

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

BULLETIN 290

JANUARY 4, 1939

1. RETAIL LICENSEES -- SUNDAY SALES -- EFFECT OF REFERENDUM -- REFERENDUM PROHIBITING SUNDAY SALES SHOULD NOT BE MOCKED BY PERMITTING CONSUMPTION ON SUNDAYS UPON LICENSED PREMISES UNDER THE TECHNICAL PRETEXT THAT THE DRINKS WERE PURCHASED BEFORE SUNDAY.

RETAIL LICENSEES-- REFERENDA -- HEREIN OF THE DANGERS OF FLAUNTING OR DEFYING THE WILL OF THE ELECTORATE.

RETAIL LICENSEES -- THE PRACTICE CONDEMNED OF PERMITTING PATRONS TO BRING THEIR OWN LIQUOR AND CONSUME IT ON LICENSED PREMISES DURING HOURS WHEN SALES ARE PROHIBITED.

Dear Commissioner:

Several of our licensees have inquired of us if they may remain open on Christmas Eve until 3 A. M. and on New Year's Eve until 5 A. M., pursuant to your notice which they have read in the papers. We have told them that they may not sell alcoholic beverages at any time after midnight on either of those days because of the referendum in East Orange which forbade all Sunday selling.

Our inquiry, therefore, is confined to the question whether they may permit patrons to remain and consume liquor purchased before midnight, and if so, under what conditions.

Very truly yours,
Harry Nolan
Edward L. Hazen
Members of East Orange Board of
Alcoholic Beverage Control

December 21, 1938.

Messrs. Harry Nolan and Edward L. Hazen,
Municipal Board of Alcoholic Beverage Control,
East Orange, N. J.

Gentlemen:

According to my records, sales of alcoholic beverages are prohibited on Sundays in East Orange by referendum held on November 8, 1928, on the question "Shall the sale of alcoholic beverages be permitted on Sundays in this municipality?" on which a majority voted in the negative.

Hours of closing are governed by Ordinance No. 14 adopted by the Council on October 28, 1925, as amended by Ordinance No. 17 adopted December 23, 1925, Sections 9 and 10 of which provide:

"Section 9. Except as hereinafter provided, no alcoholic beverage shall be sold, served, delivered nor shall any licensee permit the sale, service or delivery of any alcoholic beverage directly or indirectly upon the licensed premises between the hours of two A.M. and six A.M. each day, except on Sunday, when no sale of an alcoholic beverage shall be made in The City of East Orange.

New Jersey State Library

"Section 10. The holder of any license issued by the Municipal Board of Alcoholic Beverage Control shall close his place of business at 12 o'clock midnight on Saturday and 2:00 A.M. on all days of the week except Sunday and shall keep the same closed during the hours in which the sale of alcoholic beverages is forbidden, provided, however, that the holder of any license engaged in the restaurant business may keep his place open for the restaurant business until 2:00 o'clock A.M. and may reopen his place for the restaurant business on Sunday after 6 A.M., a restaurant being defined for the purpose of this ordinance 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 food; and provided further that when any Christmas Day or New Years day falls on any other day than Sunday, it shall be lawful to make sale of intoxicating beverages until 4:00 A. M.

"The hours aforementioned shall be construed to indicate Standard Time or Daylight Saving Time during such period when each may be in effect in The City of East Orange."

Because of the referendum, for the reasons given in Re Runyon, Bulletin 287, Item 14, and Re Gloucester Township Beverage Association, Bulletin 261, Item 12, it is not permissible for your licensees to sell alcoholic beverages on Sunday at any time, Christmas and New Year's Eves notwithstanding. There is no power in the Council to permit any Sunday sales, either by ordinance or by resolution. The referendum prohibits all Sunday sales until changed by another referendum in the future.

Hence, as the matter now stands, all licensees in East Orange must stop selling alcoholic beverages at 12:00 o'clock midnight Saturday night, Christmas and New Year's included, and must close their licensed premises at 12:00 o'clock midnight Saturday night and keep them closed until 6:00 A. M. Monday morning unless the place is a restaurant, in which event it may stay open until 2:00 A.M. Sunday and reopen at 6:00 A.M. Sunday, but not in any event to sell or serve any alcoholic beverages.

I do not see that it would avail your licensees much for the Council to permit them to stay open longer on Christmas and New Year's Eves. They could not sell any alcoholic beverages after midnight. Nor could they serve any, even though it was some that the customer himself had brought in. And if they served set-ups and accessories, it would be a great risk that they would be running and very apt to get them into trouble. To say that they are only consuming what they purchased before midnight smacks of subterfuge and evasion. It is all too loose. I am very much opposed to customers bringing their own and to licensees allowing any consumption of alcoholic beverages on licensed premises during the hours when sales are prohibited. See Re Wismer, Bulletin 288, Item 1. With everyone bringing his own on Christmas and New Year's Eves, it would be well-nigh impossible to ascertain whether it was honestly brought on by a customer or whether the licensee was taking advantage of the situation to make unlawful sales, thereby committing a misdemeanor.

The people of East Orange have declared against liquor at any time on Sunday so far as licensed premises are concerned. In words, they have voted "No Sales." In substance, they meant "No Consumption."

Hence no practice should be countenanced which gives the very appearance of flaunting or defying the wishes of the majority. Licensed places, at least, ought not to be used for the very purposes to which the electorate has declared its opposition. To trifle with that sentiment is to invite disaster. The power which extinguished Sunday selling can, if exasperated, wipe out the retail industry altogether. Those who mock invite the bears.

I therefore cordially suggest that you not only oppose any extension of hours, but that you affirmatively bring to the attention of your licensees that, as with all other Sundays, sales must stop at midnight Saturday and that it will go hard with them if there is any violation of the referendum. Violation of the referendum may be punished by fine or imprisonment or both, and is also cause for the suspension or revocation of the license.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

2. RETAIL LICENSES - ADVERTISING - MINIMUM OF TWO WHOLE DAYS BETWEEN SECOND PUBLICATION AND ISSUANCE OF LICENSE REQUIRED.

December 20, 1938

N. J. Licensed Beverage Association,
Somerset Co. Div. No. 25,
Belle Mead, N. J.

Gentlemen:

I do not like the idea of pushing licenses through before anyone who may have grounds to object can get his protest in and secure an opportunity to be heard. The purpose of the notice is not accomplished merely by its publication. The notice is required in order that anyone deeming that good reason exists for the denial of the license may have the opportunity of filing objections and a chance to be heard. Objectors must, therefore, be allowed a reasonable time after publication of the notice in which to file their protests. Until such opportunity is afforded, the license should not be issued.

In Re Novack, Bulletin 174, Item 6, I established a minimum, between the date of second publication and the issuance, of two whole days, not counting the day on which the publication was made. Please bring this ruling to the attention of the municipality. I shall expect them to conform their procedure to its requirements.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

3. UNLICENSED RESTAURANTS - SERVICE OF WINE ON CHRISTMAS EVE -
SERVICE OF ALCOHOLIC BEVERAGES BY UNLICENSED RESTAURANTS CONSTITUTES UNLAWFUL SALE AND IS A MISDEMEANOR.

December 20, 1938

Illan's Park Restaurant, Inc.,
Plainfield, N. J.

Gentlemen:

My records do not show that there is any retail liquor license in Plainfield in the name of Illan, or Illan's Park Restaurant, Inc., or for premises 111 Park Avenue, Plainfield.

The serving of alcoholic beverages in restaurants not licensed to sell liquor is prohibited. Such service is, in the contemplation of the Alcoholic Beverage Law, a sale, and if made without a license, is a misdemeanor for which the offender may be punished by fine or imprisonment or both.

Unlicensed restaurants may not sell or serve any alcoholic beverages in any manner or under any pretext.

Hence, serve no wine to your patrons or friends on Christmas Eve or at any other time. It is very apt to get you in trouble if you do. If you want to have anything whatsoever to do with liquor, you must first take out a license.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

4. APPELLATE DECISIONS - HORN-SALE, INC. ET ALS. v. WEST ORANGE.

HORN-SALE, INC., ET ALS.,)
Appellants,)

-vs-)

ON APPEAL
CONCLUSIONS

BOARD OF COMMISSIONERS OF THE)
TOWN OF WEST ORANGE,)
Respondent)
-----)

William E. Kennedy, Esq., Attorney for Appellants.
Gerald T. Foley, Esq., Attorney for Respondents.

BY THE COMMISSIONER: (Orally)

This matter comes on before me personally on this 23rd day of December, 1938, upon short notice, and the consent of the attorney of the respondent. It is an appeal filed by the appellants, some seventeen tavernkeepers in West Orange, from a resolution of the Board of Commissioners of West Orange passed on December 20, 1938, requiring the licensees of West Orange to close at midnight on Christmas Eve. In view of the shortness of the time, I have advanced this case on the appeal list and have sat specially to hear it, and will decide it at once, since it has been fully heard and well argued.

The West Orange ordinance now in force, section three, provides that every place in which the retail sale of alcoholic beverages is authorized by a license, except restaurants, shall be closed and all patrons or guests excluded on Sundays between 3:00 A.M. and 1:00 P.M.

On December 20th, a resolution was passed by the Board of Commissioners of West Orange requiring these places to close and patrons to be excluded at 12:01 A.M., that is one minute after midnight. Normally, an ordinance, which is a regulation of a solemn character, cannot be changed except by another ordinance, an instrument of equal dignity, for an ordinance, as distinguished from a resolution, requires publication in the newspaper, successive readings, and an opportunity to be heard. This ordinance, however, contains a clause in it reserving to the Board of Commissioners the right by resolution "to change the closing hours with respect to Christmas Day and New Year's Day." If it were not for that reservation, the resolution of December 20th would be automatically invalid. The real question then is not one of power but rather of policy, for the Board had the power legally to make the resolution which they did. The statute says that municipalities may in the first instance determine the hours between which alcoholic beverages may be sold, but that if any person considers himself aggrieved by those hours he may appeal to the State Commissioner, and that the Commissioner, after a public hearing, may set aside, repeal, or modify the same. That narrows the issue, in accordance with my defined policies of administration in which I give full rein to the principle of home rule, subject only to whether it is a reasonable exercise.

The case is unique in that this has been the first municipality which has ever exercised a right reserved to change hours, by changing them backwards. In every other case the hours have always been extended, as Mr. Kennedy contends. The operative word, however, is "change", and the word change is not a one-way street. It can be changed either way, backward or forward. Whatever speculation there may be as to the intent of the Board is resolved by construing the word which they used and the word was "change"; so the whole question then comes down to whether a change of hours on Christmas Day is reasonable.

I have ruled that normally three o'clock on Sunday morning, or any morning for that matter, is the limit which I will go. Last year I think it was in Pearce v. West Orange, just about a year ago, the shoe was on the other foot. West Orange had allowed sales on both Christmas and New Year's all night long. In that case I decided that the sales would have to stop on Christmas morning at 3:00 A.M., but they could continue on New Year's because there is a substantial difference in the character of the two days, and I am glad that my Methodist friend recognized that this morning. In following out that decision this year, because of the fact Christmas came on a Sunday, I said 3:00 A.M. on Christmas Day will have to be the limit, but that on New Year's the limit would be five (5:00) A.M. All I meant thereby was to fix the maximum limits. I was not making any determination as to what I personally felt other people might do.

In this case West Orange has put the hour back to midnight. They have a right to do that, for Christmas is a special day. It is more or less common knowledge Masses are celebrated at midnight, Christmas carols sung. I cannot say that there is anything which has been produced which shows that the action of the Commissioners is not reasonable. They have the right to decide for West Orange what shall be the rule in West Orange, and I shall not disturb that action unless it appears to be unreasonable, and in this case I find that West Orange has acted reasonably and not arbitrarily. Consequently the appeal is denied.

5. ADVERTISING -- NOTICE OF APPLICATION -- OMISSION OF FEE LINE DOES NOT INVALIDATE THE ADVERTISING FOR THE PURPOSES OF AN APPLICATION FOR A LIQUOR LICENSE.

My dear Commissioner:

It appears that some newspapers run the "application notices" as a public notice in the classified advertising column, without a fee line.

It is my opinion that "notices of application" should be legal notices and should therefore carry a date and fee line.

Cordially yours,

Edward F. Walsh, Secretary,
Hackensack Chamber of Commerce

December 23, 1938.

Hackensack Chamber of Commerce,
Edward F. Walsh, Secretary,
Hackensack, N. J.

Gentlemen:

Title 35 of the Revised Statutes, dealing with Legal Advertisements, defines "official advertising" and "official advertisements" as all matters required by law to be published.

As the notice of application for liquor license is required by law to be published (R.S. 33:1-25), it would seem that such notice is official advertising within the contemplation of Title 35.

R.S. 35:2-3 provides:

"There shall be printed and published on and with every official advertisement a statement of the price therefor established by law, which price shall be the legal amount due for the whole length of time that the same is to be published. No charge shall be made or recovery had for publishing any official advertising unaccompanied by such statement of price."

Other than those set forth in the sentence last above quoted, there appear to be no consequences attendant upon the omission of the fee line. This Statute does not declare the advertisement to be void for failure to print the fee line or in anywise conditions its validity upon such printing. The Statute has fixed its own penalty for non-compliance, viz., that any newspaper which omits the fee line may make no charge for the advertising services. Where express penalties are fixed, the law implies that there are no others.

The absence of the fee line would therefore not invalidate the advertising for the purposes of an application for a liquor license. The publication having been made, and due notice to potential objectors given, the statutory purpose would have been served, and that is all that is required so far as the Alcoholic Beverage Law is concerned.

Of course, there will be no question if in all cases the fee line is printed, as the law requires.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

6. SOLICITATION-- OUT-OF-STATE BREWERIES -- THE SENDING OF SAMPLES BY OUT-OF-STATE BREWER NOT LICENSED IN NEW JERSEY, INTO THIS STATE TO NEW JERSEY MANUFACTURERS AND WHOLESALERS, CONSTITUTES SOLICITATION WHICH IS UNLAWFUL WITHOUT A NEW JERSEY LICENSE.

Gentlemen:

Will you kindly advise us if the State Law permits a manufacturer such as ourselves to send a sample package of two bottles of our product to the various distributors of your State?

Very truly yours,

GREENWAY BREWERY COMPANY, INC.

December 23, 1938.

Greenway Brewery Company, Inc.,
Syracuse, N. Y.

Gentlemen:

My records do not disclose that there has been any New Jersey license issued to the Greeway Brewery Company, Inc.

Under the New Jersey law and regulations, a licensed New Jersey manufacturer or wholesaler may, on his own initiative, purchase alcoholic beverages from an out-of-State non-licensee, subject, of course, to the laws of the other State, and may bring said alcoholic beverages into this State in his own vehicle or by any duly licensed transporter.

Hence, if that is what your delivery involved, it would be permissible.

But out-of-State manufacturers and wholesalers not licensed in New Jersey may not send representatives into New Jersey or solicit in New Jersey, because that is something that only New Jersey licensees may do.

If what you are planning is to send samples into New Jersey to our licensees in the hope of interesting them in your products and obtaining orders, that is soliciting in New Jersey which you cannot do without a license.

I see little difference between sending samples and sending salesmen. To be sure the pressure is not so high, but the sample is, in effect, a silent salesman, and the effort is solicitation.

Participation in such solicitation by New Jersey licensees will render their licenses subject to suspension.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

7. ELIGIBILITY - MORAL TURPITUDE - FACTS EXAMINED - CONCLUSIONS.

December 23, 1938.

RE: CASE NO. 240

In his questionnaire, the above named employee admitted that he had been convicted in 1930 on a charge of manslaughter and sentenced to serve eight months in a County Penitentiary.

At a hearing duly held, the employee testified that he had been arrested and convicted because, while driving a coal truck, he struck a man who subsequently died as a result of the injuries sustained. It has been determined that the criminally negligent operation of an automobile resulting in an unintentional death, although constituting the crime of manslaughter, does not necessarily involve moral turpitude. Case No. 44, Bulletin 163, Item 4; Case No. 69, Bulletin 202, Item 5.

There are, however, no aggravating circumstances in the record.

It is recommended that the employee be advised that he is eligible for employment by liquor licensees in New Jersey.

Edward J. Dorton,
Attorney-in-Chief.

Approved:

D. FREDERICK BURNETT
Commissioner.

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

December 23rd, 1938.

Re: Case No. 241.

In his application and questionnaire applicant denied he had ever been convicted of a crime. Fingerprint records disclosed that, in February 1934, he was arrested for violating the Alcoholic Beverage Control Act.

At a hearing duly held, applicant admitted his arrest on said charge and testified that, after indictment, he pleaded guilty to said charge, and was fined \$100. and placed on probation. Explaining the circumstances surrounding his arrest, he testified that, after Repeal, he had held a temporary liquor license for his candy store, but that his temporary license had not been renewed for the month of February 1934 because his premises were too close to a school; that his arrest followed the sale of liquor by one of his employees after the temporary permit had been denied.

In the absence of aggravating circumstances, a single violation of the Alcoholic Beverage Control Act does not involve moral turpitude. Case No. 238, Bulletin 288, Item 14 and cases therein cited. I do not think that sufficient aggravating circumstances appear from which it should be concluded that the element of moral turpitude is involved in the conviction.

However, applicant now has one strike against him. Another violation of the Control Act will mandatorily disqualify him from holding a liquor license or being employed by a liquor licensee in New Jersey. R.S. 33:1-25, 26 (Control Act, Sections 22, 23).

Applicant further testified that he had sworn he was never convicted of a crime because he thought there was no conviction since he was not sentenced to jail. Whatever construction applicant placed upon the word "crime", it appears that he likewise swore in his application that he had never been convicted of or committed any violation of the Alcoholic Beverage Control Act or R.S. Title 33, c. 1.

It is recommended that the application for solicitor's permit be granted, but that the issuance thereof be withheld until January 18th, 1939 because of the false affidavit.

Edward J. Dorton,
Attorney-in-Chief.

Approved:

D. FREDERICK BURNETT
Commissioner

9. LICENSES -- PUBLIC BUILDINGS -- PRINCIPLES INVOLVED -- HEREIN OF A PROPOSED CLUB LICENSE TO A VOLUNTEER FIRE COMPANY HOUSED IN THE BOROUGH'S NEW MUNICIPAL BUILDING.

December 23, 1938.

C. Conrad Schneider, Esq.,
Livingston Building,
Englewood, N. J.

Dear Mr. Schneider:

I have yours of the 13th re application of Volunteer Fire Company to the Borough Council of Closter for a club license in the new Municipal Building.

So far as a club license is concerned: Regulations 7, Rule 2, provides that "No license shall be issued to any club unless it shall have been in active operation in the State of New Jersey for at least three years continuously, immediately prior to the submission of said application, and shall have been in exclusive, continuous possession and use of a clubhouse or club quarters for the same period of time ****". This raises two questions: (1) Whether the Volunteer Fire Company, housed in a municipal building, can be said to have exclusive possession and use of a clubhouse or club quarters; (2) Whether it could comply with the three year requirement.

These requisites do not apply if the Fire Company takes out a plenary retail consumption license.

But, since any license issued to the Fire Company would involve the Municipal Building, the consent of the State Commissioner must first be obtained irrespective of what kind of a liquor license is applied for. This is so because R. S. 33:1-42 (Control Act, Section 39), provides:

"No sales of alcoholic beverages shall be made in any public buildings belonging to or under the control of the State or any political subdivision thereof except as permitted by the commissioner in specified cases and subject to rules and regulations."

Whether my consent would be granted in the instant case would depend on the facts, and hence, until hearing both sides, I do not entertain, let alone express, any opinion on the merits.

I have no hesitancy, however, in saying that, in general I am opposed to the sale of liquor in public buildings, and especially so in a City Hall, nor in declaring that I shall not even consider giving such consent unless and until the governing body of your municipality decides the matter of local public policy and whether or not the sale of liquor in the Municipal Building would be a bad influence on the entire community.

I note that contention is made that fire companies in Westwood and Old Tappan have permission for club licenses. This is not true. No fire company has any license whatsoever in either Westwood or Old Tappan. All that has happened is that these fire companies have received, each on two different occasions months apart, special permits for a one night affair, each time a dance. I granted these temporary special permits for isolated occasions only upon the consent of the respective governing bodies first obtained. In the case of Old Tappan dances, the affairs were not held on publicly owned property. Temporary social affairs of this kind are obviously radically different from a proposition to maintain and operate a permanent bar in the City Hall.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

10. ADVERTISING - GIVING AWAY A FREE DRINK WITH EACH BOTTLE SOLD VIOLATES THE FAIR TRADE RULE AS WELL AS THE INDUCEMENT RULE - HEREIN OF HOW A LITTLE KNOWLEDGE IS A DANGEROUS THING.

December 27, 1938.

Honest Phil's Tavern,
137 No. Main St. at No. Straight St.,
Paterson, N. J.

Gentlemen:

I have before me your newspaper advertisement which appeared in the Paterson Evening News reading:-

"WINES AND LIQUORS
"(Taste them before you buy them)
"SPECIALLY PRICED FOR THE HOLIDAYS"

"We carry the largest variety of liquors in the city. All priced to the lowest amount that the Fair Trade Act will allow, and then, we let you taste any brand you are interested in, because we have the license to do it. As you know, an ordinary store cannot have their bottles open to let you taste the liquor you are buying.

"BE CONVINCED -- NEVER UNDERSOLD LEGITIMATELY!!"

Now, Phil, honestly this is all wrong. What you're saying in substance is: "I'm a Fair Trader, I am. But I've got a consumption license, and so, if you deal with me, I'll give you a free shot with each bottle you buy."

I see you're up on the law -- especially upon what the other fellow can't do, but haven't you forgotten that State Regulations 20, Rule 20 provides:

"No retail licensee shall, directly or indirectly, offer or furnish any gifts, prizes, coupons, premiums, rebates, discounts or similar inducements with the sale of any alcoholic beverage for consumption off the licensed premises....."

And that violation is cause for revocation!!!

Moreover, if you sell a Fair Trade product at the Fair Trade price but include a free drink, you are, in effect cutting the price. And that, you know, means ten days!

Because you've been so studiously legitimate, I am not going to pick you up this time for your prank, providing you give me your solemn written promise at once that no further violations will be committed.

You are hereby directed immediately to cease and desist from the practice advertised by you.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

11. LICENSEES -- THE RULES FORBID GIFTS OF LIQUOR FOR OFF-PREMISES CONSUMPTION -- THIS IS TRUE EVEN IN THE ABSENCE OF ANY ACTIVE IDEA OF INDUCING FUTURE SALES.

December 28, 1958.

Mr. Rubin Eckstein,
Paterson, N. J.

Dear Sir:

I wired you on the 24th: "It is illegal for you to give your customers a Christmas bottle of wine."

Rule 20 of State Regulations No. 20 provides:

"No retail licensee shall, directly or indirectly, offer or furnish any gifts, prizes, coupons, premiums, rebates, discounts or similar inducements with the sale of any alcoholic beverage for consumption off the licensed premises, provided, however, that nothing herein contained shall prohibit retail licensees from furnishing advertising novelties of nominal value."

This means that liquor licensees may not make any gifts to customers at any time. The decision in Re Lieberman, Bulletin 219, Item 7, is exactly in point.

I realize full well that in this Season of good will you may be and probably are actuated solely by the impulse to give your customers a token of appreciation for past patronage

and not with any active idea in mind of inducing future sales.

But, if I allowed this to be done, I might as well wipe out the rule entirely for the unscrupulous would seize such interpretation as a pretext to ride rough shod through the regulation with blithe evasions winding up in a galaxy of good will bestowals every time the spirit moved or there was a desire to move the sale of spirits -- Easter, Yom Kippur, Hitler's Birthday -- any old day which the licensee chose on which to be a big shot and give away or pose as Generous George.

I have no way to probe the recesses of a licensee's mind and determine whether he is merely obeying the impulse we feel towards our real friends, or whether the motive is tinged with the thought of recoupment out of future transactions.

It is not, therefore, a matter of the licensee's actual but secret intent. In determining whether a violation of the Rule has occurred, I go solely by the licensee's actions. This is an objective test which anyone can determine.

The practice of which you inquire is against the Rule. You will get only pains for your thanks if you violate it.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

12. TIED HOUSES -- A GUARANTEE OF OPEN ACCOUNT IS A MERE OBLIGATION WHICH DOES NOT CREATE ANY INTEREST IN OR LIEN UPON RETAIL BUSINESS -- HENCE IT IS NOT WITHIN THE STATUTORY PROHIBITION.

Dear Commissioner:

May a wholesale distributor accept a written guarantee of payment of a delinquent account incurred by a retail plenary consumption licensee, the written guarantee to be given by the father of the prospective purchaser or transferee of the debtor's business?

Very truly yours,

LEON GEROFISKY

December 28, 1938

Leon Gerofsky, Esq.,
Somerville, N. J.

Dear Mr. Gerofsky:

The guarantee as described by you is a mere personal promise or obligation which does not create any estate, interest or lien in or upon the business of the retailer. Hence it is not within R. S. 33:1-43 (Control Act, Sec. 40).

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

13. RETAIL LICENSEES - HOURS - EXTENSION OF HOURS ON NEW YEAR'S DAY
PURSUANT TO INCHOATE ORDINANCE.

December 28, 1938

Frederick H. Young, Mayor,
Nutley, N. J.

My dear Mr. Young:

I have yours of the 28th and copy of the ordinance passed on first reading last night, which ordinance, when finally effective, fixes the regular closing hour, both for weekdays and Sundays, at 2:30 A.M., as heretofore, but provides that, on two nights of the year, taverns may be open all night, viz.: Christmas Eve and New Year's Eve, except that, when December 25th and January 1st fall on Sunday, the closing hours shall be 3:00 A.M. on December 25th and 5:00 A.M. on January 1st.

So far as Christmas Eve is concerned, I shall not approve any extension beyond 3:00 A.M., irrespective of whether Christmas falls on Sunday or an ordinary weekday, for Christmas, as distinguished from New Year's, is a holy day, a family day, a home day. Three A.M. on Christmas Eve is plenty late enough. I therefore cordially commend that you change your ordinance, when it comes up for second reading, to comply with this limit.

The general dispensation you have granted for New Year's Eve is approved as well as the limitation thereon till 5:00 A.M. in deference to Sunday when the holiday falls on such a day.

The remaining question is the effect of this new ordinance upon the New Year's Eve which occurs at the end of this week.

Your Board of Commissioners adopted a resolution on December 20th purporting to extend the hours on January 1st next until 5:00 A.M. I wrote you on the 23rd that the hours, having been fixed by ordinance, no amendment could be made except by procedure of equal dignity and solemnity, to wit: by a new ordinance, and hence the resolution, although there was no dissent from its substance, would not suffice.

I understand that the instant amendatory ordinance was introduced to effectuate the intention of the informal resolution. Technically, of course, the amendatory ordinance does not become effective until compliance with the statutory requisites, but the ordinance, having been introduced in good faith to carry out the avowed intent of the previous resolution and to meet and comply with the requisite formalities, I shall give weight to the declared intention rather than to the incidental technicalities and, therefore, pursuant to the power to make such special rulings as may be necessary for proper regulation and control, I shall accord full faith and credit to this ordinance and treat it as constituting an extension of the closing hour this coming New Year's Eve until 5:00 A.M. on January 1st.

Sincerely yours,
D. FREDERICK BURNETT,
Commissioner.

14. COURT DECISIONS - NEW JERSEY SUPREME COURT - SILVER ROD STORES, INC. v. BURNETT, COMMISSIONER.

NEW JERSEY SUPREME COURT

SILVER ROD STORES, INC., a corpora-)
tion of the State of New Jersey,)

Prosecutor,)

-and-)

D. FREDERICK BURNETT, ESQ., Com-)
missioner of the Department of)
Alcoholic Beverage Control of the)
State of New Jersey, and BOARD OF)
ALDERMEN OF THE CITY OF PATERSON,)
New Jersey,)

Respondents.)

Submitted October 4, 1938; decided

On application for writ of certiorari.

Before Justices Case, Donges and Porter

For the prosecutor: Jacob E. Max

For the respondent D. Frederick Burnett: Nathan L.
Jacobs

The opinion of the court was delivered by:

PORTER, J.

The application is for a writ of certiorari to review the action of the respondent D. Frederick Burnett, Commissioner of the Department of Alcoholic Beverage Control, in the revocation of a license issued to the prosecutor by the respondent Board of Aldermen of the City of Paterson to sell liquor at retail at 135 Main Street, Paterson.

The facts are not in dispute. The prosecutor conducts a store at the above address for the sale of drugs, tobacco, liquor, food, etc. The store is in two buildings separately owned, one fronting on Main Street and the other directly adjoining in the rear thereof, fronting on Washington Street. A fire door at the rear wall of each store, when closed at night, separates the two premises. During business hours this fire door remains open so that the two stores are, in fact, one and are conducted as one establishment. The public enter the premises from either street entrance. Complaint was made that an entrance to the licensed place of business was within the prohibited 200 feet from an entrance of the First Particular Baptist Church. A hearing was held by Commissioner Burnett and the testimony disclosed that the distance from the Washington Street entrance of the store to be less than 200 feet distant from the nearest entrance to the said church. His conclusion was that the Washington Street entrance was an entrance to the licensed premises and it being within the prohibited distance from a church entrance the license was declared void and the license certificate ordered surrendered to the Clerk of the City of Paterson.

We entertain no doubt of the soundness of that conclusion.

The application for the writ is denied, with costs.

15. STATE BEVERAGE DISTRIBUTOR'S LICENSE - NO AUTHORITY TO MAKE OUT-OF-STATE SALES.

Gentlemen:

We are holders of license number SBD-33. We also hold an importer's license, number I-679, and are completing arrangements for importing a foreign beer.

Kindly advise us if it would be permissible with your department for us to make out-of-State shipments to wholesalers. If you require us to pay the New Jersey State tax for such shipments please advise us so.

Very truly yours,
CONGRESS BEVERAGE COMPANY, INC.

December 29, 1938

Congress Beverage Co., Inc.,
Jersey City, N. J.

Gentlemen:

The privileges of a State Beverage Distributor's License are conferred by R. S. 33:1-11 (Control Act, Sec. 12(2)c). It provides that the holder may sell unchilled brewed malt alcoholic beverages "to retailers licensed in accordance with this act", and also at retail to be delivered by the licensee to the person for consumption in his home. It speaks only of sales made within this State. It is silent in respect to out-of-state sales.

This silence is significant when contrast is made with the manufacturers' licenses, each of which confer express power to make out-of-state sales.

The silence is intensified when comparison is made with the wholesaling licenses under which your license is grouped. Of the six so listed, the two export licenses expressly confer power "to sell and distribute without this State to any person pursuant to the laws of the places of such sale and distribution," but the other four, including yours, are silent in this respect. This additional clause is the only distinction between the two export wholesale and the ordinary plenary and limited wholesale licenses. To grant express power in some cases and to withhold it in others is dispositive of the legislative intent to differentiate with precision. Silence means that the privilege does not exist.

I therefore rule that a State Beverage Distributor's License does not authorize out-of-state sales.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

16. DISCIPLINARY PROCEEDINGS - KEEPING PLACE OPEN AFTER CLOSING HOURS - A GRAVE DISSERVICE IS DONE BY PERMITTING LICENSEES TO FLOUT DULY CONSTITUTED AUTHORITY.

December 30, 1938

Arthur D. Bolton,
City Clerk,
Passaic, N. J.

My dear Mr. Bolton:

I have before me staff report and your letter re disciplinary proceedings on November 29th against James J. Cahill, charged with permitting sale or consumption of alcoholic beverages and keeping his place open after the closing hour and hindering an investigation.

It appears that Cahill was acquitted by a tie vote, Commissioner Roegner and the Mayor voting for acquittal and Commissioners Martini and Whitehead against.

According to the report, the investigators stood outside from 3:20 to 3:30 A.M. and heard the cash register ring frequently. Gaining access at 3:30, they found 28 persons, all with drinks before them. The licensee did everything in his power to obstruct the investigation, at first refusing to permit my men to enter, even after they displayed their credentials, and finally refusing to answer any questions or order the patrons out of the place. At police headquarters, he admitted that there were at least 15 persons on the premises and that there were alcoholic beverages on the bar and tables when the men arrived. At the hearing, he admitted that there were 16 persons but claimed that 13 were employees and that they were eating sandwiches and drinking coffee, but he changed his story and denied the presence of any alcoholic beverages. What of the other three? Disregarding the testimony of your police and of my men, by his own admission, Cahill established his own guilt!

And what of the charge of hindering the investigation? A grave disservice to the cause of decent control is done by permitting a licensee to flout duly constituted authority.

The report states:

"Following the hearing, an open discussion took place among the four Commissioners hearing the case. Commissioners Whitehead and Martini expressed their opinion that they believed the licensee guilty as charged whereas Mayor Turner and Commissioner Roegner said that they felt that the licensee was guilty but did not deem it a severe violation and hence were inclined to regard it as merely technical. When Commissioners Whitehead and Martini stated that they favored a penalty of at least five days' suspension, the Mayor declared that if a penalty was to be given to the licensee, he would vote for acquittal but if they found him merely guilty and imposed no penalty, he would vote for conviction. He is quoted as having said, 'I don't care whom it will hurt. I know Mr. Burnett will not like that but I am going to vote according to the dictates of my conscience.'"

The Mayor makes a perfect score! I really don't!!

Accordingly, no further disciplinary proceedings against this licensee will be inflicted upon your Board.

With the hope of better things next year, I am

New Jersey State Library

Sincerely yours,

W. H. Burnett
Commissioner