Commissioner Burnett
Sent to Regular Mailing List

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

BULLETIN NUMBER 147 NOVEMBER 12, 1936.

1. APPELLATE DECISIONS - PECK vs. WEST ORANGE

MORRIS PECK,)
Appellant,)
-vs- ON APPEAL
)
THE BOARD OF COMMISSIONERS OF THE TOWN OF WEST ORANGE AND MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF WEST ORANGE,) CONCLUSIONS
Respondents.)

. . . . . .

Abraham I. Harkavy, Esq., Attorney for Appellant.
Alfred J. Grosso, Esq., Attorney for Respondents.

BY THE COMMISSIONER:

On July 7, 1936, the Board of Commissioners of West Orange, adopted an ordinance which provided in Section 3 thereof that every licensed place, except restaurants, shall be closed between the hours of 3:00 A.M. and 1:00 P.M. on Sundays and between the hours of 2:00 A.M. and 7:00 A.M. on weekdays. Restaurants were defined (Section 4) to include premises principally used for the purpose of providing meals and equipped for the service of food to at least 100 customers at one time, and clubs equipped to serve food to at least 100 members and their guests at one time. "Restaurants" may not sell alcoholic beverages during those hours but their premises need not be closed.

Section 37 of the Control Act provides that the governing board of each municipality may "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 ordinance has never been formally approved by the Commissioner. Appellant, the holder of a plenary retail distribution license for premises conducted as a delicatessen store, now seeks its disapproval.

The first contention is that approval should now be withheld because attempts have been made to enforce the ordinance despite the absence of such approval. This contention is wholly without force. Municipalities may adopt ordinances regulating the conduct of the licensed liquor business but such ordinances do not become legally effective until the Commissioner's approval is obtained. Bulletin #21, Item #55. Whether this ordinance should be approved or disapproved must be determined solely upon its merits. Premature attempts to enforce it without approval would demonstrate its legal ineffectiveness but are utterly irrelevant to the question whether the ordinance should now be approved and so become legally effective. The argument assumes that respondents should be penalized for off-side play. The answer is - simply - the pass was not completed. Therefore, we go back to the point where the play started.

The appellant next contends that the ordinance is a violation of his vested rights, that is, that because he held a

license prior to the adoption of the ordinance in question, he obtained the right to do business as theretofore and that this right could not be affected by subsequent regulation. This contention disregards completely the nature of a license to sell alcoholic beverages. It is not a contract right; it is a privilege, subject to existing and subsequent regulation in the exercise of the police power of the State. Re Hendrickson, Bulletin #17, Item #3, strikes the key note, viz:

> "The fact that Sunday sales were lawful at the time of the issuance of the temporary licenses will not bar the subsequent passage of a resolution prohibiting such sales. The Issuing Authority may adopt reasonable regulations with respect to the conduct of the business of licensees at any time and such regulations when adopted are binding upon prior as well as future licensees. See Woolen and Thorton, The Law of Intoxicating Liquors, Sec. 331.
>
> > 'It is the peculiar province of the State, either by constitutional or legislative enactment, or through authority delegated to its municipalities to exercise its police power for the protection of the lives, health, and property of its citizens, as well as to maintain good order and preserve public morals. It is everywhere conceded that the traffic in intoxicating liquors affects all these subjects and that it is, hence, a proper subject for police regulation. It is essential, therefore, that the power to regulate shall be a continuing one, ever present, and available, to be exercised by the State as the emergency may require. Hence, the rule that neither the State nor any of its agents to whom the power has been delegated, can divest themselves of the right to impose such other additional restrictions upon the sale of intoxicating liquors as the maintenance of good order or the preservation of public morals would seem to require.'
>
> "The decision in Hoboken v. Goodman, 68 N.J.L. 217 (Sup. Ct. 1902) and Hoboken v. Greiner, 68 N.J.L. 592 (Sup. Ct. 1902) are to the same effect."

Cf. Re Hamburg, Bulletin #44, Item #13; also Re Powell, Bulletin #59, Item #15 ("The Mayor and Council have the legal right to repeal or amend the local limitation of licensees at any time. The right to enact the limitation was founded on general underlying police power. So was the right to rescind or alter it. It neither constituted a contract with those to whom licenses were granted pursuant to the resolution, nor a representation on which they had a right to rely, because the resolution was not enacted for their benefit, but in, what at the time was supposed to be, the best common interest of the public at large. If experience shows that sound local policy requires that the resolution should be amended or rescinded outright, there is nothing in the law to prevent."); also Re Lamson, Bulletin #118, Item #6 ("There is nothing to prevent the Township Committee from amending their regulation regarding hours of sale at any time. Such amendment need not wait until the end of the fiscal year. The original regulation did not bind the Township Committee so as to prevent any future change. At the time it was adopted, it represented merely what the Committee then supposed to be the best common interest of the public

at large. Now, if experience has shown to the contrary, it may be amended or rescinded outright for the right to change is founded on the same power which vested in the Township Committee the right to enact it in the first place."); also Re Ellis, Bulletin #133, Item #7.

The quietus to this line of appellant's argument is supplied by the very terms of his own license, the officially prescribed form of which reads: "This license.....is also subject to the provisions of all municipal ordinances and/or resolutions of the above named municipality which have been or shall have been approved by said State Commissioner." Bulletin #31, Item #12.

Appellant finally contends that the ordinance is discriminatory and therefore void. This requires careful thought. There is no substantial dispute that a legislative enactment or a municipal regulation (pursuant to proper legislative delegation) requiring that all premises licensed to sell alcoholic beverages be closed within specified limited hours would be valid. Cf. Richards vs. Bayonne, 61 N. J. L. 496 (Sup. Ct. 1898); Croker vs. Camden, 73 N. J. L. 460 (Sup. Ct. 1906). The gist of the argument is that the ordinance is improper in that it discriminates in favor of a particular group of licensees, designated as "restaurants".

In general, licensees of the same class must be treated alike. Classifications may not be arbitrary, fanciful or illusory. Re Teaneck, Bulletin #125, Item #8. Classifications based upon significant factual distinctions, however, are sustainable. Thus, various regulations imposing restrictions on all licensees, except hotels and restaurants, have been approved. See generally Bulletin #43, Item #11; Retail Liquor Dealers Association vs. Plainfield, Bulletin #70, Item #1; Re Mullica Township, Bulletin #109, Item #4; Re Pine Hill, Bulletin #115, Item #13. Similarly, the Courts have sustained statutes and ordinances which establish separate classifications and impose restrictions applicable to all within a single class although not to all classes. Thus, in Meehan vs. Excise Commissioners, 73 N. J. L. 382 (Sup. Ct. 1906), affirmed 75 N. J. L. 757 (E.&A.1907), legislation exempting restaurants, clubs, etc. from a requirement that the place of business be exposed to public view was held to be constitutional, the Court saying:

> "Class legislation, whether within or without the police power, discriminating against some and favoring others, is prohibited, but legislation carrying out a public purpose, although limited in its application, if, within the sphere of its operation, it affects alike all similarly situated, is not interdicted by the fourteenth amendment."

And in Wagman vs. Trenton, 102 N. J. L. 492 (Sup. Ct. 1926) the Court sustained an ordinance which restricted auction sales of jewelry but not sales of merchandise by auction generally. In the course of its opinion, the Court said:

> "Undoubtedly, the rule is that if there is a reasonable basis for the classification, and if all in the particular class are treated alike, the ordinance cannot be said to be invalid as discriminatory (Falco v. Atlantic City, supra; Kolb v. Boonton, 64 N. J. L. 163), and that is the case with respect to the ordinance now in question."

There appears to be ample basis in fact for exempting restaurants and dining rooms operated by clubs from a requirement that

the premises be actually closed during the time that sales of alcoholic beverages are prohibited. These exempted licensees are rendering service as distinguished from other licensees who merely sell a commodity. The exemption fosters public convenience by sanctioning the service of meals at all times.

A more difficult question is whether the classification between those restaurants and clubs which have facilities to serve 100 persons at one time and those which have not is reasonable.

Regardless of the propriety of the distinction between restaurants and clubs equipped to serve 100 persons and those not similarly equipped, appellant has no standing to attack the ordinance on this basis. He operates a delicatessen store and not a restaurant or a club. Cf. Bulletin #88, Item #10. Consequently, he is not affected and therefore not aggrieved by the fact that the ordinance exempts some rather than all restaurants and dining rooms operated by clubs. Thus, in Gamble vs. Avon-by-the-Sea, Bulletin #45, Item #11, I said:

> "It may be argued that so much of the resolution as prohibits the issuance of licenses to hotels containing less than forty guest rooms or which have been operated for less than two years is invalid as having no reasonable relationship to administration of the Control Act. Since, however, appellant does not operate any hotel, he cannot be aggrieved by such provisions."

If this were an ordinary appeal case, where the issue as between the parties is which one is right in its contentions as appears by the record, I should find in favor of the respondent Board of Commissioners.

The question still remains, however, whether, irrespective of the lack of standing of appellant to challenge the validity of the ordinance in the one spot in which it is vulnerable, it should be approved or not. The mere fact that this ordinance came before me originally by way of appeal in nowise lessens the duty.

In view of the previous discussion, the only question now to pass upon is whether the numerical minimum imposed, of facilities to serve 100 persons at one time, is a proper and reasonable line of demarcation as between different restaurants and clubs in the same municipality. In Ex Parte Lewinsky, 66 Fla. 324 (1913), the Court sustained a regulation applicable to all licensees, except hotels having 100 rooms or more, saying:

> "We may suggest, as a reasonable basis for the classification, that in very large hotels the bar is an incident merely, and that the hotel management, under constant supervision of the state, will see to it, by reason of self-protection, that the bar is conducted in an orderly, decent manner; whereas, in the smaller hotels the liquor business may be the principal, and the hotel the incident. Where the dividing line may be placed is primarily for the decision of the Legislature, and it is not, nor from our knowledge of Florida as a state, much frequented by winter tourists, can it decently be claimed, that the line is so placed as to apply to but few hotels. A smaller number of rooms might have subjected the state to the crying evil, so vigorously denounced by the press and public not many years ago, supposedly produced by the so-called Raines law in the most populous state of the Union."

So, also, the recent case of State ex rel Floyd vs. Noel, 169 So. 549, decided by the Florida Supreme Court on July 20, 1936, sustaining a municipal ordinance prohibiting the sale of liquor between designated hours, but exempting, as to sales to registered guests during certain hours, hotels having 100 rooms or more.

The trouble with the Florida precedents is that a dividing line between a hotel having 100 rooms and one having less, when applied to a state like Florida with numerous hotels to service the winter playground may be reasonable and proper but entirely out of place in a municipality like West Orange which, so far as the record shows, has no hotel at all. If it had, the hotel would be as much entitled to exemption as a restaurant or a club. Since, however, there is no such hotel the validity of the ordinance is in nowise affected since it is nobody's business. The question, therefore, boils down to this: Should the Florida numerical precedent be followed by analogy in its application to restaurants and clubs? As a class, I have hereinbefore held that restaurants and clubs may properly be exempted from this ordinance because so far from merely selling a commodity they are rendering service to the community. But the very reason that salvages clubs and restaurants from the operation of the ordinance spoils the attempted discrimination between particular restaurants and clubs, i. e., between those equipped to serve 100 persons and those equipped to serve less. What is the essential difference between a restaurant or club serving 99 persons and one serving 100? Or one serving 59? Or one serving 29? Since, in order to obtain a liquor license at all it must be a bona fide restaurant or a bona fide club, why should there be any discrimination between restaurants and clubs based on the mere number of persons whom they may serve at one time? A restaurant is defined by the Control Act, Sec. 1(ss) as "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." There is no mention of the number of customers for whom they must be equipped to serve. A club, while not defined in the Control Act, has been defined in the rules made pursuant thereto, as "An organization, corporation or association consisting of five (5) or more persons operating solely for benevolent, charitable, fraternal, social, religious, recreational, athletic or similar purposes, and not for private gain." There is no requirement as to the minimum facilities which it must have. If an establishment is a restaurant in fact it ought to be treated on a parity with every other restaurant. So, if it is a bona fide club. In Re Ocean Township, Bulletin #115, Item #11, I held that a bona fide hotel is one regardless of the number of rooms it contains, whether 10, 30 or 300. In Re Teaneck, Bulletin #125, Item #8, I disapproved an ordinance which attempted a definition of a restaurant other than that set forth in the statute holding "it excludes establishments which are restaurants in fact and is therefore unreasonable."

So, in the instant case, without pausing to consider whether the West Orange ordinance furnishes a vague and inadequate regulative test concerning the serving of food for at least 100 customers at one time in that it does not specify whether they are to be seated or may remain standing, which, conceivably, would make considerable difference in space and equipment, I disapprove the ordinance because of the arbitrary and discriminatory exceptions made in favor of some restaurants and clubs as against others.

D. FREDERICK BURNETT

Commissioner

Dated: November 5, 1936.

2. LICENSEES - EMPLOYEES - COMPENSATION ON COMMISSION BASIS - HEREIN OF SIGHT AS AFFECTED BY PROFIT MOTIVE.

Gentlemen:

Will you kindly advise me whether or not there has been any Departmental ruling regarding the payment of stewards employed by Golf or Country Clubs on a part salary and commission or straight commission basis. The Golf or Country Club holding a retail liquor license for consumption upon the premises.

If there has been no such ruling as yet upon this question, do you consider it permissible to compensate the steward on a full or part commission basis.

Very truly yours,

J. HARRY O'BRIEN

November 5, 1936.

J. Harry O'Brien, Esq.,
Hoboken, N. J.

Dear Mr. O'Brien:

Paying a steward on a commission basis might cause undue promotion of the sale and consumption of alcoholic beverages by giving him a direct participation according to the volume of business done. It might, because of the profit motive, cause temporary blindness as to age or sobriety of patrons or total loss of sight of time or general let down. But this is also true of the employer. Both, however, regardless of personal interest, must obey the law. The licensee is, at all times, fully responsible, not only for his own acts but for those of his employees. It is a shortsighted steward who endangers the business of the boss and his own permanent employment by trifling with illegal sources of gain.

Employment on a commission basis is a matter of policy for each licensee to decide for himself. He shoulders the entire risk. There is nothing in the Control Act or the Rules against it.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

3. LICENSES - ISSUING AUTHORITIES - POWER TO ISSUE LICENSE TO TAKE EFFECT AFTER TERM OF ISSUING AUTHORITY EXPIRES - WHERE TERM OF OFFICE OF ISSUING AUTHORITY EXPIRES ON DECEMBER 31, 1936, IT HAS NO POWER TO ISSUE A SEASONAL LICENSE TAKING EFFECT MAY 1, 1937.

September 24, 1936.

Dear Commissioner Burnett:

I should appreciate very much having your advice as to Seasonal Retail Consumption Licenses. One of the municipalities, which we represent, will probably within the next week have an

application for a Seasonal Retail Consumption License for the period of May 1st to November 1st, 1937.

It is my opinion that the present Borough Council has no right to grant a Seasonal Retail Consumption License to commence on May 1st, 1937 and expire November 1st of next year. My opinion is based on the fact that as a general principle of law, no Borough Council has the right to bind the new Council which will take office on January 1st, 1937.

While I presume that the new Borough Council taking office on January 1st, 1937, would have a right to grant a Seasonal Retail Consumption License effective May 1st, 1937 and expiring November 1st of that year, I should appreciate having your opinion as to whether or not Section 23 of the Control Act is operative. I refer particularly to the first sentence of Section 23 which reads: "All licenses shall be for a term of one year from the first day of July in each year." This provision would seem to indicate that all licenses would expire on June 30th in each year.

Am I correct in my opinion that Section 23 of the Control Act is not effective as far as Summer Seasonal Retail Consumption License is concerned?

Very truly yours,
GEORGE W. BABCOCK

October 7, 1936.

Mackay and Babcock, Esqs.,
Hackensack, N.J.

Gentlemen: Att: George W. Babcock, Esq.,

Your letter of September 24th has been carefully considered.

Efficient administration requires that, in general a municipal governing body should not have power to bind its successors with respect to matters first taking effect during the terms of the successors. Accordingly, our Courts have repeatedly held that the appointing body which will be in office at the time an appointee is to take his office can alone make an appointment to such office unless there is express legislative authority otherwise. See Dickinson vs. Jersey City, 68, N.J.L. 99 (1902). An appointment to office to commence during the term of the successor body is, therefore, void. See Bownes vs. Meehan, 45, N.J.L. 189 (Sup.Ct. 1883).

I understand that your present Borough Council's term of office expires on December 31, 1936 and the inquiry is whether it has power to issue a seasonal license to take effect May 1, 1937. Although the Control Act contains no specific provision which is controlling, it would appear from the adjudications referred to above that no such power exists. See Hendersonville vs.Price, 2 S.E.155 (N.C.1887).

The provision of Section 23 to the effect that all licenses commence on July 1st has no application to seasonal licenses, the terms of which are definitely fixed by Section 13 of the Act.

Very truly yours,
D. FREDERICK BURNETT
Commissioner

By: Nathan L. Jacobs
Chief Deputy Commissioner
and Counsel

4. LICENSEES - EMPLOYEES - PERMITS NECESSARY FOR MINORS TO WORK IN LICENSED PREMISES IRRESPECTIVE OF WHETHER COMPENSATED OR NOT.

Honorable Sir:

This office represents one Oscar Vlaminck, the holder of a Plenary Retail Consumption License, who conducts his place of business at 138 Fifth Avenue, Paterson, N. J.

Mr. Vlaminck has a daughter Ruth, who is 19 years old, and supports and maintains in his household a step-daughter, 17 years old, whose name is Louise Engelskirchen, she being the daughter of Mrs. Vlaminck by a former marriage. Both of these parties are members of the licensee's household.

Mr. Vlaminck has made inquiry to this office concerning his right to use their services in connection with the operation of the licensed remises. We have advised him that inasmuch as these young ladies are members of his family and inasmuch as he does not contemplate the payment of compensation, he could avail himself of their services, provided that they did not serve alcoholic beverages of any kind or variety.

We have noted a provision of the Rules and Regulations promulgated by your office, in which it is specified that no minors should be employed except upon a special permit obtained from the Commission for that purpose, and while we do not regard the presence of members of the licensee's family at the licensed premises as violative of this order even though they perform some incidental service without compensation, we nevertheless thought that to avoid difficulty, it would best serve their purpose to obtain the necessary permit. We have, therefore, advised our client to make the proper application at your office.

Would you kindly advise us whether or not these ladies can assist their father, upon obtaining the permit above mentioned, and whether or not it would be proper for them to serve food and perform other duties in and about the place, providing they did not assist in the sale or service of alcoholic beverages?

Our client has further represented to us that his wife, Louise Vlaminck, who is of full age, performs services in and about the tavern, which services does not involve the sale or service of alcoholic beverages. There is a city ordinance prohibiting the employment of a female bartender, and while Mrs. Vlaminck, the wife of the proprietor, does not act in that capacity, our client nevertheless wondered whether she could do so in the event that during the slower hours of the day, there would be no one about, to take care of the customers who patronize his establishment.

It is our opinion that the local ordinance prohibiting the employment of a female bartender does not embrace within its provisions the situation contemplated by our client, inasmuch as the wife under the circumstances would perform the service involved gratuitously, and, therefore, could not be said to be employed.

Yours respectfully,

DE WALSCHE & BOHL

November 5, 1936.

DeWalsche & Bohl,
Paterson, N. J.

Gentlemen:

I have yours re Oscar Vlaminck, holder of a Plenary Retail Consumption license at 138 Fifth Avenue, Paterson, New Jersey. Your letter states that Mr. Vlaminck desires to employ his daughter and step-daughter, who are minors, to serve food and perform other duties, not including, however, the sale or service of alcoholic beverages; also to utilize the services of his wife as bartender during certain periods of the day.

In reference to Mrs. Vlaminck, you are correct in stating that the City of Paterson adopted a resolution prohibiting the employment of female bartenders. Such resolution was approved by me on December 3, 1935. Mr. Vlaminck, therefore, cannot employ his wife as a bartender at any time. She may, however, continue her duties on the licensed premises in a capacity other than tending bar, and, being of full age, needs no permit from me.

You are also correct in stating that the Control Act and the State regulations provide for the employment of minors by licensees if special permission of the State Commissioner is obtained.

It will, therefore, be in order for Mr. Vlaminck to present his application to me for the employment of his daughter and step-daughter in the capacity above mentioned.

Enclosed are the necessary forms.

The foregoing rulings apply irrespective of whether any salary or wage or compensation whatsoever is paid either Mrs. Vlaminck or the children. The operative words of the Statute are: "shall be knowingly employed by or connected in any business capacity whatsoever with the licensee". To employ means to make use of the services of another; to have or keep at work; to entrust with some duty. The Statute does not say "hire". "Employ" emphasizes the idea of services to be rendered, whereas "hire" places the accent on wages to be paid. The Statute clinches the case by the alternative "or connected in any business capacity whatsoever with the licensee".

Consequently, both the wife and the children are subject to these rulings, irrespective of whether they are compensated or not.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

5. MUNICIPAL ORDINANCES - PROHIBITION OF EMPLOYMENT OF MINORS - EXTENT TO WHICH SUCH REGULATIONS WILL BE APPROVED.

November 5, 1936.

Edward DuPree
City Clerk,
Paterson, N. J.

My dear Mr. DuPree:

In connection with an inquiry which I have just received from DeWalsche & Bohl, 64 Hamilton Street, Paterson, regarding

the employment of waitresses who are minors in a Paterson restaurant which holds a liquor license, I had occasion to refer to the resolution imposing certain regulations upon plenary retail consumption and distribution licensees which was adopted by your Board of Aldermen on June 29, 1935.

Section 7 of the resolution, had it not so far as applicable been disapproved by me in letter to you of December 3, 1935, would have controlled. That part of Section 7 referred to read: "No licensee shall have in his or her employ anyone under the age of 21 years....." It was disapproved because inconsistent with Section 23 of the Control Act which permits the employment of minors with the approval of the Commissioner and subject to rules and regulations provided that they not in any manner sell or solicit the sale of alcoholic beverages. While approval might have been given to the regulation if it had been confined to prohibiting the employment of minors in capacities which reasonably could have been considered detrimental to their moral welfare or contrary to local public policy, yet in the form in which it was presented it was too broad because it would have prevented all employment whatsoever of anyone under twenty-one. For instance, the employment of minors as clerks or delivery boys in grocery or drug stores, as bellhops or bus boys in hotels and restaurants, as caddies in golf clubs and in other capacities which could easily and effectively be segregated from that part of the employer's business involving the sale of alcoholic beverages.

Illustrating what I mean by prohibiting the employment of minors in capacities which reasonably could be considered detrimental to their welfare or contrary to local public policy, I call your attention to re Hightstown, Bulletin 117, item 5. Section 16 of the Hightstown ordinance prohibits minors from singing, dancing, performing, acting, playing in an orchestra or engaging in any performance or entertainment conducted upon a licensed premises. It relates to specific employment, the nature of which must bring minors in intimate contact with the licensee's alcoholic beverage business. Hence, even though under the statute the Commissioner may issue permits for the employment of minors in such capacities, the local regulation was approved.

If your Board desires to enact a regulation similar to that of Hightstown, it is at full liberty to do so, and it will be approved the same as the Hightstown ordinance. So also any other prohibitions concerning minors providing they are consistent with the law and appear to be sound and fair policies. Will you please bring this to the Board's attention at early convenience so that there may be no misunderstanding of the reason why Section 7 of the Regulations of June 29, 1935 was disapproved in part.

Herewith is copy of my reply of November 5th to DeWalsche & Bohl.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

6. DISCIPLINARY PROCEEDINGS - CONDUCT RULE 4- PICKPOCKETS AND WOMEN

November 4, 1936.

Mr. A. D. Bolton,
City Clerk,
Passaic, N. J.

Dear Mr. Bolton:

I have before me staff report and your letter of

October 28th, relative to proceedings before the Board of Commissioners of Passaic against Andrew Smyslo, charged with having violated the State Rule which provides:

> "No licensee shall allow, permit or suffer in or upon the licensed premises any known criminals, gangsters, racketeers, pick-pockets, swindlers, confidence men, prostitutes, female impersonators, or other persons of ill-repute."

I note Smyslo was adjudicated guilty and his license suspended for five days.

The report states:

> "On August 6, 1936 one Marin complained to the Passaic Police that he had lost a wallet containing $30 in the licensed premises. He also described the activities of two women in the licensed premises. Subsequent investigation revealed that the two women were recorded in the police records as disorderly persons and the facts indicated that their illegal activities were being carried on in the licensed premises. The licensee had been warned by the police to keep them out of his place."

I am not expressing any opinion on the merits of the case, because, perchance, it may come before me by way of appeal, and my mind, therefore, must be entirely open on that score.

Licensees will learn that they are to be held to strict account in Passaic for the proper conduct of their licensed premises and that vice will not be tolerated in licensed premises.

Please express to the members of the Board my appreciation for their cooperation in law enforcement.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

7. LICENSES - NON RESIDENTS - STOCK HELD BY NON-RESIDENTS IN CORPORATIONS HOLDING LICENSES PURSUANT TO THE EXEMPTION AFFORDED BY SECTION *22A IN FAVOR OF RENEWALS MAY BE TRANSFERRED TO OTHER NON-RESIDENTS - NO CORPORATION (EXCEPT CORPORATION HOLDING LICENSE PURSUANT TO THE AFOREMENTIONED EXEMPTION) MAY HOLD A RETAIL LICENSE WHERE ANY ONE OF ITS STOCKHOLDERS HOLDING MORE THAN 10% OF ITS STOCK DOES NOT QUALIFY IN EVERY RESPECT AS AN INDIVIDUAL APPLICANT.

October 7, 1936.

My dear Commissioner:

A client of mine residing in New York has become interested in the purchase of the stock of two corporations now engaged in the sale at retail of liquors under distribution licenses and these two problems have presented themselves.

1. May a non-resident who owns more than 10% of the stock of a corporation which had procured its original license prior to the passage of Section 22A sell and assign his stock to another non-resident at this time without affecting the status of the corporation when it applies for its renewal license next July?

2. May a resident stockholder of more than 10% of the stock of a corporation which received its license after the passage of Section 22A sell his stock to a non-resident without affecting the renewal right on July 1st next?

Sincerely yours,

CHARLES HERSHENSTEIN

October 28, 1936.

Charles Hershenstein, Esq.,
Jersey City, N. J.

Dear Sir:

Your letter of October 7th has been referred to me for attention.

Under section 22 of the Control Act a retail consumption or distribution license may not be issued to an individual unless he has been resident within this State for at least five (5) years continuously immediately prior to his application. And under section *22A (P.L. 1936, c.188) no such license may be issued to a corporation unless each owner of more than 10% of its stock has likewise been resident for five (5) years, except, however, that licenses held by corporations at the time of the passage of this latter Act may be renewed despite non-compliance with the residence requirement.

The legislative policy is evident. Retail licenses are to be confined to residents and the corporate device may not be used to circumvent this policy. The exemption in the 1936 Act in favor of renewals is for the protection of the limited number of businesses theretofore established and owned by corporations having non-resident stockholders. Transfers of stock by such non-resident stockholders are not prohibited either by the letter or spirit of the Act. Consequently, your first inquiry is answered in the affirmative.

Your second inquiry, however, presents different considerations. If the free transfer of stock in a corporation having all resident stockholders to non-residents were permitted, the statutory policy in favor of residents could be nullified. Every existing corporate licensee and new corporate licensees could ultimately be owned entirely by non-residents. The Act should receive a liberal construction to avoid disregard of a clear legislative policy. Accordingly, it is the Commissioner's ruling that, exclusive of the limited number of corporations holding licenses pursuant to the exemption afforded by section *22A of the Control Act in favor of renewals, no corporation may obtain or hold a retail consumption or distribution license where any one of its stockholders holding more than 10% of its stock

does not qualify in every respect, including residence, as an individual applicant.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

By: Nathan L. Jacobs
Chief Deputy Commissioner
and Counsel

8. APPELLATE DECISIONS - WEHMANN vs. HOHOKUS

HUGO WEHMANN, Appellant, -vs TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HOHOKUS, Respondent.	ON APPEAL CONCLUSIONS

Thomas S. Doughty, Esq., Attorney for Appellant.

BY THE COMMISSIONER:

Appellant appeals from the denial of his application for a plenary retail consumption license in connection with the restaurant which he has conducted for the last six years on premises located on State Highway #2, Mahwah, Township of Hohokus.

Respondent filed no answer and made no appearance at the hearing on appeal. The petition of appeal, however, states that while no reason was given for the denial, a resolution was thereafter adopted limiting the number of such licenses to the eleven which were then issued and outstanding.

The Township is very large geographically, extending in either direction some seven or eight miles. It is subdivided into several separate communities. Six of the present licensed premises are concentrated in the factory district of West Mahwah. Appellant's restaurant is in a rural district, more than a mile from any other tavern.

Appellant testified that there was a real need for a license in his locality. No objections were filed against the issuance of the license, and the appellant is personally qualified.

In view of the record and the absence of any evidence in support of the denial and the subsequently adopted limitation, I find that the denial and the limitation are unreasonable as applied to the appellant.

The action of respondent is, therefore reversed. The respondent is directed to issue the license as applied for.

D. FREDERICK BURNETT
Commissioner

Dated: November 6, 1936.

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

November 6, 1936.

Re: Application for Solicitor's Permit - Case No. 39.

In his questionnaire applicant stated that he had never been convicted of a crime. Fingerprint records disclose that he was arrested in 1926 and held for the Grand Jury on a charge of atrocious assault and battery. Applicant was notified to appear for a hearing to determine whether he had been convicted of a crime.

From the testimony given at the hearing, it appears that the charge arose out of an altercation between appellant and his wife. It seems that, at first, they merely argued about money, but he, perhaps running short of arguments, acted unwisely in pushing her and she, in turn, resenting the fact that he had thus overstepped the bounds of his marital prerogatives, pushed him. It does not appear exactly what degree of force was used by either party, but appellant testified that when his wife pushed him she cut her hand upon a pair of scissors which he had in his pocket. Appellant was arrested, arraigned in the Recorder's Court, and at first was held for the Grand Jury on a charge of atrocious assault and battery. He testified, however, that the Recorder immediately changed his mind, and, instead of holding him for the Grand Jury, imposed a fine of $25.00, which was paid. This version of the affair is verified by a letter received from the Chief of Police of the City in which the arrest was made.

Appellant further testified that he thought he had never been convicted of a crime because he had not been sentenced to jail and had not been held for the Grand Jury. I believe that he acted in good faith in stating that he had never been convicted of a crime. There is no question of moral turpitude involved. It is recommended that the Solicitor's Permit be granted.

Edward J. Dorton,
Attorney-in-Chief.

Without attempt to adjudge marital prerogatives, if such there be, or ascertain why scissors should appear in a man's pocket, the facts show no moral turpitude. Issue the permit.

D. FREDERICK BURNETT
Commissioner

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

February 19, 1936.

Re: Application for Solicitor's Permit
Case No. 21

Application was filed for solicitor's permit pursuant to the provisions of P.L. 1935, c.256. In his questionnaire applicant admitted that he had been convicted of the crime of embezzlement and placed on probation to make restitution. Our investigation discloses that the applicant had been indicted for embezzling $1,081.00 while employed as collector for a brewery, and that, after pleading non vult in the Court of Special Sessions, he had been sentenced to one year at the County Farm. It further appeared that

after suspending sentence, the Court placed the applicant on probation for two years to make restitution. Ordinarily the crime of embezzlement is a crime involving moral turpitude. See "Application for Solicitor's Permit, Case No. 5", Bulletin #92, item 10, and cases cited therein. Notice was served upon the applicant to show cause why his application should not be denied on the ground that he had been convicted of a crime involving moral turpitude, and a hearing was duly held.

At the hearing applicant testified that he collected during one week the money mentioned above, and that he carried this sum of money in cash in the pockets of his clothes. He further testified that he had suddenly discovered that this money was missing; that he accused his wife of taking the money out of his pocket; that she immediately left him and that thereafter he obtained a divorce from her. He further said that when the brewery went into receivership a short time thereafter, the receiver had caused his arrest because of the shortage in his accounts. His explanation is interesting because, if true, it might show an entire absence of guilty intent on his part.

In order to test the story told by applicant, it was deemed advisable to examine the records of the Court of Chancery. These records disclose that about six months after the embezzlement occurred, applicant's wife instituted suit for divorce against him, alleging extreme cruelty; that the action was undefended and that petitioner has received a final decree of divorce. From the petition filed in the divorce proceedings it appears that applicant's wife had left him prior to the time of the embezzlement and not, as he now says, after the alleged embezzlement.

Our investigation further discloses that the applicant, shortly after his arrest, gave an explanation to sworn officers of the law of the circumstances surrounding the embezzlement which differs entirely from the explanation given by him at the hearing, viz., he admitted that he had collected the money as agent for the brewery, but said that he had "become confused in his accounts due to paying credit for bad barrels of beer to customers and money he spent on the trade when collecting." In said explanation he admitted liability to the amount named in the indictment and stated that he was anxious to make restitution if given an opportunity by the Court.

Consideration of the testimony and of the facts disclosed by our investigation leads to the conclusion that the explanation now given by the applicant is untrue.

It is recommended that the application for solicitor's permit be denied.

EDWARD J. DORTON
Attorney-in-Chief

APPROVED:
D. FREDERICK BURNETT
Commissioner

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

June 16th, 1936.

IN RE: Hearing No. 101

In his questionnaire filed with this Department prior to the issuance of his permit, the solicitor swore that he had never

been convicted of any crime. Subsequently his fingerprints were taken and, as a result thereof, it was disclosed that he had been convicted in the year 1920 on a charge of breaking, entering and larceny.

At the hearing the solicitor explained that in the year 1930 he and two other young men had broken into a railroad station and had stolen about Twenty-Five Dollars ($25.00) worth of shirts. The solicitor was about twenty years old at that time. After his conviction, he was sentenced to the State Reformatory at Rahway, and remained there for about fifteen months, after which time he was paroled.

The crime of breaking, entering and larceny involves moral turpitude. U.S. ex rel Griffo vs. McCandless, 28 Fed. 2nd, 287; Tessari vs. Schmucker, 53 Fed. 2nd, 570.

It is recommended that this permit be revoked.

At the conference the solicitor made a plea to the Commissioner that, if the decision was unfavorable, notice thereof be sent to him so that he might resign from his position rather than be discharged. He is a married man, with two children, has worked for his present employer since Repeal and impressed me quite favorably. I told him at the conference that I would convey his request to the Commissioner.

Edward J. Dorton
Attorney-in-Chief

APPROVED AS TO BOTH RECOMMENDATIONS
D. FREDERICK BURNETT
Commissioner

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

June 16th, 1936.

IN RE: Hearing No. 104

In his questionnaire filed with this Department prior to the issuance of his permit, the solicitor swore that he had never been convicted of any crime. Subsequently his fingerprints were taken and as a result thereof, it was disclosed that in 1932 he had been convicted on a charge of attempted burglary and placed on probation for three years.

At the hearing solicitor explained that in 1932, while he was out of work, he and four other young men were arrested while attempting to take some gasoline for their auto from the tank of another auto parked in an open field near a railroad station. They were also accused of attempting to steal a tire from the other car. All were tried in Special Sessions and pleaded guilty. Four of them, including the solicitor, received three years probation and the fifth young man received a jail sentence because he had a criminal record.

While technically the crime might be designated as attempted burglary, it does not appear from the evidence that there were any elements in this case usually associated with the crime of burglary. Rather, it takes on the appearance of a boyish prank and while his conduct was reprehensible, I do not believe that the act for which he was convicted was of such a base nature as to involve turpitude.

As to his false affidavit, solicitor explained that the questionnaire was filled out in his employer's handwriting and that he had signed the affidavit without reading it.

Undoubtedly the affidavit was false. It is recommended that if a solicitor's permit is granted to him for the next license period, such permit be not issued until five (5) days after the license period begins.

Edward J. Dorton
Attorney-in-Chief.

APPROVED: as to issuance but, as he has not learned much since 1932 about telling the truth, withhold permit until November 1st.

D. FREDERICK BURNETT
Commissioner

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

June 16th, 1936.

IN RE: Hearing No. 107

In his questionnaire filed with this Department prior to the issuance of his Permit, the solicitor swore that he had never been convicted of any crime. Subsequently his fingerprints were taken and, as a result thereof, it was disclosed that in 1933 he had been convicted on a charge of petty larceny, given a sixty days suspended sentence.

At the hearing thereafter granted to him, the solicitor explained that at the time of his conviction he had been engaged in business as a farmer and had stolen some sheaves of wheat from a neighboring farm. Thereafter he had been arrested, convicted of petty larceny and received the suspended sentence.

It has been held that petty larceny under certain circumstances may involve moral turpitude. Patricola vs. Karnuth (1935) 9 Fed. Sup. 961. Under the circumstances of this case, however, the theft does not show an act of baseness, villainy or depravity and, hence, does not involve moral turpitude.

As to the false statement in his questionnaire, solicitor said that he had not disclosed this conviction to his employer, who filled out the questionnaire, "because maybe I couldn't get the job down there".

This solicitor has never been convicted of any other crime and apparently his record is otherwise good. There is no doubt, however, that his questionnaire contained a false statement.

It is recommended that if a solicitor's permit is granted to him for the next license period, such permit be not issued until five (5) days after the license period begins.

Edward J. Dorton,
Attorney-in-Chief.

APPROVED: as to issuance but, in view of false affidavit, withhold permit until September 1st, half the time of case 104 because of his candor at the hearing.

D. Frederick Burnett
Commissioner