

COMMISSIONER BURNETT
SENT TO REGULAR MAILING LIST

STATE OF NEW JERSEY

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

744 Broad Street,

Newark, N. J.

BULLETIN NUMBER 76

June 3, 1935

1. NOTICE

TO ALL MUNICIPAL ISSUING AUTHORITIES:

Complaints have been received that licenses have been issued by various municipalities for road stands where alcoholic beverages are being served at counters or at fountains at which ice cream and soft drinks are served to patrons, including many children. This is not only objectionable as a matter of social policy, but also is expressly prohibited by the Control Act.

Section 13 prohibits the issuance of consumption licenses for premises where any other business is carried on except the keeping of a hotel or restaurant. Consequently, a road stand proprietor who desires a consumption license must so separate the premises where the alcoholic beverages are to be sold from the premises where the prohibited business is carried on as to render them substantially separate and distinct.

The statutory language and the governing rules are fully set forth in Bulletin 35, Item 15, and Bulletin 38, Item 6, and need not be repeated here. It is important to note that even where the applicant does conduct a bona fide hotel or restaurant, a consumption license may nevertheless not be issued if he also operates on the same premises a delicatessen, grocery, candy store or any other proscribed business. Evasions and subterfuges must not be permitted to nullify the legislative policy.

I cordially recommend that careful and complete investigation be made to insure that consumption licenses will not be granted or renewed where the operation of the licensed premises would be in violation of Section 13.

Your cooperation will be greatly appreciated.

D. FREDERICK BURNETT,
Commissioner

Dated: May 27, 1935

2. MUNICIPAL OFFICIALS - DISQUALIFICATION TO VOTE ON ALCOHOLIC BEVERAGE MATTERS - WHEN DISQUALIFIED

Dear Commissioner:

The Mayor of South Belmar is the steward in the Moose Home in Belmar. His duties consist, among other things, of superintending the liquor department of the Moose organization. Query: Is he eligible to vote on matters pertaining to alcoholic beverages in view of the foregoing fact, bearing in mind that he is employed in another municipality?

One of the Councilmen has a tenant who operates a tap room. He has no interest in the proceedings except to receive rent from his tenant. Is he eligible to vote?

Another Councilman's mother owns premises where an alcoholic beverage license has been issued. Is he eligible to vote

New Jersey State Library

on the issuance of this particular license, or on any other legislation which may be contemplated by the municipal authorities pertaining to alcoholic beverages?

Very truly yours,
ELVIN R. SIMMILL

May 20, 1935

Elvin R. Simmill, Esq.,
Asbury Park, N. J.

Dear Sir:-

(1) A person employed by a club licensee in one municipality is not disqualified from participating in his capacity as a member of the governing body of another municipality in alcoholic beverage matters presented to such governing body. The Commissioner has heretofore, on numerous occasions, ruled that members of an issuing authority who are interested in the liquor business may not participate in alcoholic beverage matters which come before such issuing authority. Each of these rulings involved a situation where the official's liquor activities covered territory including the very municipality where he held office and the consequent conflict of interest was direct. In the instant situation, however, the fact that the official is employed in a different municipality by a licensee privileged to serve only its regular members and their guests, renders remote any suggestion of personal interest. No principles of fairness or impartiality are violated if he is permitted to act on alcoholic beverage matters arising before the governing body.

(2) A member of a municipality's issuing authority who owns premises conducted by a retail licensee within such municipality and receives rent from such retail licensee, is disqualified from voting on any matters involving alcoholic beverage control. See Bulletin 70, Item 5.

(3) It may well be suggested that where a councilman's mother owns premises which are sought to be licensed, he should not vote on the application in order to avoid the suggestion of partiality. However, in legal contemplation, the blood relationship does not of itself create any interest in the application. Consequently, the ownership, by a mother of a councilman, of premises sought to be licensed does not disqualify such councilman from voting on the application provided he has actually no interest in the premises or in the business to be conducted under the license.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

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

3. REFUNDS - NONE ON TRANSFERS

LICENSES - TRANSFERS - NO REFUNDS

May 3, 1935

Dear Sir:-

On February 18th, 1935, one of our Plenary Retail

Consumption Licensees notified the Township Committee of its intention to apply for a transfer of its license. The publication and papers in connection with the transfer were completed and March 4th designated as the date for hearing. Our investigation was not complete at that time and the hearing was continued to March 18th. Under date of March 14th we were advised that the licensee had decided to continue business at his original address and the application for transfer was withdrawn.

The Township had received the transfer fee of \$5.00 provided in the act and we are now called upon to return it to the applicant.

Will you please advise me of your ruling in such an instance.

Yours very truly,
MABEL E. GOFF
Township Clerk

May 11, 1935

Miss Mabel E. Goff,
Township Clerk,
Millburn, N. J.

Dear Madam:

I have your letter of May 3d.

Section 23 of the Control Act provides that an application for a transfer of license shall set forth the same matters and things with reference to the premises to which a transfer of license is sought as are required to be set forth in connection with an original application for license. It contemplates that the \$5.00 transfer fee shall accompany the application. It makes no mention of any refund in the event the application is withdrawn or denied and in view of the provisions of section 28 pertaining to refunds, no right to a refund in this situation should be implied.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

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

4. LICENSES - PUBLICATION OF NOTICE OF INTENTION IN NEWSPAPER
PUBLISHED IN THE MUNICIPALITY - UNOFFICIAL SUBDIVISIONS OF
MUNICIPALITIES ARE NOT COGNIZABLE

May 7, 1935

Dear Sir:

We have in our files a copy of your ruling setting forth a definite decision relative to the matter of Notices of Intention being published in newspapers.

In this bulletin, you specifically ruled that where a community has a paper qualified to insert legal notices, all applicants for

licenses, from that community, must use that paper.

In the past few months we have had requests from persons in surrounding boroughs and townships to insert their notices.

To illustrate, there was one Christy Gnazzo who was applying to the Township Committee of Pennsauken Township for a license. We turned down his request to insert a notice due to the fact that a small weekly paper, the Community News, printed in the Borough of Merchantville, claims to be the official paper for the Borough of Merchantville and Pennsauken Township which lie adjacent to one another.

It has always been our understanding that the official status of a newspaper was established by the statement on its masthead as to what post-office it was entered under. By that we mean that if the Community News was entered at the Merchantville Post-Office that automatically would establish it as a Borough of Merchantville paper but not necessarily as an official paper for Pennsauken Township.

However, with the consolidation of a number of these small borough and township post-offices under the Camden Post-Office, it has made all the papers in these communities change their masthead to read - "entered at the Camden Post-Office".

This presents a problem to us as to whether or not we are within our rights to accept notices from these communities.

As it is nearing the time for the notices to be inserted again for the new licenses to be issued July 1st, we want to get a definite ruling from your office for our own protection as well as to give the proper information and protection to the applicants.

In instances where a community having a small weekly paper is located within a township, we are not quite sure whether we can accept notices from other communities in that township that do not have a paper or whether you consider the paper of one community as the official paper for the whole township.

We would greatly appreciate a statement of your version of these problems so that we know just exactly where we stand in either accepting or declining a notice for publication.

Thanking you for any information you can give us and awaiting a reply at your earliest convenience, we are

Very truly yours,
COURIER-POST NEWSPAPERS
W. L. Tushingham
Business Manager.

May 15, 1935

Courier-Post Newspapers,
Camden, N. J.

Gentlemen:

I have your letter of May 7th.

Section 22 of the Control Act provides that notice of

intention shall be inserted in a newspaper published and circulated in the municipality in which the licensed premises are located, provided that if there is no such newspaper then the notice may be published in a newspaper published and circulated in the county in which the licensed premises are located. I am enclosing herewith Bulletin 35, Item 2, and Bulletin 67, Items 15 and 16, which set forth the general principles pertaining to the qualifications of newspapers for the publication of notice of intention.

Where there is a newspaper qualified to publish legal advertisements, printed in the English language and published and circulated weekly or daily within a township, notices of intention with respect to licensed premises located therein may be published in such newspaper. Consequently, a newspaper circulating in the county, but not published in such township, is not qualified to publish notices of intention for such premises. Where there is a qualified newspaper within a township, the fact that it circulates mainly in one of several unofficial communities in the township is immaterial since the statute provides that the newspaper must be published and circulated in the "municipality in which the licensed premises are located". This means the entire city, township, borough or other municipality; unofficial subdivisions thereof are not cognizable in law. Cf. Bulletin 40, Item 5; Bulletin 41, Item 6 and Bulletin 61, Item 3.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

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

5. RULES GOVERNING SIGNS AND OTHER ADVERTISING MATTER - RULE 3 -
NOT PERMISSIBLE TO DISPLAY PRICE OF ALCOHOLIC BEVERAGES VIA
RESTAURANT MENU

May 14, 1935

Gentlemen:

Our Company comes under the provisions of Rule #3, promulgated by your Department on April 9, 1935, and we are trying to comply with this provision. We find, however, that a literal interpretation of this rule actually works a hardship upon us. It is customary for us to print the prices of all the items which we sell on our daily menus and we also make it a practice to affix this menu to our store windows. We are enclosing two sample menus and you will notice that the prices of the beers are listed in a separate block. The size of the type, however, is so small that these particular items are not emphasized and would not attract undue attention.

It is our belief that the rule in question was passed to discourage and prevent flagrant advertising of the prices of alcoholic beverages and not to cover instances of this kind.

We should prefer to have our menus in the State of New Jersey standardized with all our menus everywhere and are consequently requesting a ruling on this particular application of the rule.

We trust you will allow us to continue advertising the sale of alcoholic beverages in the manner shown on the menu, and remain

Very truly yours,
 CHILDS COMPANY
 By:
 P. F. Fuchs
 Assistant Treasurer

May 18, 1935

Childs Company,
 New York City.

Gentlemen:

I have your letter of May 14th.

You are correct in your suggestion that rule #3 prohibiting price display by retail consumption licensees was aimed mainly at flagrant price advertisements in windows. As a matter of administration, however, it was essential that a uniform and broad regulation be adopted in order to avoid discriminations and subterfuges and effectuate the desired results. The Commissioner is firmly convinced that the making of exceptions in individual cases will eventually lead to the breaking down of the entire rule and that minor hardships involved in individual cases must be accepted for the greater social good.

I have examined the menus enclosed in your letter and they are objectionable only in so far as they mention the price of the beer therein referred to. This objection can readily be removed by placing over such price a small strip effectively concealing it from public view. If this suggestion is adopted, there will be no economic waste and any hardship in the particular situation presented will substantially be eliminated.

The ruling of the Commissioner is that you may not display the price of any alcoholic beverage in your window, despite the fact that such price display is contained in a general menu.

Very truly yours,
 D. FREDERICK BURNETT,
 Commissioner

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

6. REMARKS OF THE COMMISSIONER IN REFERENCE TO THE ABROGATION OF THE FEDERAL ALCOHOL CONTROL ADMINISTRATION

May 28, 1935

The termination of the Federal Alcohol Control Administration is not a cause for alarm, nor a vital blow to liquor control any more than the termination of any distillers', rectifiers', brewers', wholesalers' or retailers' trade association would be. For, in essence, the FACA was a glorified trade association clothed with the semblance of law when the six codes which constituted its framework were approved by the President. The prime incidence of those codes was upon economic and not control pro-

blems, viz., to prevent price cutting and to provide for fair trade practices. Those codes were in substance by-laws for the regulation of the members of each of the different industries as among themselves, and in their relation to allied industries, and not in reference to their relations to the consuming public and the extermination of the racketeer and the bootlegger, which are the main objectives of liquor control as I understand it.

The State of New Jersey has never surrendered or in anywise abdicated its sovereign prerogatives to control the manufacture, sale and distribution of liquor within the State. I have on two occasions followed the lead of FACA, just as I have adopted suggestions from trade associations and other control boards when demonstrated to be worth while. Those two occasions were in respect to its labeling regulations and, again, in reference to its standards of fill for bottles, but in each instance reserved the right to change the rules or even to go contrary to the Federal regulations if experience should indicate the necessity or expediency.

As early as December, 1933, there was vociferous and insistent demand for State labeling regulation. Brief study sufficed to show that it was highly undesirable for each state to devise its own system of labeling. This was a subject where uniformity was highly desirable. Hence, because of the studies then being made by FACA concerning labeling, I declined to make any local rule in New Jersey until actual experience should show the necessity or expediency. And upon the subsequent promulgation of those rules by FACA, I found that they substantially filled the bill and dispensed with any need for any labeling regulations in New Jersey. It now becomes necessary to promulgate labeling rules in New Jersey, which I shall proceed to do forthwith. We have kept in close check with the Federal Department and are prepared to adopt immediately such of the Federal labeling regulations as have proved desirable in operation, and which should be adopted in New Jersey.

As regards standards of fill, the first step was taken here long in advance of any Federal regulation, when on February 22, 1934, the sale of 2 ounce nips was forbidden to package stores, because their sale for easy consumption on the street, in telephone booths and in public parks worked havoc with the younger generation, conduced to public drunkenness and indency, and was otherwise opposed to sound public policy. Later, when the elaborate nation-wide standards of fill were promulgated by FACA, they formed the basis of the rules in June, 1934 as constituting standards of fill for New Jersey. Hence no further rule need be made on this score.

Uniformity, however, is not a fetish to be blindly worshipped. It is good only to the extent that the underlying conditions to which the uniform legislation are to be applied are substantially the same. Hence, on all other subjects, New Jersey has made its own rules based on actual experience with local conditions in the State.

There is one thing, however, which might perhaps well be made the subject of uniformity and as to which, with the falling of FACA, we will have henceforth to do without, and that is the subject of regulations governing liquor advertising. The

authority of the State Commissioner is confined to regulating signs and displays on licensed premises. The Commissioner has no power over liquor advertising as such. It might be well for the Legislature to consider conferring express power upon the Commissioner to prescribe reasonable and salutary restrictions, not upon the quantity of advertising but upon the wording thereof, so as to prevent misleading, unfair and offensive advertising

The Federal decision gives point and impetus to the coming Convention of the National Conference of State Liquor Administrators because of the necessity by voluntary action among the states of working out uniform legislation which experience has shown to be valuable and where the underlying conditions in the several states are fairly identical. There is more need for this now than ever because of the absence of any centralized Federal authority to accomplish this within the several liquor industries themselves. The pending Senate Bill 289, which has already passed the Senate and is now in the Assembly, confers express power upon the Commissioner to make reciprocal regulations with other states. My Chief Deputy and Counsel, Nathan L. Jacobs, in anticipation of this Bill becoming a law, has already made an intensive study of such rules and has had conferences with the New Jersey State Commission on Inter-State Cooperation. The last conference on this was held last Friday evening with Assemblyman Joseph C. Paul, Chairman of the Sub-Committee on Liquor Traffic, which was also attended by Senator John E. Toolan, and Judge Richard Hartshorne, who are members of that Commission, Judge Hartshorne being the Chairman.

We shall miss the valued help of Joseph H. Choate, Chairman of the Federal Commission, in his sincere, effective, pioneering work in those fields which we did not have to explore, as above mentioned, because he was doing the work. He worked from within. We worked from without. Thus the fact that I did not have to study labeling intensively, but could safely follow his lead, was just one less headache. Henceforth, all matters which are proper subjects for uniform legislation will have to be independently studied without his valued aid.

I shall also miss his splendid, far-sighted cooperation in demanding the radical reduction of the Federal tax as a factor of greatest moment in eliminating the racketeer and bootlegger.

D. FREDERICK BURNETT,
Commissioner

7. NEW RULE - LABELING REGULATIONS

May 28, 1935

Yesterday's decision of the United States Supreme Court, in Schechter vs. United States, terminated the present legal effect of the FACA labeling regulations.

No labeling regulations have heretofore been made for New Jersey pending observation and study of the Federal Alcohol Control Administration's efforts in this field. It therefore becomes necessary to promulgate at once complete labeling regulations applicable to New Jersey.

Hence the following rule is effective immediately:-

Regulations heretofore announced by the Federal Alcohol Control Administration relating to labeling and in force under their terms on May 27, 1935, are made a part hereof as though fully set forth and are hereby promulgated with respect to the State of New Jersey.

Investigation and study of the entire subject will be rushed to completion. The Commissioner invites immediate suggestions and comments from all branches of the industry and the public generally. The present FACA regulations are continued in force in order to avoid the hiatus which would otherwise arise.

D. FREDERICK BURNETT,
Commissioner

8. APPELLATE DECISIONS - KRAUSE VS. FREEHOLD

WALTER KRAUSE,)
Appellant,)
-vs-)
TOWNSHIP COMMITTEE OF THE)
TOWNSHIP OF FREEHOLD)
(MONMOUTH COUNTY),)
Respondent.)

ON APPEAL
CONCLUSIONS

Schlossbach & Newman, Esqs., by Mr. Newman, for the appellant.
McDermott & Finegold, Esqs., by Mr. Finegold, for the respondent.

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail consumption license for premises located on the Freehold-Lakewood Road, Highway #4 and #9, Freehold Township.

Respondent contends that the application was properly denied because the number of licensed places presently operating in the township is adequate to supply the demands of the residents as well as the transient trade and that the issuance of an additional license would be socially undesirable.

The Township of Freehold is a rural agricultural community, with a population of approximately 3000, completely surrounding the Borough of Freehold. There are now four plenary retail consumption licensees operating in the Township, one being located on each of the main roads. The evidence clearly establishes that these four licensed places are adequate to supply the needs of the community as well as the transient trade. Furman vs. Springfield, Bulletin 49, Item 6; Botfan vs. Howell, Bulletin 64, Item 9; Voos vs. Union, Bulletin 73, Item 1.

Appellant argues, however, that his application was improperly denied because at the time it was denied there was a resolution effective in Freehold Township limiting the number of plenary retail consumption licenses to be issued to "not more than 5" and that since only four had been issued, there was one vacancy remaining. Sosnow Drug Co. vs. Borough of Freehold, Bulletin 68, Item 13. Nineteen days after appellant's applica-

tion was denied, however, and before this appeal was heard, respondent amended its resolution and limited the number of plenary retail consumption licenses to be issued to "not more than 4". The question is whether this subsequent amendment of the resolution can be invoked to sustain the denial of appellant's application, assuming that, in the absence of the amendment, such denial would have been improper.

In Franklin Stores Co. vs. Elizabeth, Bulletin 61, Item 1, the Commissioner discussed at considerable length, collecting numerous authorities, the effect of subsequent municipal action upon the denial of an application and held that the municipal policy, properly enunciated and in force at the time of the appeal, is the true criterion, rather than the factual situation as it existed at the time of the denial of the application. In the course of his opinion, the Commissioner said:

"Sound public policy requires that if a special privilege is to be given, the grant must be consonant with such policy at the time the grant is made. 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."

The only distinction between the Franklin case and the case at bar is that in the Franklin case there was no prior municipal enactment inconsistent with the ordinance adopted subsequently to the denial of the application, whereas here it may be argued that there was such a prior enactment. No reason is suggested, however, why this factual difference should lead to any different legal result. It is not claimed that appellant was misled or relied upon the existence of the prior resolution. Indeed, any such claim would be without merit. No person has a right to a license. It is, at most, a privilege conferred by the State, which the issuing authority may deny in the exercise of sound discretion. Bumball vs. Bernardsville, Bulletin 66, Item 9. Since, therefore, the limitation of licenses now in effect in the Township of Freehold was reasonable both in its adoption and in its application to appellant, it will not be overruled. Ryman vs. Branchburg, Bulletin 37, Item 18.

The action of respondent is affirmed.

Dated: May 29, 1935

D. FREDERICK BURNETT,
Commissioner

9. APPELLATE DECISIONS - ZDENEK VS. FREEHOLD

JOHN JACK ZDENEK,)
Appellant)
-vs-)

ON APPEAL
CONCLUSIONS

TOWNSHIP COMMITTEE OF THE
 TOWNSHIP OF FREEHOLD (MONMOUTH
 COUNTY),
 Respondent

Joseph A. Wenzel, Esq., Attorney for Appellant.
 McDermott & Finegold, Esqs., by Max Finegold, Esq., Attorneys
 for Respondent.

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail consumption license for premises located in the Township of Freehold.

The facts and issues are identical with those in Krause vs. Freehold, Bulletin 76, Item 8, and the denial of appellant's application must be sustained for the reasons therein expressed.

Appellant contends that he had been promised by members of respondent committee that, in the event he made certain alterations in his premises, a license would be issued and relying upon these promises he made the suggested alterations, expending a considerable amount of money in doing so. He thus attempts to invoke an estoppel. Without regard to the legal merits of this contention, there is nothing in writing and the oral testimony with reference to the alleged promises is so indefinite, meager and unsatisfactory that, in the face of the categorical denial by the Committeemen, it cannot be accepted.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
 Commissioner

Dated: May 29, 1935

10. REVOCATION PROCEEDINGS - ANNA WILKALIS - BAYONNE

In the Matter of Revocation
 Proceedings against Anna Wilkalis,
 107 Hobart Avenue, Bayonne, the
 Holder of Plenary Retail Consump-
 tion License C-115, issued by the
 Board of Commissioners of Bayonne.

CONCLUSIONS AND ORDER

Harry H. Weinberger, Esq., Attorney for Anna Wilkalis.
 Jerome B. McKenna Esq., Attorney for the Department.

BY THE COMMISSIONER:

A copy of charges preferred against Anna Wilkalis, holder of plenary retail consumption license C-115 issued by the Board of Commissioners of Bayonne, for premises located at #107 Hobart Avenue, Bayonne, was served upon the licensee who was ordered to show cause why her license should not be suspended or revoked. Pursuant thereto, a hearing was duly held.

The charges may be briefly summarized as follows:

1. Failure to pay the penalties assessed for delinquency in filing tax returns.
2. Possession of illicit beverages with intent to sell, bottle, rectify and mix the same, and possession of paraphernalia for this purpose, in violation of Section 48 of the Control Act.
3. Possession of premises in which unlawful property was kept and stored in violation of Section 53 of the Control Act.

The licensee admits the truth of the first charge, but claims she offered to compromise her penalty, which offer of compromise was rejected. Under the Alcoholic Beverage Tax Act, P.L. 1933, Chapter 434, as amended, such compromise may be made by the State Tax Commissioner if satisfied that the delinquency was excusable. In the instant case the compromise offer was rejected because the Tax Commissioner was not so satisfied. The licensee did not take the witness stand nor was any evidence introduced on her behalf. There is no explanation of why the delinquency occurred. There is thus nothing before me except the fact that the penalty was properly assessed and remains unpaid. The matter is aggravated by the fact that after the default had occurred the licensee executed an affidavit for use before the municipal issuing authority in Bayonne in which she swore that she had properly filed the tax returns in question. No explanation was offered for this false affidavit. I find the licensee is guilty on the first count.

As regards the second count: The testimony discloses that during the course of an inspection two State investigators discovered a large quantity of illicit beverages in barrels and tin cans in the attic of the premises at 107 Hobart Avenue owned and occupied by the licensee and her husband, Stanley Malakauskas, who is also a plenary retail consumption licensee in Bayonne. Although the entrance to the attic was walled in, a pipe leading from one of these barrels to the living quarters acted as a conduit through which the liquor could be, and was, drawn. There is testimony that the wall shutting up the entrance to the attic was recently constructed. Unquestionably it was constructed after the licensee and her husband came into possession of the premises. Thus they were the last persons in control of the attic prior to the entrance being closed and even aside from the conduit pipe leading into their home they are fully responsible for the presence of the illicit beverages on the premises. In the living quarters hydrometers, a gauging cup and other paraphernalia commonly used in rectification and bottling were found.

Premises at #238 Broadway, Bayonne are also owned by the licensee Anna Wilkalis. These premises are two doors away from the premises for which her husband, Stanley Malakauskas, holds a plenary retail consumption license. Part of the premises at #238 Broadway consist of a garage in which large quantities of illicit beverages, coloring matter, bottling paraphernalia and bottles were found and seized. After the seizure, Malakauskas broke into this garage by tearing down part of the wall between the garage and an adjoining store, for the stated purpose of overturning a barrel. Malakauskas then disappeared

and shortly thereafter contacted his attorney. The licensee, although pleading "not guilty", did not testify or produce any witnesses on her behalf.

Where facts are testified to which are accusations against the defendant and which he, by his oath, can deny, and he fails to take the stand in his own behalf, it raises a strong presumption that he cannot truthfully deny those facts. State vs. Bien, 95 N.J.L. 474; State vs. Gimbel, 107 N.J.L. 235. In the Bien case, supra, the Court of Errors and Appeals in considering the relationship between the plea of "not guilty" and a subsequent failure of the defendant to offer himself as a witness, said:

"Nor is it sufficient, as plaintiff in error argues, that as he had denied his guilt by pleading 'not guilty' to the indictment, he was entitled on the trial to the benefit of such a denial to the same extent as if he had testified in contradiction of all material facts, but that is not so because the plea was not under oath, nor was he subject to any cross-examination." 95 N.J.L.474, 478.

The unexplained presence of large quantities of illicit beverages, coloring matter, bottling paraphernalia, etc., on premises owned and occupied by the licensee and her husband and in the garage also owned by the licensee and over which her husband exercised some control convinces me that the respondent is guilty as charged on the second count.

The foregoing finding of facts also clearly shows that the licensee was guilty of violating Section 53 of the Control Act in that she knowingly occupied and kept premises in which unlawful property was stored and is therefore guilty as charged on the third count.

It is, therefore, on this 29th day of May, 1935, ORDERED, that plenary retail consumption license C-115 issued by the Board of Commissioners of the City of Bayonne to Anna Wilkalis for premises located at #107 Hobart Avenue, Bayonne, be and the same is hereby revoked, effective immediately; and

It is further ORDERED that said revocation shall render the licensed premises known as #107 Hobart Avenue, Bayonne, ineligible to become the subject of any further license, of any kind or class under the Control Act, for a period of two years from the date hereof.

D. FREDERICK BURNETT,
Commissioner

11. REVOCATION PROCEEDINGS - STANLEY MALAKAUSKAS - BAYONNE

In the Matter of Revocation Proceedings against Stanley Malakauskas, 234 Broadway, Bayonne, the holder of Plenary Retail Consumption License C-114, issued by the Board of Commissioners of Bayonne.

CONCLUSIONS AND ORDER

Harry H. Weinberger, Esq., Attorney for Stanley Malakauskas.
Jerome B. McKenna, Esq., Attorney for the Department.

BY THE COMMISSIONER:

A copy of charges preferred against Stanley Malakauskas, holder of plenary retail consumption license C-114 issued by the Board of Commissioners of the City of Bayonne for premises located at #234 Broadway, Bayonne, was served upon the licensee who was ordered to show cause why his license should not be suspended or revoked.

The charges may be briefly summarized as follows:

1. Possession of illicit beverages with intent to sell, bottle, rectify and mix the same, and possession of paraphernalia for this purpose, in violation of Section 48 of the Control Act.
2. Possession of premises in which unlawful property was kept and stored, in violation of Section 53 of the Control Act.

By consent of counsel, the hearing on these charges was held together with the hearing on charges preferred against Anna Wilkalis who is Malakauskas' wife and my finding of facts are stated in the opinion rendered therein. Re Wilkalis, Bulletin 76, Item 10.

As in the Wilkalis case, supra, the licensee here did not take the stand or offer any testimony in his own behalf.

I find him guilty as charged.

It is, therefore, on this 29th day of May, 1935, ORDERED, that plenary retail consumption license C-114 issued by the Board of Commissioners of the City of Bayonne to Stanley Malakauskas for premises located at #234 Broadway, Bayonne, be and the same is hereby revoked, effective immediately; and,

It is further ORDERED, that said revocation shall render the licensed premises known as #234 Broadway, Bayonne, ineligible to become the subject of any further license of any kind or class under the Control Act for the period of two (2) years from the date hereof.

D. FREDERICK BURNETT,
Commissioner

12. GIFTS - OUT AND OUT GIFTS DISTINGUISHED FROM SALES AND
EVASIVE DEVICES

May 29, 1935

Julius Rosenberg, Esq.,
Camden, N. J.

Dear Sir:

I have your correspondence in which you inquire whether a

Volunteer Fire Company may serve beer free of charge to members and their guests in the fire hall on Sunday, notwithstanding a local prohibition against Sunday sales. You state that the Volunteer Fire Company holds no liquor license and that the fire company building, where the beer will be served is owned not by the municipality but by the Volunteer Fire Company itself.

If what they purpose is a real out and out gift of the beer by the fire company to members and their guests, it does not constitute a sale within the meaning of the Control Act. The local prohibition relates to sales, not the consumption of alcoholic beverages on Sundays. Accordingly, if no sale is made there is no objection legally to the consumption of beer on Sundays by the members and their guests at the fire hall.

They must be sure, however, that their method of distribution does not constitute a sale within the meaning of the Control Act. Where tickets are sold, an admission fee charged, the hat or basket passed or participants chip in, or any artifice made to conceal the real nature of the act, it constitutes a sale just as much as if the alcoholic beverages are sold by the glass. If it is bona fide, all right. If it is a trick or subterfuge, it will be just too bad. If you sponsor it personally, I feel it is sincere.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

13. REVOCATION PROCEEDINGS - WHEN WITHDRAWN FROM LOCAL ISSUING AUTHORITIES BECAUSE OF FAILURE TO ACT

May 29, 1935

Fred L. Bascom, Chairman,
Franklin Township Committee,
New Brunswick, R.D.6, N.J.

Dear Sir:-

March 27th last, the Department transmitted to the Township Committee of Franklin Township of Somerset County, report of violations of the Alcoholic Beverage Control Act at the licensed premises of George Rieck, trading as Kingston Hotel, Lincoln Highway, Kingston, N. J., together with my recommendation that proceedings be instituted toward revocation or suspension, and pointing out specifically the instructions and forms set forth in the several Bulletins referred to therein, and offering to supply our four investigators prepared to give sworn testimony of the matters complained of, to wit: the sale of alcoholic beverages to minors attendant upon Princeton University.

No reply has ever been made by you or any member of the Township Committee, or any attorney for it, to that letter.

Upon receipt of a further complaint on May 16th against the same licensee from Christian Gauss, Dean of the College, to the effect that the place has given Princeton University no end of trouble and is a public nuisance and has been twice raided by inspectors from my Department, assisted by the

University Proctors, and that he is reliably informed that gambling goes on there regularly and that it is frequented by undesirable women and that liquor is sold to minors and that disorderly conduct is frequent, the Clerk of the Township, John V. Garretson, was contacted by telephone, who stated that there had been a meeting of the Township Committee at which the matter was discussed, but he was reluctant to give any information as to what had occurred or what action would be taken, and suggested that you, as Chairman, be consulted, but that you were then out of town.

A week ago today, Deputy Commissioner Frost telephoned you, and reported that you stated that our letter of transmittal of March 27th was sent to Franklin Park, delivered to a member of the Township Committee who held it unopened until the April meeting of the Committee, which took place about the middle of April; that at that time the Committee referred the matter to your attorney with the understanding that he would communicate with this Department; that at a meeting of the Committee on May 20th, the attorney was instructed to send out a notice of a hearing to be held in the near future; that you desired a letter from me indicating what action I thought should be taken.

That action is indicated in my letter to you of March 27th, to wit: institution of revocation proceedings.

A week having now passed since your telephone communication with Mr. Frost and still hearing nothing from your Committee, or in its behalf, Mr. McKenna, of my Legal Staff, telephoned you this afternoon and reports that no date has yet been set for hearing and that the matter is still in the hands of your attorney.

In view of the facts recited, I now withdraw the request of March 27th that your Committee institute revocation proceedings. These will be handled by the Department direct.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

14. MUNICIPAL ORDINANCES - PLENARY RETAIL DISTRIBUTION LICENSES - STATUTORY OPTION TO EXCLUDE SUCH LICENSEES FROM TRANSACTING ANY OTHER MERCANTILE BUSINESS DOES NOT PERMIT DISCRIMINATION

MUNICIPAL ORDINANCES - PLENARY RETAIL DISTRIBUTION LICENSES - EXCLUSION OF SUCH LICENSEES FROM SALE OF GASOLINE IS PROPER EXERCISE OF POLICE POWER

May 31, 1935

William R. Conover, Township Clerk,
Freehold, N. J.

Dear Sir:-

I have for consideration resolutions passed by your Township Committee pursuant to the Alcoholic Beverage Control Act.

Section 5 (b) provides: "Class C-2 (Retail Distribution) may conduct such other business as licensee may desire in connection therewith, excepting the sale of gasoline." The

statute confers an option upon the governing bodies of the several municipalities to enact by ordinance that Plenary Retail Distribution licenses "shall not be issued to permit the sale of alcoholic beverages in or upon any premises in which any other mercantile business is carried on". Question, therefore, at once arises whether the Legislature, by the use of the words "any other", intended that, if the option were exercised by the municipality, all other mercantile business was to be prohibited or whether it intended that a particular class of mercantile business could be singled out and prohibited. While the quoted words are grammatically susceptible of the latter meaning, it could not have been the legislative intent to afford a statutory option to discriminate against any one particular kind of mercantile business, as a municipality might arbitrarily or capriciously decide. It must have meant all or none. I, therefore, reject that interpretation and now rule that if a municipality desires to restrict Plenary Retail Distribution licensees to the sale of alcoholic beverages exclusively, it must prohibit all other mercantile business without discrimination.

The above ruling is the unwritten predicate of the decision made last July in respect to the Trenton ordinance which read (Bulletin 41, item 2): "That no Plenary Retail Distribution license shall be issued to permit the sale of alcoholic beverages in or upon any premises in which any other mercantile business is carried on; provided, however, that the holder of any such license shall be permitted to sell non-alcoholic beverages, in original containers, for consumption off the licensed premises." I approved that ordinance and ruled that "the proviso, excepting non-alcoholic beverages, was merely a saving clause to insure that sale of ordinary accessories to alcoholic beverages was not to be interpreted as other mercantile business, but rather as part of the same business."

The same thought, and illustrating the converse proposition, underlies the ruling in Re Boonton, Bulletin 57, item 17, where an attempted exception of the sale of cigars and cigarettes from the ban of a municipal ordinance prohibiting other mercantile business to package stores was disapproved.

Those two previous rulings adumbrate the ruling now made.

If, therefore, approval of your municipal regulation were dependent upon its compliance with the statutory option, I should be compelled to disapprove it because it singles out one mercantile business for exclusion but allows all other kinds of business to be transacted.

The remaining question is whether this municipal regulation prohibiting the sale of gasoline at package goods stores may be sustained as a proper exercise of police power - that underlying power to protect the lives, the safety, the health, the morals and the general welfare of the public - practically government itself.

I approve it as a proper and highly salutary exercise of police power. It is trite to say that alcohol and gas - drinking and driving - do not mix. What is common knowledge needs no argument. Suffice it to say that A. W. Magee, Acting Commissioner of Motor Vehicles, reports that last year in New

Jersey 1443 automobile accidents were caused by drivers who were under the influence of liquor in one degree or another.

Your section is approved as submitted.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

15. APPELLATE DECISIONS - MURPHY VS. TRENTON

JOHN JOSEPH MURPHY,	}	
Appellant,		
-vs-		
CITY COUNCIL OF TRENTON,	}	ON APPEAL
Respondent.		CONCLUSIONS

Abraham S. Lewis, Esq., Attorney for Appellant.
Romulus P. Rimo, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the denial by the Board of Commissioners of Trenton of an application for a plenary retail consumption license for premises located at #28 South Warren Street, Trenton.

Since denying appellant's application the Board of Commissioners has gone out of existence and been replaced by the City Council.

Respondent contends the application was properly denied because a sufficient number of licensed places exists in the vicinity of appellant's premises adequately to supply the demands of said vicinity and the issuance of an additional license would be socially undesirable.

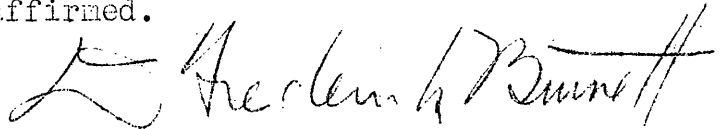
The right of a municipality to refuse to issue a license for premises where the issuance thereof would result in the existence of too many licensed places within any given vicinity is well settled. Bader vs. Camden, Bulletin 44, Item 8; Furnan vs. Springfield, Bulletin 49, Item 6; Clement vs. Loder, Bulletin 52, Item 5; Faccidono vs. Union Beach, Bulletin 55, Item 8; Shinn vs. Camden, Bulletin 64, Item 8; Voos vs. Union, Bulletin 73, Item 1.

There are four existing licensed places of business within one block of appellant's premises, one consumption place being only two doors away. There is nothing to indicate that public necessity or convenience dictates the issuance of an additional license or that the denial of appellant's application was unreasonable.

It is true that there are sections in Trenton in which licenses have been issued without any regard to the number of licensed places in the vicinity. This condition is the direct result of improper licensing by respondent's predecessor, the

Municipal Board of Alcoholic Beverage Control of Trenton. See Zebrowski vs. Trenton, Bulletin 56, Item 9; Skwara et al vs. Trenton, Bulletin 57, Item 7. The mere fact that the old Municipal Board caused an intolerable situation to be created is no reason why it should be extended or perpetuated. The new City Council is entitled to a clear chance to use its own broom. Since it now appears that there are a sufficient number of licenses in the vicinity, and there is no fault on the part of the present issuing authority, the Commissioner will not reverse the findings of the Board of City Commissioners.

Their action is affirmed.



Commissioner

Dated: May 31, 1935.