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

BULLETIN 274 OCTOBER 25, 1938.

1. APPELLATE DECISIONS - SKEBA v. MILLSTONE TOWNSHIP.

MARY SKEBA,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
TOWNSHIP COMMITTEE OF THE)
TOWNSHIP OF MILLSTONE,)
Respondent)
- - - - - - - - - - - - - - - - - - -)

Bernard H. Weiser, Esq., Attorney for Appellant.
Max Finegold, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This appeal is from the denial of a plenary retail consumption license for premises located at the intersection of State Highway 33 and the Manalapan-Englishtown Road, Millstone Township.

Respondent contends that the denial of appellant's license was valid because, in its opinion, the 3 consumption places outstanding in Millstone (a rural township containing some 1500 persons) are sufficient.

However, this contention is unavailing. On May 20, 1935, respondent adopted a resolution limiting the consumption licenses in the Township to 4. This formal quota, while remaining in effect, decisively fixes the number of consumption licenses to be deemed sufficient for the Township. Respondent, to show its change of mind that a lesser number is sufficient, must correspondingly change its formal quota. Eisen v. Plainfield, Bulletin 68, Item 12; Sosnow v. Freehold, Bulletin 68, Item 13; Re Smith, Bulletin 110, Item 6; Re Cliffside Park, Bulletin 224, Item 7.

However, the existence of a vacancy in a formal quota does not require that any application to fill that vacancy must be granted. The character of the applicant and the fitness and location of his premises must, as in all instances of application for a license, be found to be satisfactory. Young v. Pennsauken, Bulletin 114, Item 2; Sadovsky v. Millstone, Bulletin 120, Item 4; Re Cliffside Park, supra; Berkey v. Pine Hill, Bulletin 262, Item 5.

In the present case, the appellant's premises are in a rural section of the Township known as Manalapan. The above resolution of May 20, 1935, among its various provisions, states:

> "BE IT FURTHER RESOLVED that the four Plenary Retail Consumption licenses hereinabove provided as the limit, shall be so issued that one of said licenses shall be in the vicinity of Perrineville, one in the vicinity of Cal's Corner, one in the vicinity of Smithburg, and one in the vicinity of Clarksburg."

The 3 consumption places now outstanding in the Township are located at Perrineville, Smithburg, and Clarksburg, respectively, thus leaving open only Cal's Corner as a permissive site for the establishment

of an additional place. Since appellant's premises are located, not in that vicinity, but in Manalapan, a different part of the Township, they are disqualified by the resolution from a consumption license.

Appellant contends, however, that her license was not denied on the ground of that resolution. Whether or not this be true, is immaterial. The resolution, so long as it remains in effect, is mandatorily binding upon respondent and limits its power to issue licenses. Franklin Stores Co. v. Belleville, Bulletin 102, Item 2; Gimbel v. Pennsauken, Bulletin 116, Item 6; Blum v. Pompton Lakes, Bulletin 126, Item 4; Duffield v. Allenhurst, Bulletin 236, Item 12; Smith v. Mansfield, Bulletin 254, Item 4.

Appellant next contends that the resolution of May 20, 1935 was repealed in its entirety by a resolution of May 2, 1938. The contention is without merit. The 1935 resolution is a comprehensive regulation on problems of local liquor control in the Township, ranging from license fees, quotas, etc., to hours of weekday and Sunday sales. On the other hand, the 1938 resolution is restricted solely to the question of hours of sale. Hence, while it is true that the 1938 resolution broadly states that "the resolution passed.....on May 20, 1935 providing that licensees shall not sell alcoholic beverages at any time on Sundays" is repealed, the repealer is obviously directed, not to the entire 1935 resolution with its comprehensive scheme of local control, but only to that part which deals with Sunday sales. That part which sets forth the geographic plan of distribution of consumption licenses in the Township remains unaffected.

Appellant next contends that the geographic plan is unreasonable and hence invalid. However, in Sadovsky v. Millstone, supra, I had this same provision of the resolution before me. There, too, as here, with Cal's Corner being the only vacancy, application for a license was made, and denied, for premises located in another part of the Township (viz., Ely's Corner). The denial was sustained on appeal on the ground that the plan of distribution was not unreasonable. Nothing appears in the present case to alter this conclusion.

Appellant contends, however, that she proposes to establish a restaurant (specializing in spaghetti and chicken dinners); that such a place is a public necessity at her location; and that her application for license should, therefore, be granted despite the geographic plan.

The evidence fails to support her contention. It is clear that a licensed restaurant is not necessary to the surrounding locality, a sparsely settled rural section, many of whose inhabitants are opposed to a liquor place being located therein. As to the fact that appellant's premises stand at a juncture on the important State Highway #33, it appears that those premises are midway between the communities of Hightstown and Freehold, in both of which places licensed restaurants may be found. The stretch of 14 miles of State Highway between those two communities is not, in these days of automobile travel, such a distance that a restaurant midway along the route, licensed to sell liquor, is a public necessity for travelers.

Appellant further contends, that prior to making her present application, she had been informally advised by two Township Committeemen and the Municipal Clerk that there was no reason why her application, when made, should be denied; that, in reliance upon such statement, she purchased the premises in question and invested

a substantial amount of money therein. Even if it is assumed that such informal advice would estop respondent from later denying appellant's application, there is no convincing evidence that any such advice was ever given.

Last, although not argued by appellant, it appears that one of the Township Committeemen who voted against appellant's application (and who has been in office since January 1938) is the landlord of the consumption licensee in Smithburg. Because of this financial interest, he was absolutely disqualified from either voice or vote on any matter involving alcoholic beverage control. Gardner v. Sea Bright, Bulletin 171, Item 9. In consequence, his voice and vote upon appellant's application tainted respondent's action with illegality. Petrusha v. Mine Hill, Bulletin 146, Item 8; Gardner v. Sea Bright, supra.

However, the denial of appellant's license is not therefore to be reversed. As already stated, the resolution of May 20, 1935 (adopted before the disqualified committeeman came into office) was binding upon respondent and mandatorily limited it to but one permissible course of action, viz., a denial. Hence, the voice and vote of the disqualified committeeman upon appellant's application, while distinctly error, was not prejudicial error in this instance.

The action of respondent is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: October 17, 1938.

2. REFERENDUM - VOTING MACHINES - SETTING UP THE WORDING IN THE LIMITED SPACE.

October 21, 1938

James W. Mercer,
County Clerk,
Hackensack, N. J.

My dear Mr. Mercer:

Mr. Hardman of your office tells me that you are in receipt of resolution from the Borough of Midland Park requesting submission at the coming general election of the question:

> "Shall the sale of alcoholic beverages at retail be permitted on Sundays in the Borough of Midland Park between the hours of 1:00 P.M. and 12:00 P.M., midnight, Eastern Standard Time, except between the last Sunday in April and the last Sunday in September of each year when the time shall be computed in accordance with Eastern Daylight Saving Time?"

He further tells me that there is available for this question on the voting machines used in Bergen County a space 2" x 4" and asks if it is permissible to abbreviate the question.

I understand that the entire space is available for the question and that no captions, titles, instructions, or other printed matter need be included.

R. S. 19:49-2, dealing with voting machine ballots, is the only provision that I find in the Voting Machine Law pertaining to

the size of type to be used. It provides, merely, that official ballots shall be printed on clear white paper or cardboard, in black ink "in type as large as the space will reasonably permit."

Were you to use 10 point type, the size required pursuant to R. S. 19:14-16 for printing public questions on the ballot that is marked by hand, a question of approximately 100 words could be set up in the 2" x 4" space with adequate margin on all sides.

The Midland Park question is but 60 words.

I therefore see no need for any abbreviation.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

3. DISCIPLINARY PROCEEDINGS - NEWARK LICENSEES - LICENSEE ACTING AS FRONT FOR ANOTHER - LICENSE REVOKED.

In the matter of Disciplinary Proceedings against

MICHAEL MRAZ,
105 Washington Street,
Newark, New Jersey,

Holder of Plenary Retail Consumption License No. C-655, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

. . . . . .

Sidney Brass, Esq., Attorney for the Licensee.
Richard E. Silberman, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Charge served upon the licensee alleges that:

"On or about June 11, 1938, you did knowingly misstate a material fact under oath in securing your plenary retail consumption license C-655, in that, in answer to Question No. 17 of your license application, which asks 'Has any person, individual, partnership, corporation or association other than the applicant any interest, directly or indirectly in the license applied for or in the business to be conducted under said license', you stated 'No', when in truth and in fact one James Gaisford was the true owner of the license applied for and of the business to be conducted under said license, in violation of R.S. 33:1-25 (Control Act, Sec. 22)."

In April 1938 Samuel Fillipovich, who was then the holder of a plenary retail consumption license at 105 Washington Street, Newark, advertised his business for sale. Michael Mraz and James Gaisford (also known as Mark Gaisford) called at the licensed premises in answer to the ad. and Mraz spoke to Fillipovich concerning the purchase of the business. Fillipovich testified that he questioned Gaisford as to his interest, and that Gaisford told him "that some financial condition is connected but Mraz is

buying the place." Subsequently, a price was agreed upon and $100. cash was advanced by Gaisford and paid to Fillipovich to bind the deal.

Mraz and Gaisford thereafter called at the office of Bernard Reilly, an attorney in the City of Newark. Mr. Reilly testified that Mraz told him he was considering the purchase of the business from Fillipovich and that Gaisford, who was a friend of his, was advancing some money to help him purchase the business. The attorney drew an agreement between Mr. Fillipovich and Mr. Mraz, which was executed by both parties. The sums of $400. and $1300. in cash, admittedly Gaisford's money, were turned over to the attorney in escrow for the purpose of closing the deal. At the time of closing, a bill of sale was executed by Samuel Fillipovich and wife to Michael Mraz, and a chattel mortgage executed and delivered by Mraz to Fillipovich; closing statement was signed by Mraz and a trade name certificate filed in the County Clerk's office in the name of Michael Mraz. On June 1, 1938, a demand note for $2,050. was given by Michael Mraz to James Gaisford. In so far as the legal steps in the matter were concerned, it appeared from all of the instruments executed and delivered that Michael Mraz was to be the true owner of the business.

Subsequent to the date of the agreement, and prior to the date of closing, Michael Mraz filed an application for the transfer of the plenary retail consumption license from Fillipovich to himself. In answer to Question 7 in said application he stated that no person, individual, partnership, corporation or association other than the applicant has any interest, directly or indirectly, in the license applied for or in the business to be conducted under said license. In the latter part of May 1938 the said license was transferred from Fillipovich to Mraz, and the business operated in the name of Mraz, in accordance with said transfer, until June 30, 1938.

On June 11, 1938 Michael Mraz filed an application for a renewal of the license. In answering Question 17 in said application, Mraz denied that any individual, partnership, association or corporation other than the applicant has any interest, directly or indirectly, in the license applied for or in the business to be conducted under said license. It is because of the answer given under oath to said question that the proceedings herein were instituted. The license was renewed in the name of Mraz and operated thereunder from July 1, 1938 to August 4, 1938.

On August 4, 1938 Detectives Teufel and Adams, of the Newark Police, visited the licensed premises. They questioned Mraz, who was on the premises, as to his duties, and he told them that he was a porter. They asked him where his beer bills were and different receipts for merchandise, and he answered: "Wait a minute and I will call one of the bosses." Prior to this conversation with Mraz, the Detectives had questioned Michael Nolan, the bartender, and Nolan had told them "I am the boss." The Detectives took Mraz and Nolan to Police Headquarters, where Mraz signed a sworn statement, the pertinent parts of which are as follows:

> "I am single and live at the above address, since May 23rd, 1938. I met a Jim Gaseworth, of Boonton Inn, Myrtle Avenue, Boonton, N. J. about two years ago.

"Some time in May, 1938 Jim Gaseworth told me he wanted to open a tavern in Newark, N.J. but he was not a resident of New Jersey for five years. At this time he lived in New York State.

"In May, 1938 Jim Gaseworth told me if I took out the license for him he would pay me eight dollars a week and board.

"On May 5th, 1938 I applied for the license and signed the application and I stated under oath to question No. 7 on the application 'Has any person, individual, partnership, corporation, or association, other than the applicant any interest directly or indirectly in the license applied for or in the business to be conducted under said license' I answered No, when in fact I am not the owner of this tavern nor do I pay any bills, hire any people, or have anything to say or do about the business in any way.

"Since I took out this license I only received eight dollars as first agreed on.

"On June 11th, 1938, I made application for renewal of the license for premises at 105 Washington Street.

"I received the $500.00 for the license from Mike Nolan, who was brought to Police Headquarters with me this morning. I dont know whose money it was. I also answered question No. 17 in the renewal as in the transfer as NO.

"I recognize my signature on the application for renewal that was shown to me this date.

"Due to the fact that I do not own this tavern, or have any interest in it I am turning over the Plenary Retail Consumption License C-655 for 1938-1939 issued to me, Michael Mraz, t/a Shamrock Bar and Grill, 105 Washington Street, Newark, N. J. to Deputy Chief Philip Sebold, as I do not want to be responsible for any thing that may happen in this tavern."

The premises at 105 Washington Street have been closed since Mraz turned the license over to Deputy Chief Sebold.

At the hearing Gaisford testified that, in April 1938, he had resided in the State of New Jersey approximately four years and nine months; that he had known Mraz for a period of about four years; that Mraz used to help him on a truck and receive small sums of money for his assistance; that Mraz had told him of the ad. in the paper for the tavern at 105 Washington Street and that he (Gaisford) had agreed to loan the money required to purchase the business on condition that Michael Nolan, who is Gaisford's brother-in-law, would be employed as a bartender to protect Gaisford's interest; that the only security he holds for his loan is the demand note for $2050., given to him by Mraz.

Mraz testified at the hearing that the portion of the sworn statement dated August 4, wherein he stated that he does not own the tavern or have any interest in it, is untrue; that he advanced the sum of $250. cash out of his pocket towards the

purchase of the tavern; that, while the business was operating, he received only the sum of $8.00 per week, plus the free use of a room on the licensed premises which he uses as living quarters; that he cleaned up the place and looked at the bills; that Nolan ordered the liquor and that the bills were paid in cash. I doubt that Mraz invested any money in this business. It is clear that the original deposit of $100. and the $1700. disbursed by the attorney, was advanced by Gaisford. The note for $2050. is evidence that Gaisford advanced the additional $250. The renewal fee was given to Mraz by Nolan. Mraz had had no experience in the liquor business. He previously had been employed at a small salary as a night watchman in a garage in Boonton. It is clear from the evidence that he was acting merely as a porter in the licensed premises, and that the business was actually run by Michael Nolan, an agent of Gaisford. The evidence satisfies me that Mraz was merely a "front" for Gaisford, who was not eligible to hold a retail liquor license because he had not resided in New Jersey for five years, and that Gaisford was directly interested in the operation of the licensed premises.

I find the licensee guilty as charged. The license will, therefore, be revoked.

There is nothing in the case which reflects in any way upon the good faith of the transferor, Mr. Fillipovich, or the attorney who represented him in the transaction. I believe that Mr. Reilly acted in good faith.

Accordingly, it is on this 22nd day of October, 1938

ORDERED that Plenary Retail Consumption License No. C-655, heretofore issued to Michael Mraz by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby revoked, effective immediately.

D. FREDERICK BURNETT
Commissioner

4. APPELLATE DECISIONS - STOCK vs. CAMP

HARRY A. STOCK AMUSEMENT CO., INC., t/a RED TOP BAR, a corporation of the State of New Jersey.

Appellant,

-vs-

HONORABLE PERCY CAMP, JUDGE OF THE COURT OF COMMON PLEAS OF OCEAN COUNTY and ISSUING AUTHORITY in and for the County of Ocean,

Respondent.

ON APPEAL

CONCLUSIONS

. . . . . .

Albert Kushinsky, Esq., Attorney for Appellant.
Joseph A. Citta, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from a ten day suspension of its plenary retail consumption license following an adjudication by respondent that it was guilty on a charge of selling alcoholic beverages to a minor. Appellant's premises are located on the Boardwalk, east of Porter Avenue, Seaside Park.

A waitress employed by appellant admits that, on July 9th, 1938, about 11:00 P. M., she served two glasses of beer to Harry Lecuyer on the licensed premises. Mrs. Fisher, who accompanied Lecuyer, testified as to both sales and Investigators Penn and Kingsley testified that they were present when the second sale was made. The proof is convincing that Lecuyer was nineteen years of age on June 19, 1938. It follows that appellant is guilty as charged. Re Sandago, Bulletin 249, Item 1 and cases therein cited.

The waitress testified that, prior to serving the first drink, she asked the minor if he was twenty-one years of age and that he answered: "Yes." This evidence, even if true, would be material only in considering whether the penalty imposed was excessive. The minor and Mrs. Fisher both testified that the waitress had taken the orders without questioning the minor as to his age. The weight of the testimony leads me to believe that the waitress did not question the age of the minor. Assuming, however, that she did, this fact alone would not be sufficient to warrant a reduction of the ten day penalty. The waitress asked for no further proof. She did not request the minor to sign a slip stating that he was "twenty-one years of age or over", although the bartender identified slips signed by alleged minors both before and after July 9, 1938.

The action of respondent is affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: October 22, 1938.

5. DISCIPLINARY PROCEEDINGS - SALES TO MINORS.

In the Matter of Disciplinary Proceedings against

HENRY DANKER
Logan Road,
State Highway Route #35,
Asbury Park, R.F.D. #1
(Ocean Township)
Monmouth County, N. J.

Holder of Plenary Retail Consumption License No. C-12, Issued by the Township Committee of the Township of Ocean.

CONCLUSIONS AND ORDER

. . . . . .

Samuel B. Helfand, Esq., Attorney for the State Department of Alcoholic Beverage Control.
Joseph F. Mattice, Esq., Attorney for the Licensee.

BY THE COMMISSIONER:

The defendant is charged with selling and serving alcoholic beverages to minors contrary to statute and State regulation.

His tavern contains a large serving room devoted to music and dancing. His son, a young man 23 years of age, acts as host or receptionist. On Saturday night, July 30, 1938, at about 10:30 o'clock a party of 2 couples (the girls each being 19 years old and the boys 19 and 22 years old respectively) entered the serving room and seated themselves at a table near the dance floor. During the next few hours, they were sold and served four rounds of beer by a waitress. Investigators Shafto and Hoffman of this Department, having entered the premises shortly after midnight, observing the last sale and service of beer, approached the couples, and discovered their ages.

I find the defendant guilty as charged.

The defendant testified that he was unaware of the sale and service of beer to the minors. But he is strictly responsible for the sale or service of alcoholic beverages to any minor by an employee. Re Eskow, Bulletin 250, Item 9. His son and the waitress testified that they had believed the minors were of age, but admitted that they had not questioned them. The waitress testified that at one time, when the 22 year old boy was away from the table, she perfunctorily asked him "Are you 21?" and, receiving the answer "Yes", thought it referred to the entire party. Such a casual endeavor to determine whether the members of that party were of age presents no case for mitigation.

On the other hand, although the two boys were not produced at the hearing, the Hearer reports that, of the two 19-year old girls who were present and testified, one girl looks no more than her years and the other even less. In view of all the circumstances, the defendant's license will be suspended for fifteen (15) days.

Accordingly, it is on this 22nd day of October, 1938, ORDERED that plenary retail consumption license C-12, heretofore issued to Henry Danker, by the Township Committee of the Township of Ocean, be and the same is hereby suspended for a period of fifteen (15) days, commencing at midnight on October 27, 1938.

D. FREDERICK BURNETT
Commissioner.

6. NUMBER OF MUNICIPAL LICENSES ISSUED AND AMOUNT OF FEES PAID FOR THE PERIOD JULY 1ST, 1938 TO OCTOBER 1ST, 1938 AS PER CERTIFICATIONS RECEIVED FROM THE ISSUING AUTHORITIES

CLASSIFICATION OF LICENSES

County	Plenary Retail Consumption No. Issued	Plenary Retail Consumption Fees Paid	Plenary Retail Distribution No. Issued	Plenary Retail Distribution Fees Paid	Club No. Issued	Club Fees Paid	Limited Retail Distribution No. Issued	Limited Retail Distribution Fees Paid	Seasonal Retail Consumption No. Issued	Seasonal Retail Consumption Fees Paid	Number Surrendered Revoked Expired	Number Licenses in Effect	Total Fees Paid
Atlantic	449	172,468.33	60	20,150.00	13	1,000.00	2	50.00	2	291.03	0	526	193,959.36
Bergen	785	253,464.46	224	57,437.58	41	3,822.94	40	1,840.00	2	312.03	0	1,092	321,877.01
Burlington	173	54,226.39	15	3,450.00	22	2,610.94	1	25.00	1	146.96	0	212	60,459.29
Camden	449	189,598.26	47	17,310.20	55	5,167.94	1	50.00	2	600.67	0	554	212,727.07
Cape May	122	42,672.18	10	3,500.00	4	400.00					0	136	46,572.18
Cumberland	70	20,900.00	8	1,625.00	15	1,250.00					0	93	23,775.00
Essex	1427	719,332.49	347	164,958.00	61	8,450.00	25	1,245.72	1	744.60	0	1,861	894,730.81
Gloucester	111	30,276.02	9	1,325.00	4	250.00					0	124	31,851.02
Hudson	1619	670,659.56	273	109,362.95	39	4,573.20	68	2,750.00			1	1,998	787,345.71
Hunterdon	80	21,420.00	1	200.00							0	81	21,620.00
Mercer	445	186,462.76	41	10,700.00	27	3,380.00			1	85.85	1	511	200,628.61
Middlesex	591	234,108.38	37	10,195.00	30	2,575.00	1	25.00	5	789.78	1	663	247,693.16
Monmouth	486	193,342.59	75	20,822.16	15	1,675.00	10	425.00	11	2,550.27	2	595	218,815.02
Morris	388	96,044.15	68	17,333.40	24	2,098.50	1	35.00	6	817.51	3	484	116,328.56
Ocean	126	63,369.95	27	9,855.00	6	600.00					6	153	73,824.95
Passaic	893	353,280.50	113	32,170.62	27	3,253.66	18	820.42	1	150.00	1	1,051	369,675.20
Salem	51	16,000.00	4	550.00	5	430.00					0	60	16,980.00
Somerset	173	61,964.25	21	5,725.00	8	825.00					1	201	68,514.25
Sussex	159	33,956.20	8	1,225.00	5	260.00			2	300.00	0	174	35,741.20
Union	553	271,011.11	116	39,125.00	52	6,105.00	21	574.00	1	260.00	0	743	317,075.11
Warren	138	38,345.00	10	1,907.50	17	1,820.00			1	150.00	0	166	42,222.50
TOTALS	9286	3,707,902.58	1514	528,927.41	470	50,547.18	188	7,840.14	36	7,198.70	16	11,478	4,302,416.01

D. FREDERICK BURNETT, Commissioner.

Report for the first quarter of fiscal year 1938-39.

Respectfully submitted,

ERWIN B. HOCK,
Deputy Commissioner.

7. DISCIPLINARY PROCEEDINGS - LEWDNESS - REVOCATION INDICATED AND EFFECTED.

October 22, 1938.

Arthur C. Malone,
City Clerk,
Hoboken, N. J.

My dear Mr. Malone:

I have before me your letter of October 20th enclosing copy of resolution adopted by the Board of Commissioners on October 18th, 1938 in disciplinary proceedings against Jean Kalinich and Antoinette Knigge, 123 Hudson Street, the holders of plenary retail consumption license C-58.

I note that the licensees were charged with permitting lewd and immoral conduct upon the licensed premises, in violation of State Regulations 20, Rule 5, in that on October 9th, Antoinette Knigge, one of the licensees, sat on the lap of one August Bohn with her clothing raised above her hips and her bloomers or underwear pulled down over her legs; that the licensees were found guilty and the license revoked.

While I can express no opinion on the merits because perchance the case may come before me by way of appeal, I wish that you would convey to the members of the Board of Commissioners my deep appreciation for having instituted these proceedings on their own initiative and the salutary penalty inflicted. A violation on October 9th and a revocation on the 18th indicates that Jersey Justice deserves its reputation.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

8. DISCIPLINARY PROCEEDINGS - SALE ON ELECTION DAY -- ALSO SALE BY LIMITED DISTRIBUTION LICENSEE CONTRARY TO THE RESTRICTIONS OF HIS LICENSE.

October 22, 1938.

J. Cory Johnson,
Town Clerk,
Bloomfield, N. J.

My dear Mr. Johnson:

I have before me staff report and your letter of October 20th enclosing resolution adopted by the Town Council on October 17, 1938 in disciplinary proceedings against Frank P. Denito, 240 Montgomery Street, holder of a limited retail distribution license.

I note that Denito was charged with sale of alcoholic beverages on Primary Election Day while the polls

were open, and sale of less than 72 fluid ounces of beer in violation of the restrictions of his license; that he pleaded guilty and thereupon his license was suspended for 15 days.

Your Council is the first to report disposition of disciplinary proceedings arising out of the last Primary Election Day violations. The adequate penalties and the dispatch with which the Council has handled these proceedings are commendable.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

9. APPELLATE DECISIONS - CRYSTAL LUNCH, INC., v. PERTH AMBOY.

CRYSTAL LUNCH, INC., trading as ALPS RESTAURANT,

Appellant,

-vs-

BOARD OF COMMISSIONERS OF THE CITY OF PERTH AMBOY,

Respondent.

ON APPEAL

CONCLUSIONS.

. . . . . .

Paul C. Kemeny, Esq., Attorney for Appellant.
Harry S. Medinets, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This appeal is brought to review the ex parte approval of Section 16 of the Perth Amboy ordinance of August 1, 1934, which reads:

> "No license shall permit the sale of alcoholic beverages, nor shall any licensee have his place of business open, between 2 A.M. and 7 A.M. on week days nor between the hours of 2 A.M. and 1 P.M. on Sundays, provided, however, any licensee conducting a hotel or club shall have the privilege of remaining open during the aforesaid prohibited hours for the purpose of carrying on their usual activities, excepting the sale of alcoholic beverages, and any licensee conducting a restaurant shall have the privilege of opening his place of business at 5 A.M. each day and continue open until the time herein fixed for permitting the sale of alcoholic beverages for the limited purpose of dispensing food and the sale of cigars and cigarettes as accommodation to their customers."

So far as Section 16 limits the hours of sale, it applies uniformly to all licensees and hence is not objectionable.

Appellant claims that the ordinance is unreasonable, arbitrary and discriminatory because it is forced to close its restaurant between 2 A.M. and 5 A.M. daily, whereas unlicensed restaurants are not required to close, and licensed hotels or

clubs may remain open at all hours to carry on their usual activities excepting only the sale of alcoholic beverages.

So far as unlicensed restaurants are concerned, appellant cannot complain. If citizens wish to sell liquor in conjunction with their other mercantile business, they will have to conform to municipal regulations governing the liquor business, or else abandon their desire. Re Toegel, Bulletin 161, Item 6. Or, as well said in Meehan vs. The Board of Commissioners, 73 N.J.L. 382, at 386 (Affirmed 75. N.J.L. 557):

> "No one is compelled to take out a license to engage in the sale of intoxicants by retail who does not wish to do so or who does not like the law to which he is required to conform."

So far as licensed hotels and clubs are concerned, the exception concerning them in the ordinance is valid. As to hotels, see Retail Liquor Dealers Association vs. Plainfield, Bulletin 70, Item 1. As to clubs, see Peck vs. West Orange, Bulletin 171, Item 10. Appellant is not really complaining of this exception. Rather, he is postulating his contention upon the ground that the failure of the ordinance to make a similar exception in favor of restaurants renders it arbitrary, unreasonable and discriminatory. It is not so much that appellant desires that hotels and clubs close at 2 A.M. but rather that it wants the same privilege of remaining open after 2 A.M. to do business (other than the sale of alcoholic beverages) as they may do.

In general, regulations fixing closing hours must apply to all retailers in the same license class. Re Wenzel, Bulletin 19, Item 7; Re Harrington, Bulletin 118, Item 13; Re Krueger, Bulletin 222, Item 4.

Exceptions may not be arbitrary, fanciful or illusory. Thus, a regulation providing different closing hours for restaurants with bars in the dining room as distinguished from restaurants without such bars, was held unreasonable. Re Teaneck, Bulletin 125, Item 8. So, likewise, an ordinance fixing closing hours which excepted restaurants providing they had a certain seating capacity. Peck vs. West Orange, Bulletin 147, Item 1.

On the other hand, a closing regulation which excepted all bona fide hotels and restaurants was held to carry out a public policy. Re Leonard, Bulletin 225, Item 14; Re Franco, Bulletin 231, Item 5. So an ordinance which permitted clubs and restaurants to keep open during the hours that other licensees must remain closed was held valid. Peck vs. West Orange, Bulletin 171, Item 10.

Counsel for appellant contends that the cases just cited are dispositive of this appeal. While they are authority for the proposition that hotels, clubs and restaurants may validly be exempted from closing regulations, no determination was made in any one of those cases that they must be exempted. Those regulations were sustained because they carried out a public purpose and affected alike all those similarly situated.

The instant case goes beyond the scope of all cases heretofore decided. It presents the problem as to whether Section 16 of the ordinance is invalid because it discriminates between hotels and clubs on the one hand, and restaurants on the other. The argument boils down to the point that because

restaurants may be grouped with hotels and clubs, therefore, they must be so classified and treated alike in every municipal regulation.

The factual difference between hotels and clubs on one side and restaurants on the other is readily recognizable. So far as food and drink are concerned, hotels and clubs do have something in common with restaurants. There, however, the identity ceases. The public service and accommodation rendered by a hotel measurably transcends the common factor of food and drink. So the fraternal and social activities of a bona fide club are not synonymous with those of a restaurant. There is a definable difference in nature, as well as in name, between the commonly accepted functions of a hotel and a club on the one side, and of a restaurant on the other. The fact that the three may be classified together for some purposes, does not mean that they must be treated as in one class for all purposes. Perth Amboy may well have had good reason, born of experience, to require that restaurants possessing the liquor privilege shall close at the same hour as the ordinary tavern. The mere fact that a restaurant may serve food as well as liquor is not an imperative reason why it must be accorded the same privileges as a hotel or a club.

I conclude, therefore, that Section 16 of the ordinance is valid.

The ordinance is approved.

D. FREDERICK BURNETT
Commissioner

Dated: October 23, 1938.

10. STATE WINERY LICENSEE - POSSESSION AND TRANSPORTATION OF ILLICIT ALCOHOL - LICENSEES WHO DABBLE IN BOOTLEGGING WILL BE ELIMINATED.

In the Matter of Disciplinary Proceedings against

VITO MIONE,
t/a MIONE WINERY,
1-5 Erie Street,
Paterson, New Jersey,

Holder of Plenary Winery License No. V-4 and Limited Winery License No. VL-52 for the fiscal year 1937-1938, issued by the Commissioner of Alcoholic Beverage Control of the State of New Jersey.

CONCLUSIONS AND ORDER

. . . . . .

J.J. Murner, Esq. and Peter A. Cavicchia, Esq., Attorneys for the Licensee.
Samuel B. Helfand, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Charges were duly served upon the licensee alleging that:

1. On or about June 13, 1938, in the City of Paterson, County of Passaic, you did possess certain illicit alcoholic beverages, to wit, six one-gallon jugs of alcohol, contrary to and in violation of R.S. 33:1-50 (Control Act, Section 48).

2. On or about June 13, 1938, in the City of Paterson, County of Passaic, you did transport certain illicit alcoholic beverages, to wit, four one-gallon jugs of alcohol, contrary to and in violation of R.S. 33:1-50 (Control Act, Section 48).

On June 13, 1938, at approximately 2:00 P. M., Investigators Wolf and Hill parked their automobile near licensee's home at 219 East 16th Street, Paterson. They observed the licensee leave his home with two jugs in paper bags which he placed in the front part of his automobile which was parked in front of his home; saw him return to the house and come out carrying two other jugs which he placed in the back of his car. After Mione had entered his car and driven a short distance, he was stopped by the Investigators. A search of the car revealed four gallon jugs which were filled with a liquid which the licensee admits was alcohol and which, in fact, he insists was good alcohol. None of the four jugs contained labels or Federal tax stamps.

The Investigators returned to Mione's home with him and discovered in the kitchen two other jugs containing alcohol, one of which was full, the other approximately three-quarters full. Neither jug contained labels or Federal tax stamps. The Investigators also saw ten or twelve empty Seagram gin bottles in a bushel basket and twelve to fourteen empty five-gallon cans in Mione's garage. Although they made a very thorough search, they found no other bottles. The licensee was placed under arrest; charges of violations of the provisions of the Alcoholic Beverage Control Act were preferred against him; he was released on bail and returned to his home at about 7:00 P. M.

Mione contends that the alcohol was emptied into the gallon jugs from tax-paid containers, and, hence, is not illicit alcohol. He testified that, at the time of his arrest, he had only three gallon jugs in his automobile and that he was taking the alcohol to his farm in Sussex County for the purpose of preserving sweet cherries; that he intended to take the other gallon jugs of alcohol to his farm at a later date for the purpose of preserving wild cherries which ripen later in the month.

As to Charge 1: The term "alcoholic beverage" includes alcohol. R.S.:1-1 (Control Act, Section 1(a)). The definition of illicit beverage, as contained in R.S.:1-1 (Control Act, Section 1(i)), includes any alcoholic beverage on which any Federal tax or tax imposed by the laws of this State has not been paid. The absence of Federal tax stamps on the seized jugs raises a presumption that the alcohol is illicit. Re Galaida, Bulletin 137, Item 2.

Licensee testified that, between 10:00 A.M. and 10:30 A.M. on June 13th, he bought five quarts of alcohol at licensed premises located at 359½ South Orange Avenue, Newark, and seven quarts of alcohol from licensed premises at 131 Elm Street, Newark; that two or three days prior to June 13th he had purchased four quarts of alcohol from licensed premises at 106 Orchard Street, Newark, and six quarts of alcohol from licensed premises on Passaic Street, Passaic; that all of these purchases consisted of quart or pint bottles bearing the proper tax stamps. Licensee contends that he had poured the contents of these tax-paid bottles into the six gallon jugs prior to the seizure by the Investigators. To corroborate his testimony, licensee presented two bills, one showing the purchase of five quarts of alcohol from the licensed premises 359½ South Orange Avenue, Newark; the other covering the purchase of seven quarts of alcohol from the licensed premises at 131 Elm Street, Newark. Both of these bills

are dated June 13, 1938. At the hearing held on July 6, 1938, licensee testified that the empty quart and pint bottles were then at his home in Paterson. By consent, the Investigators then went to Mione's home in Paterson and found fourteen empty quart bottles and sixteen empty pint bottles, all of which apparently had contained alcohol and all of which bore the necessary tax stamps.

I find as a fact, however, that these empty pint and quart bottles were planted by the licensee at his premises after the time of his arrest in order to bolster up his defense that the seized alcohol came from tax-paid sources. I base this finding of fact on the testimony given by Harry Lief, John Pepalas and Edward Lun. Mr. Lief, the owner of licensed premises at 106 Orchard Street, Newark, testified that he sold two pints and three quarts of alcohol to Mione at approximately 7:30 P.M. or 7:45 P.M. on June 13th; Mr. Pepalas, the President of the licensee conducting business at 131 Elm Street, Newark, testified that he sold six quarts and two pints of alcohol to Mione at about 9:00 P.M. or 10:00 P.M. on June 13th; Mr. Lun, an employee at the licensed premises on Passaic Street, Passaic, testified that he sold ten pints and one quart of alcohol to Mione at about 11:00 P.M. on either June 13th or June 20th. It will be noted that Mione arrived at his home after being bailed out at about 7:00 P.M. on June 13th. Despite testimony that he remained at his home on that evening until about 11:00 P.M., when he retired, I am satisfied that he visited the stores in Newark and Passaic after the seizure and arrest for the purpose of obtaining the tax-paid bottles. If Mione had these tax-paid bottles on his premises at the time the Investigators made their search on the afternoon of June 13th, why did he not call the attention of the Investigators to the presence of these bottles? Why did Mione, shortly after his arrest, sign the following statement in the presence of Investigator Wolf:

> "I am the holder of a winery license V-4 at 1-5 Erie Street, Paterson, New Jersey. On June 13th, 1938 I purchased twenty-four quart bottles tax-paid alcohol on First Avenue, New York. I do not know the name or address of the place where I bought the alcohol. I bought the alcohol to make some cordial."

Why, if he were innocent, did the licensee, at the time they searched his car, tell the Investigators that the four jugs contained distilled water? Why, if innocent, did he try to bribe the Investigators? Investigator Hill testified: "He said to me 'Can't we fix this thing up?'" Investigator Wolf testified: "While waiting for the police, Mione said, 'What are you going to get out of this by placing me under arrest? It is not too late yet, and I will give you a thousand dollars'; and I said, 'Nothing doing, I got bigger offers than that while in the department, and I am not going to start taking your bribes now.'"

As to Charge 2: Having found that the seized alcohol was illicit, the transportation thereof, regardless of quantity, constituted a violation of R.S. 33:1-50 (Control Act, Section 48). Even if not illicit but intended for personal consumption, the transportation of four gallons in a private car was illegal. Both Investigators so testified. The only evidence to the contrary is the licensee's statement that in fact he was transporting only three gallon jugs. It may well be that the licensee is familiar with the provisions of the law permitting the transportation in any vehicle of not more than twelve quarts of alcohol within any consecutive period of twenty-four hours. I think that his testimony was given solely for the purpose of attempting to show that he was transporting only the amount permitted by law.

I do not believe his testimony. Hence, regardless of the question as to whether the alcohol was illicit, I find the licensee guilty as to the second charge.

On a motion to dismiss, it was contended that these proceedings should be dismissed because none of the things alleged to have been done had anything to do with the licensee on or about the licensed premises. It is true that the licensed premises are located more than a half mile from the licensee's home and that there is nothing in the case to show that any violations occurred at the licensed premises. That, however, is no ground for dismissal of the complaint herein. The era of the tolerated bootlegger passed out of this State with Repeal. Licensees who now dabble in bootlegging stamp themselves as unfit to engage in the alcoholic beverage industry, and must be eliminated. In Re Siess, Bulletin 252, Item 7. The only proper punishment in this case is revocation.

Since these proceedings were instituted, the licenses which Mione then held expired by their terms. He is now the holder of plenary winery license No. V-4 and limited winery license No. VL-52, issued for the current fiscal year, both of which are conditioned on the outcome of these proceedings. The penalty will apply to the licenses which he now holds.

Accordingly, it is on this 23rd day of October, 1938

ORDERED that Plenary Winery License No. V-4, and Limited Winery License No. VL-52, heretofore issued to Vito Mione, t/a Mione Winery, by D. Frederick Burnett, Commissioner of Alcoholic Beverage Control, for the current fiscal year, be and the same are hereby revoked, effective immediately.

D. Frederick Burnett
Commissioner