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

BULLETIN 298 FEBRUARY 8, 1939.

1. GAMBLING - SLOT MACHINES - HEREIN OF THE 'NEW DEAL TRADE STIMULATOR' WITH THE SAME OLD PLUMS AND LEMONS.

February 4, 1939

Trade Stimulator Corporation,
Newark, N. J.

Gentlemen:

I have before me prospectus of your "NEW DEAL TRADE STIMULATOR", sample inserts of the number combinations and sample of the free tokens.

It appears that the tokens are given with each purchase, the larger the purchase the more the tokens, each token entitling the holder to win the daily merchandise prize award.

The machine is operated by inserting a token. Pulling the lever causes three revolving dials to whirl, each eventually coming to rest upon a single number. If the combination thus produced matches up with any of the inserts posted on the face of the machine, the lucky customer gets the "prize award."

Despite the fact that "The Trade Stimulator" can only be operated with the special tokens (smaller than the smallest of coins), it is apparent that the tokens are given out for money paid which fact, coupled with the pay-off, makes it nothing but a slot machine. Instead of numbers, you might just as well use the same old plums and lemons and belle fruit gum. There's no New Deal in this!

The presence of such a machine on premises licensed for the sale of liquor would, therefore, be in violation of Regulations 20, Rule 8, which prohibits licensees from possessing any 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.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

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

In the Matter of Disciplinary Proceedings against

MARTIN HEFFNER,
48 Smith Street,
Perth Amboy, New Jersey,

Holder of Plenary Retail Consumption License No. C-72, issued by the Board of Commissioners of the City of Perth Amboy.

CONCLUSIONS AND ORDER

Miss Lillian M. Fass, Attorney for Licensee.
Samuel B. Helfand, Esq., Attorney for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Charge was served upon the licensee alleging that, on November 23, 1938, he sold a quart bottle of Calvert's "Special" blended whiskey below the minimum retail price, in violation of State Regulations No. 30.

Investigator Carlin, of this Department, testified that he visited the licensed premises on November 23, 1938; that he purchased a quart bottle of Calvert's "Special" blended whiskey for $2.15 from David Fass, the manager who was in charge of the licensed premises; that Mr. Fass admitted that he had received a copy of the Fair Trade price list which included the item in question. The minimum retail price of the item is $2.25 a quart.

Investigator Finzel corroborated the testimony of Investigator Carlin.

Mr. Fass admitted the sale of the quart of Calvert's "Special" blended whiskey for $2.15, which he thought was the right price. As a mitigating circumstance, he said that this was the first violation that he had ever committed and that, in fact, he was charging more than Fair Trade prices on another product.

The licensee is responsible for the acts of his employees performed within the scope of their duties and, since the item was sold at less than the minimum price, the licensee is guilty as charged.

This is the licensee's first conviction of record.

Accordingly, it is, on this 4th day of February, 1939,

ORDERED, that Plenary Retail Consumption License No. C-72, heretofore issued to Martin Heffner by the Board of Commissioners of the City of Perth Amboy, be and the same is hereby suspended for a period of ten (10) days.

Pursuant to notice of December 17, 1938, Bulletin 289, Item 1, the effective date of suspension is reserved for future determination.

D. FREDERICK BURNETT,
Commissioner.

3. TWO HUNDRED FEET RULE - PROCEEDINGS TO CANCEL LICENSE BECAUSE ISSUED FOR PREMISES WITHIN TWO HUNDRED FEET OF A CHURCH.

In the Matter of Proceedings to Revoke or Cancel Plenary Retail Consumption License No. C-64, issued to

NICHOLAS RALPH ALDARELLI, 1 Thompson Place, Asbury Park, New Jersey,

by the City Council of the City of Asbury Park.

CONCLUSIONS AND ORDER

Meehan Bros., Esqs., by John J. Meehan, Esq., Attorneys for the Licensee.
Emerson A. Tschupp, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Notice was served upon the licensee to show cause why his license should not be revoked or cancelled because (1) in his application dated June 17, 1938 he falsely stated that his premises are not within two hundred feet of any church, and (2) his licensed premises are located within two hundred feet of the Mt. Royal Baptist Church, in violation of R. S. 33:1-76 (Control Act, Sec. 76).

The premises wherein the licensee is now operating his business are the same premises considered in Aldarelli v. Asbury Park, Bulletin 186, Item 12, which were there described as being located at 1311 Springwood Avenue, but the licensed premises are now described as being located at #1 Thompson Place, a distinction without any difference. The change in address is accounted for by the fact that the driveway to the west of appellant's premises, as shown on the diagram appearing in the Aldarelli Conclusions, allegedly is now known as Thompson Place. It does not appear that the driveway is officially designated by that name; it was not so designated in the appeal case, and the only evidence on that point which appears herein is the statement by the licensee that it is usually called Thompson Place by "everybody in the neighborhood."

In Aldarelli v. Asbury Park, supra, the action of respondent in denying appellant's application for a license at 1311 Springwood Avenue was affirmed because it was found that appellant's premises were within two hundred feet of the Mt. Royal Baptist Church. It was there decided that a door leading from said premises to Springwood Avenue, and two doors both leading from said premises to the driveway, were within two hundred feet of the church if the distance between the nearest entrance to the church and said doorways were properly measured. Conclusions in that case were signed on June 12, 1937. Thereafter Aldarelli made an application to the City Council for a consumption license for the very same premises, wherein he described the premises as being located at #1 Thompson Place, and the license was issued to him for said premises for the fiscal year 1937-1938. On June 16, 1938 he filed an application for renewal of said license, wherein he described the location of the premises to be licensed as follows: "1 Thompson Place, Asbury Park, New Jersey." He answered "No" to Question 10 in said application, which reads "Are premises within 200 feet of any church or schoolhouse?" It is because of the answer to said question that the first charge has been preferred.

At the hearing licensee testified that the attorneys who represented him in the appeal case had merely informed him that the case had been lost, and that they did not show him a copy of the Conclusions entered therein; that he believed the rear door opening on the driveway was more than two hundred feet from the church entrance because "according to the survey it was two hundred two feet."

The licensee, however, was present and testified at the hearing held on the appeal case, and he must have known that the only substantial question presented at that appeal was the accuracy of the survey to which he refers. Whether or not he saw the Conclusions in that case, he knew at least that the decision went against him and, as a reasonable man, he must have known that the measurements made by his surveyor and introduced therein were not accepted as correct. I conclude that the licensee deliberately and falsely stated that his premises are not within two hundred feet of any church.

There being no contention made at the hearing herein that there has been any change in the physical conditions, the decision in Aldarelli v. Asbury Park, supra, is res adjudicata as to the measurements between the nearest door of the church and the rear door opening on the driveway or Thompson Place. Hence, I find that the licensed premises are located within two hundred feet of the church.

Accordingly, it is on this 4th day of February, 1939,

ORDERED, that plenary retail consumption license C-64, heretofore issued to Nicholas Ralph Aldarelli by the City Council of the City of Asbury Park, be and the same is hereby suspended for the balance of its term, effective immediately, with leave reserved to the licensee to file application with the City Council of the City of Asbury Park, and if the application be granted, to apply to me fo an order lifting the suspension herein imposed so that the license may be effectively transferred. In view of the adjudication of guilt on the first count, as aforesaid, no order will be made in any event to lift the suspension until at least thirty days shall have elapsed from the date of this order.

D. FREDERICK BURNETT,
Commissioner.

4. DISCIPLINARY PROCEEDINGS - NEWARK LICENSEES - SALES AFTER HOURS - TEN DAYS.

In the Matter of Disciplinary Proceedings against)
)
PATSY CALABRESE,)
299 Morris Avenue,) CONCLUSIONS
Newark, New Jersey,) AND ORDER
)
Holder of Plenary Retail Consumption License No. C-78, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.)

Nicholas T. Fernicola, Esq. and Frank Calabrese, Esq., Attorneys for the Licensee.
Charles Basile, Esq., Attorney for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Charges were served on the licensee alleging that (1) on November 12, 1938, he sold and served alcoholic beverages to divers persons between 3:00 A.M. and 7:00 A.M., and (2) on the same date, his licensed premises were open between 3:00 A.M. and 7:00 A.M.; both of which charges are alleged to be violations of Section 1 of Ordinance No. 6579 of the City of Newark.

The pertinent parts of said Section 1 are as follows:

> "No person *** shall sell or serve any alcoholic beverage between the hours of three o'clock A.M. and seven o'clock A.M. on weekdays *** and no place or establishment licensed under an act of the Legislature of the State of New Jersey entitled: 'An Act Concerning Alcoholic Beverages', shall be open during the above prohibited hours, except that restaurants, drug stores and establishments where the principal business is other than the sale of alcoholic beverages may remain open during the above prohibited hours for such other purpose only."

Sergeant McGowan and Detective Petroll, of the Newark Police Department, testified that, when they entered the licensed premises at 3:57 A.M. on November 12, 1938, there were about twenty men and women seated at tables in a side room; that there were about twenty partly filled and some empty glasses on the tables; that they seized the contents of one of the glasses, which proved, on analysis, to be beer.

Licensee, his bartender, Frank Meyers, and two of his patrons denied that any drinks had been served after 3:00 A.M. All of them testified that some of the persons who were in the premises when the officers entered were eating sandwiches. The licensee and his bartender testified that the police officers had found only one glass which contained some beer; that the glass was on a window sill and had been overlooked in cleaning up the side room.

It appears from the testimony of the police officers, however, that they were observing the licensed premises from the outside from about 3:25 A.M. to 3:57 A.M., when they entered; that, during that time, they had observed numerous people enter a yard in the rear of the tavern; that, before entering, Detective Petroll had looked through a transom into the barroom and had seen the licensee carrying a tray of beer to the side room; that, shortly thereafter, both officers had looked through the transom into the barroom and had seen the licensee and Frank Meyers behind the bar apparently drawing beer into glasses which were set on a tray which was later carried by the licensee towards the side room. Both officers testified that, when they finally entered the premises, the licensee admitted that he had served a couple of beers but said that he didn't think it was so late. I believe that this conversation occurred, despite the denial by the licensee and his bartender.

I find the licensee guilty as to the first charge.

It is contended that the licensee's premises come within the exception set forth in the ordinance permitting restaurants *** and establishments where the principal business is other than the sale of alcoholic beverages to remain open during prohibited hours. It is true that Patsy Calabrese has a restaurant license, but he serves only sandwiches and special dinners when arrangements are mad in advance. Despite the fact that he has a gas range and refrigerator on his licensed premises, the evidence produced is not sufficien

to show that he operates a restaurant which is defined by R. S. 33:1-1 (Control Act, Section 1(ss)) as follows:

"An establishment regularly and principally used for the purpose of providing meals to the public, having an adequate kitchen and dining room equipped for the preparing, cooking and serving of foods for its customers and in which no other business, except such as is incidental to such establishment, is conducted."

Moreover, his application filed with the City Clerk contains the following questions and answers:

"Q Will the applicant conduct any business other than the sale of alcoholic beverages on the premises sought to be licensed? A No.

Q State principal business. A Tavern."

In addition, the ordinance which excepts certain establishments from the closing provisions thereof provides that such establishments may remain open during the prohibited hours "for such other purpose only."

Having found that the licensee was serving alcoholic beverages on his licensed premises after 3:00 A.M., it appears that, regardless of the nature of his premises, it was kept open during prohibited hours for the sale and service of alcoholic beverages and not merely "for such other purpose only."

The licensee is guilty as to the second charge.

This is the licensee's first conviction of record.

I shall suspend the license for five days for selling and serving during prohibited hours, and five additional days for remaining open during prohibited hours.

Accordingly, it is on this 4th day of February, 1939,

ORDERED that Plenary Retail Consumption License No. C-78, heretofore issued to Patsy Calabrese by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for a period of ten (10) days, commencing February 9, 1939.

D. FREDERICK BURNETT,
Commissioner.

5. LICENSEES - DISQUALIFICATION - FOR COMMISSION OF TWO OR MORE VIOLATIONS OF THE ACT - HEREIN OF THE DIFFERENCE BETWEEN OFFENSES AGAINST THE ACT ITSELF AS DISTINGUISHED FROM VIOLATION OF RULES AND REGULATIONS - HEREIN ALSO OF MANDATORY PENALTIES AND THE EXTENT OF THE DISCRETION OF MUNICIPAL LICENSE ISSUING AUTHORITIES.

Dear Sir:

In your recent Bulletin No. 294, Article 13, disciplinary proceedings, I note in the second paragraph of your letter, addressed to the Borough Clerk of Mt. Ephraim, N. J. that you passed on a liquor violation as follows:

"that the ten-day penalty for a second offender such as he was, is entirely proper."

I note from the above that this was his second offense and the members of the Board of Commissioners and myself have been under the impression that a second offense carries with it a penalty for mandatory revocation.

In a recent case of the Town of Phillipsburg a communication received from your department contains the following statement:

> "R. S. 33:1-25 (Control Act, Section 22) provides that no license shall be issued to any person who has committed two or more violations of said Act. The R-Gent Social Club having committed two such violations, is hence permanently barred from rec iving another liquor license in New Jersey." (Bulletin 235, Item 3).

As we have several cases now pending for hearing, the Board would like to be advised if a licensee can be penalized for two violations and a mandatory revocation for the third violation, or if a mandatory revocation is demanded for a second violation.

Very truly yours,
Harvey G. Wismer,
Town Clerk.

February 5, 1939

Harvey G. Wismer,
Town Clerk,
Phillipsburg, N. J.

My dear Mr. Wismer:

R.S. 33:1-25 (Control Act, Sec. 22) provides that no license of any class shall be issued to any person who has committed two or more violations of this Act. That means that the two offenses, in order to constitute a disqualification, must have been offenses against the Act itself as distinguished from violations of rules and regulations.

The violation of a municipal regulation may or may not constitute also a violation of the Act. It all depends on what the violation involved. If the same conduct is contrary to a municipal regulation, as well as to some provision of the Act, and the offender is found guilty of violating both the local regulation and the Act, then he has one strike on him for having committed a violation of the Act. One more will put him out for good. If, on the other hand, the violation of the local regulation does not involve a violation of the Act, then this statutory provision does not apply at all. See Re Bailey, Bulletin 172, Item 10. The same is true with respect to violations of the State regulations. Hudson-Bergen County Retail Liquor Stores Association v. Gold's Drug Stores and Union City, Bulletin 253, Item 8.

Thus, you see there is considerable difference between Re Phillipsburg, Bulletin 235, Item 3 and Re Kershaw, Bulletin 294, Item 13. The former concerned sale by a club licensee to non-members contrary to the terms of its license and hence constituted a violation of the Control Act itself, Section 13(5), (R. S. 33:1-12), which provides that the holder of a club license may sell only to bona fide members and their guests. The latter (Re Kershaw) was concerned only with violations involving sales of alcoholic beverages during hours prohibited by the local regulation. Such violations were therefore not of the Control Act at all. Hence, no automatic disqualification ensued.

I shall write you further concerning my present views on another phase of the ruling made in Re Phillipsburg, Bulletin 235, Item 3, but that point has no bearing upon your instant question.

As to penalties: Even if a licensee is adjudicated guilty for a second time of violating the Act itself, it is not mandatory that his license be revoked for the statute hereinabove first cited declares that no license shall be issued to any person who has committed two or more violations of the Act. The operative words are cast in terms of the future. It is therefore clear that in such case no renewal or any other license may be granted a licensee guilty of commission of two or more violations of the Act. It is not, however, mandatory that his license be revoked then and there, although such revocation would be well within the sound discretion of the issuing authority. But if they find him guilty, then whether they revoke or not, he is rendered permanently ineligible to obtain any further license.

On the other hand, where the disciplinary proceedings concern only violations of the rules and regulations, local or state, and do not involve any violation of the Control Act, then the penalty is wholly within the discretion of your Board of Commissioners. Thus I have recommended that the penalty for closing hour violations be five days for the first offense, ten days for the second, and revocation for the third.

In general, your Board will not err if it exercises its discretion by imposing man-sized penalties which command respect.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

6. LICENSE - SURRENDER UNDER FIRE - THE SURRENDER OF A LICENSE AFTER DISCIPLINARY PROCEEDINGS HAVE BEEN INSTITUTED AGAINST A LICENSEE WHILE ELOQUENT OF GUILT IS NOT OF ITSELF THE LEGAL EQUIVALENT OF A PLEA OF GUILT - PREVIOUS RULING ABROGATED.

February 5, 1939

Harvey G. Wismer, Town Clerk,
Phillipsburg, N. J.

My dear Mr. Wismer:

In writing you today in reference to your question as to when disqualification arises from the commission of two or more violations of the Alcoholic Beverage Act itself, as distinguished from violations of rules and regulations, Bulletin 298, Item 5, I had occasion to review the ruling previously made in Re Phillipsburg, Bulletin 235, Item 3.

In that case, after disciplinary proceedings had been instituted by the Board of Commissioners of Phillipsburg against the R-Gent Social Club, a licensee, the President of the Club, appeared before the Commissioners on the day of the hearing and voluntarily surrendered the license. Those proceedings were based on an alleged sale made to non-members of the Club in violation of the terms of its license. Such violations are of the Act itself and not merely of the Regulations. There had been a previous adjudication of guilt of such sales on January 5, 1937, at which time the Club license was suspended for thirty days.

To your question whether, on that record, the licensee was eligible for another license, I replied: "I suppose your question arises because of the fact that there was a surrender of the license instead of a formal adjudication of guilt carrying with it a suspension or revocation" and thereupon answered your question in the affirmative holding "a surrender of a license after a charge has been filed against a licensee is an admission of guilt as eloquent as a written confession. Surrender under fire is a substitute for and dispenses with any further proof of guilt."

On reflection I am convinced that this ruling was not sound. Surrender under fire, to be sure, does raise a strong inference of guilt but I over-stated the proposition in holding that such surrender is equivalent to a plea of guilt. While that is the natural inference, it is possible that the licensee did not want to stand trial for some other reason, for instance, physical condition such as angina pectoris, or financial inability to afford a defense. I do not think for a minute that such reasons are the natural or probable causes of surrender under fire, but they are possible. In other words, guilt is not the only and inevitable inference of surrender under fire. Therefore, since R. S. 33:1-25 (Control Act, Sec. 22) provides that no license shall be issued to any person who has committed two or more violations of the Act and hence works a permanent disqualification, this Statute must, like any statute imposing a penalty or working a forfeiture, be strictly construed. Cf. Re Wizner, Bulletin 251, Item 1.

Consequently, I recant my earlier ruling and now hold that a surrender of a license after a charge has been filed against the licensee, while eloquent of guilt, is not of itself the legal equivalent of a plea of guilt. It therefore does not dispense with proof of guilt as does the unequivocal plea.

It follows that I must, on my own motion, reverse the ruling in Re Phillipsburg, supra, wherein I held that the R-Gent Social Club was permanently barred from receiving another license in New Jersey.

It need not be thought that this abrogation of the earlier ruling will in any wise prejudice municipalities in the conduct of disciplinary proceedings. Nor need there be any worry lest licensees, when confronted with disciplinary proceedings toward the end of a fiscal year, will immediately surrender their licenses only to take out new ones at the beginning of the next fiscal year. The law is not so easily thwarted. For first, as aforesaid, surrender under fire raises a strong inference of guilt and in the absence of adequate explanation justifies a municipality in refusing to issue any new license. Secondly, and more important, the Control Act, Sec. 28 (R. S. 33:1-31) expressly provides that the "surrender of a license shall not bar proceedings to revoke such license." It is therefore within the province of municipal issuing authorities, if they so desire, to go ahead with disciplinary proceedings and revoke a license notwithstanding its surrender. An adjudication of guilt so reached in such a proceeding will have a permanent effect upon eligibility incomparable with mere cessation of the licensed privilege.

Surrender under fire therefore confers no immunity.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

7. SCREENS - INTERPRETATION OF PLEASANTVILLE ORDINANCE - HEREIN OF THE REQUIREMENT THAT REGULATIONS TO BE EFFECTIVE MUST PRESCRIBE A CLEAR RULE OF CONDUCT.

February 5, 1939

Louis D. Champion, Esq.
Robert N. McAllister, Esq.

Re: City of Pleasantville v. Dominick Callaco, Walter Lash and Jack Kilpatrick.

Gentlemen:

I have before me Section 10 of the Pleasantville Ordinance No. 404, as amended by Ordinance No. 434, adopted September 8, 1936, which provides:

> "Section 10. None of said alcoholic beverages shall be sold under said license in any place which shall be concealed by a screen or otherwise from public view, except such place be a hotel or the holder of a club license."

I am greatly indebted to both of you for your letters, in lieu of briefs, which set forth your respective views so helpfully, candidly and fairly.

The interpretation of the Section is fraught with difficulty It does not say, as contended, that, except for hotels and clubs, the interior of a licensed place shall be unobstructed by any screen or other device from public view. What it does do is to forbid sale of alcoholic beverages in a place which shall be concealed by a screen from public view. This is its only operative effect. It does not forbid screens. It is aimed solely at concealment. It does not specify, however, whether the forbidden concealment is to be total or merely partial. A screen two feet high might conceal the interior to a two year old toddler. But it could hardly be said that the place was concealed from public view. So, a screen of greater height - say five feet two - might obstruct but would not necessarily conceal the view. Carrying it out to the nth degree, if a given window were totally screened, it would not necessarily follow that the place were concealed from public view if, perchance, a full view of the licensed premises could be obtained through an unscreened doorway. For there is no requirement that all windows be unobstructed. The mention of screens or other devices is merely illustrative of the manner in which such concealment may be effected.

An ordinance to be legally enforceable should definitely indicate the specific requirements with which licensees must comply, the particular rules which must be obeyed, the actual conduct which is prohibited. The question should be, not as to what the rule means, but whether there has been compliance with it. Re Rahway, Bulletin 106, Item 4.

The widely variant views which you learned men of the Bar have expressed as to the true interpretation of the ordinance in the particular case illustrate the point that liquor licensees should not, as a matter of ordinary fairness, be held to regulations of conduct which prescribe no clear rule. I must therefore disapprove the section because of its indefiniteness.

It follows that the proceedings based on this section must fall.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

8. PROPOSED LEGISLATION - NOTICE

February 6, 1939

The Commissioner has today transmitted to Assemblyman S. Emlen Stokes, as Chairman of the Assembly Committee on Alcoholic Beverage Control, the following bills with request that they be introduced, viz.:

1. To provide that operators of unlicensed restaurants, dining rooms and other places where food is sold or served to the general public shall not permit alcoholic beverages to be consumed at such premises and that no persons shall consume alcoholic beverages thereat.

   To provide that persons who violate this act shall be adjudged disorderly persons and punished accordingly.

2. To prohibit alcoholic beverage manufacturers and wholesalers from discriminating in price or granting discriminatory discounts, rebates, free goods, allowances and other inducements.

   To afford express power to the State Commissioner to adopt rules and regulations necessary to effectuate the foregoing restrictions.

3. To provide that no retail license shall be issued or renewed to any member of a governing board or body or issuing authority, or to any issuing official, or to any person in such member's or official's household, or to any individual, corporation, organization or association in whose license such member, official or person will be interested.

   To authorize the State Commissioner to issue licenses in such cases provided the license will be used only in connection with a bona fide hotel or a bona fide club.

4. To extend until December 6, 1940 the right of licensed manufacturers and wholesalers to retain their interests in retail licensed premises where such interests existed on December 6, 1933; and to provide that such interests may continue after December 6, 1940 provided the products of the licensed manufacturers and wholesalers are not sold at the retail licensed premises.

5. To provide that no retail licensee shall sell or possess alcohol and that no person shall sell alcohol at retail to consumers except pursuant to special permit.

   To exempt alcohol unfit in fact for beverage purposes and alcohol used by registered pharmacists in the manufacture of U.S.P. & N.F. preparations and the compounding of physicians' original prescriptions from the above prohibition.

6. To provide that a person who sells alcoholic beverages to a minor shall not be prosecuted where the minor has falsely represented, in writing, that he was over age, appeared to be over age, and the sale was made in the reasonable belief that he was actually over age.

The Commissioner believes and has certified that each of the foregoing bills is in the public interest.

D. FREDERICK BURNETT,
Commissioner.

9. PROPOSED LEGISLATION - THE BILL DIVORCING LOCAL POLITICS FROM THE LIQUOR TRAFFIC - REASONS FOR THE RECOMMENDATION.

February 7, 1939

Hon. John M. Kerner,
Elizabeth, N. J.

My dear Mr. Kerner:

I have before me your letter of December 2nd inquiring as to the scope and reasons of the recommendation I have made in respect to the divorce of local politics from the liquor traffic.

In the Report to the Governor and Legislature, I said:

"Unholy alliances between the liquor industry and those charged with the enforcement of the laws governing the same must be broken. I have prohibited the issuance of license for any business in which a law enforcement official was interested directly or indirectly and have declined to issue solicitor's permit to any member of a municipal governing body or issuing authority. Further steps, however, are necessary. Under the law, as it now stands, members of municipal governing bodies and issuing authorities, who are otherwise qualified, are entitled to hold liquor licenses and be employed by licensees. If there is ever to be an approach to the ideal of the complete divorce of local politics from liquor traffic, a change in this regard is required. I therefore recommend the enactment of a law prohibiting members of municipal governing bodies and issuing authorities from being interested as licensees, employees of licensees or otherwise, in the liquor industry. Appropriate exception, subject to safeguards, may safely be made in favor of established bona fide hotels and bona fide clubs."

I have not heretofore replied pending the drafting of the actual legislation. This has now been accomplished and the bill is included in those transmitted yesterday to the Chairman of the Assembly Committee on Alcoholic Beverage Control.

The bill under consideration amends R. S. 33:1-20 to read:

"No retail license shall be issued under this chapter to any member of any governing board or body or issuing authority, or to any issuing official, or to any person in such member's or official's household, or to any individual, corporation, organization or association in whose license such member, official or person will be [by any issuing authority to any member thereof or to any corporation, organization or association in which any member thereof is] interested directly or indirectly; provided, however, that where the license sought will be used only in connection with a bona fide hotel or bona fide club [but in any such case] application for such license may be made by such member, official, person, individual, corporation, organization or association directly to the commissioner who is hereby authorized to issue such license, subject to rules and regulations, upon the same terms and conditions and for the

same fee as other licenses of the same class are issued or are issuable by the municipal issuing authority [said governing board or body]. In addition to the fee for such license, which shall be payable to the municipality, a fee of ten dollars shall be payable to the commissioner to be accounted for by him as are license fees."

The problem is real and vital. It has been with us from the very beginning. The first ruling was made as early as December 13, 1933, but one week after the Department was created. The Associated Press, in consequence of the confused and controversial nature of the many reports it was handling, asked me (1) if a City Commissioner who owned properties occupied by taverns had the right to participate in the granting of liquor licenses, and (2) if he had the right to acquire a financial interest in a liquor distributing company. Bulletin 5, Item 4. I replied:

"The answer in each instance is unequivocally 'No.' The disqualification exists independent of Statute and extends to everybody who is called upon to sit in judgment upon the rights of his fellow-men. It goes against the grain even to think of a person being a judge in his own case or to have his judgment in formulating rules for other men warped by financial self-interest."

But that was only the beginning. Since then there has been a constant flow of requests on similar and related questions, until now there are some sixty odd rulings reprinted in the official bulletins alone, not to mention the literally hundreds of inquiries that, involving no new thought or problem, have been answered on the strength of rulings previously made, and, therefore, are not published.

Where the premises sought to be licensed are owned by a member of the municipal license issuing authority, or leased by him and subleased to the proposed licensee, such member is disqualified from participating in any alcoholic beverage matters coming before the Board. Bulletin 5, Item 4; Bulletin 7, Item 2; Re Bailey, Bulletin 70, Item 5; Re Simmill, Bulletin 76, Item 2; Gardner v. Sea Bright, Bulletin 171, Item 9.

So, also, where such member has a financial interest in the retailing of alcoholic beverages. Bulletin 5, Item 4; Bulletin 7, Item 2; Bulletin 39, Item 2 (certain sections of resolution and ordinance of the City of Asbury Park disapproved because of the participation in their enactment of member of governing body who was also manager for a retail licensee); Re Loog, Bulletin 39, Item 3 (the said resolution and ordinance of the City of Asbury Park disapproved in toto, for the same reason); Re Bischoff, Bulletin 53, Item 5 (member of governing body who is also manager for a retail licensee, not to participate in proceedings to suspend or revoke licenses); Re Schulz, Bulletin 80, Item 12 (Councilman tending bar for and otherwise helping his wife, who is a licensee); Re Siracusa, Bulletin 89, Item 9 (Commissioners who have stock in corporation holding retail license); Marsteller v. Hagenbucher and Somers Point, Bulletin 95, Item 10 (Councilman employed by retail licensee); Re Sweeney, Bulletin 130, Item 7 (Councilman holding retail license); Petrusha v. Mine Hill, Bulletin 146, Item 8 (Chairman of Township Committee holding retail license); Re Rosenberg, Bulletin 203, Item 5 (Councilman employed by retail licensee); Goff v. Piscataway, Bulletin 234, Item 5 (denial of license affirmed - member of governing body holding retail license did not participate); Re Butera, Bulletin 257, Item 4 (Mayor who is member of club holding retail license); Berry v. Clementon, Bulletin 258, Item 4 (Councilman whose wife holds retail license).

The same is true where the disqualifying interest is in the wholesaling or manufacturing of alcoholic beverages. Re Cavallo, Bulletin 18, Item 4 (Councilman interested in wholesale license); Re Mulligan, Bulletin 18, Item 5 (salesman for manufacturer); Re Bischoff, Bulletin 53, Item 5 (Councilman holding wholesale license); Re Gnichtel, Bulletin 80, Item 7 (Commissioner employed as salesman and collector for brewery); Re Caccavajo, Bulletin 115, Item 2 (brewery employee); Re Ford, Bulletin 225, Item 8 (Councilman employed by brewery).

It is for the same reason that I have ruled that solicitors' permits may not be issued to members of municipal governing bodies or license issuing authorities, or to any person charged or entrusted with the enforcement of the alcoholic beverage laws. Rules Governing Solicitor's Permits, Rule 8, Bulletin 81, Item 2; Re Emerson, Bulletin 82, Item 1; Re Reese, Bulletin 82, Item 2; Re Brundage, Bulletin 84, Item 17. Of course, where the employee is collector only, and there is no solicitation, no solicitor's permit under the law is necessary. Re Reese, Bulletin 91, Item 8; Re Chandless, Bulletin 91, Item 9. And where no retail licenses of any kind are issued in the municipality in which the Councilman serves, the rule is not invoked because the reason does not apply. Re Johnson, Bulletin 98, Item 2.

The matter is succinctly put in Re Siracusa, supra:

"The policy involved clearly necessitates the conclusion that the disqualification is not limited to the passing upon applications for licenses. On the contrary, it extends to all proceedings pertaining to alcoholic beverages, including applications for transfers, ordinances and regulations governing the sale and distribution of alcoholic beverages, etc. Nor may the disqualified members satisfy the requirements merely by refraining from voting on the issue presented. They must withdraw entirely from the proceeding for otherwise the purpose of the disqualification will in large part be nullified. See Bulletin 80, Item 7, where the Commissioner quoted the following language by the court in Stevens v. Haussermann, 172 Atl. 738 (Sup. Ct. 1934) in support of its decision that the concurrence of an interested member in the action taken by the body taints it with illegality, and that it is immaterial that the result reached was not produced by the vote of the disqualified member:

> "'It is supported by a twofold 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.'"

And in Re Brundage, supra:

"I gladly note that you agree with the fundamental principle involved, which, as you see from the foregoing survey, has been uniformly applied. Your present effort, I take it, is to seek modification or relaxation of the Rule to the extent that a Solicitor's Permit may be granted to a brewery salesman who is also a member of a municipal governing body conditioned, however, that no solicitation may be made in the municipality of which the salesman is a member of the governing body.

"The lines of influence are not so easily defined. The primary duty of enforcing the alcoholic beverage control act is 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. The salutary principle must not be frittered away by engrafting exceptions which will eventually sap its life blood. The matter is not one of personality but of principle. However high the character of your client, a sound public policy demands that a Solicitor's Permit be denied him unless and until he resigns the public office which charges him with the duty of enforcing the law governing those very permits and every other ramification of the retail trade.

"Considered then on the basis of principle, it is obvious that if the exception which you propose were allowed, it would apply to all cases. A Commissioner of West Orange then could operate in the contiguous territory of East Orange and so a Councilman of East Orange sell in the adjoining Town of West Orange, and both be employed by the same brewery. Form would be followed but substance sacrificed. Prospective customers might well, in such case, be solicited with the insidiously effective declaration: 'Commissioner So and So or Councilman Whosit is not allowed you know to solicit any business in this territory but he will be mighty well pleased, - in fact permanently grateful - for anything you may do for Mr. Smith who represents the same brewery. He'll get the credit, you know, for all orders you may place.'

"To state your proposition when thus analyzed is to refute it."

By the same token, a licensee may not also be a policeman (Re Scott, Bulletin 109, Item 5); nor may a bartender be a policeman (Re Franco, Bulletin 109, Item 6); nor may a licensee be a justice of the peace (Re Bruers, Bulletin 113, Item 9); or a constable (Re Schepis, Bulletin 115, Item 3); or a magistrate (Re Johnson, Bulletin 116, Item 1); or a Police Recorder (Re Branigan, Bulletin 129, Item 3); or a magistrate (Re Sweeney, Bulletin 130, Item 7); or a police marshal even though part time and in another municipality (Re DuPree, Bulletin 156, Item 11); or serve on the Police Committee (Re Everson, Bulletin 162, Item 10; Re Hoffman, Bulletin 165, Item 9); or serve as Assistant Prosecutor (Re Hueston, Bulletin 166, Item 3); or a constable (Re Osborne, Bulletin 174, Item 16); police officers, magistrates, justices of the peace (Re Lederer, Bulletin 196, Item 15; Re Sugrue, Bulletin 227, Item 2).

Carried through to its proper conclusion, the principle clearly requires that employees of this Department, as well as all other enforcement officers, likewise must refrain from participation. Hence, Re Schwartz, Bulletin 16, Item 5, and Bulletin 17, Item 6, which so rule.

Please do not get the impression from this plethora of citations that the principle has been arbitrarily applied in all situations, whatever the facts. On the contrary, the Bulletins are replete with rulings where, recognizing that there may possibly be an interest, the danger of abuse has been deemed so remote that no

prohibition or disqualification has been effected; e.g., Re Simmill, Bulletin 76, Item 2 (Mayor of one municipality employed as club steward in another; licensed premises owned by Councilman's mother); Re Klughaupt, Bulletin 85, Item 14 (Assistant Park Director or Foreman may hold solicitor's permit); Bulletin 91, Item 6 (municipal tax assessor may hold solicitor's permit); Re Martin, Bulletin 96, Item 7 (employee of State Highway Department may hold license); Re Grant, Bulletin 124, Item 7 (member of governing body may act as real estate agent or sell insurance); Re Gallaher, Bulletin 138, Item 6 (member of governing body may be agent for bar fixture concern); Re Reichenstein, Bulletin 144, Item 2 (member of issuing authority, who is also director of bank owning licensed premises, should not participate in matters concerning such licenses but is not disqualified generally); Re Csik, Bulletin 156, Item 12 (Fire Commissioner may hold a liquor license); Re Blank, Bulletin 177, Item 6 (a hospital employee may hold a liquor license); Re Kahl, Bulletin 197, Item 11 (member of Board of Education or Sinking Fund Commission may also); Re Lehman, Bulletin 198, Item 3 (so also, County Freeholder); Re Higgins, Bulletin 203, Item 14 (a bartender may also be a constable where his duties as such are confined to protection of municipal water shed); Re Franco, Bulletin 262, Item 11 (a bartender may be a special police officer to police golf course and keep out trespassers); Re Cranmer, Bulletin 263, Item 1 (a regular policeman may tend bar at a social function where there is no compensation); Re Minetti, Bulletin 264, Item 14 (Member of Board, holding liquor license, not disqualified from voting on a curfew ordinance which has nothing to do with liquor control).

These rulings are my gropings in the direction of and in the effort to reach the practical point where fair and clean control of alcoholic beverages is exercised in the light of modern business relationships.

My conclusion, drawn from this wealth of experience and first hand contact with the problem, is that legislation along the lines first above suggested, is necessary. I have had it in mind for some time. Just a year ago this past November, in writing to the Recorder of Manchester Township (Bulletin 212, Item 9), I expressed the same thought, saying:

> "I hope sometime this statute will be amended to provide that no member of any governing body of any municipality may hold such a license because, even if such members do not participate in decisions concerning the issuance or revocation of licenses or the formulation of regulations governing licensees, they do have direct control over the local police who are in duty bound to enforce the law and the rules."

I am glad to report that the New Jersey Brewers Association has resolved "That the Association approve the recommendation of the Commissioner of Alcoholic Beverage Control for the enactment of a law prohibiting members of municipal governing bodies and issuing authorities from being interested as licensees, employees of licensees, or otherwise, in the liquor industry, and recommends to the Commissioner consideration of the enlargement of the class of public employees so as to include in his recommendation the prohibition of all persons who hold public office by appointment with compensation or by election."

I believe the proposed bill is wholly in the public interest.

Very truly yours,

Frederick Burnett

Commissioner.