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

BULLETIN 392 MARCH 13, 1940.

1. DISCIPLINARY PROCEEDINGS - FAIR TRADE - SALES AT CUT RATES.

In the Matter of Disciplinary Proceedings against ABE NEWMAN, 118 Spruce Street, Newark, New Jersey, Holder of Plenary Retail Distribution License D-53, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	CONCLUSIONS AND ORDER

Abe Newman, Pro Se.

Charles Basile, Esq., Attorney for the State Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The licensee has pleaded guilty to a charge of selling liquor at less than the Fair Trade price at the licensed premises on January 3, 1940, in violation of Rule 6 of State Regulations No. 30.

The usual penalty for this violation is ten days.

By entering this plea in ample time before the day fixed for hearing, the Department has been saved the time and expense of proving its case. The license will, therefore, be suspended for five (5) days instead of ten (10) days.

Accordingly, it is, on this 7th day of March, 1940,

ORDERED, that Plenary Retail Distribution License D-53, heretofore issued to Abe Newman by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for a period of five (5) days, effective March 11, 1940, at 3:00 A. M.

D. FREDERICK BURNETT,
Commissioner.

2. DISCIPLINARY PROCEEDINGS - FAIR TRADE - SALES AT CUT RATES.

In the Matter of Disciplinary Proceedings against CORNELIUS J. FLORE, 527 Ocean Avenue, Jersey City, N. J., Holder of Plenary Retail Distribution License D-59, issued by the Board of Commissioners of the City of Jersey City.	CONCLUSIONS AND ORDER

Cornelius J. Flore, Pro Se.
J. Garry Keely, Esq., Attorney for the State Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The licensee has pleaded guilty to a charge of selling liquor at less than the Fair Trade price at the licensed premises on February 1, 1940, in violation of Rule 6 of State Regulations No. 30.

The usual penalty for this violation is ten days.

By entering this plea in ample time before the time fixed for hearing, the Department has been saved the time and expense of proving its case. The license will, therefore, be suspended for five (5) days instead of ten (10) days.

Accordingly, it is, on this 7th day of March, 1940,

ORDERED, that Plenary Retail Distribution License D-59, heretofore issued to Cornelius J. Flore by the Board of Commissioners of the City of Jersey City, be and the same is hereby suspended for a period of five (5) days, effective March 11, 1940, at 2:00 A.M.

D. FREDERICK BURNETT,
Commissioner.

3. ADVERTISING - BASEBALL SCOREBOARD BEARING ADVERTISEMENT OF BEER DISTRIBUTOR - PERMISSIBLE BUT SUBJECT TO QUESTION OF POLICY.

March 8, 1940

Thomas Hutchison, Jr.,
Recorder, Independence Township,
Vienna, N. J.

My dear Mr. Hutchison:

I have before me your letter of March 5th inquiring on behalf of a group of young men (whom I take to be a baseball team) whether a beer distributor may build on a baseball field a scoreboard bearing his advertisement.

Since he could advertise on a billboard, there is no legal objection to such a scoreboard.

Before accepting his offer, however, these young men might well consider whether it is good policy to focus attention upon such an advertisement rather than exclusively upon what their own club has achieved in the way of a score against the visiting teams.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

4. DISCIPLINARY PROCEEDINGS - FAIR TRADE - SALES AT CUT RATES - SECOND OFFENSE.

In the Matter of Disciplinary Proceedings against Charles Maire, 428 East First Ave., Roselle, N. J., Holder of Plenary Retail Distribution License D-3, issued by the Mayor and Council of the Borough of Roselle.	CONCLUSIONS AND ORDER

Charles Maire, Pro Se.
J. Garry Keely, Esq., Attorney for the State Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The licensee has pleaded guilty to a charge of selling liquor at less than the Fair Trade price at the licensed premises on February 10, 1940, in violation of Rule 6 of State Regulations No. 30.

The usual penalty for this violation, upon first offense, is ten days. The Department record discloses, however, that this is the licensee's second offense and that his license was heretofore suspended because of a previous similar violation. The license will, therefore, be suspended for twenty (20) days, less five (5) days for entering this plea in ample time before the day fixed for hearing, whereby the Department has been saved the time and expense of proving its case.

Accordingly, it is, on this 7th day of March, 1940,

ORDERED, that Plenary Retail Distribution License D-3, heretofore issued to Charles Maire by the Mayor and Council of the Borough of Roselle, be and the same is hereby suspended for a period of fifteen (15) days, effective March 11, 1940, at 2:00 A.M.

D. FREDERICK BURNETT,
Commissioner.

5. APPELLATE DECISIONS - FRANCO v. PHILLIPSBURG

HERBERT J. FRANCO and WILLIAM H. SWICK, Appellants,	:	On Appeal
-vs-	:	CONCLUSIONS
BOARD OF COMMISSIONERS of the TOWN OF PHILLIPSBURG, ROY HUFF, and JACOB NUSSMAN, Respondents.	:	

Robert S. Meyner, Esq., for the appellants
Sylvester Smith, Jr., Esq., for the respondent Board of Commissioners
Saul N. Schecter, Esq., by
Leonard M. Cohn, Esq., for the respondent Jacob Nussman

BY THE COMMISSIONER:

Each appellant, by three separate petitions of appeal, appeals from the increase of the Phillipsburg limitation upon the number of plenary retail distribution licenses to be issued, and the granting of the two additional such licenses authorized thereby to respondents Huff and Nussman respectively. At the hearing the six appeals were consolidated into one.

On May 22, 1935, the Board of Commissioners adopted a resolution which provided in part:

> "RESOLVED, that any of the present licenses heretofore issued and granted and not suspended or revoked may be renewed for the premises now licensed but no new license of any class authorized to be issued shall be hereafter issued for any new premises until the number of plenary retail consumption licenses issued and outstanding shall be reduced by revocation or surrender to twenty, and the number of plenary retail distribution licenses issued and outstanding shall be reduced by revocation or surrender to three and the number of club licenses issued and outstanding shall be reduced by revocation or surrender to seven . . . "

On August 16, 1939, at which time there were outstanding thirty-eight plenary retail consumption, three plenary retail distribution and seven club licenses, the Board of Commissioners adopted an ordinance which provided, inter alia,

> "§1. (b) that the number of plenary retail distribution licenses outstanding in the Town of Phillipsburg at the same time shall not exceed five."

Thereafter the additional licenses now protested were issued.

These appeals raise the question as to what public necessity demanded the enabling ordinance and the issuance of two additional licenses?

Phillipsburg is a railroad and manufacturing town having an area of roughly three and one-half square miles, and a population of 19,255 according to the 1930 Federal Census. At the time of the

issuance of the two additional licenses there were outstanding forty-eight licenses, or one license per four hundred population. Since 1935 when the original limit was established, there has been no substantial change in the population, more homes having been razed than built. Industry is practically at a standstill. A large silk industry has disappeared. Trading appears to be done in Easton, a city of forty to fifty thousand, across the river from Phillipsburg. Two of the three distribution licensees make deliveries and some of the consumption licensees conduct a package goods business and so advertise.

Four members of the Board of Commissioners were called as witnesses. Commissioner O'Donnell testified:

"Q Was there any public demand for an increased number of package stores?
A I don't know as there was any public demand.
Q Was there any demand other than by these two applicants and their friends?
A I suppose that is the answer. I don't know that the public were interested that much in whether we had two more or not.
Q Had you received any suggestions from disinterested persons that perhaps they were not getting adequate service?
A No.
Q In your opinion, was the public getting adequate service?
A I presume they were.
Q There is no dearth of places, is there?
A No."

Commissioner Fagan testified that he favored the increase not because he was interested in the number of distribution licenses but because he was interested in increasing the number of club licenses from seven to nine, which was accomplished at the same time that the quota on distribution licenses was increased.

Commissioner Hartman testified that he was interested in having a fourth license issued but disinterested as to the fifth; that his interest in the fourth license was because of "some" public sentiment in favor of it.

Mayor Watson at first favored the amendatory ordinance because of the concomitant increase in the quota of club licenses, but finally voted against the ordinance because he felt there was no necessity for an additional liquor store.

Appellants have sustained the burden of proof that public necessity and convenience did not warrant the granting of two additional plenary retail distribution licenses, at least to the extent that the onus of going forward was shifted to respondents. But respondents produced no testimony tending to establish the reasonableness of the increase in the quota and the public necessity for the additional licenses. For aught that appears, the issuance of the licenses served only the private interests of the individual respondents.

Accordingly, section 1(b) of ordinance adopted August 16, 1939, above quoted, is hereby set aside, vacated and repealed pursuant to the power conferred by R.S. 33:1-41 so far as the above quoted section is concerned.

The amendatory ordinance having been set aside and vacated so far as concerns the issuance of additional plenary retail distribution licenses, it follows that the issuance of such licenses respectively to respondents Huff and Nussman contravenes the prohibition of the resolution of May 22, 1935, limiting such licenses

to three. The action of the respondent Board of Commissioners in granting such licenses to respondents Huff and Nussman is therefore reversed, and said licenses are hereby cancelled and declared null and void and of no force and effect. Operations thereunder shall terminate and cease forthwith.

D. FREDERICK BURNETT,
Commissioner.

Dated: March 11, 1940.

6. DECANTING - REGULATIONS NO. 25 CONSTRUED - PERMISSIBLE TO DECANT WINE FROM GALLON GLASS JUGS.

March 11, 1940

Mr. Joseph A. Liebesman,
Lakewood, N. J.

My dear Mr. Liebesman:

Pursuant to Regulations No. 25 (Pamphlet Rules, page 69), it is permissible for retail licensees authorized to sell alcoholic beverages for on-premises consumption, to transfer wine on the licensed premises from tax-paid barrels, casks or kegs to decanters, bottles or other containers and serve such wine for on-premises consumption, provided the decanter, bottle or other container is labeled as required by Regulations No. 25.

Your inquiry is occasioned, I take it, because the Regulations as written authorize decanting only from barrels, casks and kegs. Technically, a gallon glass jug is not a barrel, cask or keg.

The terms "barrel, cask or keg" are used in the Regulations in their generic sense, as illustrative of the general type of container from which wine may be drawn. They are descriptive and consequently their use does not make barrels, casks and kegs the exclusive containers from which wine may be drawn. They contemplate related things of the same class, such as gallon glass jugs. It is, therefore, permissible to decant wine from gallon glass jugs provided it is done in accordance with the rules.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

7. DISCIPLINARY PROCEEDINGS - ELECTION DAY - 5 DAYS' SUSPENSION.

In the Matter of Disciplinary Proceedings against ARTHUR DEL POMO, 237 So. Orange Ave., Newark, N. J., Holder of Plenary Retail Distribution License D-143, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	CONCLUSIONS AND ORDER

Arthur Del Pomo, Pro Se.
J. Garry Keely, Esq., Attorney for the State Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The licensee has pleaded guilty to the charges of selling an alcoholic beverage on Special Election Day, Tuesday, February 20, 1940, in violation of both Rule 2 of State Regulations No. 20 and of the local municipal regulation.

By entering this plea in ample time before the day fixed for hearing, the Department has been saved the time and expense of proving its case. The license will, therefore, be suspended for five (5) days.

Accordingly, it is, on this 11th day of March, 1940,

ORDERED, that Plenary Retail Distribution License D-143, heretofore issued to Arthur Del Pomo by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for a period of five (5) days, effective March 14, 1940 at 3:00 A. M.

D. FREDERICK BURNETT,
Commissioner.

8. HOURS OF SALE - NO RIGHT IN MAYOR AND POLICE COMMISSIONER TO GRANT DISPENSATIONS FROM HOURS OF SALE FIXED BY LOCAL GOVERNING BOARD - SUCH SPECIAL PERMISSIONS ARE NOT ONLY WORTHLESS BUT WHOLLY ILLEGAL.

March 11, 1940

August J. Perry,
Borough Clerk,
Carteret, N. J.

My dear Mr. Perry:

I have before me your letter of March 1st re disciplinary proceedings against Matthew Kondrk, 52 Wheeler Avenue, charged with sale of alcoholic beverages after 2:00 A.M. on Sunday in violation of local ordinance.

I understand that on the morning in question the Slovak Sokol Club was celebrating the anniversary of the birth of Czecho-Slovakia and in consequence permission to stay open was given to the licensee by Mayor Mittuch and Police Commissioner Cutter who were present at the affair.

You say: "In view of the fact that both the Mayor and Police Commissioner gave special sanction, we see no reason for the charges as instituted by your investigators."

In this you are in error.

So was the Mayor and the Police Commissioner for they had no lawful right whatsoever to give such permission.

The law is clear that when the hours of sale are fixed by an ordinance those hours can be changed only by a formal amendment of the ordinance and this requires the action of the Borough Council and would have to apply to all licensees alike. Consequently the special permission they granted was not only worthless but wholly illegal.

I presume, however, that this permission was given by Mr. Mittuch and Mr. Cutter in the best of good faith and that instead of meaning to usurp the powers of the Borough Council, their hearts were softened by the perfectly understandable desire of the friends of Czecho-Slovakia to give it a boost - even as you and I - and therefore gave an illegal permission without realizing it. I take it also that the licensee relied upon their word in like good faith. Hence it would be unfair to penalize the licensee. For these reasons the charges are now withdrawn.

I would appreciate a personal letter from the Mayor and Police Commissioner to the effect that they now understand the law on this point and that hereafter no special permissions will be given, however worthy the cause.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

9. APPELLATE DECISIONS - ITALIAN AMERICAN CITIZENS CLUB v. GREENWICH TOWNSHIP.

ITALIAN AMERICAN CITIZENS CLUB,)
Appellant,)
-vs-) ON APPEAL
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF GREENWICH (GLOUCESTER COUNTY),) CONCLUSIONS
Respondent)

Morrissey and Dzick, Esqs., by John L. Morrissey, Esq., Attorneys for Appellant.
No appearance on behalf of Respondent.

BY THE COMMISSIONER:

The Italian American Citizens Club appeals from the refusal of the Greenwich Township Committee to grant it a club license.

Appellant first presented its application to the Greenwich Clerk on September 30, 1939 but, on the Clerk's request, did not leave it for filing since the Clerk was uncertain about his authority to accept the application.

Appellant ultimately filed its application on October 7, two days after respondent, at its October 5 meeting, introduced an ordinance prohibiting club licenses in the Township. The first of the two required notices of intention of such application had already been advertised on October 2; the second was advertised on October 9.

On October 16 respondent adopted the prohibitory ordinance; denied appellant's application, and returned the posted fee.

Respondent's authority to adopt the ordinance prohibiting club licenses is clear. The Alcoholic Beverage Law expressly provides that "each municipal governing body may, by ordinance, enact that no club licenses shall be granted within its respective municipality." R. S. 33:1-12(5).

The State Commissioner has no jurisdiction to review the reasonableness of such an ordinance. Cf. Tenenbaum v. Salem, Bulletin 109, Item 1; Re Gordon, Bulletin 151, Item 12.

Appellant contends that, even though the Greenwich ordinance prohibiting club licenses be valid, nevertheless the ordinance is no bar since its application was filed (October 7) before final adoption of the ordinance (October 16) and was denied (October 16) before the ordinance, though then finally adopted, could, since not yet finally published, take legal effect. See R. S. 40:49-2.

Giving appellant the full benefit of viewing its application as filed on September 30 (when originally presented) and hence prior even to introduction of the ordinance on October 5, nevertheless, its contention is without merit. For, while normally an ordinance is not to be given retroactive effect, an ordinance such as the one now under consideration does declare what the municipal policy shall be from then on in respect to the issuance of liquor licenses. If, therefore, such ordinance is in force at the time an appeal case is decided, it is a pertinent factor of heavy moment. For the question which confronts me is - Shall this license be issued NOW?

A similar situation occurred in Franklin Stores v. Elizabeth, Bulletin 61, Item 1. In that case, too, the application was made and denied before the ordinance was enacted. It was there contended by the appellant that such subsequently enacted ordinance did not validate denial of the application; that such an ordinance could not have any retroactive effect; that the appeal must be adjudicated on the factual situation as it existed at the time of the denial of the application.

I there ruled:

> "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.....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."

I therefore held in that leading case that the municipal policy exhibited by the ordinance, properly enunciated and in force at the time of the decision, was the true criterion on which the decision must be based rather than the factual situation as it existed at the time of the denial of the application.

The same result must follow in the instant case.

The same principle has been repeatedly applied. Bumball v. Bernardsville, Bulletin 66, Item 9; Krause v. Freehold, Bulletin 76, Item 8; Zdenek v. Freehold, Bulletin 76, Item 9; Redfern v. Keansburg, Bulletin 81, Item 7; Stein v. West New York, Bulletin 101, Item 7; Tenenbaum v. Salem, Bulletin 109, Item 1; Burdo v. Hillside, Bulletin 191, Item 10; Duffield v. Allenhurst, Bulletin 202, Item 1; Widlansky v. Highland Park, Bulletin 209, Item 7; Cocciolone v. West Deptford, Bulletin 247, Item 3; Galluccio v. Belmar, Bulletin 255, Item 8; Garrison v. Bridgeton, Bulletin 301, Item 3; Schuttenberg v. Keyport, Bulletin 327, Item 3.

The action of respondent is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: March 11, 1940.

10. APPELLATE DECISIONS - McGUIRE vs. PAULSBORO

CHARLES A. McGUIRE, :

Appellant :

-vs- : On Appeal

BOROUGH COUNCIL of the BOROUGH OF PAULSBORO, : CONCLUSIONS

Respondent :

William A. Gravino, Esq., for the Appellant
Charles Camp Cotton, Esq., for the Respondent

BY THE COMMISSIONER:

Appellant appeals the denial of his application for renewal of plenary retail consumption license for premises 233-235 West Adams Street, Paulsboro, for the year 1939-40.

Appellant has held a license for those premises since April 20, 1937. No reason was assigned for the denial but in its answer respondent alleges eight reasons as to seven of which there was no testimony in support.

As to the remaining one, viz., "Appellant has otherwise conducted his said place of business in a manner injurious to the best interests of the community", testimony established that on twelve occasions during the calendar year 1938 the Police Department investigated complaints of disturbances at or in the vicinity of the licensed premises. However, it appears from the records of the Police Department that on ten occasions the complainant was the licensee himself who called the police whenever trouble was brewing. That is what I have always recommended to licensees. Why shouldn't they rather than try to take the law in their own hands. The eleventh involved the licensee only to the extent that the police went to the licensed premises to ascertain whether a colored man who annoyed the complainant was known at the licensed premises. The twelfth involved the licensee not at all, but a doctor by the same name to whom an injured man was taken. The conduct of the licensee in reporting potential disturbances to the police is commendable rather than reprehensible.

In its attempt to sustain the denial the respondent dragged in, among other things, as though the licensee were somehow at fault, a homicide which occurred in June 1937 in which the licensee was involved to the extent of having sold some whiskey to the men who later committed the murder on the other side of town, and a fray in a Chinese restaurant about 200 feet away around a corner, in which one of the licensee's bartenders was shot at.

Applications for renewal licenses may not be denied arbitrarily. No cause appears justifying respondent's action. The action of respondent is therefore reversed and respondent is directed to issue the license applied for.

D. FREDERICK BURNETT,
Commissioner

Dated: March 12, 1940

11. APPELLATE DECISIONS - BRADFORD vs. PAULSBORO

RICHARD H. BRADFORD, trading as ELMIRA CLUB,
Appellant
-vs-
BOROUGH COUNCIL of the BOROUGH OF PAULSBORO,
Respondent

On Appeal

CONCLUSIONS

William A. Gravino, Esq., Attorney for Appellant Richard H. Bradford
Charles Camp Cotton, Esq., Attorney for Respondent Borough Council of Paulsboro

BY THE COMMISSIONER:

Appellant appeals from the denial of his application for a renewal license for the year 1939-40 for premises 12 Mantua Avenue in Paulsboro.

Respondent gave no reason therefor at the time it denied the application.

In its answer to the appeal, respondent alleges several grounds among which is that appellant knowingly misstated a material fact in his application for license.

Question 29 asks: "Have you or has any person mentioned in this application ever been convicted of a crime?"

He answered "No."

The fact is that he pleaded guilty in 1933, in the Gloucester Court of Quarter Sessions for maintaining a disorderly house, whereupon he was fined $175.00.

Appellant explains that he had been employed as a telephone clerk in a bookmaking establishment operated by one Brooks, which was the basis for the indictment to which he pleaded guilty; that he thought that the only crimes which required disclosure were those which involved moral turpitude and that gambling was not such a crime.

There is neither cause nor color in the question asked for any such self-favoring exemptions. The inquiry is -- Have you ever been convicted "of <u>any</u> crime?" His negative answer was false. He knew that he had. Whether the crime for which he was convicted involved moral turpitude or not, his duty was to answer the questions asked without mental reservation or secret evasion of mind whatsoever. It was the province of the Borough Council, not his, to decide whether the crime disqualified him or not. License issuing authorities are entitled at least to know the plain unvarnished truth.

The Borough Council were wholly within their rights in refusing a license to one who trifled with the truth.

Hence it is unnecessary to consider the other grounds.

The action of respondent is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: March 12, 1940

12. DISCIPLINARY PROCEEDINGS - SALES OUT OF HOURS - 10 DAYS.

In the Matter of Disciplinary Proceedings against

THOMAS MESSINA and JOSEPH RUISI, 257 Market Street, Newark, New Jersey,

Holders of Plenary Retail Consumption License C-663, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

Stanton J. MacIntosh, Esq., Attorney for the State Department of Alcoholic Beverage Control.
Michael A. Santa Maria, Esq., Attorney for the Defendant-Licensee.

BY THE COMMISSIONER:

The defendants are charged (1) with selling alcoholic beverages between the hours of 3:00 A.M. and 3:15 A.M., and (2) with permitting the licensed premises to be open between the same hours, on December 14, 1939, in violation of Newark Ordinance No. 3930.

Motion was made for dismissal of both charges on the ground that prosecution of the present proceeding would constitute double jeopardy since a trial of the same offenses, resulting in a suspended sentence, had already been had in Newark Police Court.

The contention is without merit.

Municipal actions against licensees, instituted under penalty clauses of municipal alcoholic beverage regulations, like criminal proceedings under the Alcoholic Beverage Law (see Re Du Pree, Bulletin 108, Item 8), are separate and distinct from disciplinary proceedings. The former are criminal in nature and are aimed at the offending licensee. The latter are civil in nature (Re Cahn, Bulletin 377, Item 7) and are directed mainly against the privilege or license. Since the two proceedings act upon different things and are independent of each other, institution of both, even though they arise from the same transaction, does not constitute double jeopardy. Hence the motion is denied.

At the hearing, Investigator Dixon testified that, on the morning in question, he entered the licensed premises at about 2:58 A.M., sat down at the lunch counter opposite the bar and ordered a sandwich, that a few minutes later he asked Messina, who was behind the bar, if he could have a beer, that the licensee said "Yes" and immediately drew the beer and gave it to him, and that the time was then 3:05 A.M. by his watch, which corresponded with the clock on the tavern wall. Investigator Arts, who was working with Dixon that morning, testified that he entered the tavern at 3:02 A.M., that he sat down alongside of Dixon and ordered a sandwich, that he, observing the sale of beer to Dixon at 3:05 A.M., asked Messina if he could have a beer, that the licensee replied "It is after hours" but nevertheless served him the beer, and that the time by both the clock on the tavern wall and by Arts' watch, which had been checked with Western Union earlier in the evening, was then 3:06 A.M.

A sharply differing account of the events of that morning was told by Messina, Patsy Delli Santi, the bartender, and Harry Dow, a friend of Messina, who was present at the time. Their testimony was substantially in agreement in that Dixon, followed a few minutes later by Arts, both entered the premises before 3:00 A.M., that Delli Santi served Dixon a beer at 2:50 A.M., and another beer to Arts at 2:57 A.M., that the licensee served a second beer to Dixon at 2:57 A.M. or 2:58 A.M., and that no further sale or service of alcoholic beverages was made after that time.

That beer was sold to Investigators Arts and Dixon on the morning of December 14, 1939 is undisputed. The sole issue is: Were the sales made before 3:00 A.M. as related by the licensee and his witnesses or did they take place at 3:05 A.M. and 3:06 A.M. as testified to by the investigators.

I see no reason for disbelieving the investigators' testimony. As sworn officers of the law, they have no personal interest in the matter and have nothing to gain by fabricating fictitious complaints.

I find as fact that alcoholic beverages were sold during prohibited hours. The fact that such sales were made during those hours is sufficient to show that the licensed premises were kept open for the purpose of entertaining customers during the time prohibited by the Newark ordinance.

This is the licensees' first offense of record. The license will be suspended for five (5) days for selling alcoholic beverages after 3:00 A.M. and for an additional five (5) days for keeping the licensed premises open after that hour.

On March 4, 1940 formal endorsement of the license herein involved, pursuant to the procedure set forth in Re Hafner, Bulletin 20, Item 7, was made by the issuing authority showing withdrawal of Joseph Ruisi from the partnership (actual withdrawal had apparently taken place in November 1939) and the continuation of the license in the name of Thomas Messina alone.

Accordingly, it is, on this 11th day of March, 1940,

ORDERED, that Plenary Retail Consumption License C-663, heretofore issued to Thomas Messina and Joseph Ruisi by the Municipal Board of Alcoholic Beverage Control of the City of Newark and now continued in the name of Thomas Messina, shall be and the same is hereby suspended for a period of ten (10) days, commencing March 14, 1940, at 3:00 A. M.

D. FREDERICK BURNETT,
Commissioner.

13. TIED HOUSES - AN EMPLOYEE OF A LIQUOR WHOLESALER MAY NOT HOLD A MORTGAGE ON PROPERTY OWNED BY A RETAIL LICENSEE EVEN THOUGH THE PROPERTY IS NOT PART OF THE LICENSED RETAIL ESTABLISHMENT.

Dear Sir:

I would appreciate if you would inform me as to whether or not an employee of a liquor wholesaler may take back a mortgage on premises which are owned by a retail licensee but which premises do not contain the licensed business.

Very truly yours,
Cohen & Abramson

March 11, 1940

Cohen & Abramson, Esqs.,
West New York, N. J.

Dear Sirs:

The purpose of R. S. 33:1-43 was to divorce completely the manufacture and wholesale of alcoholic beverages from their retail sale in order to prevent the so-called "tied house." Re Princeton Municipal Improvement, Inc., Bulletin 255, Item 1.

In Re Lichtenthal, Bulletin 199, Item 10, I held that a mortgage by a wholesaler on property owned by a retail licensee is prohibited even though the property is not part of the licensed retail establishment, saying: "In the instant case, the wholesaler purposes to get his grip on the retailer by loaning him money on property of the retailer other than the place where the retail business is conducted. What difference is there in principle? Suppose the mortgage was on the retailer's home? The statute is not to be evaded simply because the security offered happens to be unlicensed property. Suppose the collateral were U. S. Treasury Bonds? Would that purge a loan otherwise unlawful? The objective of the statute is to break up financial deals and hog-tied interests between wholesaler and retailer. It is not concerned with the form of the collateral but with the substance of the transaction. A business divorce is in name only when financial intercourse continues wide open. Any other construction will let down the barrier against 'tied houses' and fritter away its purpose by indirection."

Since the wholesaler may not take or hold such a mortgage, neither may his employee. The salutary provision of the law is not so readily disintegrated.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

14. DISCIPLINARY PROCEEDINGS - TIED HOUSES - A WHOLESALER WHO IS AN OFFICER OR STOCKHOLDER OF A CORPORATION OWNING PREMISES LICENSED FOR RETAIL CONSUMPTION MAY NOT LAWFULLY SELL BEER TO TENANTS OF SUCH PREMISES.

In the Matter of Disciplinary Proceedings against

I. J. MILASK,
T/a QUALITY BEVERAGE CO.,
1700 Federal Street,
Camden, N. J.,

Holder of State Beverage Distributor's License No. SBD-140, issued by the State Commissioner of Alcoholic Beverage Control.

CONCLUSIONS AND ORDER

Starr, Summerill & Lloyd, Esqs., by Alfred E. Driscoll, Esq., Attorneys for the Defendant-Licensee.
Richard E. Silberman, Esq., Attorney for the State Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The defendant, a State Beverage Distributor licensee, is charged with violating the Alcoholic Beverage Law, R. S. 33:1-43, by being interested in the respective plenary retail consumption liquor businesses at:

(1) 7 North Forklanding Road, Maple Shade, Chester Township;

(2) 303 Kaighn Avenue, Camden; and

(3) The Spread Eagle Inn, Market Street and Kings Highway, Mount Ephraim Township.

Said R. S. 33:1-43 prohibits a liquor manufacturer or wholesaler, including a State Beverage Distributor (who has, inter alia, the privilege of wholesaling beer) from being interested either "directly or indirectly" in any retail liquor establishment. Re Carabelli, Bulletin 174, Item 15; Re Rosenberg, Bulletin 217, Item 8.

The salutary purpose of this broad prohibition is to prevent liquor manufacturers or wholesalers from controlling and dominating the retailers and thus producing the so-called "tied house", source of so many of the evils which led to Prohibition. See Re Princeton Municipal Improvement, Inc., Bulletin 255, Item 1.

As to charges (1) and (2): The defendant is President and a minority stockholder in the Dots Securities Corp., which, since 1936, has owned premises at 7 North Forklanding Road, Maple Shade, Chester Township. He is also President and a minority stockholder in the Exchange Securities Co., which, since 1937, has owned premises at 303 Kaighn Avenue, Camden. Both places, since time of their acquisition by these companies, have been conducted as taverns by tenants holding plenary retail consumption licenses. Defendant has sold beer to both of these tenants.

Since a liquor manufacturer's or wholesaler's ownership of a retailer's premises (except where such ownership existed on December 6, 1933, when the Alcoholic Beverage Law took effect) constitutes a forbidden interest in the retail establishment contrary to

R. S. 33:1-43, hence, were the defendant, in lieu of the corporations, personally the owner of the said retail premises since 1936 and 1937 respectively, such ownership by him would of itself constitute a violation of R. S. 33:1-43. Goldstein v. Trenton, Bulletin 54, Item 1; Lucidi v. Trenton, Bulletin 54, Item 6.

There is no less a violation where the defendant, as here, instead of personally owning the said retail premises, is president and (albeit minority) stockholder in the corporations owning them. He is vested, both by virtue of his office as president and also by reason of his stock ownership, with a control over those retailers which is wholly contrary to the spirit and letter of R. S. 33:1-43. Even though the corporations may be technically the owners of the retail premises, nevertheless the retailers, in point of practical reality, deal, not with corporations in the abstract, but with the men who constitute and run them. In so dealing with the defendant, they are subject to his pressure.

That the defendant, who has sold beer to both the said retail establishments, may actually not have exercised any influence over or sought to impose any beer purchasing agreement upon those establishments, is immaterial save as to penalty. The statute wisely seeks to prevent even the potential situation where a manufacturer or wholesaler may exert influence or control.

Hence, I find the defendant guilty on charges (1) and (2).

As to (3): When the agents of this Department were investigating the facts on which the above two charges were based, Harry Mendell, Secretary-Treasurer and holder of one-third of the shares of stock of the Exchange Securities Co. (and also its attorney), signed a statement on September 5, 1939 declaring that that company owned fixtures and personal property at the licensed retail liquor establishment at the Spread Eagle Inn, Mount Ephraim Township, and that the retail licensee there had, for more than two years, been paying $15.00 per month for use of those fixtures and personal property.

Like ownership of a retail liquor dealer's premises, so too a liquor manufacturer's or wholesaler's ownership of the fixtures and personal property at the retailer's establishment constitutes a forbidden interest therein under R. S. 33:1-43. Cf. Re Carabelli, supra; Re Rosenberg, supra. It follows, under the principles set forth in discussion of charges (1) and (2), that a manufacturer or wholesaler commits a violation when, although not himself owning the fixtures and personal property, he is President and stockholder of a corporation owning them.

Hence I would, if the facts set forth in Mr. Mendell's statement were true, find the defendant, who is President and minority stockholder in the Exchange Securities Co., guilty of charge (3).

However, Mr. Mendell, at the hearing in this case, testified that, when making his statement to the investigators, he was merely relying upon his memory; that he has, on resorting to the original records, discovered that the true facts are that, in August 1936, he personally lent $500.00 of his own money to one Thorman, a previous licensee at the Spread Eagle Inn, and took as security a chattel mortgage on the fixtures and personal property there; that thereafter he foreclosed upon the mortgage and bought in the property at the foreclosure sale; that the premises remained idle for six months thereafter; that the present licensees then moved in and, on July 10, 1937, leased the fixtures and personal property from him for $15.00 per month.

In explanation of his error, Mr. Mendell (who apparently dominates and runs the Exchange Securities Co., although the defendant is President thereof) testified that, as a personal convenience to himself, he had been depositing in the company's account, withdrawable at his will, the monies received by him on the original chattel mortgage and on the present lease of the fixtures and personal property; that it has been a regular practice with him thus to deposit (and withdraw) monies obtained by him from various of his personal transactions; that, when speaking with the investigators, he had forgotten whether the transaction concerning the fixtures and personal property at the Spread Eagle Inn were his own or the company's.

He corroborated his story by producing the original chattel mortgage, (recorded in Camden County on August 27, 1936), an authenticated copy of the bill of sale on foreclosure of the mortgage (said bill being dated December 17, 1936), and the lease (dated July 10, 1937).

I believe him.

Charge (3) is, therefore, dismissed.

For the defendant's guilt on charges (1) and (2), I shall, treating as a mitigating circumstance the fact that, so far as appears, he used no influence or control over the retailers in question, suspend his license until he severs his connection with the Dots Securities Corp. and the Exchange Securities Co. but in no event for a period of less than five days.

Accordingly, it is, on this 11th day of March, 1940,

ORDERED, that State Beverage Distributor's License No. SBD-140, heretofore issued to I. J. Milask, T/a Quality Beverage Co., by the State Commissioner of Alcoholic Beverage Control, be and the same is hereby suspended until Milask severs his connection out and out with the said Dots Securities Corp. and the Exchange Securities Co., but in no event for less than five (5) days, commencing March 18, 1940.

Commissioner.