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

BULLETIN 278 NOVEMBER 7, 1938

1. APPELLATE DECISIONS - M. O'NEIL SUPPLY CO. et al. v. TOWNSHIP OF OCEAN et al.

M. O'NEIL SUPPLY CO., and LEWIS LUMBER CO.,

Appellants,

-vs-

TOWNSHIP COMMITTEE of the TOWNSHIP OF OCEAN, MONMOUTH COUNTY, and PAUL'S, INC.,

Respondents.

M. O'NEIL SUPPLY CO., and LEWIS LUMBER CO.,

Appellants,

-vs-

TOWNSHIP COMMITTEE of the TOWNSHIP OF OCEAN, MONMOUTH COUNTY, and CARL A. HUSSA,

Respondents.

M. O'NEIL SUPPLY CO., and LEWIS LUMBER CO.,

Appellants,

-vs-

TOWNSHIP COMMITTEE of the TOWNSHIP OF OCEAN, MONMOUTH COUNTY, and WILLIAM PLADKE,

Respondents.

ON APPEAL

CONCLUSIONS

Matlack & Lautman, Esqs., by Isaiah Matlack, Esq., Attorneys for Appellants.
Henry H. Patterson, Esq., Attorney for Respondent Township Committee.
Milton R. Konvitz, Esq., Attorney for Respondent Paul's, Inc.
Carl A. Hussa, Pro se.
Joseph Mattice, Esq., Attorney for Respondent William Pladke.

BY THE COMMISSIONER:

Appellants appeal from the issuance of renewals of plenary retail consumption licenses by respondent Township Committee to respondents Paul's, Inc., Carl A. Hussa and William Pladke.

The sole ground of appeal in each of the three cases is that the respective licenses were issued in violation of the zoning ordinance of the Township of Ocean enacted June 6, 1930, in

that each of said licensees conducts his or its place of business and the respective licenses were issued for use in a property within a residential district in which no business is permitted to be conducted under said ordinance.

This zoning ordinance was under consideration in Marinaccio vs. Ocean Township, Bulletin #264, Item 11. Marinaccio appealed from the refusal of the Township Committee to grant him a plenary retail consumption license. I found as fact that the premises then under consideration were located in a district restricted to residential purposes and, therefore, held that his application for a liquor license in such a place was properly denied because the issuance thereof would have violated the terms of the zoning ordinance.

On Marinaccio's contention that the sale of liquor was permissible as a non-conforming use because his premises had been continually used as a restaurant from 1928-9 (a date prior to the enactment of the Ordinance of June 6, 1930), I ruled:

> " *** this non-conforming use of the premises as a restaurant does not include the privilege to sell alcoholic beverages there. When the restaurant began operation (1928-9) and when the zoning ordinance was adopted (1930), Prohibition was in effect. As a result, although the restaurant may continue as a non-conforming use in this residential zone, it may so continue only as a non-liquor vending restaurant, since its exemption from the ordinance is limited to its non-conforming character at the time that ordinance was adopted. R.S.40:55-48; Sec. 5, Ordinance of June 6, 1930."

The refusal of the Township Committee to grant Marinaccio a license was, therefore, affirmed.

In the three cases now under consideration, the Township Committee renewed the plenary retail consumption licenses of the respondent licensees for the current fiscal year beginning July 1st, whereupon the appellants filed their appeals in each case on July 27, 1938.

It is not disputed that the premises operated by each of the respondent licensees are located in a district which was restricted to residential purposes under the zoning ordinance at the time the respective licenses were granted. If that were all, then the principles heretofore laid down would dispose of these cases and require reversal of the issuing authority on the ground that the licenses had been issued contrary to the terms of the local zoning ordinance. Speake vs. Closter (decided by the Supreme Court of this State on April 4, 1934, but not reported); Talbot vs. Keppler, Bulletin #117, Item 1; Corradi vs. Closter, Bulletin #219, Item 3; East Brunswick Township Board of Adjustment vs. East Brunswick, Bulletin #223, Item 5; Marinaccio vs. Ocean Township, supra.

The defense in these cases, unlike that in the Marinaccio case, is that after the renewal licenses were issued and after these appeals were taken on July 27, 1938, that the respondent Township granted exceptions to and made an amendment (by way of supplement) of the aforesaid zoning ordinance of June 6, 1930, the legal effect of which is presently to permit the sale of alcoholic beverages on the respective licensed premises -- in short, that, at the present time, the fact that these three licenses are outstanding in no way violates the terms of the zoning ordinance as thus revised.

It appears that the Board of Adjustment of the Township

of Ocean adopted a resolution on August 15, 1938, recommending to the Township Committee of Ocean that it except from the aforesaid zoning ordinance the premises owned by Paul's, Inc. so as to permit the use and the continuance of those premises for a licensed restaurant and tavern and the effectuation of the plenary retail consumption license then held by Paul's, Inc.; that the Township Committee, on August 19, 1938, upon receipt of said recommendation, adopted a resolution granting such exception so as to permit the use and continuance of these premises for a restaurant and licensed tavern under the license held by Paul's, Inc. and renewals thereof; that likewise, on August 31, 1938, the Board of Adjustment recommended, and on September 2, 1938, the Township Committee granted, similar exceptions in favor of the two other licensees, i.e., Hussa and Pladke.

It further appears that, on September 2, 1938, the Township Committee passed on final reading a supplement to the zoning ordinance reading as follows:

> "Section 9, Paragraph A, sub-division 3, is hereby supplemented to include the words 'sale of alcoholic beverages.'
>
> "This ordinance shall take effect when passed and published according to law."

The original sub-section, just mentioned, had provided that, within any business district no building or premises shall be used or constructed "except for one of the following specified trades, industries or purposes." It then enumerated specifically certain trades, industries or purposes, such as public restaurant, retail store, bank, billiard room, undertaking establishment, barber shop and bakery, but there was no mention therein of the sale of alcoholic beverages. The supplement, therefore, makes the sale of alcoholic beverages permissible in a business district.

R.S. 40:55-39(d) provides that the Board of Adjustment shall have power to:

> "Recommend in writing to the governing board or board of public works upon appeal in specific cases that a structure or use be allowed in a district restricted against such structure or use where the real estate in respect of which such recommendation is made does not abut a district in which such structure or use is authorized by the zoning ordinance or where such real estate is more than one hundred fifty feet beyond the boundary line of the district in which such structure or use is allowed by the zoning ordinance. Whereupon the governing body or board of public works may by resolution, approve or disapprove such recommendation. If such recommendation shall be approved by the governing body or board of public works then the administrative officer in charge of granting permits shall forthwith issue a permit for such structure or use."

Section 13A of the ordinance in question provides:

> "A Board of Adjustment is hereby established in the Township of Ocean in the County of Monmouth, which shall in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of this ordinance in harmony with its general purpose and intent and in accordance with the rules

herein contained and by law established."

Section 11 of said ordinance provides:

"The Township Committee may from time to time, after public notice and hearing, amend, supplement or change, the regulations and zones herein established."

Thus it appears that by statute, and by the terms of the zoning ordinance itself, the Board of Adjustment had the power to make recommendations and the Township Committee had the power to grant exceptions from the terms of the zoning ordinance and also to amend the ordinance.

On these premises, the appellants contend that the exceptions recommended by the Board of Adjustment and granted by the Township Committee of Ocean are nugatory because, under the Zoning Act, the recommendation of the Adjustment Board, on which exceptions, if valid, must be based, must be for a use permitted by the zoning ordinance in a district not abutting a district in which such use is permitted; that the Board of Adjustment had no jurisdiction under the statute to recommend the exceptions in these cases because Section 9 of the ordinance, as it originally stood, enumerates the kinds of businesses permitted in business districts and barred all others, including the sale of liquor, because not mentioned; that, at the time the respective exceptions were recommended and granted, the sale of liquor was still prohibited by the zoning ordinance even in business districts and, therefore, the Township Committee, as well as the Board of Adjustment, were without jurisdiction to do what they did in respect to the exceptions on which the licensees rely.

The point raised is highly technical. It throws intention into discard and places its emphasis on timing. If the supplement to the zoning ordinance had been enacted before the exceptions in favor of these three licensees were granted, the argument of appellants would fall of its own weight. As to two of the exceptions, i.e., those in favor of respondents Hussa and Plaake, the exceptions were actually granted on the same day that the ordinance was supplemented. The law does not take cognizance of fractions of a day. True, that in the case of respondent Paul's, Inc., the exception was granted before the supplement was enacted, and that, in all three cases, the Board of Adjustment made its recommendations before the ordinance was formally amended. But one of the objects of creating the Board of Adjustment was to authorize variance from the terms of an ordinance "as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done." R.S.40:55-39(c). True it is that, at the time of its enactment, the zoning ordinance did not permit the sale of alcoholic beverages in any zone. But, at that time, the sale of alcoholic beverages was forbidden by the Eighteenth Amendment. To have included such sale as a permissive use within the business district at that time would have been as nugatory as the appellant now contends the instant supplement is, despite the fact that such sales are now lawful. Clearly, the power to amend exists. The Township Committee have sought to exercise the power. Their declared intention is clear. If I cancelled these licenses, obeisance would be made to form, but nothing in substance gained, for, by merely re-enacting the ex-

ceptions and recommendations, if it be held necessary, new liquor licenses could, without question, lawfully be issued. On the record presented to me I see no reason why the supplement may not properly be considered retroactive so far as liquor licenses are concerned. As I said in Franklin Stores Co. vs. Elizabeth, Bulletin 61, Item 1:

> "Whether a license should be issued is not a game of legal wits or abstract logic, but, rather, a solemn determination on all the concrete facts, whether presented originally or on appeal, whether or not it is proper to issue that license. It is not a mere umpire's decision whether or not some administrative official previously made a move out of order or erred in technique or did something which by strict rules he had no right to do, but rather a final adjudication whether the license should be issued NOW."

As regards substantive or procedural questions before the Board of Adjustment or the Township Committee, that is none of my business -- for instance, the presence of legal evidence tending to establish facts which are made prerequisites to the exercise of power by the Board of Adjustment and the Township Committee by the Statute and the ordinance, or whether the supplemented ordinance was a reasonable and proper exercise of municipal power or a diversion from the true objectives of the zoning enactments. The review and determination of these and similar questions is confided exclusively to the Supreme Court. See Fonda vs. O'Donohue, 109 N.J.L. 584 (Sup. Ct. 1932); Linden M.E. Church vs. Linden, 113 N.J.L. 188 (Sup. Ct. 1934); Schnell vs. Township of Ocean, 120 N.J.L. 194 (Sup. Ct. 1938).

Pending such final adjudication by a court of competent jurisdiction, I shall rule that the exceptions granted appear on the face of the proceedings to have been proper.

The action of respondent Township Committee, in issuing a renewal license to each of the other respondents herein, is, therefore, affirmed, with leave reserved to appellants to reopen this appeal if a court of competent jurisdiction decides either that the supplement was not properly adopted or that the exceptions in favor of the respondent licensees were not properly recommended or granted.

D. FREDERICK BURNETT
Commissioner

Dated: October 31, 1938.

2. DRINKS ON THE HOUSE - AN ATTEMPTED SOLUTION - HEREIN OF ITS LEGAL AS WELL AS INTRINSIC DEFECTS.

Dear Sir:

We have a novel idea in entertainment which is explained below in detail and we would appreciate a ruling from you as to whether or not it is a violation of the Beverage Control Law.

There are a great number of patrons who expect the house to buy after they have bought a certain number of drinks and of course, if you buy one party, the rest would expect the same. So, we have put numbers on each table and have a wheel with corresponding numbers, then every half hour we spin the wheel and the table number matching the wheel number gets a drink on the house.

We also wanted to run "Country Store Night" with an assortment of groceries to be given to the patrons in the same manner as stated above.

There is no inducement here to make the patrons spend more money, as the party buying a ten cent beer will have the same chance as the party spending five dollars. There are absolutely no chances given or sold.

I wanted to use this merely as a means of entertainment and to also help regulate the so-called "house treats."

Respectfully yours,

PATRICK GALLAGHER

October 31, 1938.

Mr. Patrick Gallagher,
1813 Atlantic Avenue,
Atlantic City, N. J.

My dear Mr. Gallagher:

I have before me your letter and am sorry I cannot go along with you.

The problem of drinks on the house is of ancient vintage. But spinning a wheel every half hour is not a solution for it will only make your patrons time conscious and insistent upon more frequent dividends, whether earned or not. And what about the standees who spurn tables? And why should the man who squanders a dime get the compliments of the house in preference to a customer who has splurged five dollars?

Nor would handing out groceries or running a pound party relieve the house from treating the cheering section or the winners of the canned goods.

Besides, both of these schemes involve the distribution of prizes by chance, and, therefore, are lotteries and cause for revocation of your license.

So perish the thought of wheels which spin.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

3. TIED HOUSES -- CHATTEL MORTGAGES - ILLEGAL FOR A BREWERY TO TAKE A CHATTEL MORTGAGE FROM A RETAILER AS SECURITY FOR UNPAID RENT OR ANY OTHER DEBT.

Dear Sir:

If a brewery owns the real estate in which the holder of a plenary retail consumption license is a tenant, and the tenant has become much in arrears in rent and is anxious to keep from being removed from the premises or being sold out under a distress, and is willing to execute a chattel mortgage upon his goods and chattels to the brewery owner of the property for the back rent, which chattel mortgage would give him an opportunity to pay off his debt in installments, would such a chattel mortgage be valid?

May we suggest that if such a mortgage should be considered invalid it would prevent any brewery from taking security for a past debt and would result frequently in a brewery being compelled to remove a saloon keeper from the premises promptly upon any default in the payment of rent, and might cause serious difficulties both for the tenant and the brewery owner.

It would seem to us also that if the chattel mortgage transaction was one in which the mortgage was given and taken in good faith by both parties, every effort should be made to uphold it.

Very truly yours,

PERLMAN & LERNER

November 1, 1938.

Perlman & Lerner, Esqs.,
Trenton, New Jersey.

Gentlemen:

It would be wholly out of order for a New Jersey brewery to take a chattel mortgage from a retailer as security for unpaid rent or any other debt. The Alcoholic Beverage Law makes it unlawful for any manufacturer or wholesaler to be interested, directly or indirectly, in the retailing of alcoholic beverages, except as expressly provided in the Act. See R.S. 33:1-43 (Control Act, Sec. 40), as amended by P.L. 1938, c. 147. The exception aforesaid was inserted solely for the purpose of avoiding conflict with two of the authorized classes of licenses, viz.: limited winery and state beverage distributor, which afford certain retail as well as wholesale privileges. Outside of that, there are no exceptions. Violation is not only a misdemeanor for which the offender may be subjected to fine or imprisonment or both, but also is cause for the suspension or revocation of the licenses.

The purpose of this drastic legislation was to prevent control of retail outlets by manufacturers and wholesalers, i.e., a recurrence of "tied houses", which were responsible for many of the social and economic abuses which brought about Prohibition. The brewery chattel mortgage did great evil in the past to the whole alcoholic beverage industry and eventually put it out of business. You will find a comprehensive discussion of the statutory provision and review of the rulings made in Re Princeton Municipal Improvement, Inc., Bulletin 255, Item 1.

If a brewery were allowed to take a mortgage from a saloon keeper for back rent, whatever the good faith in the particular transaction, it would not be long before other tenants were allowed or even encouraged to become in default so as to cover the acquisition of prior liens on the several taverns. If it could be accomplished through the meidum of defaulted rent, so also a chattel mortgage would be valid if taken for any past due debt. But all this is just what the present Statute was expressly designed to prevent. If it should eventuate, as you surmise, that breweries would remove a saloon keeper from premises promptly upon defaulted payment of rent, that would be much better in the long run for the saloon keeper rather than put him in irons for the rest of his life so far as his franchise, furnishings and fixtures are concerned.

As I said in Re Van Horn, Bulletin 259, Item 8: "True, a retailer must pay his honest debts but that is something radically different from clamping on him a chattel mortgage in the same old ante-Prohibition way and then continuing to deal with him as if nothing had happened."

You understand, I presume, that the ownership of the retailer's premises by the brewery is permissible only by virtue of express statutory moratorium. R.S. 33:1-43, as amended. After December 6, 1939, even such ownership will be prohibited.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

4. LICENSEES - ENTERTAINMENT - SINGING CONTEST.

Gentlemen:

We have a cocktail bar in Union City, business card attached, and we desire to have a "Gift Night" next week. The following articles are to be given away absolutely free: Punch Bowl Set; Small Table Lamp; White Fur Cat. The method of awarding these prizes is as follows:

We intend to have a singing contest amongst the patrons, and three judges are to be selected from the audience to decide who are entitled to the prizes purely upon their merits. Before going ahead with our plans, we would like to have the O.K. from your Department that we are in no way doing anything against the rules and regulations covering the above.

If the above way is not satisfactory in distributing the gifts, possibly you could give us the correct method.

Yours very truly,

Russell Pontifex

November 1, 1938.

Mr. Russell Pontifex,
Rose Bowl Bar,
Union City, N. J.

My dear Mr. Pontifex:

I have your letter, but am not sure whether the emphasis is on passing out gifts or upon conducting a genuine singing contest.

If the latter, there is no objection to awarding prizes in accordance with your plan. But be sure that the affair is kept under control and doesn't offend your neighbors. Despite recent injunctive proceedings concerning free speech and assembly, there is, for reasons born of experience, no constitutional right to sing. So, to keep the peace, I'd cut out provocative folk songs, yodeling and bagpipe accompaniments -- and keep a hook handy.

I am assuming, of course, that the white fur cat is not a contestant.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

5. ENFORCEMENT DIVISION ACTIVITY REPORT FOR OCTOBER, 1938

To: D. Frederick Burnett, Commissioner

ARRESTS:
Total number of persons - - - - - - - - - - - 55
Licensees - - 3 Non-Licensees - 52

SEIZURES:
Stills - total number seized- - - - - - - - - 17
Capacity 1 to 50 gallons - - - - - - 7
Capacity 50 gallons and over - - - -10

Motor Vehicles - - total number seized - 3
Trucks - - 0 Passenger Cars - 3

Alcohol
Beverage Alcohol - - - - - - - - - - - 166 Gallons

Mash - Total number of gallons - - - 83,907

Alcoholic Beverages
Beer, Ale, etc. - - - - - - - - - - - 71 Gallons
Wine - - - - - - - - - - - - - - - -2821 "
Whiskies and other hard liquor- - - 106 "

RETAIL INSPECTIONS:
Licensed premises inspected - - - - - 1,883
Illicit (bootleg) liquor - - - - 9
Gambling violations - - - - - - 62
Sign violations - - - - - - - - 57
Unqualified employees - - - - - 86
Other mercantile business - - - 75
Disposal permits necessary- - - 16
"Front" violations - - - - - - - 2
Improper beer markers - - - - - 7
Other violations found- - - - - 53

Total violations found- - - - -367
Total number of bottles gauged - - - 12,633

STATE LICENSEES:
Plant Control Inspections completed - 195
License applications investigated - - 35

COMPLAINTS:
Investigated and closed - - - - - - - 449
Investigated, pending completion- - - 168

LABORATORY:
Analyses made - - - - - - - - - - - - - 136
Alcohol and water and artificial coloring cases - - - - - - - - - 21
Poison and denaturant cases - - - - - 3

Respectfully submitted,

E. W. Garrett,
Deputy Commissioner.

6. DISCIPLINARY PROCEEDINGS - PERMITTING MINOR EMPLOYEES TO SERVE LIQUOR AND MISLABELING OF BEER TAPS - LOCAL LICENSING AUTHORITIES HOODWINKED AGAIN.

October 31, 1938.

Hon. George Tierney,
Mayor, Township of Cedar Grove,
152 Market Street,
Paterson, N. J.

My dear Mayor:

I have before me staff report and your letter of October 4th re disciplinary proceedings conducted by the Board of Commissioners of Cedar Grove on September 30, 1938 against Ralph De Luccia, t/a North End Tavern, 182 Stevens Avenue, charged with permitting a minor employee to serve alcoholic beverages in violation of R.S. 33:1-26 (Control Act, Section 23) and State Regulations 11, Rule 3; and mislabeling of a beer tap, in violation of State Regulations 22, Rule 1.

I note that the licensee pleaded guilty but that the Board of Commissioners imposed no penalty and instead merely reprimanded him and suspended sentence; also that the minor who had made the sale was punished for misrepresenting his age to the investigators by being instructed to report to Police Headquarters every night from 7:00 P. M. until 10:00 P. M. for one week.

According to the staff report, the investigators entered the licensed premises at 6:50 P. M. and thereafter found the mislabeled beer tap. I note from your letter that the licensee's alibi was that his father, who had tapped the beer, was distracted by an automobile accident which occurred outside the premises at about 5:00 P. M., and while he was absent, the investigators entered and discovered the violation.

It is indeed amazing that an accident occurring at 5:00 P. M. should create so much excitement that the improper tap marker was not corrected by 6:50 P. M., almost two hours later. It is also strange how the story has changed since the violation was discovered. At that time, the father said nothing about the accident and instead said that he had been out to the meat market to get provisions for the tavern. I am afraid that the Board of Commissioners has been hoodwinked.

A similar excuse was offered in Re Highway Tavern, Inc., Bulletin 272, Item 5, where the bartender claimed that he had neglected to change the tap marker because he first waited on seven customers and while so doing, the investigators entered. But it was held:-

> "The explanation is not an excuse. The fact that the spigot was mislabeled for only ten minutes before the violation was discovered goes only to the length of the violation and not to the fact of its occurrence. It was the bartender's duty to first comply with the law even though the seven thirsty customers had to wait a brief minute."

The alibi that the minor who had served the investigators was expressly instructed to refrain from all sale or service of alcoholic beverages deserves scant notice. Licensees

are forever coming in and defending on the ground that their employees have exceeded their authority. I had occasion to deal with an alibi of this sort as recently as Re Boulevard Tavern, Inc., Bulletin 272, Item 14. You can see that it's an old story unworthy of serious consideration. It was dismissed in short order:

> "The alibi is quite shopworn. Licensees are directly answerable for the violations of their employees upon the licensed premises. Re Kneller, Bulletin 49, Item 4; Riewerts v. Englewood, Bulletin 60, Item 9; Re Pombo, Bulletin 238, Item 5; Re Neidenberg, Bulletin 271, Item 4."

In Re Kneller, the ruling was:

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

And in Re Pombo:

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

Passing the question of the authority of the Board of Commissioners to require the minor employee to report to Police Headquarters every night for a week in punishment of his lie to the investigators, it is obvious that it can be of no great hardship to the licensee. He continues to do business uninterrupted by any suspension. In all probability, a suspension of five days would have caused him to impress the minor, in a manner much more effective, with the necessity of obeying orders in the future.

I cordially suggest to the Board of Commissioners that in the future they be not so ready to condone violations, but instead, impose penalties that will make licensees in Cedar Grove realize that the law is meant to be obeyed.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

7. WINE - SALES TO CONSUMERS - LICENSES AVAILABLE.

Sir:

May I respectfully ask to be advised concerning the following: I have been consulted by a client who desires to know whether he is permitted to engage in the sale of fermented wines, the same to be drawn from tax paid barrels into containers supplied by the general public consumer or licensee, these wines to be consumed off

the premises, and also on the same premises to sell package goods such as wines and liquors in original containers.

If so, what type or types of licenses are required? If a limited winery license is the proper license for the sale of wines in the manner aforesaid, it appears from the Act that the amount to be sold shall not exceed 5,000 gallons per annum. Is there a license permitting the sale of a larger amount?

Most respectfully yours,
Milton C. Kitay

October 31, 1938

Milton C. Kitay, Esq.,
Paterson, N. J.

My dear Mr. Kitay:

You inquire for the type of license which would enable your client to sell, for off-premises consumption, wine drawn from tax-paid barrels into containers supplied by consumer or licensee, and at the same time to sell other alcoholic beverages generally, in original containers.

There is no license, or licenses, covering all of these things.

Under a limited winery license, your client could sell any naturally fermented wines and fruit juices that had been manufactured or bottled by him, to consumers, for off-premises consumption. Such license, however, does not permit sales in containers belonging to the consumer and brought in by him to be filled. With the exception of draught beer, which is not material to your inquiry, all alcoholic beverages sold to be taken off the premises must be in sealed containers, properly labeled as to maker and content and bearing proper indicia of tax payment. Hence, the wine may be sold only in the containers of the licensee. Furthermore, the license being restricted to naturally fermented wines and fruit juices, no other liquor could be sold. (R. S. 33:1-10; Control Act, Sec. 11(2)b).

Under a plenary retail consumption license, your client could sell all alcoholic beverages in open containers for consumption on the licensed premises and in original containers for consumption off the premises. He could decant wine, pursuant to Regulations No. 25, for on-premises consumption. But he could not sell such decanted wine, or rebottle same, for off-premises consumption, as the law requires that all alcoholic beverages so sold by such licensee be in the original unopened container in which it was received. (R. S. 33:1-12; Control Act, Sec. 13(1)).

Under a plenary retail distribution license, he could sell all alcoholic beverages in original containers for consumption off the premises. But there is no privilege of decanting because there is no provision for on-premises sales. (R. S. 33:1-12; Control Act, Sec. 13(3)a).

The same person may not hold a limited winery license and a plenary retail consumption or distribution license at the same time. It is, according to R. S. 33:1-43 (Control Act, Sec. 40), unlawful for anyone interested in the manufacturing or wholesaling of alcoholic beverages to be directly or indirectly interested in the retailing of any alcoholic beverages, except as provided in the Act. The exception aforementioned is solely for the purpose of avoiding conflict with the two classes of licenses, limited winery and State beverage distributor, which afford both wholesale and retail privileges.

These are the licenses for the sale of wine to consumers which the statute affords. If your client wishes to be licensed to sell wine, he will have to conform his business accordingly.

The fact that the largest limited winery license authorizes the manufacture and sale of only 5,000 gallons per year does not mean that a winery, in no event, could handle more than 5,000 gallons a year. As the quota of each limited winery license is reached, successive licenses may be obtained.

Applications for plenary retail consumption and plenary retail distribution licenses are made directly to the municipality. Hence, for application forms and further information, communicate with the Municipal Clerk. Limited winery licenses are issued by this Department. Application forms are available on request.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

8. MUNICIPAL REGULATIONS - REGULATION PURPORTING TO REQUIRE CONSENT TO TRANSFER, FROM THE OWNER OF THE PROPERTY FROM WHICH A LICENSE IS TO BE TRANSFERRED, DISAPPROVED.

October 31, 1938

J. Willard DeYoe, Esq.,
Attorney for West Milford Township,
Paterson, N. J.

My dear Mr. DeYoe:

I have before me proposed ordinance for West Milford Township, amending Section 14 of ordinance adopted June 27, 1936, amended May 15, 1937.

* * * * * *

Subdivision (e) provides:

> "For the transfer of a consumption license or a seasonal license, the Township Committee may require the consent of the owner of the property for which said license was granted."

The right to transfer a license from place to place, which the statute affords, cannot be nullified or otherwise diminished by municipal regulation, or denied, except for good cause. Such cause, generally speaking, is that which could be said to be necessary and proper to accomplish the objects of the Alcoholic Beverage Law and secure compliance with its provisions; e.g., that the applicant for the transfer had no enforceable right to possession of the premises to which the transfer was sought or that the premises were unsuitable or that there were already too many licenses in the vicinity. See Craig v. Orange, Bulletin 251, Item 4; Re McElroy, Bulletin 247, Item 6; VanSchoick v. Howell, Bulletin 120, Item 6. Cf. Kirschhoff v. Millville and Beckett, Bulletin 254, Item 8; Luzzi v. Nutley, Bulletin 244, Item 5; Re Kessel, Bulletin 160, Item 5.

But it is a far cry from this to requiring the consent of the owner of the property from which the license is to be transferred. That doesn't carry out the objects of the Act. It serves only the private interests of the owners by giving them strangle holds on their tenants whereby refusal to give consent could be made the means of exacting an exorbitant rent. I appreciate that the regulation provides merely that the Township Committee may require the consent. But that means that whether or not a consent will be required will

depend upon the private arrangements between the landlords and the licensees, which the Township Committee has no power, and therefore should not attempt, to adjudicate. See Potanski v. South River, Bulletin 226, Item 7. I am familiar with the problems confronting owners of property leased for tavern purposes. See Puri v. Warren, Bulletin 266, Item 2; Re Konesky, Bulletin 217, Item 7. Of course, every place that may be suitable cannot be given a license. The issuance of licenses can't go on forever. But no one place is entitled to a license any more than any other. It is entirely possible that places other than presently licensed may be eminently more desirable, or new and better places erected in the future.

I conclude that the refusal of the owner of the property to consent to the transfer of a license is not such cause as could support the denial of the transfer. Subdivision (e) is therefore disapproved.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

9. DISCIPLINARY PROCEEDINGS - PERMITTING PROSTITUTES ON LICENSED PREMISES - EVIDENCE WHICH LED TO ACQUITTAL DISCUSSED.

October 31, 1938,

J. Donald Markey, Clerk,
Rahway Municipal Board of Alcoholic Beverage Control,
Rahway, N. J.

My dear Mr. Markey:

I have before me staff report and your certification of October 4, 1938 re disciplinary proceedings conducted by the Board on September 15, 1938 against Russell V. O'Connor, 549 Jaques Avenue, charged with permitting a prostitute on the licensed premises, in violation of Regulations 20, Rule 4, and permitting lewdness or immoral activities upon the licensed premises in violation of State Regulations 20, Rule 5.

I note that after hearing, your Board found no cause for action and the defendant not guilty.

According to the staff report, my men, after being solicited for sexual intercourse by an habitué of the premises, known familiarly as "Boots", engaged the licensee in conversation and asked his opinion whether "Boots" was physically healthy and suitable for the purpose, whereupon he assured them that she was "O.K." and that if she made a date she would keep it.

At the hearing, the licensee categorically denied that any such conversation took place. It is indeed amazing how the licensee's recollection has strengthened since the evening in question. At that time, in a statement that he gave to the investigators, he said that he didn't remember being asked that question and didn't remember the details of his conversation with them. Yet, over a month later, he not only is positive that no such question was asked, but he has dredged from the depths of his memory the vivid recollection that he overheard "Boots" say to Investigator King, "If you had a sister, you would not say that." It therefore came as no surprise to find that the licensee's fiancee was close at hand at the crucial moment and overheard the same remark. I do not see, however, any mention that "Boots" was called as a defense witness to give the lie to the investigators. I suppose she could have just as well as the other self-interested witnesses.

The summation of City Attorney Eugene F. Mainzer strikes a high note that might well have been heeded. He said:

"You must remember that the inspectors testified that they visited these licensed premises as a result of a complaint * * * * They are law enforcing agents with a sworn duty to go out even though it may be harsh to enforce those duties."

I sincerely trust that the Board will find no occasion to regret its action.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

10. ELIGIBILITY FOR EMPLOYMENT - MORAL TURPITUDE - FACTS EXAMINED - CONCLUSIONS.

November 1, 1938

Re: Case 227

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

In his application, he admitted his conviction of the crime of possession of counterfeit money, and sentence to imprisonment for one year and one day, of which he served five months before being paroled.

Applicant claims that he had no knowledge that the ten dollar bill found in his possession was counterfeit, and hazards the guess that he must have got it at the Camden dog track which he frequented daily, making bets on the dog races.

Applicant's explanation of the innocent acquisition of the counterfeit bill might be more credible except for two collateral matters. He testified that he had been arrested on only one other occasion, for being drunk and disorderly, he thought, and that he had never been convicted of anything but the instant crime. Return of fingerprint inquiry from the Federal Bureau of Investigation, however, disclosed arrests on three separate occasions for (1) keeping a gambling device (2) suspicion of murder, and (3) impersonating an officer. As a result of the first and third arrests, he was fined.

He likewise testified that since his release from prison in 1934, he has been unemployed except for odd jobs as an electrician, carpenter or steamfitter. Investigation by this Department established that applicant has been employed by his brother, the holder of a state beverage distributor's license, for more than a year past, the employment being admitted by the licensee.

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

Prima facie, the crime of possessing counterfeit money involves moral turpitude. Cf. Re Case 71, Bulletin 199, Item 9. Should the testimony establish its innocent acquisition, the presumption might be overcome. However, in view of applicant's disregard for the truth and his attempt to gloss over his past record and present employment, his explanation of how he came to possess the counterfeit ten dollar bill is unworthy of belief.

It is recommended that applicant be declared ineligible for a solicitor's permit.

Emerson A. Tschupp,
Attorney.

APPROVED:
D. FREDERICK BURNETT,
Commissioner.

11. LICENSEES - AMATEUR NIGHTS - ENTERTAINERS AT AMATEUR NIGHTS MUST QUALIFY UNDER THE STATUTE THE SAME AS REGULAR EMPLOYEES.

November 1, 1938

Mr. John Dersi,
Hopewell, N.J.

My dear Mr. Dersi:

There is no objection to your conducting amateur nights, provided the entertainment is clean and decent and not in any way objectionable.

But whether the entertainers are paid or whether they perform gratuitously, as at an amateur night, they are, nevertheless, employed on the premises, and hence must possess the same qualifications as regular employees.

The law provides (R. S. 33:1-26, as amended by P.L. 1938, c. 297, Control Act, Sec. 23), with certain exceptions, that no person who would fail to qualify as a licensee shall be knowingly employed by or connected in any business capacity whatsoever with a licensee. That means that you may not employ on your premises, either as entertainer or otherwise, anyone who has committed two or more violations of the present Alcoholic Beverage Law or who has been convicted of a crime involving moral turpitude (R. S. 33:1-25), unless, as regards the latter, after application to and hearing by the State Commissioner pursuant to R. S. 33:1-31.2, the disqualification has been removed. It also means that persons who are not citizens of the United States (except citizens of one of the countries listed in Re Guskind, Bulletin 130, Item 5, who qualify because of Federal treaties affording reciprocal privileges to respective nationals), or who are under twenty-one years of age, may not be employed unless special employment permits have first been obtained, and further, that persons who have not been residents of the State for five years must also have such permits before they may be employed, unless the premises is a bona fide hotel or restaurant and the employees will have nothing whatsoever to do with alcoholic beverages.

You may allow to perform or entertain on your premises only those whose qualifications are such that they can obtain licenses in their own names, or (excepting non-residents, in the circumstances aforesaid) for whom special employment permits have been issued.

It is, therefore, essential, before each amateur entertainment, that you ascertain the qualifications, as above indicated, of each of the performers. If they are aliens or minors, they may entertain only if employment permits are first procured. If they do not have five years' residence in New Jersey, they will need no employment permit provided (1) your place could be said to be a bona fide hotel or restaurant, (2) lack of residence is the only disqualification, and (3) they are employed only as entertainers and not in any manner whatsoever to serve, sell or solicit the sale of any alcoholic beverage, or participate in the mixing, processing or preparation thereof. Otherwise, those who do not have the five years' residence need permits too.

Those who do not conform must not perform. You risk the suspension of your license if you allow it.

Applications for employment permits are obtainable from the office of the Department upon request.

Very truly yours,

L. Frederick Burnett

Commissioner.