

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

BULLETIN 282.

November 22, 1938

1. ADVERTISING - ADVERTISEMENT OF THE PRICE PER DRINK IS PERMISSIBLE -
HEREIN OF THE DIFFERENCE BETWEEN PRICE FIXING AND PRICE
MAINTENANCE.

November 14, 1938.

Sidney Simandl, Esq.,
Newark, N. J.

My dear Mr. Simandl:

I have before me your letter of October 28th, and have examined the enclosed business card containing prices of sandwiches and drinks. The prices are very low - so low that there is no question but what it cheapens the industry to give, for instance, a ten ounce glass of beer for a nickel or a glass of Calvert for a dime. I find nothing, however, in violation of either the Alcoholic Beverage Law or the State Rules.

Rule 3 of the Rules Governing Signs and Other Advertising Matter prohibits retail licensees from directly or indirectly advertising the price of any alcoholic beverage being sold for on-premises consumption on the exterior of the licensed premises or on the interior when visible from the street. It contemplates the use of signs on or attached to premises. Re Quality House, Bulletin 280, Item 2. It does not forbid newspaper advertising or the distribution of business cards or circulars advertising the price of alcoholic beverages through the mail or from door to door, provided the subject matter is proper and the distribution is in conformance with the Rules. See Re Ostrov, Bulletin 153, Item 1; Re Advertising Distributors of America, Bulletin 173, Item 17.

Rule 3 was designed to put an end to the price sign abuse which created so serious a problem not so long ago. But that problem, you will remember, arose from retailers plastering their windows with offensive and unsightly signs. The rules were not intended to eliminate all advertisement of price. The abuse was confined to the signs, hence, so was the rule.

The gist of your complaint is the price of drinks sold over the bar for on-premises consumption. I have no jurisdiction to fix the price per drink. That is a matter of economics - not of control. If your thought is to handle such matters similarly to the Fair Trade regulations, the trouble is - who would fix the price? Under ~~the~~ statute my powers are confined, as they should be, to price maintenance, which is a radically different thing from price fixing.

Until an evil or abuse presents itself and necessitates regulation, I am not inclined to add to the rules already burdening licensees, either by extending the scope of existing regulations so as to include anticipated evils or by promulgating new ones.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

New Jersey State Library

2. TRANSFERS - REGULATIONS NO. 3 - APPLICATION FOR TRANSFER MUST BE ACCOMPANIED BY CERTIFICATE FROM STATE TAX COMMISSIONER - WHERE LICENSE IS TRANSFERRED NOTWITHSTANDING ABSENCE OF SUCH CERTIFICATE REVOCATION PROCEEDINGS WILL BE INSTITUTED.

October 18, 1938.

Hon. J. Lindsay de Valliere,
Director, State Tax Dept.,
Beverage Tax Division,
Trenton, N. J.

Dear Director:

Rule 3 of Regulations No. 3, promulgated by the Commissioner, provides that where a proposed transferee seeks transfer of a license, his application therefor must be accompanied by an appropriate certificate from the State Tax Commissioner certifying "that the transferring licensee is not delinquent in the payment of any tax or in the filing of any report required by the provisions of the Alcohol Beverage Tax Act". Where a license is transferred to an applicant who has not complied with the aforementioned rule, the Commissioner has power under Section 28 of the Control Act (now R.S. Sec. 33:1-31), after proper hearing, to revoke or suspend the license.

Accordingly, you are advised that upon receipt of certification from your Department that a municipal issuing authority has transferred a license to an applicant who has not complied with Rule 3, this Department will communicate with the transferee and afford him a reasonable opportunity to effect such compliance. In the event that he fails to do so within the time stipulated, disciplinary proceedings will be instituted.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

By: Nathan L. Jacobs,
Chief Deputy Commissioner
and Counsel.

3. STATE BEVERAGE DISTRIBUTORS - SAMPLING OF CHILLED BEER IS NOT PERMISSIBLE IN SALESROOM OR SHOWROOM.

Dear Commissioner:

May a State beverage distributor take premises adjacent to those now occupied by him and use same as a showroom for the purpose of inviting thereto prospective customers to sample his beer which he will maintain at the proper temperature so as to exhibit to the prospective customer the finer qualities of his beer if maintained in a manner exhibited by him? The State beverage distributor who propounds this question to me desires to use this as part of his sales promotion in a showroom separate and apart from his ordinary business.

If he can do so, this State beverage distributor will, of course, comply with the rules of your department in so far as reporting and filling out the proper papers for this showroom.

Very truly yours,

Glickenhau & Glickenhau

November 14, 1938.

Glickenhauß & Glickenhauß, Esqs.,
Newark, N. J.

Gentlemen.

Unless the beer were chilled, as your client proposes, to the proper temperature, it would make an unpalatable sample and its alleged finer qualities would not be appreciated by prospective customers.

But right here comes the difficulty. For the license of a State Beverage Distributor authorizes the sale of unchilled malt beverages only. Moreover, the quantity must not be less than 144 fluid ounces. R.S. 33:1-11 (Control Act, Sec. 12(2)c).

The law specifically declares that the term "sale" includes "the gratuitous delivery or gift of any alcoholic beverage by any licensee." R.S. 33:1-1 (Control Act, Sec. 1(v)).

Passing the question of the customer's capacity to down something over a gallon, which makes a sizable "sample", the fundamental barrier is that such a distributor may not make any gratuitous delivery or gift of malt beverages except, as aforesaid, they be unchilled.

Hence, the serving of chilled beer to prospective customers by a State Beverage Distributor licensee is not permitted either on his licensed premises or in a separate showroom and even though the beer so served is not "sold" in the ordinary sense but is intended only as a sample.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

4. LICENSES - SPECIAL CONDITIONS - FORBIDDING OPERATION OF FASCIST, COMMUNIST OR NAZI CAMP OR BUND - CONSIDERATIONS INVOLVED.

November 15, 1938

G. Arnold Conant,
Clerk of Fredon Township,
Newton, N. J.

My dear Mr. Conant:

You tell me that issuance of license to Fritz F. Haussler, trading as Forest Inn, was made subject to the special condition that "no Fascist, Communist or Nazi Camp or Bund shall be operated on the premises", because Haussler was **formerly** connected with Camp Nordland and the Bund and that the Township Committee thought that "the best way to stop such things was to stop them before they got started as this is a rural American community."

Haussler's record, I take it, is clear and he is worthy and otherwise well qualified, or else no license at all would have been granted.

The special condition imposed on his license is the first of its kind submitted for approval. It gives me grave concern. I do not want to establish a precedent which might be invoked later on to justify similar exclusion of a Jewish, Catholic or Protestant Society. Neither do I want to do anything that might seem to encourage swastikas, goose-stepping and Nazi salutes or to condone the barbarous atrocities now rampant in Germany.

We must not, however, let flaming indignation sear our judgment. We must not do here the very thing we condemn abroad.

Savagery feeds on reprisals. Like begets like. The Golden Rule will never prevail except by force of example.

Of course, if subversive doctrines are preached or practiced on the licensed premises, State rules will be immediately enacted and rigidly enforced, competent to nip them in the bud, and there will be no pussyfooting on that score.

In the meantime, as the matter now stands and in the name of tolerance, the special condition is disapproved.

Very truly yours,

D. FREDERICK BURNETT,
Commissioner.

5. ADVERTISING - "TIE-UP" ADVERTISING - SCOPE AND EXTENT TO WHICH PERMISSIBLE.

November 18, 1938

Bergen Evening Record,
Hackensack, N. J.

Gentlemen:

I have yours of November 10th and tear sheet from your November 4th issue, illustrating adjacent ads of Mission Bell Wines and the Gold Seal Liquor Co., a local retailer, which you refer to as "tie-up" advertising.

Mission Bell has a right to advertise on its own account as much as it pleases. Assuming that its advertised prices are not in conflict with the Fair Trade regulations, I see nothing wrong whatsoever with the particular advertisement.

Nor is there anything wrong with the advertisement of the Gold Seal Liquor Co., who state that they are agents for Mission Bell wines. The fact that their ad is underneath and immediately adjacent to the Mission Bell advertisement is immaterial.

There is no objection to so-called "tie-up" advertising as such. Hence, if the Mission Bell advertisement is paid for by the vintner or by the wholesaler and that of the Gold Seal Co. by the retailer, there is no violation of the State Rules and Regulations whatsoever.

In reaching the foregoing conclusions, I am aware of the trade practice of many manufacturers and wholesalers in all lines to furnish general advertising in aid of local distributors, and that it might well be thought that such advertising is, in a sense, in conflict with Regulations 21, which prohibit manufacturers and wholesalers from furnishing advertising matter (except to the annual extent of \$50.00) to a retail licensee.

True it is that the general advertisement by Mission Bell, which describes its products, states their prices and declares that these wines are "now on sale at your package store", enures to the benefit of the local distributor. It saves him, obviously, from saying the very thing that Mission Bell has said. Such an advertisement, however, also enures to the benefit of the vintner and the wholesaler like any other general advertisement. It is designed to acquaint the reading public with the wares and to bespeak their talking points and to create consumer demand. There is no mention in it, however, of the Gold Seal Company or of any other distributor. Intrinsicly and on the face of it, there is no "tie-up" with any particular distributor. The fact that it also helps a distributor is a mere incident - a consequence which naturally flows from all general advertising, whether it be national, semi-national, or local. So does every billboard which carries a general message. If the Mission Bell advertisement appeared on a separate page of the newspaper, no question could be raised as to its propriety. So, if it were on the same page but separated from the distributor's own advertisement. Yet in each case the distributor would incidentally benefit. The fact that the two advertisements are placed immediately adjacent to each other does not make unlawful that which a difference of an inch between would make permissible! The regulations are not designed to accomplish arbitrary and unreasonable results. When an interpretation would lead to an absurd result, that of itself indicates that such is not the true intent and meaning. As the matter stands, and as the regulation is properly construed, there is no violation.

It would be a horse of another color, however, if Mission Bell paid, not only for its own advertising, but also for that of the local distributor. In that event the Regulations fix \$50.00 as the maximum amount of advertising matter which may be furnished by a manufacturer or wholesaler to a retailer.

Very truly yours,
 D. FREDERICK BURNETT,
 Commissioner.

6. COURT DECISIONS - NEW JERSEY SUPREME COURT - MORGAN v. BURNETT - RE RUNNEMEDE REFERENDUM.

EDWARD J. MORGAN,)
)
Prosecutor,)
- vs -)
D. FREDERICK BURNETT, State Com-)
missioner of Alcoholic Beverage)
Control, and the BOROUGH OF)
RUNNEMEDE,)
)
Defendants)
-----))

Argued May 5, 1938; decided November 16, 1938.
 On certiorari.
 Before Brogan, Chief Justice, and Justices Bodine and Heher.
 For the prosecutor: Harry Grossman.
 For the defendant, D. Frederick Burnett, State
 Commissioner, &c.: Nathan L. Jacobs.
 For the defendant, Borough of Runnemedede: S. Lewis Davis.
 The opinion of the court was delivered by

HEHER, J.

In 1934, at a referendum election held pursuant to section 44 of the act relating to alcoholic beverages (Pamph. L.1933, pp.1180,

1211, as amended by Chapter 257, Pamph. L. 1935, p. 818; Rev. Stat. 1937, §3:1-47), the electors of the Borough of Runnemede, in the County of Camden, resolved in the negative the question of whether the sale of alcoholic beverages should "be permitted on Sundays" in the municipality.

At a meeting held on September 30, 1937, the municipal governing body adopted a resolution directing the resubmission of the identical question to the voters of the municipality at the ensuing general election. The referendum was had accordingly; and the question was answered in the affirmative.

The resolution of resubmission was based upon a petition filed with the governing body under section 44 of the beverage control act, supra, signed by the requisite number of qualified electors, requesting a referendum on the question of whether the sale of alcoholic beverages should "be permitted on Sundays in the municipality after 1:00 P.M.;" and on December 27, 1937, the Commissioner of Alcoholic Beverage Control, in response to the borough clerk's request for his "opinion on the whole matter, that is in regard to the question submitted, and the legal hours of sales now in this Borough on Sunday," advised the clerk by letter that, in view of the failure of the governing body to submit the question demanded in the petition, the referendum was "void and of no effect," and therefore the "previous referendum", held in 1934, resulting in a prohibition of Sunday sales of alcoholic beverages, "has never been superseded," and "no sales of alcoholic beverages may be lawfully made at any time on Sundays in Runnemede."

The return shows that on Sunday, January 2, 1938, representatives of the defendant commissioner "explained" to prosecutor, the holder of a plenary retail consumption license issued by the local governing body, that "there was some controversy" relating to "the wording on the ballot concerning open Sunday and until the matter was definitely settled licensed premises should remain closed on Sunday as the licensee would be subject to revocation proceedings and might lose the license for the premises;" that the "licensee was responsible for the conduct of his premises and he would have to decide for himself if he wanted to be subject to revocation proceedings;" and that prosecutor expressed his "desire to do what" the defendant-commissioner "desired," and informed them that he "would immediately close," and acted accordingly.

Prosecutor maintains that the questions of the validity of the referendum, and the binding force of the result, are not subject to collateral attack --- citing State, ex rel. Love v. Freeholders of Hudson County, 35 N. J. L. 269; O'Donnel v. Dusman, 39 N. J. L. 677; Conger v. Convery, 52 N. J. L. 417; Winters v. Warmolts, 70 N. J. L. 615; Long Branch v. Sloane, 49 N. J. L. 356; Camden v. Mulford, 26 N. J. L. 49, 58.

It is the insistence of the defendant commissioner, on the other hand, that the referendum "was void on its face," in that a petition for the submission of that particular question was a jurisdictional prerequisite, and the whole proceeding is therefore a nullity -- citing App. v. Stockton, 61 N. J. L. 520; Garron v. Martin 26 N. J. L. 594; State v. Mayor and Aldermen of Jersey City, 36 N.J.L. 188.

There is no occasion to consider this question. The return reveals no action reviewable on certiorari.

It is stipulated that, following the reply to the clerk's inquiry, to which we have adverted, the defendant commissioner, through his investigators, notified the local licensees, including prosecutor, "of the contents of his letter" to the clerk, and

advised them that, in the event of Sunday sales of alcoholic beverages, "he would cause proceedings to be instituted for violation of the Control Act;" that prosecutor "thereafter kept his licensed place of business closed on Sundays;" and that "no other judicial proceedings have been instituted by the defendant" commissioner, "or the Borough of Runnemede or any other person to determine the validity of the referendum." The return shows that the commissioner's representatives were not authorized to direct the closing of prosecutor's place of business on Sundays; nor did they do so. As pointed out, he was distinctly informed that "there was some controversy" respecting the validity of the referendum, and that it was his responsibility, as the licensee, to determine upon a course of action.

And so the commissioner did not, in the matter complained of, profess to exercise authority conferred by section 36 of the Beverage Control Act, supra. He did not undertake to review the referendum proceedings; nor did he, by word or deed, lay claim to or indicate an assumption of such judicial authority by virtue of his office. He merely expressed, in compliance with the municipal clerk's request for an expression of his view, the opinion that the election was void, and therefore afforded no justification for Sunday sales of alcoholic beverages. It was neither a judicial determination nor an administrative act subject to review by certiorari. He went no further than to say that, such being his opinion, Sunday sales would impose upon him the duty of action as for violation of the law. In venturing this opinion, he was exercising a right common to all --- i.e., to disregard an action that, for jurisdictional lack, is a nullity, and therefore subject to collateral attack. Maguire v. Van Meter, 121 N. J. L. 150.

It is the settled rule in this court that "certiorari will not lie to revise or correct erroneous opinions, however hurtful they may be to individuals concerning whom they are expressed. An order, judgment or determination affecting the rights of prosecutors is necessary as a foundation for the use of the writ. * * * The writ of certiorari cannot be used to draw judicial opinions in advance or to affect adjudications of subordinate tribunals." Newark v. Fordyce, 88 N. J. L. 440; Livingston v. Rector, &c., of Trinity Church, 45 N. J. L. 280; Drake v. Plume, 44 N. J. L. 362; Watson v. Medical Society of New Jersey, 38 N. J. L. 377.

The desire of prosecutor to have a judicial review of the opinion thus given is understandable; but it would be a decided innovation --- at variance with settled principles that make for orderly administration of justice --- to anticipate, on the basis of a mere expression of opinion as to the state of the law or its application to the facts of a given case, the ultimate action of a statutory tribunal in the exercise of judicial or quasi-judicial powers after hearing had on notice to the parties.

There is therefore no occasion to express an opinion on the validity or effect of the last referendum; and we reserve that question.

The writ is accordingly dismissed, but without costs.

7. APPELLATE DECISIONS - GRANDA v. ROCKAWAY TOWNSHIP.

ANDREW M. GRANDA,)
 Appellant,)
 -vs-)
 TOWNSHIP COMMITTEE OF THE)
 TOWNSHIP OF ROCKAWAY,)
 Respondent)

ON APPEAL
CONCLUSIONS

 Samuel C. Meyerson, Esq., Attorney for Appellant.
 Elden Mills, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from denial of a plenary retail consumption license for premises located on the main road leading from Rockaway to Mount Hope, in the Township of Rockaway.

Respondent denied the license, claiming that the location of the licensed premises is residential and unsuited for business; that the issuance thereof would be hazardous to traffic; and that a licensed premises is sufficiently near to serve the needs of the community.

Appellant has rented the first floor of a two-story house, fixed it up "ready for a tavern" and installed a bar. This section of the Township is not closely built up, there being about forty homes within a radius of a mile. The nearest objector resides about one-eighth of a mile away and another objector is developing a section of the Township about one-half of a mile away. Since it is admitted that nearly all licenses outstanding have been issued in similar residential sections, the denial cannot be sustained on that ground.

The evidence as to an alleged traffic hazard is not sufficient to sustain the denial. There is a space of forty-five feet in front of appellant's premises which may be used for parking; other premises which have been licensed are closer to intersections of roads which carry heavier traffic.

Respondent has adopted no ordinance or resolution limiting the number of licenses which may be outstanding. It appears, however, that consumption licenses have been issued for premises about one mile away in the direction of Mount Hope, and also for premises about three-quarters of a mile away in the direction of Rockaway Borough. There are a total of thirteen consumption, one club and two seasonal licenses already outstanding in the Township, which has a population of but three thousand. In the absence of strong evidence to the contrary, it would appear that there is no need for an additional license in the Township.

Appellant testified:

"I don't depend on the neighbors for a nickel's worth of business. I depend on outside trade."

It appears that quite a few people travel on the road on which appellant's premises are located to and from Picatinny Arsenal, located several miles away. The needs of transients may be taken into consideration in determining whether an additional license should be issued, but the primary consideration is the need of the

residents of the community. Levitt v. Liberty, Bulletin 169, Item 4; Bialoglow v. Independence, Bulletin 254, Item 7. Appellant has failed to sustain the burden of proof in showing that an additional license is necessary to supply the needs of the community or of transients passing through the community.

It has not been denied that prior to making application appellant asked the Chairman of the Township Committee if he could have a tavern and that he was told to go right ahead because there was no ordinance. The Chairman testified that subsequent investigation led him and the other members of the Township Committee to reach the conclusion that the license should be denied. The Chairman is but one member of the Township Committee. The governing body can act only as a board and then only by a majority vote. Expressions of an individual member are, therefore, not binding on the governing board. Consequently, there is no estoppel. Cf. Stein v. West New York, Bulletin 101, Item 7.

In fairness to applicants, members of issuing authorities should refrain from expressing advance opinions which may well lead applicants to incur unnecessary expenses.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 18, 1938.

8. APPELLATE DECISIONS - WILSON v. HIGHLANDS.

ZEPHA WILSON,)	
)	
Appellant,)	
)	
-vs-)	ON APPEAL
)	CONCLUSIONS
BOROUGH COUNCIL OF THE BOROUGH)	
OF HIGHLANDS,)	
)	
Respondent)	

George R. Sommer, Esq., Attorney for the Appellant.
William A. Stevens, Esq., Attorney for the Respondent.

BY THE COMMISSIONER:

This appeal is from a refusal to renew appellant's plenary retail consumption license for premises located at 25 Cedar Street, Borough of Highlands.

Appellant has operated a tavern at these premises since July 1934. The tavern is a converted dwelling house, with a main entrance on Cedar Street and a rear entrance on a narrow, unnamed public thoroughfare. It consists of two rooms, one of which contains a player piano and a victrola. The neighborhood is residential in character, summer bungalows being the predominant type of dwelling. On Cedar Street, across from the tavern, there is an empty lot which is used by appellant's patrons as well as by residents in the vicinity for parking their automobiles.

When appellant applied for a renewal of his license for 1936-7, residents in the immediate vicinity objected that the tavern was disturbing the neighborhood. The objection was dropped, and a

renewal granted, on appellant's assurance that he would "cut down" on the noise at the tavern and that "all music and annoyance to the public would be stopped at a reasonable hour." These neighbors protested against a renewal of appellant's license for the current fiscal year on the ground that the tavern is again disturbing the neighborhood.

One such resident, who lives directly behind the vacant lot opposite from the tavern, testified at the hearing on appeal that there are "always fights and rows outside" the tavern; that he has seen "drunken people going in and out of the place"; that patrons who park their automobiles in the vacant lot return to them at late hours, use noisy, filthy language, and use the lot as a toilet; that there is loud and boisterous singing, yelling and playing of the piano and victrola in the tavern "around two or three o'clock in the morning"; that he called the police several times in 1937, and also on or around June 25, 1938, to quell disturbances at the tavern between 2:00 and 4:00 A.M. His wife, who corroborated his testimony, further stated that she once witnessed "three or four fellows (patrons from the tavern) attack a girl right on the back seat of a car" in the vacant lot; that during the summer of 1938, two men from the tavern accosted her at night while she was returning to her home from a store, and "one of them put his arms around my neck and what he said to me wasn't very nice."

Another nearby resident testified that she has seen persons leaving appellant's premises drunk in the early morning hours; that there have been "free-for-all" near the tavern; that patrons have parked their cars on her grounds, and have used her yard as a toilet; that the tavern has remained open after 3:30 and 4:00 A.M. despite the local three o'clock closing hour then in effect; that throughout the year, there have been loud noises, singing and music from the tavern until 3:30 or 4:00 A.M.; that on June 25, 1938, the noise both "inside" and "outside" the tavern was "terrible." Her stepson corroborated her testimony.

Another nearby resident testified that there was a fight at the vacant lot during the evening hours of June 24 or 25, 1938; that the persons then went into the tavern; that the tavern grew noisy until and after 4:00 A.M.; that four or five patrons came into her yard and "committed a nuisance there", yelled "dirty things" to her when she objected, and then staggered down the street.

The police officer who patrols the neighborhood in question testified that residents therein have complained to him about the tavern; that he was called several times during the last two years to quiet the disturbances going on there; that he witnessed street quarrels outside the tavern which he had to break up; that at 2:30 A.M. on June 25, 1938, he received a complaint of noise at the tavern; that he thereupon warned the appellant's bartender to "cut down on the noise and close up the windows and doors"; that he returned to the tavern every half hour (until at least 4:00 A.M.); that at 4:00 A.M. the place was still open and music going on "but not so loud."

Appellant denied that his tavern unduly disturbed the neighborhood. Various members of six households in the immediate vicinity testified on his behalf to a similar effect. However, appellant admits that the police several times were called to quell disturbances outside the tavern, and that he kept the tavern open until "sometimes four" (during the period ending June 28, 1938, when closing hour in the Borough was 3:00 A.M.). One of his witnesses admits that he has seen fights "on Cedar Street and in the (vacant) lot"; another admits that he has seen fights in the neighborhood.

The testimony of the objecting residents, together with the corroboration of the police officer and the admission by appellant and his witnesses, convinces me that the tavern has been creating undue disturbance to the neighborhood.

A licensee who locates his tavern in a residential district is under a strict duty to cause no disturbance to the residential quiet and decency of the neighborhood. Where, as here, he violates that duty after having previously allayed objection to his license by assurances of "keeping the peace", the local issuing authority is neither arbitrary nor unreasonable in refusing to renew his license. Cf. Callahan v. Keansburg, Bulletin 204, Item 6.

The action of respondent is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 18, 1938.

9. DISCIPLINARY PROCEEDINGS -- NEWARK LICENSEES - REMAINING OPEN AFTER HOURS - HEREIN OF INSURANCE AND SODA.

In the Matter of Disciplinary Proceedings against

HERMAN WEITZMAN,
25 Birks Place,
Newark, N. J.,

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption License No. C-970, Issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

Samuel B. Helfand, Esq., Attorney for the State Department of Alcoholic Beverage Control.
Sidney Simandl, Esq., Attorney for the Licensee.

BY THE COMMISSIONER:

The defendant, a Newark licensee, is charged with keeping his tavern open after 3:00 A.M. on Friday, August 12, 1938, in violation of Newark Ordinance 6579, which forbids licensed premises (with certain exceptions here not material) from being open between 3 A.M. and 7 A.M. on week days.

At about 3:20 A.M. of the Friday in question, Officers Faerber and Nygard of the Newark police, while cruising in their radio car, were attracted to the defendant's tavern by the sight of a small group of persons congregated in front of it and by the fact that the tavern seemed more brightly lighted than would be the case if it were closed. Accordingly, the officers stopped the radio car to investigate. Officer Faerber went to the front door of the tavern but found it locked. He testified that he then peered into the interior over a curtain on the door, noted that a ceiling light was lit inside, and saw the defendant behind the bar, another man (named Schoen) in front of it, and what appeared to be two empty glasses on the bar between them; that he shouted to the defendant to close the tavern since it was after hours; that the defendant then extinguished all lights save the night light and went out the back door with Schoen; that he (the officer) also went

to the back door and then met and asked the defendant why he was open after hours; that the defendant answered that "his clock was slow."

The defendant denies that he was keeping his place open after 3 A.M. He, his bartender, Schoen, and several patrons who were in the tavern on the morning in question testified that Schoen, an insurance man, entered at about 2:45 A.M.; that the defendant's bartender sold and served him a "whiskey and soda" shortly after he entered; that at 2:50 A.M. the bartender directed all patrons that they must leave by 3 A.M.; that at about 2:53 A.M. everyone was out of the tavern except the defendant and Schoen; that the patrons who left (some six or eight) waited outside for the defendant to join and have coffee with them. The defendant and Schoen further testified that Schoen remained on the premises merely to talk insurance to the defendant while the latter was making his preparations to leave the tavern for the night. As for the two glasses which Officer Faerber saw on the bar in front of Schoen at 3:20 A.M., the defendant explains that they were the glasses of "whiskey and soda" which had been served to Schoen at 2:45 A.M.; that he (the defendant), while straightening out the tavern after 3 A.M., nevertheless allowed these glasses to remain on the bar for Schoen's disposal because the soda glass still contained some seltzer.

I find the defendant guilty as charged. Whether or not Schoen was talking insurance to the defendant while in the tavern after hours, concededly he was also being entertained there as a patron finishing a drink. It is immaterial that his drink may actually have been served before 3 A.M., or that the unfinished part of the drink was the soda and not the whiskey. It is equally immaterial that the defendant's front door had been locked at or before 3 A.M. Where a licensee voluntarily continues to entertain a single patron on his premises, his tavern is "open" (in the sense of the ordinance), whether the doors be locked or not. Re Casarico, Bulletin 268, Item 1; Re Zenda, Bulletin 271, Item 5.

The defendant's license will be suspended for five (5) days.

Accordingly, it is, on this 18th day of November, 1938, ORDERED that plenary retail consumption license No. C-970, heretofore issued to Herman Weitzman by the Municipal Board of Alcoholic Beverage Control of the City of Newark, shall be and the same is hereby suspended for a period of five (5) days, commencing November 23, 1938, at 3 A.M.

D. FREDERICK BURNETT,
Commissioner.

10. DISCIPLINARY PROCEEDINGS - PETITION TO LIFT SUSPENSION - GRANTED.

In the Matter of Disciplinary Proceedings against)
TURF CLUB, INC.,)
4814 Hudson Boulevard,)
West New York, New Jersey,)
Holder of Plenary Retail Consumption License No. C-87, issued by the Board of Commissioners of the Town of West New York.)
- - - - -)

ON PETITION
CONCLUSIONS AND
ORDER

Fredman and Fredman, Esqs., Attorneys for Petitioner.

BY THE COMMISSIONER:

This matter comes before me on petition to modify an order entered herein on October 2nd, 1938, which suspended petitioner's license for the balance of its term. (Bulletin 272, Item 12). The petition likewise prays that the Commissioner may restore the license and permit petitioner to transfer it to an interested "third party."

If the offense of which petitioner was found guilty in the disciplinary proceedings were of such a serious character as to disqualify the licensee and its officers from holding a license, I would deny relief herein because the petition fails to mention the name of the "interested third party" or to set forth the terms of agreement, if any, between said party and petitioner. In the disciplinary proceedings, however, licensee was found guilty of conducting its licensed business after the curfew hour and permitting persons other than its employees and agents upon its licensed premises after that hour and the finding of guilt does not necessarily disqualify the corporate licensee or its officers. Under these circumstances, failure to disclose the name of the person to whom the license is sought to be transferred does not make the petition fatally defective.

My purpose in suspending the license for the balance of the term was to prevent the licensee from escaping an effective ten-day suspension if it solved its financial difficulties and resumed possession of the licensed premises. It appears from the petition herein, verified on November 15, 1938, that, due to a distraint against the licensed premises by the landlord, petitioner was out of possession at the time the order was issued and has been out of possession ever since. The petition further sets forth that, by reason of the distraint aforesaid, it was compelled to close its business and its entire investment became a total loss. It sufficiently appears that licensee will not be able to resume business at the licensed premises.

I am satisfied that the purpose of the petition is not to avoid the effect of the ten-day suspension which would normally have been imposed, but that said petition is made in good faith to permit the licensee to transfer its license. Sufficient punishment has been imposed. I shall modify the order heretofore entered so as to restore the license to good standing but determination as to whether said license should be transferred must, of course, be made by the Board of Commissioners of the Town of West New York on an application duly filed.

Accordingly, it is on this 19th day of November, 1938,

ORDERED that the suspension now in force be lifted, and that Plenary Retail Consumption License No. C-87, heretofore issued to Turf Club, Inc. by the Board of Commissioners of the Town of West New York, be and it is hereby declared to be again in full force and effect.

D. FREDERICK BURNETT,
Commissioner.

11. SALES ON CREDIT - SOLICITATION OF CHARGE ACCOUNTS - DISAPPROVED.

November 21, 1938

Mr. Leo V. Salamandra,
Salamandra Liquor Store,
Trenton, N. J.

My dear Mr. Salamandra:

I have examined the circular letter that you propose to distribute through the mail. While, technically, there is nothing in the law or regulations at the present time prohibiting sales of alcoholic beverages on credit, I am not favorably impressed at all with your solicitation of charge accounts. Too many buy liquor they can ill afford. Hardly a week goes by that does not bring plaintive appeals from a wife or mother or child that the family is being deprived of the necessities of life because the weekly pay check is squandered on drink. Many of the cases are indeed pitiful.

I did not abrogate the State regulation prohibiting sales of alcoholic beverages on credit (Bulletin 135, Item 1) because I was not in sympathy with the principle or the purpose. I believed it to be right and a constructive and forward step and still do. It was abolished (Bulletin 151, Item 7) because four months of trial demonstrated that sub rosa transactions and devious methods of circumvention made enforcement highly impractical, and hence the rule did not accomplish its purpose. I am opposed to having laws on the books that are disobeyed because they can't be enforced. Such a condition breeds disrespect for all laws. Furthermore, it puts law-abiding licensees at a disadvantage because while they are scrupulously obeying the regulation, the chiselers get away with "murder."

Moreover, you are prohibited by Section 30 of ordinance adopted by the Trenton City Council on June 23, 1936, from selling any alcoholic beverages on credit for on-premises consumption. For violation, you may be subjected by the local magistrate to fine or imprisonment or both, and by the Council to suspension or revocation of your license.

I do not approve of the solicitation of charge accounts. It is a wise liquor dealer who considers the effect of his conduct and policies on the community and on his fellows in the industry as a whole. My advice is that you do nothing that would create an adverse public reaction even though it means the loss of a few sales.

Otherwise, I see nothing wrong with your letter. Its distribution through the mail, with the solicitation of charge accounts omitted, will be permissible.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

12. DISCIPLINARY PROCEEDINGS - GAMBLING - POSSESSION OF SLOT MACHINES -
HEREIN OF "PACES RACES."

In the Matter of Disciplinary :
Proceedings against :

TWIN BROOKS COUNTRY CLUB,
Mountain Boulevard, :
Watchung Borough, New Jersey, :

CONCLUSIONS
AND
ORDER

Holder of Club License No. CB-69,
issued by the Commissioner of :
Alcoholic Beverage Control. :

Andrew V. McDonough, Esq., Attorney for Licensee.
Emerson A. Tschupp, Esq., Attorney for Department of Alcoholic
Beverage Control.

BY THE COMMISSIONER:

The following charge was served upon the licensee:

"On October 10, 1938, you possessed one 'Paces Races'
machine, a slot machine or device in the nature of a
slot machine, on or about your licensed premises, in
violation of State Regulations 20, Rule 8."

Licensee admits that, on October 10, 1938, Investiga-
tors Briscoe and Cox found a "Paces Races" machine in the locker
room which is part of the licensed premises. It contends, how-
ever, that said machine is not a slot machine or device in the
nature of a slot machine.

There is no evidence that the machine was being used for
gambling purposes. The sole question, therefore, is whether it is
a "slot machine or device in the nature of a slot machine which
may be used for the purpose of playing for money or other valuable
thing." If so, its mere possession on licensed premises consti-
tutes a violation of Rule 8 of State Regulations No. 20.

Investigators Briscoe and Cox testified that "Paces
Races" machines are of a table-type with ten miniature horses and
ten slots, one for each horse; that a player may select a horse or
horses by placing a five-cent coin in one or more of the slots;
that, thereupon, an indicator gives the odds on the horse selected;
that, after the winner is determined by the movement of the
horses to the other end of the table, the machine pays off the
winner in coins according to the odds appearing on the indicator.
The player has no control of the movement of the horses. There is
no skill involved. The winner and the odds are determined by
chance so far as the player is concerned.

In Re Conover, Bulletin #51, Item 6, I said:

"It is apparent that Rule 8 does not create new law but is a mere restatement of existing law. Both under the Law and the Rule, the test of an illegal machine is not the presence of the slot but rather that it is a machine 'which may be used for the purpose of playing for money or other valuable thing.' Therefore, you must distinguish on the one hand between harmless bagatelle games and variations thereof, such as the baseball game, where the primary purpose is skill and amusement, and on the other hand, the common type of so-called slot machine which contains coins and pays money or other valuable thing to the player if he is lucky enough to draw certain combinations when he operates the lever which spins the wheels. The gist of gambling is the payment of money for the opportunity to win more money by a scheme of chance. The vice of gambling is the chance of a gain disproportionate to the price of the chance. A slot machine, the deposit of money in which entitles the player to a chance to get money from the machine, is illegal per se. Its mere presence on licensed premises violates both the Law and the Rule. A machine of this type is quite different from bagatelle and kindred games which do not pay out or deliver to the player at any time, however lucky he may be, any money or other valuable thing. To be sure, those games may be used illegally, in which event they violate both the Law and the Rule ***, yet intrinsically they are not illegal. If the slot machines which you mention are the common type which pay money itself to the lucky player, you do not have to pause to determine the sometimes difficult question as to whether the use made thereof is illegal, because, to use the words of Vice Chancellor Buchanan in Pure Mint Co. vs. LaBarre, 96 N.J. Eq. 186, 'the machines are intended to do what they in fact do', and hence their very presence is illegal, irrespective of the use made of them. Such slot machines are gambling devices. Hence there is no necessity for you to see it being actually operated by a player, or to determine anything more than that such machine is on the licensed premises."

Since it is clear from the Investigators' testimony that a "Paces Races" machine pays money itself to the lucky player, it is a slot machine of a type, the mere possession of which is forbidden on licensed premises by said Rule 8.

The licensee is guilty as charged.

As an alleged extenuating circumstance, licensee contends that the members of the Club can afford to gamble for small sums and that the situation differs, therefore, from cases in which such machines are found in an ordinary saloon. The rules, however, apply to the rich as well as the poor.

On behalf of licensee, the Chief of Police of the Borough of Watchung testified that the licensed premises are conducted in an orderly manner and that he has never received a complaint against the Club. From our records, however, it appears that, on January 30, 1936, a warning was sent to licensee after two slot machines had been found on its premises and that, on February 7, 1936, the President of the licensee advised that in-

instructions had been given to employees to comply with the rules and regulations.

I shall suspend the license for five days.

Accordingly, it is on this 20th day of November, 1938

ORDERED that Club License No. CB-69, issued to Twin Brooks Country Club by the Commissioner of Alcoholic Beverage Control, be and the same is hereby suspended for five (5) days, effective November 24, 1938, at midnight.

Frederick J. Burnell

Commissioner.