COMMISSIONER BURNETT

SENT TO REGULAR MAILING LIST

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

BULLETIN NUMBER 80 June 24, 1935.

1. NEW LEGISLATION - SUPPLEMENT TO CONTROL ACT.

Senate Bill 289 was approved by Governor Hoffman on June 8, 1935, and thereby became Chapter 254 of the Laws of 1935.

Since no effective date is stated in the supplement, it becomes effective on July 4, 1935.

Section 1 reads: "1. In any proceeding for any violation of the act to which this is a supplement, as amended and supplemented, or any ordinance or resolution enacted pursuant thereto, any alcohol, beer, lager beer, ale, porter, naturally fermented wine, treated wine, blended wine, fortified wine, sparkling wine, distilled liquors, blended distilled liquors and any brewed, fermented or distilled liquors, shall be presumed to be fit and intended for use for beverage purposes and to contain more than one-half of one per centum (½%) of alcohol by volume."

This Section simplifies criminal prosecutions by creating a presumption that any brewed, fermented or distilled liquors shall be presumed to be fit and intended for use for beverage purposes and to contain more than one-half of one per cent of alcohol by volume. This presumption applies not only to prosecutions for violations of the Control Act but also to violations of ordinances or resolutions enacted pursuant thereto. The presumption is rebuttable by the defendant but, until rebutted, obviates the necessity for introducing affirmative proof as to the facts so presumed.

Section 2 reads: "2. Upon conviction of violation of any of the provisions of the act to which this is a supplement, or any amendments thereof or supplements thereto, any license held at the time of said conviction pursuant to said act by the person convicted or by any partnership of which he is then a member, or by any corporation of which he was a director or officer or stockholder owning ten per centum (10%) or more of the stock either at the time of the conviction or the violation resulting therein shall suspend automatically and without notice. The pendency of an appeal from the conviction shall not affect the suspension which shall continue for the balance of the term of the license unless the commissioner, in his discretion and for good cause shown, shall otherwise order. Nothing herein contained shall bar proceedings pursuant to said act to revoke or suspend any license."

Under this Section where any person is convicted for a violation of the Control Act any license held by him or by any partnership of which he is a member at the time of his conviction or by any corporation of which he holds ten percent (10%) or more stock is automatically suspended without notice. Such automatic suspension, however, does not bar proceedings to revoke the license instituted pursuant to Section 28 of the Control Act. By a revocation, the licensee becomes disqualified

for a period of two years from receiving any license, whereas, under the automatic suspension provided by this Supplement in Section 2, the suspension is only for the balance of the term of the license. The Commissioner may, for good cause shown, in his discretion, order that the pendency of an appeal from the conviction shall operate to lift the automatic suspension until the determination of the appeal. This section will do away with the anomalous situation whereby a licensee is permitted to continue in business even after he has been convicted for a violation of the Control Act and until revocation proceedings are instituted and completed. Issuing authorities should be on the alert to see that persons so convicted should immediately cease to do business.

> Section 3 reads: "3. No owner, part owner, stockholder, officer or director of any corporation or any other person whatsoever interested in any way whatsoever in any brewery shall make any loan, directly or indirectly, to any retail licensee; provided, however, that the foregoing shall not prohibit the extension, subject to rules and regulations, of reasonable credit in respect to ordinary current sales of brewery products. No owner, part owner, stockholder, officer or director of any corporation or any other person whatsoever interested in any way whatsoever in any brewery shall furnish, repair or replace fixtures in any licensed retail business, except that the cleaning and repairing of pipes and similar matters may be permitted by rules and regulations."

This provision should be read with Section 40 of the Control Act. It was enacted pursuant to the legislative program which contemplates complete elimination of the prepro-hibition brewery controlled saloon.

> Section 4 reads: "4. The commissioner is hereby authorized and empowered to make such reciprocal rules and regulations and special rulings pertaining to any one or more States designated therein as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages and the enforcement of the act to which this is a supplement, in addition thereto and not inconsistent therewith, and to alter, amend, repeal and publish the same from time to time."

This provision enables the State Commissioner to make reciprocal regulations and will help translate into action the work now being planned by the Governor and the State Commission on Interstate Cooperation. The collapse of the Federal Alcohol Control Administration by virtue of the decision in Schechter vs. United States (U.S. Supreme Court, May, 1935, not yet officially reported) may make this provision of great practical moment.

Bulletin 80 sec 5.

> Section 5 reads: "5. No class C license shall be issued or renewed to any corporation, except for premises operated as a bona fide hotel, unless each owner, directly or indirectly, of more than ten per centum (10%) of its stock qualifies in all respects as an individual applicant, anything to the contrary contained in the act to which this is a supplement notwithstanding."

This Section should be read in connection with Section 22 of the Control Act. The phrase "Class C" does not refer merely to consumption licenses, but includes all Class C

licenses as set forth in Section 13 of the Control Act which comprises every form of retail license. The Section is designed as far as possible to prevent unqualified applicants from obtaining licenses in corporate disguise. Bona fide hotels are exempt from the operation of this Section.

Section 6 reads: "6. If, at any time after this act becomes effective, a petition, signed by at least fifteen per centum (15%) of the qualified electors of any municipality as evidenced by the total number of votes cast at the then next preceding election for members of the General Assembly in such municipality, shall be presented to the governing board or body thereof, requesting a referendum on any proposed questions as to whether the hours between which the sale of alcoholic beverages at retail may be made in said municipality on week days, Sundays, either or both, shall be fixed as provided in said petition, which questions shall be specifically and separately set forth in said petition, such governing board or body shall adopt forthwith a resolution directing the clerk of the county in which such municipality is situated to print such question or questions stated in said petition pursuant to the act entitled 'An act to regulate elections' (Revision 1930), and the acts amendatory thereof and supplementary thereto, (which last mentioned act and its amendments and supplements is hereafter referred to as the general election law) upon the official ballot to be used in said municipality at the next ensuing general election. Thereupon the clerk or secretary of said governing board or body shall forthwith deliver to such county clerk a certified copy of such resolution. If said copy shall be delivered to said county clerk not less than thirty days before said general election, he shall cause such question or questions to be printed in an appropriate place on the ballot to be used in said municipality at the next ensuing general election, pursuant to said general election law and thereupon all proceedings with respect to the referendum on said question or questions shall be subject to and governed by said general election law as in other cases of the submission of public questions to the electorate.

"If a majority of the legal voters shall vote affirmatively on the question of whether the hours of sale shall be fixed in the manner set forth in said question or questions, the clerk of the governing board or body of said municipality shall forthwith in writing notify the commissioner and municipal board, if any, of the action taken by the legal voters of said municipality and thereafter the retail sale of alcoholic beverages may be made only within the hours fixed by said referendum. Such sale at any other time within said municipality shall be unlawful and constitute a violation of this act.

"If a majority of legal voters voting upon said question or questions shall vote in the negative on the question of whether the hours of sale shall be fixed in the manner set forth in said question or questions, the clerk of the governing board or body of said municipality shall forthwith in writing notify the commissioner and municipal board, if any, of the action taken by the legal voters of said municipality and thereafter the hours between which the sale of alcoholic beverages at retail may be made may be regulated as theretofore in said municipality.

"No petition under this section shall be received by the governing board or body while any other petition covering the same subject matter which has theretofore been presented hereunder has not been voted upon.

"Whenever a referendum shall have been had in any municipality pursuant to this section, no further referendum on the same question shall be held therein prior to the general election to be held in said municipality in the third year thereafter and so long as said referendum remains effective, all ordinances, resolutions or regulations inconsistent with the result of said referendum shall have no effect within said municipality."

This Section affords an additional referendum whereby specific hours of sale on Sundays and weekdays may be determined by each municipality for itself. As the existing referenda stand, the Sunday hours which the electorate may vote are all or none. This new referendum provides reasonable flexibility so that each municipality can decide for itself exactly which, if any, hours it chooses for sale.

This should be signed.

2.

APPELLATE DECISIONS - THOMAS VS. EVESHAM

ALLISON E. THOMAS,
Appellant,
-vs-

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EVESHAM (BURLINGTON COUNTY),
Respondent.

ON APPEAL
CONCLUSIONS

Powell & Parker, Esqs., by Harold T. Parker, Attorneys for Appellant.
Howard G. Stackhouse, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail consumption license for premises located at the corner of Main Street and Community Avenue, Marlton, New Jersey, in the Township of Evesham.

Respondent contends that the application was properly denied because the premises sought to be licensed are located in a residential neighborhood and the issuance of a license therein is objected to by a great number of residents.

It has been held that a municipal issuing authority may properly refuse to issue a license for premises located in a residential neighborhood. Vannozzi v. Trenton, Bulletin #35, Item #7; Apgar V. Tewksbury, Bulletin #66, Item #2; Hickey v. Lopatcong, Bulletin #68, Item #1; Hackman v. Greenwich, Bulletin #71, Item #13.

Evesham Township is an agricultural community with a population at the last census of 1694. The premises sought to be licensed are located in a portion of the Township known as

Marlton, which is stipulated by counsel to be principally residential in character containing only a few small stores to service the immediate needs of the local residents. Respondent has issued no licenses for premises located in this neighborhood. The only licenses issued in the Township were for premises located in rural areas along state highways.

Numerous persons residing in Marlton and the surrounding portions of the Township objected to the issuance of any licenses therein. These objections, coupled with the residential character of the community, reasonably sustain the denial of appellant's application. Apgar v. Tewksbury, supra; Hickey v. Lopatcong, supra; Hackman v. Greenwich, supra.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Commissioner

Dated: June 17, 1935

3. APPELLATE DECISIONS - SUSKIND VS. CLIFTON

PHILIP SUSKIND,
Appellant,
-vs-
MAYOR AND CITY COUNCIL OF THE CITY OF CLIFTON (PASSAIC COUNTY),
Respondent.

ON APPEAL
CONCLUSIONS

Israel Friend, Esq., Attorney for Appellant.
John C. Barbour, Esq., by Donald G. Collester, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the revocation of appellant's plenary retail consumption license for possession of illicit beverages with intent to sell the same in violation of Section 48 of the Control Act.

Appellant's sole ground of appeal is that respondent improperly denied a request to adjourn the hearing on the charges preferred against him.

It is admitted that respondent complied with the requisites of Section 28 of the Control Act pertaining to revocations by serving notice of charges upon appellant and fixing a date for hearing six days later. At the time and place fixed for hearing, however, appellant's attorney requested an adjournment, on the ground that he had just been called into the case and was not prepared to proceed. The request was denied. Thereupon the hearing was held and evidence introduced establishing the guilt of appellant. Appellant's attorney did not take part in the hearing, did not introduce any evidence, or cross-examine any witnesses. He rested strictly upon what he believed to be his right to an adjournment.

There is no such right. An adjournment, if granted, is a matter of grace and not of right. It will not do for persons charged with violations of the Control Act to wait until the case is ready for trial and then engage a lawyer. The statute gives each accused person five days in which to select a lawyer who will be able to try the case when it is called.

The transcript shows that the appellant was clearly guilty as charged. He was tried in the Criminal Judicial District Court of Passaic County for violation of Section 48 of the Control Act, found guilty, and fined $100.00. There are no merits to this appeal.

The denial of a request for adjournment was eminently proper.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Dated: June 18, 1935. Commissioner

4. APPELLATE DECISIONS - CALVARY BAPTIST CHURCH, ET AL VS. TRENTON, ET AL

THE TRUSTEES OF CALVARY BAPTIST CHURCH, TRENTON, NEW JERSEY, and G. M. RILEY, PASTOR,
Appellants,
-vs-
BOARD OF COMMISSIONERS OF THE CITY OF TRENTON AND KNIGHTS OF ST. STEPHEN'S CLUB, INC.,
Respondents.

ON APPEAL
CONCLUSIONS

G. M. Riley, Esq., Pro Se, and also in behalf of the Calvary Baptist Church, Appellants.
Mr. John J. Sabo, Representing Knights of St. Stephen's Club, Inc., Respondent.
No appearance in behalf of the Board of Commissioners of the City of Trenton.

BY THE COMMISSIONER:

This is an appeal from the issuance of a Club license to the Knights of St. Stephen's Club, Inc. for premises located at #108 Roebling Avenue, Trenton.

Since the issuance of this license Trenton has adopted the City Manager plan of government and the Board of Commissioners has gone out of office. The City affairs are now being administered by the City Council and City Manager. They had nothing to do with this case.

Appellants contend the license was improperly issued because the licensed premises are within 200 feet of appellant's church and do not come within any of the exemptions contained in Section 76 of the Control Act.

The facts were considered and are fully set out in

Knights of St. Stephen's Club v. Trenton, Bulletin 37, Item 16, and Knights of St. Stephen's Club v. Trenton, Bulletin 54, Item 11. In the first of the cited cases the local issuing authority was sustained in refusing to transfer a license to the premises located at #108 Roebling Avenue, Trenton, because said premises were within the proscribed distance set forth in Section 76 of the Act; and in the second case cited the issuing authority was sustained in refusing to issue a license for the same premises for the same reason.

The Board of Commissioners nevertheless issued a license to the Club. On appeal the Board of Commissioners filed no answer, and failed to enter any appearance or submit any evidence.

The issuance of the license was clearly erroneous and in flagrant contravention of Section 76 of the Control Act.

The action of the Board of Commissioners in issuing the license is reversed. The license is hereby declared void. All activity thereunder must cease forthwith.

D. FREDERICK BURNETT,
Commissioner

Dated: June 18, 1935

5. NEW LEGISLATION - SUPPLEMENT TO CONTROL ACT

June 20, 1935

N O T I C E

TO MUNICIPAL ISSUING AUTHORITIES:

Numerous inquiries have been received as to the present effect of P.L. 1935, c. 254, approved June 8, 1935 (Senate Bill #289), Section 5 of which provides:

> "No Class C license shall be issued or renewed to any corporation, except for premises operated as a bona fide hotel, unless each owner, directly or indirectly, of more than ten per centum (10%) of its stock qualifies in all respects as an individual applicant, anything to the contrary contained in the act to which this is a supplement notwithstanding."

This Act is effective July 4, 1935. It has no application to licenses issued to corporations prior to such date. Consequently, until such date retail licenses may be issued to corporate applicants even though persons holding more than ten per centum (10%) of the corporate stock are non-residents, aliens, or minors and therefore not qualified as individual retail licensees.

See Bulletin 80, Item 1, supra.

D. FREDERICK BURNETT,
Commissioner

6. MORAL TURPITUDE - DISORDERLY HOUSE - THE NATURE OF THE OFFENSE AND NOT ITS NAME DETERMINES WHETHER IT INVOLVES MORAL TURPITUDE

Dear Sir: June 15, 1935.

In answer to question #8, Mr.------ answered this question in the negative, with the explanation that twenty-three years ago, he plead non-vult to an indictment charging disorderly house. I believe it was the custom at that time, where a saloon keeper was found open on Sunday on several occasions, to make a complaint against him for maintaining a disorderly house. His establishment was located on Broadway near Washington St., and I think was the largest establishment of its kind in the City, at that time. It was an old German beer garden. I am informed that the charge was to some extent the outgrowth of a political feud. However the fact is that after he was tried and the jury disagreed, he subsequently plead non-vult and was fined $500.00.

Under the circumstances, I advised him to answer the question as indicated with a brief explanation.

Yours respectfully,
JAMES M. DUNN

June 19, 1935

Hon. James M. Dunn,
Paterson, N. J.

My dear Mr. Dunn:

I have yours of June 15th.

A negative answer, provided it is coupled with a complete explanation of the facts, does serve to relieve the odium which might otherwise well rest. It is a dangerous practise unless the above proviso is simultaneously and scrupulously observed, as I presume it has been. After all, it is truth and the whole of the truth that counts.

I did not know anything about the practise in liquor cases 23 months ago, let alone 23 years ago, but have no hesitancy in saying that if there is nothing more to the charge of a disorderly house than that it was technical and without any imputation of immorality, or anything which is intrinsically wrong, that the facts should be examined under the specification of charges and then the principles applied, exactly as if he had been convicted of violating the National Prohibition Law. It is the nature of the offense and not its name which determines whether the conviction involves moral turpitude.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

7. MUNICIPAL RESOLUTIONS - INVALIDITY - WHEN MEMBER OF THE GOVERNING BODY IS INTERESTED IN THE EVENT

My dear Commissioner:

In association with John W. Woelfle, Esquire, I have been retained by eleven storekeepers of the Town of West Orange for the purpose of opposing an ordinance which comes up for first reading before the Board of Commissioners on Tuesday evening, June 18.

A list of the storekeepers whom we represent, with their respective addresses, is attached to this letter. We have also placed after each of their names the amounts invested by them in liquor stock and fixtures. These figures were given to us without inventory and are necessarily approximate. The total is $25,900.00. Our clients are all holders of plenary retail distribution licenses under Section 13 (3) of Chapter 85, P.L. 1934, which licenses expire June 30, 1935. All but two have paid their state fees and deposited with the Town $350.00 and advertised, for renewal.

The ordinance requires that on and after July 2, 1935 the license referred to 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. The fee for the license is increased from $350.00 to $500.00, which is the present charge in the Town for a plenary retail consumption license.

The effect of this ordinance, if passed, would be to terminate the liquor business of most of our clients. They are composed principally of small grocery and delicatessen merchants who cannot afford to maintain separate liquor establishments.

We are reliably informed that this ordinance has been sponsored and urged in committee by the Commissioner of Public Safety, Armand T. Brundage. The only reason given by the Commissioner for requesting the passage of the ordinance is that his police department is unable to check on store violations of the Sunday morning sales restriction.

Commissioner Brundage has been for some time past and is now employed by the Ballantine and Sons Company as a salesman and collector. He sells to and collects from the taverns of West Orange.

We should deeply appreciate the benefit of a ruling from you upon the propriety of any participation by Commissioner Brundage in sponsoring or voting upon the proposed ordinance.

Respectfully yours,
William S. Gnichtel

June 15, 1935

William S. Gnichtel, Esq.,
Newark, N. J.

Dear Mr. Gnichtel:

I have yours of even date.

The power to enact the ordinance exists. Whether the power should be exercised is a matter of policy to be determined by the governing body of the municipality. Control Act, Section 13 (3)a.

If it is the fact, as you allege, that the Commissioner of Public Safety of West Orange is connected in business with the brewing concern, he is disqualified to vote on any such ordinance. The disqualification arises independent of statute. It is fundamental that no one may be judge in his own case. His vote must not be warped by financial self-interest. I have ruled this heretofore in the Asbury Park cases, Bulletin #39, Items #2 and #3.

In Bulletin #18, Item #4, I ruled that a Councilman who was interested in a wholesale alcoholic beverage license was ineligible to pass on the issuance of retail licenses, saying:

> "Although there is no evidence in this case that the Councilman's judgment is influenced for or against the issuance of retail licenses, because of his interest as a wholesaler in his own right, it is entirely possible that such a condition could exist. His judgment in determining who may or may not hold retail licenses in his own Borough should not be warped by financial interest in the alcoholic beverage industry.
>
> "Every licensee is his potential customer. Even though this Councilman or his company may not directly solicit their business, certainly the very fact that each year these retailers must appear before him for a renewal of their licenses could tend to influence these retailers in their purchases. Therefore, as a matter of policy, this should disqualify this Councilman."

In Stevens vs. Haussermann, 172 Atl. 738, decided by Mr. Justice Heher on May 16th, 1934, the Supreme Court of New Jersey entered judgment of ouster in quo warranto because it was determined that one of the parties voting upon a certain motion of a City Council was disqualified because of his personal interest. The learned Justice said:

> "Generally, public policy forbids the participation of a member of a municipal governing body in any matter before it which directly or immediately affects him individually."

Because of the collision of private interest with public duty, the Court held that the action, then under review, must be determined by a disinterested body. It was further held as a necessary corollary that the concurrence of an interested member in the action taken by the body taints it with illegality, and that it is immaterial that the result reached was not produced by the vote of the disqualifying member. The Court said:

> "It is supported by a twofold reason, viz.: First the participation of the disqualified member in the discussion may have influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision. It being impossible to determine whether the virus of

self-interest affected the result, it must needs be assumed that it dominated the body's deliberations and that the judgment was its product."

It is not my function to comment on the propriety or ethics of any one in sponsoring the ordinance. Suffice it to say that I shall rule, if the facts are as you allege, that he may not vote upon the ordinance and that his participation in the meeting will taint the whole measure with illegality.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

DFB:G

8. REGULATIONS RELATING TO REVOCATION PROCEEDINGS PENDING OR CONTEMPLATED AT EXPIRATION OF LICENSE

June 20, 1935

Inquiries have been received as to whether revocation proceedings contemplated or instituted but not completed by midnight June 30, abate upon the expiration of the license. The answer must be in the negative. Any contrary conclusion would nullify, in such instances, the legislative policy underlying the statutory disqualifications incident to revocation. In addition, where the license is renewed the revocation proceedings should be carried through to completion in order that the determination therein apply to such renewal license. To effectuate the foregoing purposes the following regulations are promulgated, effective immediately:

1. Revocation proceedings shall not be barred or abate by the expiration of the license.

2. Any license may be suspended or revoked for proper cause, notwithstanding that such cause arose during the term of a prior license held by the licensee.

3. Where revocation proceedings are instituted and the license expires and is renewed during the pendency thereof, such proceedings shall be carried through to completion and any order of suspension or revocation therein shall apply without further proceedings to such renewal license.

4. Where the license expires and a new license is issued to another person for the same premises during the pendency of revocation proceedings, such new license shall be subject to any order made in the revocation proceedings declaring the licensed premises ineligible to become the subject of a license during the period therein provided.

5. All licenses shall be conditioned upon the foregoing regulations as though fully set forth therein.

D. FREDERICK BURNETT,
Commissioner

9. APPELLATE DECISIONS - ANTHONY, ET AL VS. BRANCHVILLE, ET AL

LOTTA ROWE ANTHONY and LYMAN H. SEAMANS,
Appellants,
-vs-
MAYOR AND COUNCIL OF THE BOROUGH OF BRANCHVILLE, SUSSEX COUNTY, and ADA B. HOWELL,
Respondents.

ON APPEAL
CONCLUSIONS

Charles T. Downing, Esq., Attorney for Appellants.
Boyd S. Ely, Esq., Attorney for Respondent, Mayor and Council of the Borough of Branchville.
Harold Simandl, Esq. and Albert W. Silverman, Esq., Attorneys for Respondent Ada B. Howell.

BY THE COMMISSIONER:

This is an appeal from the issuance of a plenary retail consumption license to respondent Howell for premises located in Branchville.

Appellants contend that the license was improperly issued because the licensee has committed two or more violations of the Control Act and therefore under Section 22 of the Act is disqualified from receiving a license of any class thereunder. See DeRousi vs. Carteret, Bulletin #75, Item #2.

It was admitted that the licensee during Prohibition had conducted a speakeasy. Appellants contended that the licensee had conducted it after Repeal and produced witnesses who testified to the purchase of liquor since December 6, 1933, and before any license had been issued. On the licensee's side, there was testimony that she had discontinued the speakeasy upon Repeal and had been law-abiding ever since and bore a good reputation in the community. At the time of the hearing, three indictments had been returned against the licensee for alleged violations of the Control Act which lent considerable color to the contention of appellants, but since the hearing two of those indictments have been nolle prossed. On this state of the record, I am bound to affirm the finding of fact made by the municipal issuing authority in favor of the licensee.

Appellants further contend that the licensed premises are located within 200 feet of the church of which appellant Lyman H. Seamans is minister.

It was stipulated by counsel for appellants and the licensee that the distance between the licensed premises and the church is beyond 200 feet if measured from entrance to entrance but that it is less than 200 feet if measured from the sidewalk in front of the church. In Ackerman vs. Paterson, Bulletin #48, Item #11, it was ruled that where a church which is set back from the sidewalk is surrounded by a fence in which there is a gate that "the entrance to the church, within the meaning of Section 76, must be considered as the point at which the gate is located, rather than the entrance door". The decision in that case, however, rested upon the existence of the fence separating the

church property from the sidewalk and the opinion adverts to the fact that "persons passing through the gate would be considered as entering the church". In the instant case there is no gate around the church property and it cannot be said that persons are entering the church until they reach the actual entrance door. It must, therefore, be concluded that the licensed premises are not within the prohibited distance from the church.

Appellants finally contend that the license was improperly issued in violation of the Branchville ordinance limiting the issuance of licenses in Branchville to "legitimate hotels that have been established as such" because the licensed premises do not constitute a legitimate hotel.

The question of what constitutes an hotel is often difficult to decide. In another connection the Commissioner defined an hotel as:

> "**** a public house for the lodging and entertainment of travelers or wayfarers for a compensation. In short, an inn of the better class. It is to be distinguished from a tavern or a house of public entertainment that does not provide lodging, and from a boarding house which, while it provides lodging, is not a public house. The boarding house keeper may refuse accommodations to anyone he chooses. The innkeeper must entertain all travelers or wayfarers who are of good conduct and ready to pay the proper charges." Re Corona, Bulletin #29, Item #5.

There is testimony that the licensed premises bear the sign "Central Inn"; that a regular guest register is maintained; and that eight or ten furnished bedrooms are let out from time to time principally to transients.

The testimony of the licensee offered on this point is decidedly weak. Against this the evidence presented by appellants as to the prior use of the premises and their adaptability might well have given pause to the issuing authority and led them to a contrary result. However, what constitutes a hotel is mainly a question of fact. I know of no air-tight, universal definition. What might fairly be considered a hotel in Branchville with a population of 665 would naturally be something entirely different from the concept of a hotel in Newark with a population of 450,000, or in a resort such as Atlantic City, which, irrespective of population, has natural advantages which attract several thousands to every one who seeks accommodations over night in Branchville.

Hence, I cannot say upon this appeal that the municipal determination that it was an hotel was not supported by the evidence.

The action of the Mayor and Borough Council is therefore affirmed.

D. FREDERICK BURNETT,
Commissioner

Dated: June 20, 1935.

10. APPELLATE DECISIONS - MILLER VS. HADDON

JOSEPH M. MILLER,
Appellant,
-vs-
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HADDON (CAMDEN COUNTY),
Respondent.

ON APPEAL
CONCLUSIONS

- - - - - - - - - - - - - - - -

Joseph M. Miller, Appellant, Pro Se.

Mark Marritz, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the revocation of appellant's plenary retail consumption license for premises located at #3010 Black-Horse Pike, Haddon Township, for violation of the Control Act.

At the hearing it appeared that appellant was apprehended by an investigator of this Department on November 23rd, 1934, for possession of alcoholic beverages upon the licensed premises in unlabeled bottles other than the original containers not bearing any tax stamps; that he was charged with the unlawful possession of such beverages in violation of the Control Act and pleaded guilty before the local Recorder and was held for the Grand Jury; that an indictment was returned for unlawful possession, to which appellant likewise pleaded guilty, and that he was sentenced to the County Jail for a term of three months, which sentence was suspended.

Thereupon respondent served notice of charges upon appellant pursuant to Section 28 of the Control Act, and ordered him to show cause why his license should not be revoked on the ground that he had pleaded guilty to a violation of the Control Act. A hearing was had at which appellant was represented by counsel and he was found guilty and the license was revoked.

Appellant's guilt is established by his plea to the indictment, the testimony taken before respondent, and the record on appeal. Revocation was eminently proper.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Commissioner

Dated: June 20, 1935

11. APPELLATE DECISIONS - PLAGER VS. ATLANTIC CITY, ET AL

ROBERT PLAGER,)

Appellant,)

-vs-) ON APPEAL
CONCLUSIONS

BOARD OF COMMISSIONERS OF THE CITY OF ATLANTIC CITY, and SARAH FRIEDMAN,)

Respondents.)

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Emerson L. Richards, Esq., Attorney for Appellant.

William H. Smathers, Esq., Attorney for Respondent, Sarah Friedman.

No Appearance for Respondent, Board of Commissioners of the City of Atlantic City.

BY THE COMMISSIONER:

This is an appeal from the issuance of a plenary retail distribution license to respondent Sarah Friedman for premises located at #1528 Arctic Avenue, Atlantic City.

The application came up for consideration before the local issuing authority at its regular meeting on January 3, 1935. Appellant appeared and objected to the issuance of the license. At the conclusion of its deliberations the issuing authority unanimously adopted a resolution rejecting the application. At a subsequent regular meeting of the Board of Commissioners on January 17, 1935, however, a resolution was adopted purporting to rescind the resolution of January 3, 1935 and immediately thereafter a resolution was adopted granting the license to Sarah Friedman. Appellant received no formal notification that the denial of the application on January 3, 1935 was to be reconsidered at the meeting of January 17, 1935, although it appears that he learned of the contemplated action informally some two hours before the meeting, and his attempt to have the reconsideration adjourned was unsuccessful.

Question immediately arises whether the issuing authority having formally passed upon and denied the application had the power at a subsequent meeting to reconsider its action and grant the application.

In re Hendrickson, Bulletin #47, Item #10, it was ruled that the issuing authority had no such power of reconsideration, and said:

"The sole method of review provided for by the Control Act, from the denial of an application for a municipal license, is by appeal to the Commissioner. See Section 19. Since there is no express provision therefor no rehearing is permissible under well accepted principles announced by our Courts. See Whitney vs. VanBuskirk, 40 N. J. L. 463 (Sup. Ct. 1878); Dilkes vs. Pancoast, 53 N. J. L. 553 (Sup. Ct. 1891); Gulnac vs. Board of Chosen Freeholders, 74 N. J. L. 543 (E. & A. 1906). In the Gulnac case the syllabus reads as follows:

'The right of a deliberative body to reconsider its action on a matter of a judicial or quasi-judicial character ceases when a final determination has been reached.'

"The foregoing conclusion finds support in reason as well as authority. Deliberation must end sometime to be followed by action. When a municipal body has acted in its deliberate judgment, it should not be burdened with the consideration of applications for rehearings. And where, as in your case, a hearing attended by objectors was held, it would be unfair to such objectors now to permit a reconsideration of the application.

"It is the Commissioner's ruling that no rehearing may be granted by a municipal issuing authority after it has denied an application for a license."

Consideration of an application for a liquor license by an administrative tribunal is essentially judicial in its nature. Wilson vs. Board of Commissioners, 94 N. J. L. 119 (E. & A. 1920); Miner vs. Larney, 87 N. J. L. 40 (Sup. 1915); Bachman vs. Phillipsburg, 68 N. J. L. 552 (Sup. 1902); Austin vs. Atlantic City, 48 N. J. L. 118 (Sup. 1886). When such consideration has been completed and final action has been taken the issuing authority is functus officio and has no jurisdiction to reconsider its action at a subsequent meeting. Whitney vs. Van Buskirk, 40 N. J. L. 463 (Sup. 1878); Dilkes vs. Pancoast, 53 N. J. L. 553 (Sup. 1891); Gulnac vs. Board of Chosen Freeholders, 74 N. J. L. 543 (E. & A. 1906); White vs. Atlantic City, 62 N. J. L. 644 (Sup. 1899); Ashworth vs. Court of Common Pleas, 92 N. J. L. 282 (Sup. 1919); Currie vs. Atlantic City, 66 N. J. L. 671 (E. & A. 1901); Vanaman vs. Adams, 74 N. J. L. 125 (Sup. 1906); Lantz vs. Hightstown, 46 N. J. L. 102 (Sup. 1884); Decker vs. Board of Excise, 57 N.J.L. 603 (Sup. 1895); Kendell vs. Camden, 47 N. J. L. 64 (Sup. 1885).

In White vs. Atlantic City, supra, an application for a liquor license having been denied the local issuing authority thereafter proceeded to reconsider its refusal and issue the license. The holding of the court is summarized in the second headnote, which reads:

"The refusal to grant such a license by a municipal body whose licensing power is subject to the same restrictions and provisions as are imposed by statute upon the like power when exercised by the courts of common pleas of this state is final, and subsequent reconsideration of such action, resulting in the granting of the license, is contrary to law and void."

In Dilkes vs. Pancoast, supra, an application for a liquor license having been finally denied, the applicant moved for leave to withdraw his application. The issuing authority permitted such withdrawal but the Supreme Court on certiorari held that:

> "The Court having considered the application at the September Term rejected and refused it. This action was final; the power of the court in the premises was exhausted, and it could not at a subsequent day reconsider it and permit the applicant to withdraw his application." Page 554.

Similarly where a liquor license has been issued, the issuing authority at a subsequent date may not reconsider its action in the absence of statute or a fraud having been perpetrated upon the issuing authority. Lantz vs. Hightstown, 46 N. J. L. 102 (Sup. 1884); Decker vs. Board of Excise, 57 N. J. L. 603 (Sup.1895); Vanaman vs. Adams, 74 N. J. L. 125 (Sup. 1906).

The doctrine discussed above is not confined to liquor cases but is applicable in all branches of law. In Kendell vs. Camden, supra, the City Common Council by charter was made the sole judge of the election and qualifications of its own members. In the exercise of this power it investigated and seated a member. At a subsequent meeting a second investigation was ordered with reference to the election of the same member. The court held that the City Council had no power to investigate further. In the course of its opinion the court said:

> "*****. In Hadley vs. Mayor &c. of Albany, 33 N. Y. 603, the common council having canvassed the returns and determined and declared the result in an election of mayor of the city, and made another canvass at a subsequent day with a different result, the court said that, having once legally performed the duty imposed, the power of the council was exhausted, and they had no right to reverse their former decision by making a different determination. A like ruling is found in Morgan vs. Quackenbush, 22 Barb. 72, 78. Whether acting as canvassers of returns or as a special tribunal to examine the whole subject of the election by going behind the returns and determining who has been legally elected by the ballots cast, a common council, having once examined and decided the question, can take no step further to reverse its action at a subsequent meeting, and certainly not when, after the lapse of a year, new members have been brought in to change its form and opinion." Page 68.

In Currie vs. Atlantic City, supra, the Court of Errors and Appeals held that, under a statute requiring the filing of consents by abutting land owners as a condition precedent to municipal approval of the laying out of new railway tracks, when the city council or other governing body has once regularly acted by the passage and approval of a valid ordinance or resolution giving or refusing such municipal consent, the council or other governing body becomes functus officio, so far as the pending application is concerned, and the consents of the abutting owners thus acted upon cannot be the basis of further action on a second application.

Similarly, in the instant case, the application made by the licensee was exhausted when denied. It must, therefore, be concluded that the issuance of the challenged license was not within the jurisdiction of the Board of Commissioners.

Furthermore, the issuance of this license must be reversed on the merits.

Appellant contends that the licensee is merely a "dummy" for her husband who is the real party in interest and that therefore the issuance of the license in her name was improper. Pilla vs. Trenton, Bulletin #30, Item #11; Kurpiewski vs. Trenton, Bulletin #34, Item #6; Severance vs. Barrington, Bulletin #47, Item #1. The evidence sustains this contention.

The husband of the licensee was the sole proprietor of and conducted a drug store at the premises now licensed until a few days before the license was issued to his wife. He had a plenary retail distribution license in his own name for the period expiring June 30, 1934. An application for renewal of this license was rejected by the Board of Commissioners. Thereafter he was arrested, tried, convicted and fined for selling alcoholic beverages without a license. He admitted that under his wife's license he conducts the business, makes all the purchases, pays all the bills and signs all the checks. He claims, however, that his only interest in the business is his salary of $25.00 per week which he pays himself in cash out of the gross income of the business.

The licensee, of course, claims that the business is hers. She appears to know little or nothing either about the conduct of the drug store or the licensed business and had no capital of her own with which to start the business. Since her marriage some five years ago she has been living with her husband and her only source of income was the money given her by him out of the drug business. Her story with reference to the manner in which the drug business was wound up and the arrangement made for her to obtain the liquor license seems strained, unnatural and contains many contradictions. Her utter confusion is demonstrated by the following excerpt from her testimony:

"Q. You are sure that the store was vacant about the first of December, 1934, until you resumed as a liquor store after the 17th of January?

A. I am not sure.

Q. Well, now, how long was the store vacant? A. I don't remember exactly how long the store was vacant.

Q. You remember a few minutes ago I asked you if you were pretty sure about that? A. I am not sure.

Q. How long was the store vacant? A. I don't exactly remember.

Q. But it was vacant? A. I don't remember.

Q. You have repeatedly told us you and your husband sold this stock of drugs to your mother some time prior to December 1, 1934, and that she took the stock out and disposed of it - is that true?

A. I guess so; I am not sure.

Q. Are you sure that any of the drugs were ever taken out of the place until you got the license on the 17th of January, 1935? A. I don't know.

Q. You want to take all that testimony back that you gave a little while ago? A. I don't know.

Q. You don't know whether you want to take it back or not, is that right? A. Yes."

In addition to the foregoing it should be noted that the application was filled out in large part by the husband of the licensee and that in his own handwriting when asked whether any person had any interest directly or indirectly in the license applied for, he wrote in "Yes," stating that he would share in the profits. At the hearing this statement was explained by both the licensee and her husband as meaning that he would in his capacity as husband, naturally profit from any money made by the licensee in the conduct of the business since the money would go to maintain their home and for living expenses.

In view of the foregoing facts it must be concluded that the licensee is merely a "front" for her husband who filed her application only because he could not obtain a license and that the business itself was his. Under these circumstances the issuance of the license was in direct violation of the Act and improper.

The action of the Board of Commissioners in issuing the license is reversed. The license is hereby declared void. All activity thereunder must cease forthwith.

D. FREDERICK BURNETT,
Commissioner

Dated: June 21, 1935

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

June 21, 1935

Mr. Charles Schulz,
South Belmar, N. J.

Dear Mr. Schulz:

Confirming conference of today: You tell me you are the Councilman referred to in Re: Simmill, Bulletin 76, Item 2, who I decided was disqualified from voting on any matters involving alcoholic beverage control because of ownership of premises rented to a retail licensee within the municipality and that you believe the decision is absolutely right. That's splendid!

You further ask whether a Councilman whose wife is a retail licensee in your municipality and who from time to time tends bar for her and helps to operate the taproom is eligible to vote.

The answer is NO. His judgment in determining who may or may not hold retail licenses in his own municipality must not be warped by financial interest in the alcoholic beverage industry. Public policy forbids the participation of a member of a municipal governing body in any matter before it which directly or immediately affects himself individually. See Re: Brundage, Bulletin 80, Item 7.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

DFB:G-

13. LICENSEES - BARTENDERS - BONA FIDE EMPLOYMENT OF INTENDED PURCHASER - DISTINGUISHED FROM SUBTERFUGES OR OTHER EVASIVE DEVICES

Dear Sir:

I have the license for Washington House in my name and have been employing my nephew, Remsen Howard, to tend the bar. This A.M. my nephew was called to take over the Gladstone Post Office as postmaster and cannot tend bar any longer for me.

Mr. Harry W. Harrison of Sussex, N.J. has made application to the township committee for a license to take effect July 1st, 1935 for the Washington House.

I would like to hire Mr. Harrison at a salary for the remaining part of this month to take over the bar. In this way it would not be necessary for me to get another bar man and would give Mr. Harrison a chance to get acquainted with the bar and his future customers. Mr. Harrison it is clearly understood is not to act in any other capacity except as an employed bartender under a stated salary as I am personally operating this business under my own license. I would like to know if there is any objection to my doing as stated above.

Yours very truly,
CAROLINE HOWARD

June 21, 1935

Miss Caroline Howard,
Washington House,
Basking Ridge, N. J.

Dear Miss Howard:

There is nothing to prevent your employing Harry W. Harrison of Sussex, N.J. as your bartender for the remainder of this year providing, of course, that he is fully qualified to be a licensee;

AND FURTHER PROVIDED that his employment is not a blind or subterfuge or device to cover the fact that he is the real person in interest and you only the nominal or ostensible operator.

On the facts certified by you to me, I am satisfied not only that there is no evasion intended by you but also of your and his complete good faith in the matter, and on that basis approve his employment in accordance with your letter.

Very truly yours,

D. Frederick Burnett
Commissioner