COMMISSCONER DURNETT
SENT TO REGULAR MAILING LIST

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

BULLETIN NUMBER 95. November 13, 1935.

1. APPELLATE DECISIONS - NORTH HUDSON YACHT CLUB v. EDGEWATER.

NORTH HUDSON YACHT CLUB, INC., a corporation of New Jersey,

Appellant,

-vs-

MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF EDGEWATER (BERGEN COUNTY),

Respondent

ON APPEAL
CONCLUSIONS

. . . . . .

Armstrong & Mullen, Esqs., by Arthur C. Mullen, Esq., Attorneys for Appellant.

Milton T. Lasher, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a club license for a houseboat anchored 700 feet from the shore line in the Hudson River, opposite #1321 River Road, Edgewater.

Section 22 of the Control Act provides, in part:

> "Every applicant for a license shall cause a notice of intention to make such application to be published in a form prescribed by rules and regulations, once a week for two weeks successively in a newspaper, printed in the English language, published and circulated in the municipality in which the licensed premises are located; provided, however, that if there shall be no such newspaper, then such notice shall be published in a newspaper, printed in the English language, published and circulated in the county in which the licensed premises are located; ***"

Appellant's notice of intention was advertised in a newspaper published in the City of Hackensack. There is a legal newspaper published in Edgewater. The advertisement was not therefore in compliance with Section 22. This is a fatal defect. See Trotto v. Trenton, Bulletin #46, Item #11.

Furthermore, not only was appellant's application unsigned, and therefore a legal nullity, but it was not filed for a considerable period of time after the second advertisement of the notice of intention, contrary to Rule #1 of the rules governing advertising of notice of intention, Bulletin #72, Item #2, which provides that: "Application for license must be filed

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Furthermore, not only was appellant's application unsigned, and therefore a legal nullity, but it was not filed for a considerable period of time after the second advertisement of the notice of intention, contrary to Rule #1 of the rules governing advertising of notice of intention, Bulletin #72, Item #2, which provides that: "Application for license must be filed

with the issuing authority at or before the first insertion of advertisement."

In view of the foregoing, it is unnecessary to consider the interesting question of whether a municipal issuing authority has jurisdiction to issue a retail license for a boat permanently anchored in the navigable waters of the State. See Ross v. Mayor etc. of Edgewater, 115 N.J.L. 477 (Sup. Ct. 1935).

The action of respondent is affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: November 7, 1935.

2. APPELLATE DECISIONS - BLATT v. RANDOLPH TOWNSHIP.

ISAAC BLATT,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF RANDOLPH (MORRIS COUNTY),)
Respondent.)

. . . . . .

Morris H. Saltz, Esq., Attorney for Respondent.

No Appearance in behalf of Appellant.

BY THE COMMISSIONER:

This is an appeal from the revocation of appellant's plenary retail consumption license #C-18 for premises located at Main Road, Mount Freedom, Randolph Township, and known as "Doc's Tavern", on the grounds that appellant had sold alcoholic beverages to minors in violation of the Control Act and had conducted the licensed premises in a disorderly manner so that they became a nuisance, in violation of Rule #5 of the State rules concerning conduct of licensees and the use of licensed premises, Bulletin #48, Item #1.

After numerous requests for adjournments had been granted the case was peremptorily set down for hearing for Monday, November 4th, 1935, and notice thereof sent to all parties. At the time and place fixed for hearing neither appellant nor anyone on his behalf appeared and no explanation was offered for his failure to appear.

Pursuant to Rule #10 of the rules governing appeals, Bulletin #81, Item #13, the appeal is dismissed for lack of prosecution.

D. FREDERICK BURNETT
Commissioner.

Dated: November 7, 1935.

3. UNLAWFUL PROPERTY - CONFISCATION PROCEEDINGS - DETERMINATIONS.

#1655

In the Matter of the Seizure on May 23, 1935, of certain alleged distilling apparatus, part or parts thereof, and other personal property including three motor vehicles contained on premises known and designated as 56 Market Street, City of Trenton, County of Mercer, State of New Jersey.

On Hearing

CONCLUSIONS, DETERMINATIO AND ORDER

Appearances:

Edgar T. Cohen, Esq., for Herman Gordon, Louis Gordon, and Mrs. M. Gordon.

M. C. Mawhinney, Esq., for General Motors Acceptance Corporation.

This matter comes before the Commissioner in accordance with the provisions of the Alcoholic Beverage Control Act, to determine whether the property described below constitutes unlawful property.

Notices of the hearing were duly posted, published and mailed, as provided by said Act, and a hearing was held on June 21, 1935, and concluded July 11, 1935. The facts and circumstances as disclosed at said hearing are substantially as follows:

On May 23, 1935, Investigators of this Department, in conjunction with Police officers of the City of Trenton, seized a number of stills or still parts, and other personal property, as well as three motor vehicles, in premises known and designated as #56 Market Street, in the City of Trenton, County of Mercer and State of New Jersey. A description of the seized property is set forth in an inventory thereof admitted in evidence. The three motor vehicles are described as follows:

1 Ford Coupe, Serial No. A-4547744

1 Chevrolet Coach, Serial No. 2B.A.0652352, N. J. 1935 registration L-23532

1 Ford Roadster, Serial No. A-3166966

Part of the seized property was exhibited at the hearing, photographs thereof were admitted in evidence, and from the testimony of the investigators of this Department, Federal officers familiar with the erection and operation of stills, and from visual observation, it satisfactorily appears that the same are still parts. The witnesses likewise identified many other parts listed on the inventory of the seized property as being still parts; none of the said still parts were registered with the Department of Alcoholic Beverage Control and the same were possessed in violation of the provisions of the "Act Concerning Alcoholic Beverages".

The building in which the still parts were seized is used as a shop and the property seized, in addition to the above mentioned still parts, consisted of tools, material and equipment used in the manufacture of such still parts as well as some property used in a radiator repair business conducted in the same building. The three motor vehicles seized were found in the same building.

It is, therefore, on this 8th day of November, 1935, ADJUDGED and DETERMINED that all of the seized property above described constitutes unlawful property and is hereby declared forfeited.

At the hearing counsel entered an appearance for Betty Gordon, the registered owner of the Ford Coupe, and Joseph Bronick, the registered owner of the Ford Roadster, and claim was made by them for the return of the said motor vehicles. The said Betty Gordon and Joseph Bronick testified that they had left their respective vehicles in said building for the purpose of having same repaired. It does not appear that either Betty Gordon or Joseph Bronick was connected with the manufacture of still parts or knew that said building was being used in the manufacture or storage of still parts in violation of the provisions of the "Act Concerning Alcoholic Beverages". The said motor vehicles will therefore be returned to the said Betty Gordon and Joseph Bronick upon the payment by them of their respective part of the costs due, paid or incurred in connection with such seizure.

At the hearing counsel entered an appearance for Louis Gordon, the lessee of the premises where the seizure was made. He stated that he was the owner of all the seized property, with the exception of the three motor vehicles, and made claim for the return of the said property on the ground that he had been legitimately engaged in the manufacture of still parts up to July, 1934, at which time he discontinued such manufacture; that the seized property consisted of odds and ends left over from said manufacturing business and one or two parts returned by one Manning, for whom he had manufactured a still; that all of the seized still parts were junk, and that he did not know he was required to register the same with the Department of Alcoholic Beverage Control, and that he had acted in good faith and had unknowingly violated the provisions of the "Act Concerning Alcoholic Beverages".

The evidence offered by claimant in support of his contention was generally to the effect that in December, 1933, he had engaged in the manufacture of stills or still parts; that his son, Herman Gordon, was in charge in his absence; that claimant terminated said business in July, 1934, at which time there remained no still or still parts on said premises; that Herman Gordon thereafter went into the business of repairing radiators.

It is admitted that Federal authorities made a seizure on said premises in December, 1934; it appears that said seizure consisted of a truck load of approximately five ton of old and new still parts, the removal of which left no still parts on the premises; that on May 23, 1935, the instant seizure was made, which again included a large number of old and new still parts; that in December 1934, Federal officers, and in May 1935, Investigators of this Department, observed Herman Gordon in charge and employees actively engaged in the manufacture of still parts; that on February 4, 1935, Louis Gordon and Herman Gordon were

billed for a large quantity of copper; and that between October 2, 1934 and April 25, 1935, five lots of wooden packing cases were billed to City Auto Radiator Works, the name under which Herman Gordon was doing business. It was testified that on the first order for said boxes, the measurements were taken by the box manufacturer under the direction of Herman Gordon from still parts on said premises, and that all of said packing cases were for the purpose of encasing still parts. It further appears that Patrick Manning denied that he had returned any still parts to Louis Gordon.

No satisfactory explanation is offered by claimant as to the repeated finding of still parts on his premises after the date he claims to have discontinued manufacturing still parts; both Louis Gordon and Herman Gordon persisted in denying that the manufacturing of still parts had been engaged in as testified to by the officers, and Herman Gordon denied that either the copper or the packing cases had been received or purchased by him.

The evident refusal of the claimant to make a frank disclosure of the business conducted by him, and the blank denial of the truth of the forceful evidence that he had been engaged in the manufacture of still parts after July, 1934, leads to the conclusion that claimant has not acted in good faith and that he is not an innocent party. His claim will be denied.

A claim was made by Herman Gordon, the registered owner of the seized Chevrolet Coach, for the return of same to him on the ground that he conducted a radiator repair shop in a portion of the building and had no connection with the other activities carried on therein. What has been said as to the claim of Louis Gordon applies with equal force to Herman Gordon, and his claim will likewise be denied.

At the hearing M. C. Mawhinney, entered an appearance for the General Motors Acceptance Corporation, which filed a claim as the holder of a conditional sales contract made by Herman Gordon covering the Chevrolet Coach seized. The proof presented by the corporation discloses that there is a balance due and owing to said corporation on such contract in the sum of $127.24, and that the corporation had no knowledge of the unlawful use to which the motor vehicle was put, and that prior to the acceptance of such contract it caused an investigation to be made, which investigation disclosed no facts which would have led a person of ordinary prudence to discover such use. The claim of said General Motors Acceptance Corporation will therefore be recognized to the extent of $127.24, subject to the payment by it of its part of the costs due, paid or incurred in connection with such seizure.

It appears that the record owner of said premises is Harry Havenson, who did not appear at the hearing, notwithstanding due notice of such hearing to him, and no cause being shown to the contrary, the Commissioner will exercise the power given him under the Control Act to restrict the use and occupation of the property.

It is therefore ORDERED that the Ford Coupe be released and relinquished to the claimant, Betty Gordon, upon payment by her of her respective part of all costs due, paid or incurred in connection with such seizure, and

It is further ORDERED that the Ford Roadster be released and relinquished to the claimant, Joseph Bronick, upon

payment by him of his respective part of all costs due, paid or incurred in connection with such seizure, and

It is further ORDERED that the Chevrolet Coach shall be sold at public sale for the use of the State, subject to rules and regulations to be announced at the sale, or retained for the benefit of State institutions, and

It is further ORDERED that out of the proceeds of the sale of the Chevrolet Coach there shall be first deducted all costs due, paid or incurred in connection with such seizure, chargeable to the General Motors Acceptance Corporation, second, there shall be paid out of the balance, if any, to said General Motors Acceptance Corporation its claim by way of lien recognized to the extent of $127.24, and third, the balance, if any, of the proceeds of such sale, after the payments aforesaid, shall be retained for the use of the State of New Jersey, and

It is further ORDERED, that the balance of the seized property above described shall be retained for the benefit of State institutions, or may be destroyed in whole or in part at the direction of the Commissioner, and

It is further ORDERED, that the premises in or on which such unlawful property was located when seized, consisting of a one-story building erected on premises known and designated as No. 56 Market Street, in the City of Trenton, County of Mercer, and State of New Jersey, shall not be occupied or used for any purpose whatsoever for a period of six months, commencing on the 20th day of November, 1935, and terminating on the 20th day of May, 1936.

D. FREDERICK BURNETT
Commissioner

4. LICENSE APPLICATION HEARING - RE PASSAIC ELKS

In the Matter of the Application of Passaic Lodge No. 387 B.P.O. Elks for a Club License at 111 Passaic Avenue, Passaic, New Jersey

CONCLUSIONS

Thomas E. Duffy, Esq., Attorney for applicant

Gardner and Lindstammer, Esqs., by Walter Gardner, Esq., Attorneys for objectors.

BY THE COMMISSIONER:

Application for a club license was filed by the Passaic Lodge #387 B.P.O. Elks with the Commissioner because three of its members are members of the issuing authority of Passaic. See P.L. 1934, c. 44.

Objections were filed to the granting of the application on the ground that the premises sought to be licensed are located in a residential area and within 200 feet of a church and hearing thereon was duly held.

It appears that the premises sought to be licensed are located in a highly residential area and directly opposite the First Reformed Church of Passaic. Rev. Edward Dawson, Pastor of the First Reformed Church testified that his congregation, which includes many residents of the vicinity, is strongly opposed to the granting of the application. John A. Doolittle, a witness on behalf of the objectors, testified that the distance from the property line fronting the entrance of the church and the property line fronting the nearest entrance of the premises sought to be licensed, is less than 200 feet. Anthony E. Petterson, a witness on behalf of the applicant, however, testified that the distance from the entrance door of the church to the nearest entrance door of the premises sought to be licensed, measured in the manner that a normal person would properly walk, was in excess of 200 feet. At the conclusion of the hearing, the applicant was advised that it would be afforded a reasonable opportunity to obtain from the issuing authority of Passaic a resolution expressing either approval or disapproval of its application. Thereafter, the matter was presented to the Board of Commissioners of Passaic and the certificate of the City Clerk reports the following action:

> "Commissioner Whitehead made a motion that the Board of Commissioners of the City of Passaic are opposed to the granting of a license for the sale of alcoholic beverages at the premises located at 111 Passaic Avenue. On call of roll,
>
> Yeas -2 - Van Houten and Whitehead;
> Excused -2 - Martini and Turner;
> Absent -1 - Roegner."

Although P.L. 1934, c. 44 seeks to eliminate decisions by members of an issuing authority on applications in which they are interested, it does not contemplate that the Commissioner may, in such cases, issue municipal licenses in opposition to justifiable local policies. Accordingly, the Commissioner's rules expressly provide that such applications must be accompanied by a resolution of the municipal issuing authority setting forth that it has no objection to the issuance of the license applied for and consents thereto. See Bulletin #75, Item #13; Bulletin #83, Item #3; Bulletin #86, Item #9.

The Commissioner has repeatedly sustained denials by municipal issuing authorities of applications for licenses for premises located in residential areas. Cf. Vannozzi vs. Trenton, Bulletin #35, Item #7:

> "A zoning ordinance restriction, however, is not necessary to justify respondent's action. The neighborhood is admittedly residential and the sale of alcoholic beverages therein is not desirable. See Speake vs. Mayor and Borough of Closter, decided on April 4, 1954 by the New Jersey Supreme Court (not reported) where the Court said:
>
> > 'Long before the Eighteenth Amendment was ever contemplated, the sale of malt liquors was not favored in residence districts. It was a well-recognized fact that the very character of a place licensed for the sale of alcoholic beverages, whatever the content, changed the character of the neighborhood.....'

"The fact that appellant conducted his business prior to the enactment of the Zoning Ordinance enables him, under the terms thereof, to continue it or change to any other business in which he has a right to engage. A license to sell alcoholic beverages is not a right, however, but a privilege which may be denied for just cause. See Moss & Convery vs. Municipal Board of Alcoholic Beverage Control of Trenton, Bulletin #29, Item #12. The strictly residential character of the neighborhood in which the premises sought to be licensed are located, was sufficient cause for the denial of the privilege sought."

In Re Cranford American Legion Holding Co. Inc., Bulletin #83, Item #3, application was made to the Commissioner pursuant to P. L. 1934, c. 44 for a club license. The municipal issuing authority disapproved the application mainly on the ground that the premises sought to be licensed were located in a residential area. The Commissioner denied the application and said:

"Without going into the questions arising out of the zoning ordinance or of the alleged non-conforming use or of the existence of the clubhouse or the operation of the club previous to the adoption of the zoning ordinance, the application must be denied because the rule has not been complied with. The object of the law which requires application to be made to the State Commissioner when a member of an applicant for a license is also a member of the municipal governing body or other license issuing authority is to eliminate self-interested decisions. The object of the rule requiring municipal consent in such cases is not to escape but to enforce local sentiment. The action of the Township Committee in refusing to approve the issuance of a license in a residential neighborhood is reasonable. Hence, the rule must be enforced."

Irrespective of appellant's failure to comply strictly with the rules, the application must be denied because of the residential nature of the locality where the premises sought to be licensed are located and the objections of the nearby residents and members of the congregation of the First Reformed Church. The action taken by the Board of Commissioners indicates that there is substantial sentiment in that body to the same effect.

In view of the foregoing conclusion, no determination need be made on the issue of whether the premises sought to be licensed are located within 200 feet of a church within the meaning of section 76 of the Control Act.

The application is, therefore, denied.

In view of the exemplary conduct of the applicant while this case was pending on its merits, the special permit heretofore granted the applicant is hereby extended for the period of ten (10) days to enable applicant to dispose of the stock of liquor on hand pursuant to the terms of the special permit, provided, however, that no further supplies of liquor shall be purchased or otherwise acquired in the meantime. The special permit will, therefore, expire at midnight, November 19th, 1935.

D. FREDERICK BURNETT
Commissioner

Dated: November 9, 1935.

5. APPELLATE DECISIONS - FAFALAK v. BAYONNE

FRANK FAFALAK, Appellant, -vs- BOARD OF COMMISSIONERS OF THE CITY OF BAYONNE, Respondent.	)	ON APPEAL CONCLUSIONS

Irving Meyers, Esq., Attorney for Appellant.

Alfred Brenner, Esq., by William Rubin, Esq., Attorney for Respondent.

William Harris, Esq., by Irving E. Gennet, Esq., Attorney for the United Liquor Dealers' Association.

BY THE COMMISSIONER:

This is an appeal from the denial of appellant's application for a transfer of his plenary retail consumption license from premises located at #21 East 17th Street to #442 Broadway, Bayonne.

Respondent contends the application was properly denied, among other reasons, because appellant had improperly conducted his licensed business at #21 East 17th Street. These premises are now closed and appellant is not conducting any business there.

A Bayonne detective assigned to investigate the application for transfer, testified that as a result of his investigation he ascertained that appellant's place had a bad reputation in the neighborhood for morality; that reputed prostitutes plied their trade there, and drunks were robbed. The evidence also established that appellant's bartender had distributed business cards advertising the tavern and bearing disgustingly indecent pictures.

Appellant denies that he had improperly conducted his business, that he had permitted prostitutes upon his licensed premises, and that he knew about or authorized the circulation of the business cards. The self-contradictory and inherently improbable explanation offered by the bartender, however, is unconvincing and gives rise to a clear impression that he is merely trying to shield his employer.

His attorney argues, however, that this is neither an application for renewal nor a revocation proceeding, and that if appellant's conduct is not so bad as to preclude him from operating a place of business at all, that such conduct should not bar an application for transfer. He overlooks, however, that appellant is invoking the exercise of a discretionary power to accord him a privilege not inherent in his license to have the same transferred to other premises. No licensee has a right to a transfer of his license. It is at most a privilege which the issuing authority may grant or deny in the exercise of a reasonable discretion. The situation came to the attention of the local issuing authority by virtue of appellant's application for transfer. Upon learning of the manner in which appellant had conducted his business, respondent could not do more in these proceedings than to deny the application. Steps to revoke the license could be taken only by a separate proceeding instituted in accordance with Section 28. Respondent may hereafter institute such proceedings if in its discretion it deems such action advisable, or if appellant should attempt to reopen his place of business at #21 East 17th Street. The denial of appellant's present application is no bar to the institution of such revocation proceedings.

The action of respondent is affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: November 11, 1935.

6. APPELLATE DECISIONS - GALE vs. NEWARK and MATLAGA.

JEROME GALE,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF NEWARK, and NICHOLAS MATLAGA,)
Respondents.)
- - - - - - - - - -)

Arthur Warner, Esq., Attorney for Appellant.

Raymond Schroeder, Esq., Attorney for Respondent Board,

Frank I. A. Kent, Esq., Attorney for Respondent Nicholas Matlaga.

BY THE COMMISSIONER:

This is an appeal from the action of respondent Board in renewing, for the current license period, the plenary retail consumption license held by respondent-licensee for premises at #191 Sherman Avenue, Newark.

Appellant contends that the renewal was improperly issued because (a) Respondent-licensee has been convicted of a crime involving moral turpitude and is therefore disqualified; (b) Respondent-licensee had improperly conducted his business under his prior license and is therefore unfit to receive a renewal.

(a) In March, 1935, respondent-licensee was convicted of assault and battery and placed on probation for one year to pay $1.00 a week. The conviction is now under appeal. The assault occurred during a heated and noisy argument over payment of a painting bill. The licensee was found guilty of using undue force in ejecting the painter's wife from the licensed premises. There was nothing to indicate premeditation; there were mitigating circumstances. The licensee has been punished for his use of excessive force. The question before me is whether the conviction involved moral turpitude. In Federko v. Piscataway, Bulletin #85, Item #4, I determined that a conviction for simple assault and battery which was unpremeditated, without malice, and which occurred in the heat of an excited moment, did not involve moral turpitude. So here, I must conclude that respondent-licensee's conviction did not.

(b) The contention that respondent-licensee improperly conducted his business under his prior license rests solely upon the testimony of the person who was assaulted as above set forth and two of her friends, one being appellant. Their testimony, naturally interested, partisan, and in many respects obviously exaggerated, cannot overcome the police report filed with respondent issuing authority by the Newark Police force that respondent had properly conducted his business and the corroborating testimony of several reputable witnesses who so testified from personal experience. Appellant's second contention is not sustained.

One further matter remains to be considered. During the course of the hearing it appeared that the licensee had stated in his application that he had not been convicted of any crime. When questioned about this misstatement he explained that he had had his application filled out at the Newark City Hall by a Notary Public; that as the questions were read to him he answered them; and that the Notary Public wrote the answers on the application. He further explained that when the question as to conviction for crime was asked of him he told the Notary of the facts surrounding the assault, and that the latter advised him it was not necessary to include that in his answer; that he relied on the Notary's knowledge and advice, and that therefore the fact of conviction was omitted. At a supplemental hearing called for the purpose the Notary appeared personally and testified in substantial corroboration of respondent-licensee's statement, explaining that due to the latter's inept command of the English language he, (the Notary) had the impression that it was a civil assault and not a criminal case. This is the one point in the case that troubles me. I don't like these obvious "outs". Licensees are to obey the law and make applications which are absolutely true. They are not to run out on the alibi of "advice". The only good advice is to comply strictly with the law. Poor advice is no defense. Of course, it falls on grateful ears when it enables the licensee to refrain from disclosing something which he fears might prevent the issuance of his license! He must have known he had been convicted of a crime else why mention it to the Notary at all! If he didn't make it clear, that was his own fault. It was his duty to see to it, at his peril, that true answers to every question asked

in the application were fully made. The questionnaire is designed to get the facts, not the advice of a Notary. If the crime thereby concealed had involved any elements of moral turpitude, I would cancel this license. I am minded to do so anyway simply because it is false. I refrain only because I think the licensee has been punished enough on account of this assault and because the conviction would not necessarily have disqualified him even if it had been truly stated. Hereafter, it will go hard with him or any other licensee who makes false answers, whether with or without advice, or whether the crime involves moral turpitude or not. I am not condoning the false answer. It is open to the Newark Board, if they desire, to take proceedings against this licensee because of his false answer. If they penalize him, I shall endorse the action.

As the case stands before me at this juncture, the action of the respondent Board is affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: November 11, 1935.

7. APPELLATE DECISIONS - CONTI v. MONTVALE

BART CONTI,

Appellant,

-vs-

BOROUGH COUNCIL OF THE BOROUGH OF MONTVALE (BERGEN COUNTY),

Respondent.

ON APPEAL
CONCLUSIONS

Frank J. Raia, Esq., Attorney for Appellant.

Charles Schmidt, Esq., Attorney for Respondent.

Major, Back & Carlsen, Esqs., by Vincent F. X. Carlsen, Esq., Attorneys for Objecting Neighbors.

Baldwin, Hutchins & Todd, Esqs., by John S. Wise, Esq., Attorneys for the Mary Hilliard Home.

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail consumption license for premises located at Summit Avenue near Main Street, in the Borough of Montvale.

Respondent contends the application was properly denied for the reason, among others, that the location of the premises sought to be licensed rendered the issuance of a license socially undesirable.

Appellant's premises are located in a rural district immediately adjacent to property owned by the Mary Hilliard Society, which conducts thereon a charitable summer camp for children between the ages of five and eighteen. The only separation between the two premises is a wire fence. The children play on all parts of the Society's grounds, which extend very close to the building in which appellant proposes to sell alcoholic beverages. Indeed, the camp's playhouse is only 60 feet therefrom. The Society, as well as numerous persons residing in the vicinity, objected to the issuance of a license to appellant for these premises.

The determination by the Borough Council that the issuance of a license at that place was socially undesirable, is justified by the evidence.

The action of respondent is affirmed.

Dated: November 11, 1935.

D. FREDERICK BURNETT
Commissioner.

8. REVOCATIONS PROCEEDINGS - VIOLATION OF RULE #4 CONCERNING GANGSTERS AND RACKETEERS - THE DUTCH SCHULTZ CASE

The decision of the Municipal Board of Alcoholic Beverage Control of the City of Newark is the first of its kind in the State and is, therefore, reprinted for the information and convenience of other issuing authorities.

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL
OF THE CITY OF NEWARK, NEW JERSEY.

In the Matter of revocation proceedings against Jack Freedman and Louis Rosenthal, operating premises known as Palace Chop House & Tavern, No. 12 East Park Street, Newark, N. J.	On notice to show cause why license should not be suspended or revoked.

CONCLUSIONS AND ORDER.

A p p e a r a n c e s:

FRANK A. BOETTNER, Esq., Corporation Counsel,
RAYMOND SCHROEDER, Esq., Asst. Corporation Counsel,

Representing the City of Newark.

MESSRS. GLICKENHAUS & GLICKENHAUS,
JACOB S. GLICKENHAUS, Esq. (Present),

Attorneys for the licensees.

BY THE BOARD:

This is a hearing to show cause why plenary retail consumption license No. C-819, issued to Jack Freedman and Louis Rosenthal, should not be suspended or revoked for violation of the Alcoholic Beverage Act of the State of New Jersey and the

rules and regulations promulgated thereunder by the Commissioner of the State of New Jersey Department of Alcoholic Beverage Control and by the City of Newark, New Jersey, as follows:

That they did, from October 10, 1935, to October 23, 1935, inclusive, violate Rule 4 of the "Rules Concerning conduct of licensees and the use of licensed premises," promulgated by the State Commissioner of Alcoholic Beverage Control on October 8, 1934, Bulletin 48, Item 1, which reads as follows:

> "Rule 4. No licensee shall allow, permit or suffer in or upon the licensed premises, any known criminals, gangsters, racketeers, pickpockets, swindlers, confidence men, prostitutes, female impersonators, or other persons of ill repute."

That they did employ in the licensed premises one Vittorio Salvatore Lovallo, a minor of the age of sixteen years, without first having obtained a special permit for that purpose as provided by Section 23 of the Alcohol Beverage Control Act of the State of New Jersey and the rules and regulations promulgated pursuant thereto by the State Commissioner of Alcoholic Beverage Control on August 1, 1935, in Bulletin 82, Item 10.

A notice to show cause, returnable November 6, 1935, was duly served on Jacob S. Glickenhaus, Esq., attorney for the licensees, on November 1, 1935, directing them to show cause why plenary retail consumption license No. C-819, granted them by the Municipal Board of Alcoholic Beverage Control of the City of Newark, should not be suspended or revoked for violation of the provisions set forth above.

The testimony heard in this matter before the Municipal Board of Alcoholic Beverage Control of the City of Newark on November 7 and November 8, 1935, showed that on the evening of October 23, 1935, four persons were shot and fatally wounded in the licensed premises; that of these four men fatally shot, at least one, Arthur Flegenheimer, alias Dutch Schultz, was a well-known criminal and person of ill repute, and that he had frequented the licensed premises from October 10 to October 23, 1935.

While the employees denied that they knew the identity of Dutch Schultz before the shooting, evidence was introduced by inspectors of the State Department of Alcoholic Beverage Control that these employees had admitted to them that they had served Dutch Schultz during this period and knew who he was. Jack Freedman, one of the licensees, admitted that on October 20 he had knowledge of the presense of Dutch Schultz in the licensed premises on October 19, and he knew of the ill repute of the said Dutch Schultz, and had decided that he was to be barred from the licensed premises in the future, but that he failed to order his employees to bar this undesirable character from the licensed premises, and also failed to notify his partner of his knowledge, as a result of which the said Dutch Schultz was permitted in the licensed premises on the evening of October 23, at which time he was shot and fatally wounded, together with three companions. This shooting occurred at approximately ten-fifteen p.m., and Jack Freedman was present in the licensed premises from 8:50 p.m. that night, being in charge of the licensed premises from that time until closing.

With respect to the second charge in the notice to show cause, the testimony shows that Louis Rosenthal, one of the

licensees, did engage for employment in the licensed premises one Vittorio Salvatore Lovallo, a minor, aged sixteen, who testified under oath to his age, without making any effort to ascertain the true age of the said Lovallo; and no permit for engaging this minor was secured from the State Department of Alcoholic Beverage Control.

Since it is a well-known fact that places where persons of the type of Dutch Schultz congregate are often the scenes of gangster feud shootings, the Board feels that the licensees, by knowingly permitting Schultz to frequent these premises, endangered the lives of reputable citizens who patronized the establishment, and therefore finds the licensees guilty of violation of Rule 4 as charged.

The appearance of the minor employee Lovallo on the stand indicated to the Board that he was not of age, and should have been sufficient notice to the licensees to make further inquiries to ascertain his true age before engaging him; and the Board therefore finds the licensees guilty of violating Section 23 of the Alcoholic Beverage Control Act of the State of New Jersey and the rules and regulations promulgated pursuant thereto by the State Commissioner of Alcoholic Beverage Control on August 1, 1935, in Bulletin 82, Item 10.

It is therefore on this 8th day of November, 1935,

ORDERED that the plenary retail consumption license No. C-819 granted by the Municipal Board of Alcoholic Beverage Control of the City of Newark, New Jersey, to sell alcoholic beverages at 12 East Park Street, in the City of Newark, New Jersey, be and the same is hereby revoked.

WITNESS OUR HAND AND SEAL this 8th day of November, A. D. 1935,

JOSEPH W. O'LOUGHLIN
Chairman, Municipal Board of Alcoholic Control of the City of Newark, N. J.

Attest:

H.S. Reichenstein
Secretary

9. REVOCATION PROCEEDINGS - AD INTERIM RESTRAINT - WHEN GRANTED

JACK FREEDMAN and LOUIS ROSENTHAL,	)	
	)	ON APPEAL
Appellants	)	ON PETITION TO STAY THE JUDGMENT OF REVOCATION AND PERMIT APPELLANTS TO OPERATE UNDER LICENSE UNTIL THE APPEAL CAN BE HEARD ON THE MERITS.
-vs-	)	
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF NEWARK,	)	
Respondent.	)	

For the Appellants: Jacob S. Glickenhaus, Esq.

For the Respondent: Raymond Schroeder, Esq.

BY THE COMMISSIONER:

The Control Act provides (Sec. 28) that the appeal from a revocation or suspension shall act as a stay pending the determination thereof unless the Commissioner shall otherwise order.

The policy of the Commissioner in making such orders is illustrated by the case of Romeiko vs. Town of Kearny, Bulletin 57, item 13, where a revocation was reversed because no notice of the charge was ever served upon the appellant and he was not afforded any opportunity to be heard.

So again, in the Show Boat case, an order was entered staying the revocation because it appeared in the moving papers that the license had been revoked on the mere submission of affidavits without opportunity afforded to the licensee to cross-examine the affiants and that the licensee was not confronted with any witnesses against him.

So, in cases arising under Sec. 19, providing for appeals from the refusal to issue a license, the same principle has been involved, that is, that an order of ad interim restraint will be issued when it appears that the action of the respondent issuing authority is prima facie erroneous, but otherwise it is refused.

Applying this principle to the instant case, the appellants have had a fair trial and the situation boils down to a conflict of evidence and a question of veracity. Appellants allege that witnesses were called and their testimony impeached without following the usual legal procedure, but eliminating the testimony of those witnesses, the candid admission of the appellant, Jack Freedman, is that he surmised on October 20th, or three days before the shooting, that it was Dutch Schultz who was frequenting his tavern. Mr. Glickenhaus frankly admitted that the basis of his appeal is not that there was no evidence to sustain the verdict reached by the Newark Board, but rather that he disagreed with the verdict and thought it was contrary to the weight of the evidence.

The decision of the Newark Board, as the record is presented, is prima facie correct and not prima facie erroneous. This does not mean, of course, that the respondent will necessarily win on the appeal. It does mean that the burden of proof will be upon appellants to establish that the verdict was erroneous and it also means that until that is proved, I will not interfere with the action of the City of Newark. There is no such proof before me now. Hence, the application must be denied.

An order will be entered accordingly.

D. FREDERICK BURNETT
Commissioner

Dated, November 11th, 1935.

11. APPELLATE DECISIONS - MARSTELLER vs. HAGENBUCHER and SOMERS POINT.

HOWER T. MARSTELLER,)
Appellant,)
-vs-) ON APPEAL CONCLUSIONS
RICHARD J. HAGENBUCHER, operating as DICK'S BAR, and COMMON COUNCIL OF THE CITY OF SOMERS POINT,)
Respondents.)

Edison Hedges, Esq., Attorney for Appellant.

Lewis P. Scott, Esq., Attorney for Respondent, Richard J. Hagenbucher.

No appearances for Respondent Common Council of the City of Somers Point.

BY THE COMMISSIONER:

This is an appeal by respondent taxpayer of Somers Point from the renewal of a plenary retail consumption license issued to respondent Hagenbucher for premises located on Shore Road in Somers Point.

Appellant contends the issuance of the license was illegal, because one of the members of the City Council who participated in the deliberations of the Council with reference to the application and who voted in favor thereof was employed at the time by the licensee.

At the hearing of the appeal, the licensee admitted that he had employed one Harry Smith, a member of the Common Council of Somers Point, and his wife, for the past few years up to and including the date his license was issued, and thereafter; the City Clerk testified that this Councilman voted in favor of the application; that the vote of the Council was unanimously in favor thereof; and that when proceedings were instituted to suspend the licensee's prior license, Councilman Smith was the only Councilman opposed.

A member of an official body who has a personal pecuniary interest in the action of that body may not participate in that action. Re Loog, Bulletin #39, Item #3. This fundamental rule has been consistently applied. Re Bischoff, Bulletin #53, Item #5; Re Gnichtel, Bulletin #80, Item #7; Re Brundage, Bulletin #84, Item #17; Re Siracusa, Bulletin #89, Item #9.

As was said in Re Brundage, supra:

> "The primary duty of enforcing the alcoholic beverage control act was placed on local municipal officials. That duty should be their first concern. It must be their only concern when the image of self-interest collides with that duty. The employee, however well intentioned, must economically heed his master's voice or lose his job. He cannot serve the public and a conflicting private interest at the same time. He must renounce one or the other."

In the language of Mr. Justice Heher in Stevens v. Haussermann, 113 N. J. L. 162, 172 Atl. 178 (1934);

> "Generally, public policy forbids the participation of a member of a municipal governing body in any matter before it which directly or immediately affects him individually. * * *It is supported by a two-fold reason, viz., first, the participation of the disqualified member in the discussion may have influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision. It being impossible to determine whether the virus of self-interest affected the result, it must needs be assumed that it dominated the body's deliberations and that the judgment was its product."

Although the vote of Councilman Smith was not essential to the issuance of the license, his participation invalidated its issuance.

It further appears that the licensee, in his application for a renewal, stated that he had never been convicted of a crime. The record shows that on February 20, 1934, he pleaded non vult to an indictment for keeping slot machines and received a suspended sentence. Section 22 of the Control Act provides that any person who shall knowingly misstate any material fact, under oath, in an application, shall be guilty of a misdemeanor, and that suppression of material facts in the securing of a license is ground for revocation thereof. In Rayfield v. Conover, Bulletin #65, Item #2, the denial of an application containing a wilfully false answer was sustained.

Respondent attempted to explain his false answer. He said he did not understand his plea of non vult to be a conviction. We shall not argue legal niceties. He did know there was something criminal about it. Instead of stating the facts, he answered in the negative. He thereby avoided the necessity of making an explanation of his conviction but, by the same token, rendered his license void.

The action of respondent is reversed. The license issued to respondent Richard Hagenbucher is hereby declared void. All activities thereunder must cease forthwith.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 12, 1935.

11. REFERENDUM - SUNDAY SALES - EFFECT OF AFFIRMATIVE VOTE - POWER TO FIX REASONABLE HOURS OF SUNDAY SELLING NOTWITHSTANDING REFERENDUM.

November 9, 1935.

Mr. Marvin L. Howell,
Clerk of Ewing Township,
R. D. 1, Trenton, N. J.

Dear Mr. Howell:

I have your telegram of November 8th reading:

"This is to officially notify you that on Tuesday November fifth Nineteen thirty five a referendum vote in compliance with State laws resulted in favoring Sunday selling the vote yes twelve ninety no eleven naught eight What is position of present ordinance which specifies open five PM Sunday Does vote for Sunday selling automatically open saloons twenty four hours Prompt reply needed.

Marvin L. Howell, Clerk Ewing Township."

In reply I wired you on the same day:

"Your old ordinance was superseded by the referendum nevertheless you may by new resolution fix reasonable hours of Sunday selling Letter follows.

D. Frederick Burnett Commissioner."

The affirmative vote on the referendum in favor of Sunday sales removed all restrictions against Sunday sales. Re Runnemede, Bulletin 47, Item 7. It cleared the slate of all previous ordinances and resolutions including the resolution of April 20, 1934, which fixed the opening hour on Sundays at 5 p.m. Assuming that the question submitted on referendum was in the statutory language "Shall the sale of alcoholic beverages be permitted on Sundays in this municipality?", the only way to give full effect to the wishes of the majority who are in favor of it is to regard that referendum as wiping out and extinguishing every existing prohibition. Since the resolution fixing your opening hour on Sunday was in effect a prohibition against any Sunday sales until 5 P. M., it fell as a result of the referendum.

The referendum, however, need not necessarily be construed as a mandate for unrestricted Sunday sales. Re Way, Bulletin 58, Item 6. The Control Act, Sec. 44, as now amended, does not necessarily or automatically mean that saloons must be open twenty-four hours on Sunday. The statute reads that "if the majority of the legal voters voting upon said question shall vote 'Yes',.....the sale of alcoholic beverages on Sundays pursuant to the provisions of this act shall be permitted in said municipality." (Italics mine). The Act elsewhere provides, Sec. 37, that the governing board of each municipality may limit the hours between which the sales of alcoholic beverages at retail may be made subject to appeal to the State Commissioner. Hence, notwithstanding the referendum, reasonable hours of sale may still be fixed by your governing body. If those hours are reasonable and constitute regulation merely, I shall uphold them. If, on the other hand, they amount to prohibition, then I am duty bound, in response to the declared wishes of the electorate, to reject them.

In short, while the referendum wiped the slate clean of all then existing prohibitions, it did not bar a new resolution regulating Sunday selling by fixing reasonable hours as distinguished from virtual prohibition.

Very truly yours,

D. Frederick Burnett

Commissioner