal. Cf. Budd v. Camden, 69 N. J. L. 193. The situation might be different if the limitation sought to be reviewed had to do with the number of licenses.

If, after the lapse of two years, as in this case, experience indicates that the limitation incorporated in the Township ordinance is not in the public interest, the orderly procedure would be for the appellants to appeal to the Township Committee for relief. If this appeal proves futile, an interested citizen is not without remedy for he may, in conjunction with other citizens, follow one of the alternative procedures outlined in Sections 44 to 47.1, inclusive, providing for a public referendum on the questions designated therein.

The doctrine of "home rule" and the attendant powers conferred upon the Township by the Alcoholic Beverage Law to adopt ordinances limiting the hours within which liquor may be sold, should not be placed in jeopardy by belated or untimely appeals. The Commissioner, while zealously guarding the broad and comprehensive powers delegated to him by the legislature, should be chary of assuming jurisdiction in doubtful cases.

I find, and accordingly rule, that appeals brought pursuant to R. S. 33:1-40 and 33:1-41 must be taken within a reasonable time. In this case, it appears that the appeal was not taken within a reasonable time.

The decision herein should not be construed as in any manner indicating a change in the Commissioner's well known position with respect to the sale of alcoholic beverages before noon on Sunday. Nor have I changed my position with respect to earlier closing hours for licensed premises.

The motion will be granted.

Accordingly, it is, on this 30th day of June, 1944,

ORDERED, that the appeal of Horace Codington and Gertrude E. Seifried, Appellants, v. Township Committee of the Township of Warren, Respondent, be and the same is hereby dismissed.

ALFRED E. DRISCOLL
Commissioner.

6. APPELLATE DECISIONS - LEVY v. NEWARK.

JACOB LEVY,
Appellant,
-vs-
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK,
Respondent

ON APPEAL
CONCLUSIONS AND ORDER

Seymour Klein, Esq., Attorney for Appellant.
Raymond Schroeder, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This appeal is from the revocation of appellant's plenary retail consumption license for premises 131 Clinton Avenue, Newark, by the respondent after he was found guilty of charges alleging that:

(1) and (2) - He sold and served alcoholic beverages to a minor.
(3) - He permitted a brawl on his licensed premises.
(4) and (5) - He permitted prostitutes on his licensed premises and also permitted lewd and immoral activities there.
(6) - He sold and served alcoholic beverages to intoxicated persons.
(7) and (8) - He permitted female employees to accept beverages at the expense of patrons.

By agreement of counsel for the respective parties, the entire record of the hearing below was introduced into evidence and it was stipulated that all the testimony therein properly admissible be considered for the purpose of this decision. A careful review of this record, excluding all of the incompetent testimony contained therein, amply supports the respondent's finding of guilt as to all charges, with the possible exception of charge (3).

In addition to this record, the testimony of one witness, a minor female who was born on March 8, 1924, was taken orally at the hearing herein. Her story presents a spectacle which can lead only

to the same conclusion that is justified on the basis of the record below, to wit, that the appellant knowingly harbored prostitutes in his tavern and encouraged -- indeed, cooperated with -- them in their "business" of soliciting male patrons there for immoral purposes.

She testified that she first visited the tavern in June 1942 with a party of friends. After being served several drinks of whiskey at a table, she separated herself from the party and occupied a stool at the bar. The appellant, also seated at the bar, commenced a conversation with her which she related as follows:

> "He asked my name and where I came from and we started talking and he bought a few drinks and he told me I should come in more often and that I would not have to pay for any of my drinks and if I treated the customers right he would treat me right."

As a result of this conversation, she began frequenting the appellant's tavern almost daily thereafter and drinking with men, many of whom were introduced to her by the defendant. On innumerable occasions, sometimes as often as twice a week, she had sexual intercourse with these men at an apartment leased by the appellant and located near the tavern. The key to the apartment was kept at the tavern and when it was required either she or her male companion obtained it from the appellant. A charge for the use of the room was made by the appellant in addition to her charge for services rendered.

This reprehensible situation continued for approximately four or five months, during all of which time there were half a dozen other girls who were also almost daily habitues of the tavern and were encouraged by the appellant to consume liquor with men. On one occasion when the minor visited the appellant's apartment, she observed one of these girls leave there with a man, the girl using the front exit and the man the rear exit.

In September or October 1942, the minor's mother complained to the appellant and requested that he refuse to allow her daughter in the tavern. Despite this request, the minor continued to visit the tavern with the appellant's knowledge, although for a period of two months thereafter some pretense at not allowing her to drink liquor was made. She testified, however, that the bartenders "sneaked" drinks of liquor to her.

In the light of the credible stories told by the female habitues of the appellant's tavern, which are part of the stipulated record, and the aforesaid detailed account given by the female minor, the categorical denials of the appellant are entitled to little, if any, weight.

Further recital of the testimony is needless. Sufficient has already been shown to demonstrate the appellant's complete unworthiness to be entrusted with the privileges of a liquor license. Any penalty short of an outright revocation of the license, merely on the basis of the appellant's guilt of charges (4) and (5) would be unwarranted. Cf. Re Sengebush, Bulletin 311, Item 8, and cases therein cited. I further find, however, that the appellant is also guilty of all other charges brought against him by the respondent with the possible exception of charge (3).

Under the circumstances, the revocation of appellant's license is affirmed and the appeal herein will be dismissed.

Accordingly, it is, on this 30th day of June, 1944,

ORDERED, that the revocation of appellant's plenary retail consumption license for premises 131-33 Clinton Avenue, Newark, by the respondent, be and the same is hereby affirmed, and the petition of appeal herein be and the same is hereby dismissed.

ALFRED E. DRISCOLL
Commissioner

7. APPELLATE DECISIONS - D'ALLESSIO v. CARTERET - ORDER OF DISCONTINUANCE.

(Case #2)
ANGELO D'ALLESSIO,

Apellant,

vs.

BOROUGH COUNCIL OF THE BOROUGH OF CARTERET,

Respondent.

On Appeal

ORDER OF DISCONTINUANCE

Benedict W. Harrington, Esq., Attorney for Appellant.
Michael Resko, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the denial of appellant's application for a person-to-person transfer of a plenary retail consumption license for premises located at 535 Roosevelt Avenue, Borough of Carteret.

At the hearing scheduled to be held herein, the attorney for appellant requested leave to withdraw the appeal. The attorney for the respondent has duly consented to the withdrawal of the appeal and no reason appears why the request should not be granted.

Accordingly, it is, on this 5th day of July, 1944,

ORDERED that the appeal herein be and the same is hereby discontinued.

Alfred E. Driscoll
Commissioner