STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark 2, N. J.

BULLETIN 976 JULY 6, 1953.

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STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark 2, N. J.

BULLETIN 976 26 NJ Super 388 JULY 6, 1953.

1. COURT DECISIONS - FREEHOLD ET AL. v. DIVISION ET AL. - ORDER OF DIRECTOR AFFIRMED - HEREIN OF BROTHER SITTING IN JUDGMENT UPON BROTHER.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-374/52

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF FREEHOLD and HAROLD F. McCORMICK and WILLIAM S. McCORMICK trading as McCORMICK BROTHERS,

Appellants,

-vs-

WILLIAM H. GELBER and DIVISION OF ALCOHOLIC BEVERAGE CONTROL,

Respondents.

CIVIL ACTION
OPINION

Argued June 8, 1953. Decided June 24, 1953.

Before Judges Goldmann, Smalley and Schettino.

Mr. Alexander Levchuk argued the cause for Appellants.

Mr. Samuel Sagotsky argued the cause for respondent, William H. Gelber (Mr. Melvin S. Taub, on the brief).

Mr. Samuel B. Helfand argued the cause for respondent Alcoholic Beverage Control. Mr. Theodore D. Parsons, Attorney General of New Jersey, attorney.

The opinion of the court was delivered by

SCHETTINO, J.S.C.

This is an appeal from an order of the Director of the Division of Alcoholic Beverage Control reversing the action of appellant, Township Committee of the Township of Freehold, in issuing a plenary retail distribution license to appellants McCormick Brothers, and directing the cancellation of the license.

On June 27, 1952 the township committee took final action upon an ordinance relating to the issuance of one plenary retail distribution license. The record is not clear as to the precise content of that ordinance but we gather the result of the amendment was that one such license could be issued upon the vote of two of the three members of the committee. At the same meeting, committee had before it four applications for that license, which included one by the McCormick Brothers and another by respondent, Gelber. No action was taken upon any of the applications other than the McCormick application, and the record of the proceedings of that day discloses two members voting for the McCormick application and the remaining member "not voting." From that action Gelber appealed to the Director, who entered the order here under review.

A full blood brother of the McCormick Brothers was a member of the township committee. He abstained from voting upon the amendatory ordinance described above, but upon the consideration of the application, his was one of the two votes cast in favor of it. The Director concluded McCormick was disqualified because of interest and his disqualification vitiated the action of the committee.

Appellants contend (1) The Director was without jurisdiction to entertain the appeal; (2) McCormick was not disqualified; (3) if McCormick was otherwise disqualified, the rule of necessity authorized his vote because the third committee member abstained; (4) the vote of the abstaining member should be deemed to be an affirmative vote, and thus the necessary vote of two members is supplied notwithstanding the vitiation of McCormick's vote. We will consider these points in the stated order.

I

Appellants concede the appeal was authorized by R.S. 33:1-22 prior to its amendment in 1946, but urge the amendment removed that right. The amendment added the words italicized in the following provision:

> "If the other issuing authority shall issue a license, *or grant an extension of said license for a limited time not exceeding its term, to the executor or administrator of a deceased licensee, or to such person who shall be appointed by the courts having jurisdiction, in the event of the incompetency of any licensee,* any taxpayer or other aggrieved person opposing the issuance of such license, may, within thirty days after the issuance of such license, appeal to the commissioner from the action of the issuing authority."

We are satisfied that the amendment had no such effect. Its purpose was merely to add to the category of appealable actions the grant of extensions in the situations embraced in the italicized portion in order to fill a gap in the statutory scheme. It could not have been the intention of the Legislature to terminate a right of review of the issuance of licenses. No reason is suggested why the Legislature would have planned the curious situation for which appellants contend. The construction urged by appellants could not be adjusted with the legislative objective that the Director be vested with jurisdiction to accomplish "fair, impartial, stringent and comprehensive administration of the statute." *Brush v. Hock*, 137 *N.J.L.* 257, 260 (*Sup. Ct.* 1948). We cannot attribute to the Legislature a purpose so at variance with the common sense of the situation when the language used is susceptible of a construction in harmony with it.

II

The granting of a liquor license involves action judicial in nature. *Dufford v. Nolan*, 46 *N. J. L.* 87 (*Sup. Ct.* 1884). The standards of disqualifying interest here controlling can be no less exacting than in the case of purely judicial action.

The briefs debate whether there existed in this case a disqualifying interest beyond consanguinity. We think it unnecessary to explore that question since the undisputed blood interest here present is dispositive. It is the rule both of common law and by statute that the relationship of brothers disqualifies a judge, and a lesser standard cannot here be applied. *N.J.S. 2A: 15-49*; *cf. Stoll v. Gariss*, 38 *N.J.L.* 200 (*Sup. Ct.* 1875); *People, ex rel. Meads v. McDonough*, 13 *N. Y. Misc.* 677, 35 *N.Y.S.* 214 (*Sup. Ct.* 1895) affirmed, 40 *N.Y.S.* 1147 (*App. Div.* 1896). See also *Vannoy v. Givens*, 23 *N.J.L.* 201 (*Sup. Ct.* 1851); *Low v. Madison*, 135 *Conn.* 1, 60 *A. 2d* 774 (*Sup. Ct. Err.* 1948).

We conclude that Committeeman McCormick could not validly vote on the application. His interest was such as to affect his decision as a member of the licensing body exercising a quasi-judicial function. His concurrence as an interested member infected the action of the whole body and rendered its action voidable. Cf. Kuberski v. Haussermann, 113 N.J.L. 162, 169 (Sup. Ct. 1934); Pyatt v. Mayor, and Council of Dunellen, 9 N. J. 548, 557 (1952).

III

Appellants contend that McCormick was eligible to vote, notwithstanding the disqualification, urging that without his vote the township committee would have been unable to function. The claimed basis is the abstention of the third member, from which it is argued that there remained but one eligible member of the committee. The fact is that two members of the committee were qualified to vote, and constituted the required quorum. Hence the rule of necessity did not come into play. Pyatt v. Mayor and Council of Dunellen, 9 N. J. 548, 557-8 (1952); 39 A.L.R. 1476 (1925). The abstention of a qualified member from voting at the meeting did not create that necessity which the principle contemplates.

IV

It is urged that the member who was recorded as "not voting" should be deemed to have voted for the license and his vote, coupled with the unchallenged affirmative vote, supplied the required majority of two. Appellants rely upon Mount v. Parker, 32 N.J.L. 341 (Sup. Ct. 1867); Abels v. McKeen, 18 N. J. Eq. 462 (Ch. 1867); Kozusko v. Garretson, 102 N.J.L. 508 (Sup. Ct. 1926); Rhinesmith v. Goodfellow, 111 N.J.L. 604 (E. & A. 1933).

We need not consider whether the present situation falls within the asserted doctrine, because the participation of McCormick tainted the action of the committee and vitiated it. Pyatt v. Mayor and Council of Dunellen, 9 N. J. 548 (1952); Kuberski v. Haussermann, 113 N.J.L. 162 (Sup. Ct. 1934). This conclusion, which under our cases would be imperative even if the third committee member had actually voted for the application, would be no less imperative if appellants were correct in their contention that the non-voting member should be deemed to have cast a favoring vote.

The order of the Director is affirmed.

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2. IMMORAL ACTIVITY ON LICENSED PREMISES - INCREASE IN SUCH ACTIVITY - WARNING TO LICENSEES - PENALTIES WILL BE HEAVIER THAN HERETOFORE IN CASES OF THIS KIND.

Rule 5 of State Regulations No. 20 reads as follows:

> "No licensee shall allow, permit or suffer in or upon the licensed premises any lewdness, immoral activity, or foul, filthy or obscene language or conduct, or any brawl, act of violence, disturbance or unnecessary noise; nor shall any licensee allow, permit or suffer the licensed place of business to be conducted in such manner as to become a nuisance." (Underscoring added.)

Our State Alcoholic Beverage Law provides (in R.S. 33:1-31(g)) that a license may be suspended or revoked for a violation of rules and regulations.

Re Rossi & Fenaroli (Bulletin 975, Item 10, decided June 16, 1953) was a case in which an employee of the licensees made rooms available for the purpose of illicit sexual intercourse. Pointing out in that case that for a number of years the penalty for such an offense had been a suspension of the license for 180 days, I said:

> "However, I am disturbed and distressed by the recent marked increase, as disclosed by the Division's records, in violations of this general nature. A prompt re-examination of the Division's policy with respect to the question of the adequacy of penalties imposed in such cases appears to be in order."

Certainly it would appear that the six-month suspensions have not effectively deterred further violations of the same sort by other licensees. Perhaps a stiffer penalty will help. All licensees concerned are warned that from now on the penalty imposed in such cases will be greater (irrespective of the plea entered) than the penalty which would have been imposed heretofore in the same situation.

DOMINIC A. CAVICCHIA
Director.

Dated: June 30, 1953.

3. APPELLATE DECISIONS - PRICE v. MILLBURN.

JAMES and ALICE PRICE, trading as MILLBURN INN, Appellants,	
-vs-	ON APPEAL CONCLUSIONS AND ORDER
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MILLBURN, Respondent.	

VanRiper & Belmont, Esqs., Attorneys for Appellants.
Reynier J. Wortendyke, Jr., Esq., Attorney for Respondent.

BY THE DIRECTOR:

This is an appeal from the denial of an application for a plenary retail consumption license for premises 5 Old Short Hills Road, Township of Millburn.

The three members of the respondent Township Committee present at the meeting on October 20, 1952, when the matter of the issuance of the license was considered, voted unanimously to deny appellants' application. The two other members of the respondent Township Committee were absent at the time.

At the hearing herein, no question was raised by anyone as to the character and fitness of the appellants to hold a liquor license. The answer herein alleges, among other reasons, that denial of the application by the respondent Township Committee was based upon the proximity of appellants' premises to the public high school. The lands upon which the respective buildings are situated adjoin each other on Old Short Hills Road.

A prior application filed by appellants for the transfer of an existing license to the same premises was denied by respondent Township Committee because it appeared that the distance from the nearest entrance of the public high school to the nearest entrance of the premises sought to be licensed, in the normal way a pedestrian would properly walk, was within 200 feet. R. S. 33:1-76. Subsequent to the initial hearing, a walk leading from the street to the entrance of the premises was blocked-off and a fence was erected across one of the entrances to the parking lot. Because of these changes, apparently, the distance from the nearest entrance of the public high school to the nearest entrance of appellants' premises, measured as required by law, is now beyond 200 feet. See, however, St. Mary's Greek Catholic Church v. Manville and Buczkowski, Bulletin 187, Item 1, where the late Commissioner Burnett said: "The object of the law was to protect churches and schools by zoning taverns at least two hundred feet away. I have repeatedly indicated that this two hundred feet was a real distance and not to be frittered away by the creation of imaginary remoteness."

At the hearing of this appeal Clarence A. Hill, Chairman of respondent Township Committee, who voted against the instant application, testified: "Well, primarily on the ground that this inn is much too close to the high school. The high school happens to be the next door neighbor of the inn. It is the next property to the inn. And we didn't consider it a proper location for a place serving liquor." Asked what effect, if any, the construction of the wall to block off the entrance to appellants' premises from the street and the erection of the fence across one of the entrances used by motor vehicles had upon his judgment, Committeeman Hill testified: "I

don't think they changed the situation one bit. In effect, we still have an inn which is in exactly the same position that it was when the prior application was denied. And nothing that has been done by way of installing a couple of rails in a driveway, or anything else for that matter, has removed the inn from its too close proximity to the high school."

William B. Gero, a member of respondent Township Committee, who also voted against appellants' application, testified: "Well, as stated in these minutes subsequently, I considered, as well as the rest of the Committee, all of the grounds that had been presented, and with reference to the first hearing found that in our opinion that the construction of a part of a wall and a fence, which in effect led a person coming from the direction of the high school down to the parking lot entrance, which was formerly the parking lot entrance, or a new entrance established to the parking lot, had not changed the essence of the problem. For that reason we thought it remained the same, and denied the application."

George H. Perkins, a member of the Township Committee who voted against the application, was sworn as a witness but was withdrawn after it was stipulated by the parties hereto that the testimony he would give would be substantially to the same general effect as that given by his two associates on the Committee, namely, Clarence A. Hill and William B. Gero. (In response to a question by the Hearer, it was specifically brought out that Committeeman Perkins' objections would be the same as those incorporated in the testimony of Hill and Gero.)

During the course of the within hearing, it was brought out on cross-examination of Committeeman Hill that in the township there is a liquor establishment across the street from a parochial school. But even if it were established that the Committeemen testifying herein were then members of the Township Committee responsible for the licensing of such premises, it would not necessarily follow that the respondent Township Committee is guilty of any unlawful discrimination. In Biscamp v. Twp. Council of the Twp. of Teaneck, 5 N. J. Super. 172, 175 (Appl. Div. 1949), the Court said:

> "Assuming, but not conceding, that other licenses were granted under somewhat similar circumstances, it does not follow that the governing body should further perpetuate earlier unwise action."

Moreover, it should be noted that in the one case the licensed premises are located across the street from the school, and in the other case the licensed premises would be located on property adjoining the property on which the school is located.

A desire by the local issuing authority to keep church or school vicinities free of liquor establishments should be left to its sound discretion. Time and again the State Director has refused to substitute his judgment for that of the local issuing authorities, even though, as here, the premises sought to be licensed are beyond the 200-feet distance from a church or school. Staciewicz v. Trenton, Bulletin 35, Item 10; Serafin v. Bayonne, Bulletin 107, Item 3; Hill v. Montville, Bulletin 148, Item 9; Rafalowski v. Trenton, Bulletin 155, Item 8; Wenzel v. Maywood, Bulletin 310, Item 3; Purouro v. Passaic, Bulletin 425, Item 1; Moraitis v. Lower Penns Neck, Bulletin 839, Item 11; Gianfortuno v. Bellmawr et al., Bulletin 900, Item 1. Bivona v. Hock, 5 N. J. Super. 118 (cited in the Brief filed in behalf of appellant) is not in point.

It is unnecessary, in view of the foregoing, to consider the testimony of the other witnesses produced by the parties hereto or any other reasons given in support of or against the issuance of the license.

In all appeals to the Director of the Division of Alcoholic Beverage Control, the burden of proof to establish "that the action of the respondent issuing authority was erroneous and should be reversed shall rest with the appellant". Rule 6 of State Regulations No. 15. There is no indication that respondent's denial was arbitrary or unreasonable so as to warrant a reversal of its action. I find that appellants have failed to carry the required burden of proof. The denial of appellants' application for the issuance of the license in question will be affirmed.

Accordingly, it is, on this 12th day of June, 1953,

ORDERED that the action of the respondent Township Committee be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

DOMINIC A. CAVICCHIA
Director.

4. APPELLATE DECISIONS - JERSEY CITY RETAIL LIQUOR DEALERS' ASSOCIATION v. JERSEY CITY AND DAL ROTH, INC.

JERSEY CITY RETAIL LIQUOR DEALERS' ASS'N; TUBE BAR, INC.; FINBAR, INC.; GRAY'S EATING PLACES OF NEW JERSEY; JOURNAL SQUARE BAKERY, INC.; ACE SHIRT SHOP, INC., all corporations of New Jersey; JOHN MASKE; JOHN DeDOUSIS; THEODORE G. ANTOS, doing business as THEODORE THE FLORIST; MANGOR DRINK STORES, doing business as GORMANS; and TERMINAL CAFE,

Appellants,

-vs-

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF JERSEY CITY, and DAL ROTH, INC.,

Respondents.

ON APPEAL
CONCLUSIONS AND ORDER

Sidney Simandl, Esq., Attorney for Appellant Jersey City Retail Liquor Dealers' Association.
Halpern & Halpern, Esqs., by Michael Halpern, Esq., Attorneys for Appellants Finbar, Inc., Gray's Eating Places of New Jersey, Journal Square Bakery, Inc., Ace Shirt Shop, Inc., all corporations of New Jersey; John Maske; John DeDousis; Theodore G. Antos, doing business as Theodore The Florist; Mangor Drink Stores, doing business as Gormans; and Terminal Cafe.
John Warren, Esq. and Charles Hershenstein, Esq., Attorneys for Appellant Tube Bar, Inc.
John B. Graf, Esq., by Jacob J. Levey, Esq., Attorney for Respondent City of Jersey City.
Wall & Whipple, Esqs., by Robert H. Wall, Esq. and Lawrence A. Whipple, Esq., Attorneys for Respondent Dal Roth, Inc.
Joseph A. Davis, Esq., Receiver for Commuters Bar, Inc., Pro Se.

BY THE DIRECTOR:

This is an appeal from the action of respondent Board on November 19, 1952, whereby it approved the application of Dal Roth, Inc. for a person-to-person and place-to-place transfer of a plenary retail consumption license from Joseph A. Davis, Receiver for Commuters Bar, Inc., to said Dal Roth, Inc. and from 35 Enos Place to premises 9-B Journal Square Station Building, Jersey City.

Appellants, in their petition of appeal, contend that the action of respondent Board should be reversed for reasons which may be summarized as follows:

(1) The granting of the transfer of such license was in direct violation of the distance between premises ordinance.

(2) The granting of the transfer of said license was socially undesirable.

(3) There was no public need or necessity for the transfer of said license to the premises in question.

(4) The granting of the transfer of said license to this congested area, one of the busiest in the State of New Jersey, creates a hazardous condition to the public safety and general welfare of the public.

(5) The granting of said transfer of license to the respondent, Dal Roth, Inc., was arbitrary and unreasonable.

(6) Joseph A. Davis, Esq., Receiver for Commuters Bar, Inc., (former licensee at the Enos Place location) had no authority or legal right to consent to the transfer of this license to the respondent, Dal Roth, Inc., said respondent not being the person who was high bidder for this right of consent at the public sale held by said Receiver.

Respondent Board, in its Answer, denied appellants' allegations and respondent Dal Roth, Inc. also filed an Answer denying appellants' allegations and set forth "separate defenses" in justification of the action of respondent Board.

The hearing on this appeal was heard _de novo_, pursuant to Rule 6 of State Regulations No. 15.

The file of respondent Board containing the application for the transfer and the record of all proceedings had thereon were admitted in evidence by stipulation. On behalf of appellants it was made clear that the introduction of the file was for the sole purpose of showing what was before the Board in the proceedings below and that the statements contained in the application for transfer should not be taken as proof of the truth of the contents of such statements.

The sole witness to testify at the hearing on this appeal was Joseph A. Davis, Receiver for Commuters Bar, Inc. The remainder of the record on this appeal consists of the file of respondent Board, as hereinabove indicated, and various documents admitted by stipulation, together with certain matters which were stipulated orally.

From all of the above it appears that Commuters Bar, Inc. is the same corporation and the two premises (35 Enos Place and 9-B Journal Square Station Building) are the same premises as were involved in _Finbar et al. v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City and Commuters Bar, Inc._, Bulletin 917, Item 1, wherein respondent Board's grant of a place-to-place transfer of this same license (then held by Commuters Bar, Inc.) was affirmed by the Director but was reversed by the Court, _Tube Bar, Inc. v. Commuters Bar, Inc._, 18 N. J. Super. 351 (App. Div., 1952). The Court, in its reversal, relied upon its own finding that there was no evidence to support the Board's finding that Commuters Bar, Inc. (admittedly a licensee having possession of licensed premises)

had been compelled to vacate such premises and that thus the licensee had not met one of the conditions contained in the proviso of the ordinance governing distance between premises (hereinafter set forth).

Following the Court's decision which reversed the Director's affirmance of the place-to-place transfer from 35 Enos Place to 9-B Journal Square Station Building, Commuters Bar, Inc., resumed the licensed business at 35 Enos Place, meanwhile retaining possession of premises 9-B Journal Square Station Building.

Thereafter, on April 4, 1952, application was made to the Superior Court for an adjudication of insolvency against Commuters Bar, Inc., and for the appointment of a receiver. While this matter was pending before the Superior Court, Commuters Bar, Inc. applied for a renewal of its plenary retail consumption license for the 1952-53 license period for premises 35 Enos Place, which was granted effective July 1, 1952. On June 27, 1952, the Superior Court adjudicated Commuters Bar, Inc. insolvent and appointed Joseph A. Davis receiver. The Order appointing the receiver contained no specific order or direction for the receiver to continue the licensed business then being conducted at 35 Enos Place and the license was not extended to the receiver until August 27, 1952. Nevertheless, the receiver conducted the licensed business at 35 Enos Place through the employment of a Mr. Donigan and John Dalton (a 50% stockholder of Dal Roth, Inc.), both of whom had been connected with Commuters Bar, Inc. This continued until September 26, 1952, when, in open court, the receiver verbally told the Judge of the Superior Court that, without paying the rent for 35 Enos Place, he was "breaking even" and that he wanted the Judge's "permission to close up", which permission was verbally granted.

The appointment of the receiver was confirmed on July 18, 1952, and by Order to Show Cause dated September 30, 1952, the receiver was directed to "expose for sale and accept the highest bid or bids...in open court" (a) all his right, title and interest in and to the tangible assets of Commuters Bar, Inc. in premises 35 Enos Place, (b) all his right, title and interest in and to the tangible assets of Commuters Bar, Inc. in premises 9-B Journal Square Station Building, and (c) his written consent as receiver to transfer to the purchaser thereof and to transfer to the same or other premises the 1952-53 plenary retail consumption license then effective in premises 35 Enos Place. Pursuant thereto, sale was made (confirmed October 15, 1952) whereby one Harry Casey acquired the tangible assets at 35 Enos Place and one Andrew Rothrock acquired the tangible assets at 9-B Journal Square Station Building, together with the consent of the receiver to transfer the aforementioned license. Thereafter, on October 27, 1952, Andrew Rothrock assigned his bid to Dal Roth, Inc., a newly-organized corporation in which the aforementioned John Dalton (as noted) held 50% of the stock, Andrew Rothrock held 49% of the stock, and Bertha Rothrock held 1% of the stock. The receiver wrote the landlord of 35 Enos Place "disaffirming" Commuters Bar, Inc.'s lease to said premises, effective October 29, 1952. On October 29, 1952, respondent Dal Roth, Inc. filed the application for the person-to-person and place-to-place transfer which is the subject of this appeal. The receiver consented to the transfer and, on November 7, 1952, respondent Board conducted a hearing thereon, at which appellants appeared and objected. Respondent Board reserved decision and requested the Assistant Corporation Counsel to advise the Board concerning the legal briefs which had been filed. The Assistant Corporation Counsel filed an opinion recommending that "The transfer should be granted" and, on November 19, 1952, respondent Board granted the transfer by a 2 to 1 vote and noted its records that the legal opinion had been received from the Corporation Counsel "advising that the requested transfer should be granted."

Thereafter, on November 26, 1952, the receiver "disaffirmed" the lease of Commuters Bar, Inc., at 9-B Journal Square Station Building.

At the hearing on this appeal, appellants questioned whether respondent Dal Roth, Inc. had ever had possession or right to possession of premises 9-B Journal Square Station Building. The only testimony on this subject is that of Joseph A. Davis, Receiver of Commuters Bar, Inc., who said that from the time of his appointment on June 27, 1952 "at least" until November 26, 1952, when he "disaffirmed" the lease, he had been in possession of premises 9-B Journal Square Station Building. He denied that he had ever assigned his right to possession in such premises to anyone. Respondent Dal Roth, Inc. relied upon its answer to Question 8 in its license application which stated that it leased or rented the premises at 9-B Journal Square Station Building from Armed Realty Corp., and contended that since said application was in evidence as part of respondent Board's file and since the answer to the question was made by Andrew Rothrock, President, under oath, it was evidential and that appellant had the burden of establishing that respondent Dal Roth, Inc. had no right to possession to such premises. Respondent Dal Roth, Inc.'s counsel asserted that the corporation had a binding agreement for such possession. As hereinabove noted, it was asserted on behalf of appellants that the stipulation admitting in evidence respondent Board's file did not constitute the statements contained in the application probatively evidential material. There followed some colloquy between counsel concerning a possible adjourned hearing to examine further into this question, but no such hearing was held or requested.

It was stipulated that neither Dal Roth, Inc., Andrew Rothrock, nor Joseph A. Davis, Receiver, was a licensee at the time when Section 4 of the above ordinance was enacted in 1937 or when it was amended in 1941. It was further stipulated that the lease at 35 Enos Place expires August 31, 1953 and that appellants would not argue or rely upon the question of public necessity and convenience raised in the petition of appeal.

An ordinance of the City of Jersey City, adopted in 1937 and amended in 1941, provides, in pertinent part:

> "Section 4. From and after the passage of this ordinance, no Plenary Retail Consumption License shall be granted for or transferred to any premises the entrance of which is within the area of a circle having a radius of seven hundred fifty (750) feet and having as its central point the entrance of an existing licensed premises covered by a Plenary Retail Consumption License, provided, however, that if any licensee holding a Plenary Retail Consumption License at the time of the passage of this ordinance shall be compelled to vacate the licensed premises for any reason that in the opinion of the Board of Commissioners of the City of Jersey City was not caused by any action on the part of the licensee, or if the landlord of said licensed premises shall consent to a vacation thereof, said licensee may, in the discretion of the Board of Commissioners of the City of Jersey City, be permitted to have such license transferred to another premises within a radius of five hundred (500) feet of the licensed premises so vacated...."

The evidence discloses that there are several premises covered by plenary retail consumption licenses which are located within 750 feet of the premises to which the license herein has been transferred, but that the distance between the former location (35 Enos Place) and the present licensed premises (9-B Journal Square Station Building) is less than 500 feet. A sustaining of the transfer here in question

would call for a finding that respondent Dal Roth, Inc. meets the requirements of the proviso contained in the ordinance.

The issues raised herein have been narrowed considerably by the stipulations entered into by counsel for the various parties and may be generally summarized as follows:

(1) Numerous acts of the receiver were without legal authority, e.g., the fact that he honored the assignment of the highest bidder without Court approval, etc.;

(2) Respondent Dal Roth, Inc. had no right to possession of 9-B Journal Square Station Building; therefore, the transfer was invalid;

(3) The matter involved in the present appeal is res judicata in view of the decision of the Appellate Division of the Superior Court, hereinabove referred to; and

(4) The transfer was in violation of the distance between premises ordinance.

As to (1): While the receiver may have continued the licensed business without specific authority from the Court to do so; while he failed to have the license extended to him until August 27, 1952; and while there may have been other actual or apparent irregularities, the fact remains that the consent to transfer the license was "exposed to public sale" and "sold" to the highest bidder and the sale was confirmed by the Superior Court whose action in this regard ought not, I believe, be attacked collaterally here.

As to (2): From the record before me it appears extremely doubtful that respondent Dal Roth, Inc. had any right to possession of 9-B Journal Square Station Building, sufficient to support the transfer. Cf. Terlizzi v. Union City et al., Bulletin 860, Item 2; Ways & Witteborn v. Egg Harbor Twp. et al., Bulletin 951, Item 3. However, in view of my decision as to (4), it is unnecessary to consider further either of these two points, (1) and (2).

Points (3) and (4) will be considered together. Specifically as to (3), while it may be that Dal Roth, Inc. is not a new party, since it derives its rights through Commuters Bar, Inc. and the receiver thereof, nevertheless the facts and issues are not the same as those in the earlier case hereinbefore adverted to.

The facts in the instant case are considerably different from the facts in the earlier case which involved a place-to-place transfer by a licensee. Here we have a person-to-person and place-to-place transfer after a consent to transfer a license had been "bought" at a receiver's sale in much the same manner as in Hudson Bergen etc. Assn. et al. v. Jersey City et al., Bulletin 931, Item 4, affirmed by the Appellate Division (Greenspan v. Division of Alcoholic Beverage Control, 23 N. J. Super. 567 (App. Div. 1952)), and by the Supreme Court on certification (Greenspan v. Division of Alcoholic Beverage Control, decided June 8, 1953, not yet officially reported). Appellants contend that such "sales" are contrary to public policy. In this connection it may not be inappropriate to point out that R. S. 33:1-26 provides:

> "Under no circumstances, however, shall a license, or rights thereunder, be deemed property, subject to inheritance, sale, pledge, lien, levy, attachment, execution, seizure for debts, or any other transfer or disposition whatsoever, except to the extent expressly provided by this chapter."

And in Novack v. Krauz, 138 N. J. Eq. 241 (Ch. 1946), the Court, in dismissing a suit wherein a "purchaser" of a license sought specific performance of the licensee's (seller's) promise to execute the requisite consent to transfer, adverted to that provision of law and said (p. 242):

> "The proper interpretation of the statute, taken as a whole, is that the licensee is protected against any interference with the license, which is not to be considered property at all. It is not subject to sale, and therefore, by necessary implication, cannot form a matter of a valid contract of sale."

The issues in the earlier case involved questions as to whether or not the ordinance exception was unreasonable, if inapplicable to Commuters Bar, Inc., a licensee which became such after the ordinance was enacted and amended, and as to whether such licensee had been forced to vacate its existing premises through no fault of its own.

The issue in the instant case is whether (as respondents contend) the proviso in the ordinance includes not only a licensee seeking a place-to-place transfer from premises he has been forced to vacate, but also a mere applicant for a license having no present interest or right to possession of the premises from which the transfer is sought. It was stipulated that respondent Dal Roth, Inc. never had possession or right to possession of premises 35 Enos Place from which the transfer was made. Yet, the opinion of the Assistant Corporation Counsel, upon which respondent Board apparently relied, and the brief for respondent Dal Roth, Inc., both contend for a construction of the ordinance which would include not only a situation where a licensee is compelled to vacate but also the case of application for person-to-person and place-to-place transfer where the proposed transferor was compelled to vacate.

With particular reference to (4) and respondents' contention with respect to the construction to be placed on the distance-between-premises ordinance, it must be remembered that a license is a mere privilege, not property. R. S. 33:1-26; Paul v. Gloucester County, 50 N. J. L. 585 (E. & A., 1888). No one has an inherent right to the issuance, renewal or transfer of a license to sell alcoholic beverages. (Zicherman v. Driscoll, 133 N. J. L. 586 (Sup. Ct., 1946); Biscamp v. Teaneck, 5 N. J. Super. 172 (App. Div., 1949)), and municipalities may enact reasonable regulations governing sales of alcoholic beverages at retail, including transfers of licenses. R. S. 33:1-40. The ordinance in question was enacted pursuant to such power.

"When a commission, board, body or person is authorized by ordinance, passed under a delegation of legislative authority, to grant or deny a license or permit, the grant or denial thereof must be in conformity with the terms of the ordinance authorizing such grant or denial. 9 McQuillin, Municipal Corporations (3d ed. 1950) § 26.73; Bohan v. Weehawken, 65 N. J. L. 490, 493 (Sup. Ct., 1900)." Tube Bar, Inc. v. Commuters Bar, Inc., supra.

The construction contended for by respondents completely overlooks the plain language and obvious purpose of that part of the exception which provides "That if any licensee holding a plenary retail consumption license...shall be compelled to vacate the licensed premises for any reason...not caused by any action on the part of the licensee...said licensee may...be permitted to have such license transferred to another premises within a radius of five hundred (500) feet...." From the language of the proviso it seems clear that that portion of the ordinance was enacted to grant relief

to licensees actually having premises which such licensees are forced to vacate through no fault of their own. Such being the case, the application of that portion of the proviso must be limited to that purpose, and the respondent Board has no power to enlarge it. Respondent Dal Roth, Inc. was not a licensee but a mere applicant for a person-to-person and place-to-place transfer when respondent Board granted its application for such transfer. Nor had respondent Dal Roth, Inc. been compelled to vacate any licensed premises for any reason. Admittedly it has no premises to vacate.

Provisos and exceptions in an ordinance are to be strictly construed and in keeping with the measure's principal purpose. N. J. State Board of Optometrists v. S. S. Kresge Co., 113 N. J. L. 287 (Sup. Ct. 1934); modified in 115 N. J. L. 495 (E. & A. 1935); United States v. Dickson, 15 Pet. 141; 59 Corpus Juris, § 639 (2), notes 42, 43 and 44. Manifestly, the basic purpose of the ordinance in question is to effect a stricture upon place-to-place transfers (Finbar et al. v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City and Commuters Bar, Inc. et al., Bulletin 917, Item 1) and it would seem abundantly clear that the main provision and the exceptions therefrom relate to place-to-place transfers only.

For the reasons hereinabove set forth, I find that the matter is not res judicata but that respondent Board either misinterpreted or disregarded the terms of the ordinance which it was its duty to observe and that the transfer was granted in violation of the ordinance. Its action granting the transfer will be reversed. Tube Bar, Inc. v. Commuters Bar, Inc., supra.

Accordingly, it is, on this 19th day of June, 1953,

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City, granting the person-to-person and place-to-place transfer application herein, be and the same is hereby reversed; and it is further

ORDERED that all alcoholic beverage activity under the license now held by Dal Roth, Inc., for Store No. 9-B, Journal Square Station Building, Concourse East, Jersey City, cease forthwith.

DOMINIC A. CAVICCHIA
Director.

5. PLENARY RETAIL CONSUMPTION LICENSE - APPLICATION FOR, BY HOLDER OF CLUB LICENSE, DENIED.

In the Matter of an Application by)
RACQUETS CLUB OF SHORT HILLS)
162 Hobart Avenue
Millburn) CONCLUSIONS
P. O. Short Hills, N. J.,
For a Plenary Retail Consumption)
License.)

Milton, McNulty & Augelli, Esqs., by John Milton, Jr., Esq., Attorneys for Applicant.

BY THE DIRECTOR:

Racquets Club of Short Hills now holds Club License CB-308 which was issued by me instead of by the local issuing authority because two members of the club are members of the local issuing authority. (R. S. 33:1-20). The club has filed an application with me for a Plenary Retail Consumption License. Written objections having been filed, a hearing thereon was held on April 2, 1953.

At the hearing twelve objectors, all of whom reside within 400 feet of the premises occupied by the club, appeared and stated that they opposed the issuance of the license. The testimony given by five of these objectors indicated that they fear that the issuance of a license to sell to the general public would create undesirable conditions in this section of Short Hills, which is admittedly residential in character.

On behalf of the applicant, Robert E. Niebling, President of applicant club, testified that the club desires a Plenary Retail Consumption License because it may thereby control "the method of consumption and hours thereof" and because "we seem to have a franchise that is now without value from a revenue standpoint." The first reason appears to be without specific merit. As to the second reason, the witness testified that under the license applied for "our members could buy package goods from us." Howard E. Grigg, a Trustee of applicant club, and eight members of the club, testified that they favored the issuance of the license.

It is apparent, in the fee provisions and other provisions of R. S. 33:1-12(5), that club licenses were designed primarily as accommodation licenses and not as revenue producers.

Conversion of club licenses to plenary retail consumption licenses was, for a time, approved by the Department, now Division, (Re Keevil, Bulletin 158, Item 11), but such approval was expressly overruled in 1944 (Re Heller, Bulletin 645, Item 5).

Issuance of the license sought would not be a violation of the township's numerical limitation ordinance but it does not follow, from a vacancy in such a measure's quota, that application must be granted. (See Sadovsky v. Millstone, Bulletin 120, Item 4.) The same is true with respect to the State Limitation Law since that Law (P. L. 1947, c. 94) "merely fixes a maximum and, in a given municipality, far fewer licenses than would be permitted by the law may be ample to serve that municipality's public needs." (Bulletin 762, Item 2.)

The question of public need is not a consideration where club licenses are concerned (Irish American Association of Kearny v. Kearny, Bulletin 293, Item 11), but is the paramount consideration

where retail licenses, other than club, are concerned (Dorio v. East Amwell Township and Colligans, Bulletin 965, Item 3). There is before me no evidence of public need for the plenary retail consumption license sought. The township's 1950 Federal census population is 14,560 and nine (9) plenary retail consumption, seven (7) plenary retail distribution and three (3) limited retail distribution licenses are outstanding there.

For the reasons hereinabove set forth I shall deny the pending application.

DOMINIC A. CAVICCHIA
Director.

Dated: June 17, 1953.

6. DISQUALIFICATION - FALSE ANSWER IN APPLICATION - PETITION DENIED WITH LEAVE TO FILE A NEW PETITION AFTER SIX MONTHS.

In the Matter of an Application)
to Remove Disqualification because
of a Conviction, Pursuant to R. S.) CONCLUSIONS
33:1-31.2. AND ORDER
)
Case No. 1050.
- - - - - - - - - - - - - - - - - - -)

BY THE DIRECTOR:

The criminal records received at this Division disclose that on March 21, 1928, petitioner was fined $125.00 after being convicted of the crime of atrocious assault and battery. On June 29, 1931, defendant was found guilty of maintaining a disorderly house (gambling) and sentenced to six months in a county prison. The operation of the sentence was suspended and he was placed on probation for a period of one year. On December 11, 1931, petitioner pleaded guilty to a charge of desertion and nonsupport and was sentenced by a Judge of a Court of Special Sessions to six months in a county workhouse. He was released therefrom on May 18, 1932. On February 2, 1933, petitioner was sentenced to a state prison for not more than three and one-half years and not less than two years on a charge of robbery. The records received from the County Prosecutor indicate that a new trial was granted in this case but he has no further information relative to the matter. The petitioner testified that he never was tried again on the robbery complaint. On April 18, 1934, petitioner was sentenced to a federal penitentiary for a period of ten years as a result of his conviction of counterfeiting of five dollar bills and possessing and passing of same. After transfer to two other federal penal institutions, he received a conditional release on June 17, 1940. His parole expired on April 7, 1944.

The crimes of counterfeiting, possessing and passing counterfeit money are crimes which involve the element of moral turpitude. See U. S. ex rel Allessio v. Day, 42 F. (2d) 217 (C.C.A. 2, 1930); Re Case No. 71, Bulletin 199, Item 9; Re Case No. 325, Bulletin 615, Item 4. The crime of atrocious assault and battery also involves moral turpitude. It is, therefore, unnecessary to determine whether the other crimes of which petitioner was convicted involve that element.

Petitioner produced three character witnesses (an employee of the company by which petitioner is employed, a housewife, and a funeral director) who testified that they have known him seven or more years and that in their opinion he has a good reputation for being a law-abiding person in the community in which he resides. One of the witnesses testified, however, that, although he knows the petitioner for twenty years, he has rarely seen him of late years.

The police department of the municipality in which petitioner lives has advised this Division that there are no complaints or investigations now pending involving petitioner.

Petitioner, in the verified petition filed in this proceeding, disclosed only the federal court conviction of counterfeiting, possessing and passing of counterfeit money. When interrogated at the instant hearing regarding his failure to include his other criminal convictions, he stated that since they occurred in state courts, he thought it unnecessary to mention them. I am not impressed with this explanation.

More than twelve years have elapsed since his release from the federal penal institution in June 1940. Despite this, however, I am not convinced, in view of petitioner withholding vital information in the petition aforementioned, that his association with the alcoholic beverage industry would not be contrary to the public interest. I cannot overlook his untruthfulness under oath. Under all the circumstances, I shall deny the present petition. I shall give petitioner leave to file a new petition, if he so desires, after the expiration of six months from the date hereof; Re Case No. 309, Bulletin 600, Item 6. If such petition is filed, the conduct of petitioner during the six months will be considered in determining whether relief should then be granted.

Accordingly, it is, on this 5th day of June, 1953,

ORDERED that the petition for relief herein be and the same is hereby denied, with leave to file a new petition, as aforesaid.

DOMINIC A. CAVICCHIA
Director.

7. DISCIPLINARY PROCEEDINGS - EFFECTIVE DATES FIXED FOR SUSPENSION PREVIOUSLY IMPOSED UPON REOPENING OF BUSINESS.

In the Matter of Disciplinary Proceedings against

PINE LAKE PARK TAXPAYERS IMPROVEMENT ASSOCIATION, INC.
Morningside & 8th Avenue, Pine Lake Park
Manchester Township
P.O. Toms River, N. J.,

Holder of Club License CB-1, issued by the Township Committee of the Township of Manchester.

O R D E R

BY THE DIRECTOR:

It appearing that by Order dated November 20, 1952, the license held by the above named defendant was suspended for a period of five days, and that the effective dates of said suspension were to be fixed by subsequent order (Re Pine Lake Park Taxpayers Improvement Association, Inc., Bulletin 949, Item 5); and

It further appearing that defendant's premises are now open to such an extent that an effective penalty can be imposed;

It is, on this 11th day of June, 1953,

ORDERED that the five-day suspension heretofore imposed shall commence at 2:00 a.m. June 19, 1953, and terminate at 2:00 a.m. June 24, 1953.

New Jersey State Library

Dominic A. Cavicchia
Director.