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

BULLETIN NUMBER 61 January 26, 1935

1. APPELLATE DECISIONS - FRANKLIN STORES CO. VS. ELIZABETH

FRANKLIN STORES CO., a New Jersey corporation,
Appellant
-vs-
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL and THE BOARD OF PUBLIC WORKS OF THE CITY OF ELIZABETH, N. J., and the CITY OF ELIZABETH,
Respondents.

ON APPEAL
CONCLUSIONS

Louis B. Englander, Esq., Attorney for Appellant
Edward Nugent, Esq., Attorney for Respondents

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail distribution license.

Appellant conducts a chain of retail stores in this State and has a number of retail liquor licenses in different municipalities. One such license had been issued to appellant for a store in Elizabeth prior to the denial of this application.

The respondents contend that this second application was properly denied because they deemed it against sound local policy to issue more than one liquor license of any class to any individual, co-partnership or corporation, and that such issuance would be in contravention of an ordinance in active contemplation at the time of such denial.

No ordinance embodying such policy had been enacted or even introduced at the time the application was denied on November 15, 1934. The respondents, however, did inform appellant that the application was denied because they intended to recommend to the governing body of Elizabeth to enact an ordinance which would effect such limitation of licenses. Subsequently, on December 27, 1934, and pending this appeal, an ordinance was enacted by the City Council of Elizabeth to take effect immediately reading: "the issuance of more than one alcoholic beverage license of any kind or class whatsoever to any individual, co-partnership or corporation, is hereby expressly prohibited, within the limits of the City of Elizabeth." On the same day, the Board of Public Works of Elizabeth enacted a similar ordinance. Both ordinances were approved by the Mayor on December 28, 1934 and are now in full force and effect.

Appellant first contends that these ordinances do not justify the denial of this application because they were not enacted until after the application was denied; that they are without and cannot have any retroactive effect; that this appeal must be adjudi-

cated on the factual situation as it existed at the time of the denial of the application.

While, at law, in an ordinary action commenced by summons, the plaintiff, in order to succeed, must show that his right of action was complete at the time the action was commenced, Titus vs. Gunn, 69 N.J.L. 410, in equity, the adjudication is made according to the facts as they appear at the time the case is heard. Thus: "The court is not restricted to an adjustment of the rights of the parties as they existed when suit was brought, but will give relief appropriate to events occurring pending the suit." 21 C.J. 137. So, "An additional right accruing to a complainant pending the suit should be set up by way of supplemental bill, and this may be done for the purpose of varying the relief as such newly-occurring facts may demand." Vaiden vs. Edson, 85 N.J.Eq. 65, 69. Appellant's contention should not be true in a statutory tribunal charged with the review of administrative acts performed by public officials. Here, equity should have the last say. The spirit and not the letter of the law should dominate. Sound public policy requires that if a special privilege is to be given, the grant must be consonant with such policy at the time the grant is made. Whether a license should be issued is not a game of legal wits or abstract logic, but, rather, a solemn determination on all the concrete facts, whether presented originally or on appeal, whether or not it is proper to issue that license. It is not a mere umpire's decision whether or not some administrative official previously made a move out of order or erred in technique or did something which by strict rules he had no right to do, but rather a final adjudication whether the license should be issued NOW. It was with this in mind that the Rules Governing Appeals, Bulletin 26, Item 4, provided that all appeal cases before the Commissioner should be tried de novo. The principle was applied in Wizner vs. Kingwood Township, Bulletin 42, Item 8, where a license was denied on appeal, which otherwise would have been granted (Cf. Schwartz vs. Kingwood Township, Bulletin 42, Item 7.), because pending the appeal the Commissioner, on his own motion, discovered that the appellant was surreptitiously selling alcoholic beverages without any license.

In the instant case, there is no question of personal unfitness, in fact no question except that the present issuance of a license would be contrary to the declared policy of the City of Elizabeth. True, the ordinance had not been adopted at the time of the denial, but it was in actual, bona fide contemplation. The good faith of respondents is demonstrated by the actual adoption of such ordinance the month following the denial. I find, as fact, that the policy existed at the time the application was denied even though it was not formally manifested until a later date. The contention of appellant fails, not because the application was barred by the ordinance but rather because to grant it now would be in defiance of the local policy manifested by the ordinance in active, bona fide contemplation at the time the application was denied.

The same principle was applied, although not named, in Platnick vs. Belmar, Bulletin 45, Item 16, where a license was denied on appeal because of a municipal policy restricting issuance of licenses too near the local boardwalk which was, in essence, a seashore public park and this despite that no resolution embodying this policy had been adopted at the time the application was rejected, but the resolution was enacted pending the appeal. In Dann vs. Manasquan, Bulletin 37, Item 12, the action of the respondent in refusing to grant a license was affirmed although no resolution was

ever passed prohibiting the issuance of licenses on the boardwalk because a uniform policy had been informally adopted and bona fide-ly applied and consistently maintained by the local board.

The same principle has been recognized and applied by the Supreme Court of New Jersey in mandamus cases. In Horowitz vs. Bayonne, 9 N.J.Misc. 203, a mandamus to compel issuance of a building permit was denied on the ground that the City was about to adopt a zoning ordinance which would prohibit the construction for which the permit was sought, and this, despite the fact that no zoning ordinance had yet been passed and notwithstanding that the City had been dilatory in adopting any such ordinance. So, in Linwood Co. vs. Bloomfield, 9 N.J.Misc. 139, the writ was denied although the zoning ordinance at the time was only in the making. So, breathing time was allowed to the municipality in Butvinik vs. Jersey City, 6 N.J. Misc. 803. On the other hand, after reasonable time had expired and no ordinance had been adopted by the municipality, the court did grant mandamus. Holdsworth vs. Hague, 9 N.J.Misc. 715; Brengel vs. Jersey City, 9 N.J.Misc. 717; Deerfield Realty Co. vs. Hague, 9 N.J. Misc. 857. In the instant case there is no question of dilatoriness. The ordinance was adopted the month following the denial and during the interim it had to pass through successive readings and statutory publication. So, here, if there had been nought but municipal de-sire paved with good intentions, the appellant would have succeeded. But, here, declared intention has been promptly translated into ac-tion. Since the Supreme Court did not act in these cases because the City might adopt a contrary ordinance, the Commissioner will not act after the City has actually adopted it.

It is true that in Advance Development Corp. vs. Jersey City, 6 N.J.Misc. 238, a mandamus was allowed. In that case, how-ever, there was not only an entire absence of any prohibitive ordin-ance but also of any statute delegating any such power to the muni-cipality. While the constitutional zoning amendment had been adopted by the people of this State, there was no reason why the court should speculate as to whether and how the Legislature would act and, if so, whether ordinances passed pursuant to legislation, still ungestated, might perchance act retroactively and adversely upon the use to which the realtor sought to put his property. In that case it was unfair to the owner who desired to convert unim-proved real estate into an income-bearing property to await a deci-sion which might never be made. In the instant case, appellant has no wait. There is no occasion to speculate. The City has acted. The municipal volition has been formally declared. The time element is no longer important.

Likewise distinguishable is Re Duffy, Bulletin 17, Item 4, where informal discussion and decision by municipal officials to grant only a limited number of retail licenses although accompanied with wide-spread publicity was held not sufficient to bar a tempor-ary licensee from obtaining a permanent license, because the limita-tion had not been embodied in any resolution. But there the tempor-ary licensees had already held their temporary licenses and had ac-quired their leases, bought equipment and stock in trade and incurred commitments on the faith thereof. A subsequent ordinance there would have deprived those licensees of vested rights resulting from the acts of the municipality and their reliance thereon. Here, the only question is whether the appellant, who, without any license or vested right, seeks such license as a privilege, is entitled thereto despite

the public policy of the municipality to the contrary.

Freund says: "It is characteristic of all administrative appeals that they extend to every phase of the original decision, unless especially restricted; they therefore may not only consider new evidence but may cover matter of discretion." Administrative Powers over Persons and Property, page 276.

In Rohrs vs. Zabriskie, 102 N.J.L. 473, Chief Justice Gummere said:- "Assuming that the ground upon which the superintendent refused to issue the permit was unsubstantial and that the action of the board of adjustment was not justified under the statute, will this court, when confronted with an ordinance passed in the valid exercise of power conferred upon the municipality, disregard its existence and direct a permit to be granted to this relator to erect a building of the character described in her application, although its erection will be a threat to the public safety, merely for the reason that such ordinance was not passed until after the conclusion of the hearing before the board of adjustment and its action thereon. We have no doubt but that this question should be answered in the negative. Admitting that the ordinance does not have a retroactive effect, so far as buildings in the course of erection are concerned, it is clearly applicable where the process of construction has not yet been begun. The power to issue a writ of mandamus is a discretionary one; and it would be an abuse of that power for this court to direct the municipality to grant a permit for the erection of a building the existence of which, if erected, has already been declared by legal authority to be a menace to the safety of the community."

I conclude that appellant's first contention is without merit.

Appellant's final contention is that the ordinance is invalid because the Section of the Control Act on which it is based is unconstitutional so far as concerns sale of liquor in packages for off-premises consumption.

Section 37 of the Control Act provides:

> "The governing board or body of each municipality may, by ordinance, enact that no more than one retail license shall be granted to any person, corporation, partnership, limited partnership or association in said municipality and that said license shall cover only the licensed premises."

This provision exhibits legislative intent to confer absolute authority upon every municipality to dispose by ordinance of what is essentially an economic problem. It is not subject to appeal. See Explanation of Amendments, Bulletin 21, Item 56. It is not unconstitutional even if aimed at chain stores. Tax Commissioners vs. Jackson, 283 U.S. 527; Liggett Co. vs. Lee, 288 U.S. 517. In the latter case, Mr. Justice Brandeis said:

> "The purpose of the Florida statute, is not, like ordinary taxation, merely to raise revenue. Its main purpose is social and economic. The chain store is treated as a thing menacing the public welfare. The aim of the statute, at the lowest, is to preserve the competition of the independent stores with the chain stores; at the highest its aim is to eliminate altogether the corporate chain stores from retail distribution."

Appellant, conceding that there is inherent power in government to regulate the sale of liquor in places where it is consumed on the premises, claims that the State has no power to authorize any municipality to enact such an ordinance applicable to stores selling package goods for off-premises consumption on the ground, as alleged, that the ordinance does not tend to promote the health, morals, safety or general welfare of the community. If this were true, it might as well be argued that the State could authorize issuance of licenses for on-premises consumption and regulate such traffic but is without such power in respect to off-premises consumption. The fallacy of the argument is that the State has the power to regulate every sale and the entire consumption of alcoholic beverages whether off or on premises. Since the State may license either or both, so it may restrict either or both. Section 37 authorizes a restriction of licenses if the municipality so wills. That is what the ordinance accomplishes. What the State has given, the State may take away. The degree by which the general welfare may be affected by licenses for on-premises consumption is undoubtedly different from those off-premises, but it is equally true that the sale of liquor in packages has a direct relation to and reaction upon the health, the morals, the safety and the general welfare of the community.

Section 37 of the Control Act is constitutional. The Elizabeth ordinance is valid.

Accordingly, the action of respondents is affirmed.

D. FREDERICK BURNETT,
Commissioner

Dated: January 21, 1935

2. ISSUING AUTHORITY - WHO CONSTITUTES - CLASSIFICATION OF MUNICIPALITIES

Commissioner of Alcoholic Beverage Control.

Dear Sir:-

Will you please advise me at your earliest convenience as to the number of New Jersey municipalities where the governing board or body constitutes the "issuing authority" and the number of municipalities which, pursuant to Section 5 of the Act, have established a separate board of alcoholic beverage control.

Very truly yours,
BURLINGAME, NOURSE & PETTIT

January 16, 1935

Burlingame, Nourse & Pettit,
New York City.

Gentlemen:

There are 564 municipalities in the State of New Jersey. For the 18 municipalities comprising Cape May County, the issuing authority is, pursuant to Section 6a of the Alcoholic Beverage Control Act, the Judge of the Court of Common Pleas of that County. For the 33 municipalities in Ocean County, the issuing authority is, likewise pursuant to Section 6a of the Act, the Judge of the Court of Common Pleas of that County. Ten municipalities, pursuant to Section 5 of the Act, have Municipal Boards of Alcoholic Beverage Control which Boards constitute the issuing authority.

These municipalities are the City of East Orange, the City of Elizabeth, the Township of Hillside, the City of Linden, the Town of Morristown, the City of Newark, the Township of North Bergen, the City of Orange, the City of Rahway and the Town of West Orange. In the remaining 503 municipalities, the governing Board or body constitutes the issuing authority.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

3. MUNICIPAL ORDINANCES- VALIDITY - SUBDIVISION OF TERRITORY

January 16, 1935

Mr. Thomas C. Magee,
Township Clerk,
Marlboro, New Jersey.

Dear Sir:

I quote the last three sections of your resolution of December 9, 1933:

(4) "BE IT FURTHER RESOLVED, That within the limits and boundaries of the Village of the Township of Marlboro there shall be an unlimited number of licenses for the sale, either at retail or distribution, and the said boundaries of the said Village are to be designated as All that territory lying adjacent to the highway leading from Matawan to Freehold on the east and west, and on the north at the property known as 'Bennetts Garage', and bounded on the south by property known as the 'Van Mater Property'."

(5) "BE IT FURTHER RESOLVED, That within the confines of the territory designated as the Village of the Township of Marlboro, no alcoholic beverages of any kind or description shall be sold, dispensed or distributed from the hours of 12:00 o'clock midnight, Saturday to 7:00 o'clock A. M. Monday."

As amended:

"RESOLVED: That all licensed liquor places be allowed to be open on Sunday from 1 P. M. until 12 midnight Sunday."

(6) "BE IT FURTHER RESOLVED, That any and all applicants within the said Village shall have been residents of the said Village for a period of one year prior to their application for the said license."

These sections, respectively, define the limits and boundaries of that territory designated as the village of the Township of Marlboro, limit the hours of Sunday sales in said designated territory and require of applicants within said territory one year of residence therein. As so worded, I am unable to place upon the resolution any other reasonable construction than that it purports to prohibit the issuance of licenses in any section of your Township other than the village above described. In reaching this conclusion, I am ascribing to your Section 4 a particular purpose. Any contrary conclusion, without further regulations indicating the use to which the Section may be put, would render it superfluous; would make unnecessary any description of the territory at all.

I am not entirely convinced that regulations arbitrarily permitting the issuance of licenses in one section of a municipality and prohibiting their issuance in others are valid. In some instances there may be reasonable ground for so doing; in others, the discrimination may be entirely unjustified. Cf. In re Strathmere, Sunday sales, Bulletin 40, item 5, and also Brighton Hotel Company vs. Loder, Bulletin 41, item 6. In the instant case, I will, nevertheless, tentatively approve Section 4. However, such approval, being ex parte, is not final. The propriety and validity of the regulation may more properly be determined when an appeal, if any, is made by anyone considering himself aggrieved thereby. All interested parties will then be given full opportunity to be heard and the judicial review will be de novo, entirely unprejudiced by the previous ex parte determination.

Section 5, as amended by the resolution of February 8, 1934, insofar as it limits the hours between which the sale of alcoholic beverages at retail may be made, for the reasons stated in Bulletin 43, item 2, does not need the Commissioner's approval to be effective. However, if licenses were being granted throughout the entire Township of Marlboro, I could not approve Section 5 because it confines the scope of the regulation set forth therein to that portion of the Township described as the village. As was said In re Strathmere, Bulletin 40, item 5, "The issuing authority has no power arbitrarily to sub-divide a municipality and grant the privilege of Sunday selling to one part and exclude the other. Neither has the Commissioner."

For the same reasons, because I do not believe that the municipality has any right arbitrarily and without sufficient reason to sub-divide its territory and thereby impose a general regulation in one section and not in others, I cannot approve Section 6. It requires of applicants for licenses that they be residents of a certain defined section of the Township for one year prior to their making application. I will, however, approve Section 6 if it is amended to require, as a condition precedent to application, residence within the Township.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

4. SPECIAL PERMITS - NONE FOR SOCIAL OCCASIONS HELD TWICE A MONTH

January 15, 1935

Dear Sir:

Please give me information how much a Special Permit would cost for the year 1935 for John Calvin Magyar Men's Society permitting sale of alcoholic beverages at social gatherings twice a month? The estimated attendance at these gatherings together with women would be from 75 to 175.

What kind of Permit would you recommend for our Men's Society? Obtaining Special Permit for each occasion taxes us so much, that the alcoholic beverages plus the fee for permit cost us more than the cash sale.

Very truly yours,
ANTHONY SZABO

January 16, 1935

Mr. Anthony Szabo,
Perth Amboy, N. J.

Dear Mr. Szabo:

I have yours of the 15th. Personally, I would like very much to accommodate you and your esteemed society. I cannot, however, see my way clear to issue any special permit for the regular sale of alcoholic beverages at social gatherings twice a month. I have gone a long way in granting these special permits for isolated occasions, but to grant a permit of the nature that you ask would amount to a new form of license for social gatherings to apply generally throughout the year. The Legislature has not seen fit to provide for this on a general wholesale basis. Therefore, I cannot grant any permit other than for the single occasion and at the full regular fee and each case must stand on its own bottom as the application is made.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

5. SPECIAL PERMITS - BARTENDERS - MUST BE AMERICAN CITIZENS

January 21, 1935

Dear Sir:

Some weeks ago a local paper published that a new rule of the commission was that all bartenders had to be citizens. I have now had it brought up as to whether the man that tends a bar at a dance or other special gathering, where a one day permission is had, must also be a citizen.

Yours truly,
EDWARD STOCHOWICZ,
Justice of the Peace

January 24, 1935

Edward Stochowicz, Justice of the Peace,
White House Station, N. J.

Dear Mr. Stochowicz:

I have yours of the 21st.

It is true that all bartenders of regular consumption licensees must be citizens. The wise policy of the law that thus puts a premium on American citizenship should not be relaxed in respect to special one-day permits for social affairs.

It is, therefore, ruled that the bartender or other dispenser of alcoholic beverages under special permits must be an American citizen.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

6. MUNICIPAL ORDINANCES - VALIDITY - NO POWER IN COMMISSIONER TO APPROVE OR DISAPPROVE ORDINANCE DECREEING PROHIBITION AS DISTINGUISHED FROM DECLARING REGULATIONS OF ALCOHOLIC BEVERAGE BUSINESS

January 25, 1935

Mr. C. L. Harris,
Clerk of Greenwich Township,
R. D. #2, Bridgeton,
Cumberland Co., N. J.

Dear Sir:-

I have before me for consideration the resolution of your Township Committee of January 26, 1934, reading:

"WHEREAS it is the opinion of the Township Committee of the Township of Greenwich in the County of Cumberland that it would not be for the best interest of the said Township to issue licenses for 1934 for the sale of alcoholic beverages, pursuant to an act entitled 'An Act covering alcoholic beverages chapter 432 of the laws of 1933 of the State of New Jersey.'

"THEREFORE, BE IT RESOLVED BY THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF GREENWICH IN THE COUNTY OF CUMBERLAND that no licenses for the sale of alcoholic beverages be granted or issued in the Township of Greenwich during the year 1934."

This resolution came before me incidentally in the case of Miller vs. Township Committee of Greenwich, Bulletin 57, Item 9, where an appeal from the denial of an application for a consumption license was dismissed on the ground that no fee therefor had been fixed by your governing Board, and that the Commissioner had neither original nor appellate power to fix the fee or to direct that the Township Committee must fix the fee.

For the reasons stated in that decision, I have grave doubts whether any municipality may enact that no licenses whatsoever shall be issued or whether this may be effected only by referendum.

One thing, however, is clear and that is that I have no jurisdiction either to approve or disapprove a resolution of the nature above quoted. It is not a regulation of the conduct of a licensed beverage business. It is not regulation at all but a prohibition of such business. There is nothing in the statute which delegates power to me either to approve or disapprove a resolution of this kind. I have no jurisdiction in any matter except to the extent confided to me by the Control Act.

Because of the absence of power, and therefore without any discussion of policy, I may not either approve or disapprove your resolution.

Irrespective of the question of validity, I respectfully call your attention to the fact that the quoted resolution became inoperative by its terms on January 1st this year.

Very truly yours,

D. FREDERICK BURNETT,

Commissioner

7. MUNICIPAL ORDINANCES - VALIDITY - NO POWER IN COMMISSIONER TO APPROVE OR DISAPPROVE ORDINANCE DECREEING PROHIBITION AS DISTINGUISHED FROM DECLARING REGULATIONS OF ALCOHOLIC BEVERAGE BUSINESS

January 25, 1935

Mr. R. S. Wigfield,
Borough Clerk,
Collingswood, N. J.

Dear Sir:-

I have before me for consideration the resolution of your Township Committee passed by your Board of Commissioners May 7, 1934, reading:

"WHEREAS, in and by Section 37 of an act entitled 'An Act concerning alcoholic beverages', adopted by the Legislature of the State of New Jersey in the month of December, 1933, being Chapter 436, it is provided, inter alia, as follows: 'The governing board or body or other controlling authority of each municipality may by resolution prohibit within its respective municipality either (1) the retail sale of alcoholic beverages, other than brewed malt alcoholic beverages and naturally fermented wines for consumption on the licensed premises by the glass or other open receptacle, or (2) the retail sale of all kinds of alcoholic beverages for consumption on the licensed premises by the glass or other open receptacle, or (3) the sale of all alcoholic beverages at retail, except for consumption on railroad trains, airplanes, and boats, or (4) the sale of all alcoholic beverages on Sunday.'

"THEREFORE, Be it Resolved, by the Board of Commissioners of the Borough of Collingswood New Jersey, that the said Board of Commissioners does hereby prohibit, within the said Borough of Collingswood, the sale of all alcoholic beverages at retail, except for consumption on railroad trains, airplanes and boats.

"AND BE IT FURTHER RESOLVED that the foregoing resolution shall become effective immediately upon the adoption thereof by the said Board of Commissioners."

This resolution cannot be supported by Section 37 of the Control Act because the provisions which your preamble quotes have been repealed - in fact on April 13, 1934, which was before the adoption of your resolution.

It is unnecessary to consider the effect of an erroneous recitation of authority upon the operative language of the resolution, for, assuming that the preamble may be eliminated entirely, the operative language constitutes a prohibition and not a regulation of the sale of alcoholic beverages.

Whether such prohibition may be accomplished by resolution or can be effected only by referendum is a question which I have no jurisdiction to decide, for the reasons set forth in Re Township of Greenwich, Bulletin 61, Item 6.

Hence, it is neither approved nor disapproved.

Very truly yours,

D. FREDERICK BURNETT,

Commissioner

8. LICENSES - EFFECT OF SUBSEQUENT ANNEXATION OF LICENSED PREMISES INTO DRY TERRITORY - LICENSE CONTINUES IN FORCE UNTIL EXPIRATION BUT LICENSEE HAS NO VESTED RIGHT TO RENEWAL

January 23, 1935

My dear Commissioner:

A very grave situation has arisen in the Township of Haddon within the last forty-eight hours, and it becomes necessary to have your decision not later than Saturday of this week.

A Bill has been introduced in the Legislature, which has for its purpose, the annexation of three sections of Haddon Township to the Borough of Collingswood. Haddon Township, in the three particular sections, has liquor distribution establishments, duly licensed. The Borough of Collingswood, although it never has a referendum under the provisions of the Act, does not permit the sale of alcoholic beverages within its boundary lines.

In the event the Bill becomes a Law, it is my opinion, as I construed the Act, that the liquor distribution establishments will continue to operate, notwithstanding that they will then be in the Borough of Collingswood. It is further my opinion, that they will not only be within their rights to act for the remaining term of the licensed period, but will be entitled to a renewal of their license, if they comply with the requirements.

I would appreciate if you would advise me in the enclosed self-addressed envelope, whether my conclusions are correct. There will be a joint conference on Saturday between the citizens of both municipalities in which this problem will be discussed in preparation for the Bill in the Legislature on Monday.

Yours very truly,
MARK MARRITZ

January 25, 1935

Mark Marritz, Solicitor,
Township of Haddon,
Camden, N. J.

Dear Sir:-

I have yours of the 23rd.

Unless the pending Bill expressly provides otherwise, your first conclusion that the licenses already issued by Haddon Township will remain in full force and effect notwithstanding annexation, is correct. This conclusion is reached independently of the validity of the Collingswood resolution. See Bulletin 61, Item 7. The Home Rule Act, P. L. 1917, Chap. 152; 2 Cum. Sup. (1924), page 2077, Sec. *136-602, provides: "that all vested rights of any kind shall not be changed or abrogated by such annexation." Where a license has been granted and acted upon and the licensee has changed his position on the faith thereof, it constitutes a vested right during the term of the license subject to be divested only in the manner expressly set forth by statute.

I do not agree, however, with your second conclusion. Licenses are good, at the maximum, for the term of one year only. All rights conferred by the license cease upon its termination. While a licensee who has lived up to the law and complied with all requirements ought, in fairness, to have first consideration when renewals are determined, nevertheless it is overstating the principle to conclude that he is therefore "entitled" to a renewal. No one has a vested right to a renewal. Whether a renewal should be granted or not is, like the original issuance of the license, a matter to be decided in the light of what is then determined as the best common interest of the public at large. When the present licenses expire, the Borough of Collingswood may determine what, if any, renewals should be granted.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

9. LICENSES - FITNESS OF APPLICANT - CONSIDERATIONS INVOLVED

January 25, 1935

Hymen M. Goldstein, Esq.,
Newark, N. J.

Dear Sir:-

Your application for a rehearing in Orofino vs. Township Committee of the Township of Millburn (Essex County), Bulletin 45, Item 15, has been carefully considered.

The petition of appeal sets forth that all conditions precedent pertaining to his application had been complied with by appellant; that respondent, Township Committee of the Township of Millburn, denied his application; and seeks the reversal of such action. The answer sets forth that on October 23, 1933, appellant was convicted of having sold beer in violation of the 3.2 Beer Act; that the application was denied by reason thereof; and seeks a dismissal of the appeal. In lieu of testimony, the parties stipulated that the foregoing allegations contained in the petition and answer are true. On the basis of this stipulation, the Commissioner concluded that respondent's determination that appellant was not privileged to hold a license was not unreasonable and would therefore be sustained. (Bulletin #45, Item #15).

The contentions underlying the application for rehearing appear to be the following:

(1) The fitness of the appellant was not raised in the pleadings or stipulation and should not, therefore, have been made the basis of the Commissioner's determination.

(2) Since section 22 does not disqualify an applicant where he has been convicted of a single violation of the Control Act, appellant's single conviction should not disqualify him.

(3) Since the Commissioner has issued licenses to persons convicted on more than one occasion of violating the National Prohibition Act (Bulletin #46, Item #3), he should not sustain respondent's denial based on a single conviction under the 3.2 Beer Act.

1. The first contention is factually unsound. Moral unfitness is merely a conclusion based upon underlying facts. Where an answer asserts the underlying facts upon which it may be concluded that the appellant is unfit, the omission to state the conclusion is not fatal. Respondent's answer asserts that the application was denied because of appellant's conviction. This adequately sets forth respondent's position that because of the conviction the appellant is not fit to hold a license.

2. The second contention misapprehends the effect of the statutory disqualifications contained in section 22. These disqualifications circumscribe the outer bounds of the sphere within which licenses may be issued. They do not deprive issuing authorities of their long recognized discretionary powers to deny licenses to persons determined to be unfit, even though not within any express statutory disqualification. Cf. Moss & Convery vs. Trenton, Bulletin #29, Item #12. In dealing with a contention similar to that presently advanced, arising in an analogous situation, the Commissioner said: (Bulletin #49, Item #13)

> "***Does such lifting of the statutory ban automatically bar all municipal discretion?
> "The first paragraph of section 76 creates an absolute prohibition against any license being granted where the premises are within 200 feet of any church or school (unless waived as aforesaid), whether the issuing authority approves of the application or not. The second paragraph merely declares that this absolute prohibition 'shall not apply' in certain cases. It does not make it mandatory that a license shall be issued. It enables, but does not require, a license to be issued where otherwise it would be absolutely prohibited. It leaves the issuing authority free to grant the application if, in proper discretion, issuance of the license is deemed advisable, but, by the same token, free to deny if deemed inadvisable. The mooted question is, therefore, answered in the negative."

Your second contention must, therefore, be overruled.

3. The third contention ignores two material considerations. First, the appellant was not convicted for a violation of the Prohibition Act, but for a crime committed while the sale of beer was legal. The significance of this distinction is sufficiently pointed out in the conclusions of the Commissioner in this matter. (Bulletin #45, Item #15).

Secondly, the decision of the Commissioner granting a license to a violator of the Prohibition Act was not made on an appeal from a refusal to issue a municipal license, but was made in the exercise of the Commissioner's original jurisdiction in the issuance of State licenses. The distinction is of the utmost importance. There is no single and absolute criterion of moral fitness (23 C.J. 541), and each issuing authority must be given considerable discretion in reaching its determination. See In Re: Hathaway, 41 N.J.L.J.248 (Morris C.P.1914), where the Court said:

> "There are three most important considerations that should be regarded by the license granting body under the present provisions of law, which are matters that appeal largely to the discretion of the licensing power in allowing or denying a petition such as in this case. The first consideration is the individuality of the applicant, his fitness as measured by his conduct and reputation; the second

consideration is the condition of the community with reference to the subject of licensed places already obtaining, particularly their number with reference to the population of the community or municipality; and third, the location in that municipality for which application is made."

When exercising his appellate powers, the Commissioner may not be guided by the action he would have taken if the identical facts raising the issue of moral fitness were presented to him as the original issuing authority upon an application for a State license. On appeal the issue is not whether the Commissioner would have reached the same result, but rather, whether the determination of the municipal issuing authority was arbitrary, discriminatory or unreasonable. See Moss & Convery vs. Trenton, supra. The record is devoid of any testimony, favorable or unfavorable, with respect to appellant's fitness except the conviction under the 3.2 Act. In Livingston vs. Corey, 50 N.W. 263 (Neb. 1891), an application for a license was denied on the ground that the applicant had, while operating under a previous license, sold adulterated whiskey. The Court held that the innocence of the applicant was immaterial since an innocent sale of adulterated whiskey constituted a violation of law and sustained the denial of the application. In In Re MacRae, 106 N.W. 1020 (Neb. 1906), a license was denied because the applicant had violated a statute forbidding screens in licensed premises, and in Appeal of Caudell, 66 S.W. 722 (Ky. 1902), the court held that an application for a license was properly denied on the ground that the applicant admitted having sold liquor without a license and in violation of law. See also Watkins vs. Grieser, 66 Pac. 332 (Okla. 1901). In the light of the foregoing, the Commissioner could not say, upon the record presented, that the respondent's determination was entirely without reasonable basis.

Accordingly, the Commissioner has denied the application for rehearing.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner
By:
Nathan L. Jacobs,
Chief Deputy Commissioner
and Counsel

10. APPELLATE DECISIONS - TOTH VS. NEW BRUNSWICK

MARY TOTH, Appellant
-vs-
BOARD OF CITY COMMISSIONERS OF THE CITY OF NEW BRUNSWICK and REV. MARCUS HAJOS, Respondents

ON APPEAL
CONCLUSIONS

C. Raymond Lyons, Esq., Attorney for Appellant
Thomas H. Hagerty, Esq., Attorney for Respondent, Board of City Commissioners of the City of New Brunswick
Rev. Marcus Hajos, Pro Se.

BY THE COMMISSIONER:

This is an appeal from the denial of an application for

a plenary retail consumption license.

Respondents contend that the application was properly denied because the premises sought to be licensed are located within 200 feet of a church and a school and that therefore the issuance of a license for these premises is barred by Section 76 of the Control Act. Appellant, conceding that the premises are within the proscribed distance contends that they are an hotel and are exempt from the statutory prohibition by virtue of the exception contained in Section 76 in favor of hotels.

After the appeal was heard and pending determination of the foregoing question, word came to the Commissioner that appellant was engaging in the sale of alcoholic beverages without awaiting his ruling and without any license. The report of two Department Investigators, sent specially to investigate the complaint, confirmed its accuracy. It was established as a fact that appellant was selling alcoholic beverages without a license in defiance of the law.

While ordinarily, on an appeal, the evidence of unfitness is produced by respondent, yet when, as here, conclusive proof of that fact is furnished by the Commissioner's own investigation, he will refuse on his own motion, not only to grant a license, but also to order anyone else to do so. Wizner vs. Kingwood, Bulletin #42, Item #8.

The appeal is therefore dismissed.

Dated: January 25, 1935 Commissioner