COMMISSIONER BURNETT
Sent to Regular Mailing List

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

BULLETIN NUMBER 110. March 19, 1936

1. LIQUOR LAW ENFORCEMENT - MEN AND NOT MEASURES NEEDED - CITIZENS URGED TO BE PENALTY-CONSCIOUS.

Atlantic City Chamber of Commerce,
Atlantic City, New Jersey.

Gentlemen:

Your letter informing that Atlantic City Chamber of Commerce, is to confer with the local liquor dealers on March 10th strikes a welcome note.

Legitimate dealers throughout the State stand for strict enforcement. They are keenly aware that the life of their business depends upon it. It is the public at large who should be aroused to the menace of the liquor outlaw. He evades taxes; markets an inferior, often unwholesome and sometimes poisoned liquor; his contempt for law, if left immune, creates a class which reaps predatory profits in many fields. Unless we wipe out the bootlegger, we cannot hope to exterminate the other rackets.

The law is adequate. What is needed is men to enforce it without fear or favor. The public demands just that. Militant indignation against violators has taken the place of its sympathetic tolerance in Prohibition days. It looks to those in authority to take every step to bring the liquor traffic under control, or else abolish it.

The way to control is to make everybody obey the law. That means punish everyone who disobeys it. It means more than a sterile "Naughty, Naughty!", or a slap on the wrist. It means virile punishment commensurate with the offence. A money fine is impotent for it merely deprives the violator of a portion of his ill-gotten gains. He keeps the rest for himself. A jail sentence is eloquent. It is the only language of the law which the violator respects. Arrests made by the police and my men mean nothing unless backstopped by indictment, conviction, and infliction by the Courts of punishment which really hurts.

So much for the liquor outlaw.

As regards retail licensees the remedy is wholly in the hands of the governing body or local excise board of each municipality. They have the power to revoke or suspend. The power should be unflinchingly exercised. Revocations and suspensions are powerful deterrents. The cheating licensee is unfair to his customers who rely and have a right to rely that he is dispensing legitimate liquor without worry as to its purity or lest it be "cracked" from poisoned denaturants. Every sale of bootleg deprives the State of just so much revenue. The greater the revenue from liquor, the less the tax on our homes! The possession of illicit liquor is a hit below the belt not only to the legitimate traffic but also to every citizen who rents or owns a home.

So every violation of the liquor law and the regula-

tions - for example, sales to minors, prohibited sales on Sundays or out of hours, dives and other indecencies - must be ruthlessly checked all along the line.

I have written this in answer to your request for "postive suggestions as to an effective manner of dealing with this problem". What is needed is men, not measures. The power exists. Your efforts to arouse the citizenry of this State to the imperative need for its exercise will be invaluable. Make them penalty conscious. When they begin to watch and commend or condemn the nature and extent of punishments meted out by courts and common councils, public opinion will do the rest.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

March 7, 1936.

2. RULES CONCERNING CONDUCT OF LICENSEES AND THE USE OF LICENSED PREMISES - RULE 1 - SALE OR SERVICE TO MINORS.

Dear Sir:

Recently a Father and Son came into my place of business and ordered two glasses of beer.

I served him only one glass informing him that his son was a minor and I could not sell him any. He then ordered another beer and paid for it, claiming that it was now his and could be disposed of as he saw fit, and gave it to the boy.

By refusing to sell the boy in his presence I have lost a steady customer.

Please advise me as to what I should do in the future in cases of this kind.

Very truly yours,

PAUL FINNEL

March 11, 1936.

Mr. Paul Finnel,
Somerville, N. J.

Dear Sir:

Rule #1 of the State Rules concerning conduct of licensees and the use of licensed premises provides:

> "No licensee shall sell, serve, deliver or allow, permit or suffer the service or delivery of any alcoholic beverage, directly or indirectly, to any person under the age of twenty-one (21) years, or allow, permit or suffer the consumption of alcoholic beverages by any such person upon the licensed premises."

You will note that this Rule prohibits not only sales to minors on licensed premises but also consumption by minors on such premises.

I am glad to note that you enforced the rule strictly. I appreciate that it is difficult even with the utmost tact to convince a certain class of patrons that you cannot and will not make exceptions in their favor. Such customers never do you any good in the long run. The making of exceptions is the beginning of trouble. I believe that few of your patrons will be so unreasonable as to ask you to risk losing your license. If, nevertheless, they "insist", do just what you did - refuse POINTBLANK. You are the master of your own place. They will respect you for it at heart. Besides, it's highly conducive to longevity of your licensed privilege!

Very truly yours,

D. FREDERICK BURNETT
Commissioner

3. APPELLATE DECISIONS - WENGER vs. RIDGEWOOD.

CHARLES F. WENGER,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
BOARD OF COMMISSIONERS OF THE VILLAGE OF RIDGEWOOD,)
Respondent.)

Thomas S. Doughty, Esq., Attorney for Appellant.
Thomas L. Zimmerman, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from the dnial of his application for a plenary retail consumption license at 65 East Ridgewood Avenue, Ridgewood.

Respondent denied the application solely because of its resolution limiting the number of plenary retail consumption licenses to six (6), and the issue of that number prior to the denial of appellant's application.

Appellant contends: (1) that the limitation of six is unreasonable; (2) that respondent on November 27, 1934 improperly issued a license to one Brunssen when it should have issued a license to appellant.

Ridgewood is a residential community. Appellant's premises, in which he plans to conduct a high class restaurant, are located near the railroad station in a small business section of the Village. He has spent $9,500. in fixing it up. Consumption licenses have been issued to two restaurants on the same block;

also to two other restaurants a few blocks away. Of the remaining two, one has been issued to a club and the other to a place on the outskirts of Ridgewood, on a main highway. There is one place licensed for consumption for approximately each twenty-two hundred (2200) inhabitants. There are also thirteen (13) distribution licenses outstanding in the municipality.

Aside from this evidence, there is no testimony in the case that another consumption place is needed in the Village. In the absence of any such evidence, it has not been shown that the limitation was unreasonable in its adoption. Furman vs. Springfield, Bulletin #49, item 6; Rosania vs. Readington, Bulletin #55, item 3; Hartlieb vs. Hillsdale, Bulletin #81, item 8; Franklin Stores vs. Belleville, Bulletin #102, item 2.

Appellant cannot successfully maintain that the limitation was improperly applied to him because he has never held a license, and the six licenses which were issued by respondent in July 1935, prior to rejection of appellant's application, were renewals of licenses previously granted. Ryman vs. Branchburg, Bulletin #37, item 18; DeBraun vs. Madison, Bulletin #57, item 5; Gruber vs. Rutherford, Bulletin#85, item 8.

As to his second contention, the evidence shows that respondent revoked a consumption license on November 27, 1934 and immediately thereafter issued a license to one Brunssen who had filed a formal application for a license and complied with all the requirements of Section 22 of the Control Act. Appellant now argues that this license should have been granted to him instead of to the other licensee. His argument is based on the fact that on November 7, 1934 he had written a letter to the Mayor of Ridgewood asking for a license for his premises. Such a letter is not an application. It was not accompanied by the necessary check of $500. It did not answer the questions and make the declarations prescribed by rules and regulations as every applicant must do. Control Act, Section 22. There was no advertisement of notice of intention. The letter was a "feeler", not an application. Even if given the effect of a formal application, there is no evidence to show that there was any discrimination against the appellant in favor of the party to whom the license was granted at that time. Cf. Walker vs. Verona, Bulletin #91, item 4. Moreover, appellant took no appeal until amost a year after respondent's action taken in November, 1934. The propriety of that action will not be reviewed at this late date. Mehlman vs. Irvington, Bulletin #86, item 4.

Legally, therefore, appellant has no case. The action of respondent is, therefore, affirmed.

The case illustrates, however, the inherent difficulty of the limitation of licenses. The applicant is worthy and his place is qualified. He is deprived of a license for his restaurant by no fault of his own solely because the allotted limit was reached before he applied. His competitors have licenses. He must go without. His only relief is to apply to the respondent to raise the quota.

D. FREDERICK BURNETT
Commissioner

Dated: March 11, 1936.

4. REVOCATION PROCEEDINGS - FALSE AND MISLEADING STATEMENTS AND SUPPRESSION OF TRUTH - SUSPENSION IMPROPER IN SUCH CASES - REVOCATION THE ONLY PROPER PENALTY UPON PROOF OF SUCH OFFENSE.

Peter Heinz, Jr.,
Town Clerk,
Guttenberg, N. J.

Dear Mr. Heinz:

I have staff report of the proceedings initiated by and prosecuted before your Mayor and Board of Council against Lillian Lorraine, holder of Plenary Retail Consumption License #C-38 for obtaining said license in violation of Section 22 of the Control Act by making false and misleading statements in that application which failed to disclose conviction of a crime.

I note the testimony of Lieutenant Brunner of your Police Department to the effect that the licensee, also known as Lillian Gonzales and sometimes as Lillian Haynes, is now serving six months in the Hudson County Jail for violation of parole on charge of running a disorderly house, as a result of a raid made by the Hoboken police on her apartment in Hoboken, and the suspension of sentence on this charge on condition that she leave Hudson County; also that the licensee was found guilty as charged, and the license revoked.

No opinion is expressed as to whether or not the licensee was guilty, because that, perchance, may come before me by way of appeal and my mind, therefore, is entirely open on that score.

Applicants who don't tell the truth won't get licenses. Lynch vs. Paterson, Bulletin #107, Item 1, and cases cited. Applicants need no warning that sworn applications must state the whole truth and nothing but the truth. The sooner they learn that suppressions and alibis are out of style the better. Suspension in such a case is improper because the license would never have been issued at all had the truth been known. Revocation is plainly indicated in all such cases.

I am glad that your Mayor and Board of Council did their full duty.

Very truly yours,

D. FREDERICK BURNETT

March 13, 1936. Commissioner

5. MUNICIPAL ORDINANCES - LIMITATION OF LICENSES - AN ORDINANCE FIXING THE NUMBER OF LICENSES MAY RESERVE THE AUTHORITY TO CHANGE THAT NUMBER FROM TIME TO TIME BY RESOLUTION.

Messrs. Reger & Smith,
12 Maple Street,
Somerville, N. J.

Attention: Arthur B. Smith, Esq.

Gentlemen: Re: Borough of Somerville

* * *

Section 7A of your proposed ordinance places a present limit on the number of licenses which may be issued.

I note that your Council requests a ruling on their desire to include in that section a provision which would give them authority to change the limitation from time to time by resolution, their thought being that if some small and undesirable place of business surrendered its license, they could reduce the limitation; whereas if some larger and more desirable place of business should discontinue temporarily they would probably want to let the limitation remain in order that a new license might be issued for such a place.

I am in full accord with their desire, believing that such limitation, while highly desirable, should neither be arbitrary nor rigid. It should not be arbitrary and on a state-wide basis, but locally adapted to the public necessity and convenience of each community. It should not be rigid because local needs change from time to time. Not only may it be proper and advisable to reduce the number in the future, but conversely it may become desirable to raise the limit to attract new industry and high-class places, or to iron out inequities. A license is a privilege, to be sure, but special privileges granted to one citizen and denied another equally worthy, create unfair situations which should be specifically weighed and righted alongside of the general desirability of limiting licenses. The limitation, therefore, should be changed from time to time as experience shows best suited to the particular needs of each community. That is no more than Home Rule.

Such local and flexible determination of the maximum number of licenses is on all fours with the other salutary Home Rule provisions in the Control Act which allow each municipality to decide for itself whether any licenses shall be issued, and if so, just what kinds.

So much for public policy.

The question of legal power remains.

Normally, an ordinance cannot be amended, repealed or suspended except by an act of equal dignity. Hence an ordinance cannot be modified by mere resolution. An ordinance is of a higher grade. It requires notice, successive readings, publication and opportunity to be heard. A resolution requires no formalities. It is no more than a motion of the governing body made, seconded and carried. Our Court of Errors & Appeals, in American Malleables Co. v. Bloomfield, 83 N. J. L. 728, held that "a mere resolution will not serve to repeal or modify a duly enacted ordinance, and that to do so necessitates action of like formality to that required for the enactment of the original ordinance."

That decision was rightly made on its facts. The contract for the elimination of grade crossings there considered, could only be sanctioned by a municipal ordinance. That ordinance, dealing with private property rights, was judicial in its nature. Hence it should not be repealed or modified, wholly or in part except upon due and proper notice. A mere resolution was therefore insufficient. It could neither create nor change what was required to be determined by ordinance.

That decision is not dispositive of the present question because the Control Act, Sec. 37, expressly delegates power to the governing board or body of each municipality to limit the number of licenses either by ordinance or by resolution. Your Council is therefore not attempting to do something by resolution, which could only be lawfully done by ordinance. Either way is sufficient. Of course, if the number of licensees has once been fixed by ordinance and the ordinance was silent as to how any change in the limitation might be accomplished, that number cannot be changed except by later ordinance. Eisen vs. Plainfield, Bulletin 68, Item 12. But where the ordinance itself contemplates that the number of licenses may be changed by resolution and so expressly provides, such ordinance by its very enactment notifies every citizen that the number may be so changed. It is no more than an express reservation of an existing power and not the creation of a new one.

It was on this ground that I approved (re Teaneck, Bulletin 79, Item 3) an ordinance which fixed a closing hour but also provided that the Township Council might by resolution extend the closing hour on special occasions. I held that it could be done by resolution since it was so specifically provided in the ordinance.

The Court of Errors & Appeals in the Bloomfield case above cited, did not reject as legally impossible, but carefully considered the contention there made that the contract authorized its modification by mere resolution, but concluded, however, that the provisions relied upon were not sufficient to warrant a modification of the scope and magnitude there presented by mere resolution. That adjudication, in effect, proves the very principle involved here. It is only a matter of clearly expressing the reserved power.

I therefore rule that an ordinance fixing the number of licenses may lawfully reserve the authority to change that number from time to time by mere resolution.

Very truly yours,

D. FREDERICK BURNETT

March 15, 1936. Commissioner

6. MUNICIPAL ORDINANCES - LIMITATION OF LICENSES - LIMITATION TO BE VALID MUST BE MADE SPECIFICALLY IN RESPECT TO EACH CLASS OF LICENSE AND NOT INDEFINITELY AS TO THE AGGREGATE OF ALL CLASSES.

LICENSES - WHILE A LICENSE IS A PRIVILEGE IN ITS NATURE IT MAY NOT BE ARBITRARILY GRANTED OR DENIED - THE FIXING OF A NUMERICAL LIMIT DOES NOT CHANGE THE PRINCIPLE - HEREIN OF THE SUPREME COURT DECISION IN BUMBALL vs. BURNETT.

Dear Commissioner Burnett:

Do you consider that the decision of the Supreme Court case of Bumball vs. Burnett, 115 N.J. Law, 254, recognizes authority in the Borough Council to include in its proposed amendatory ordinance a provision authorizing the Council to fix, by resolution, a limitation upon the number of licenses to be issued and, by resolution, to change that limitation from time to time?

It appears to me from the language used by Justice Parker in this case that the governing body might, without making any reference in the ordinance to a limitation upon the number of licenses to be issued, arbitrarily grant or refuse a license to any applicant, or that it might arbitrarily grant or refuse a license even though a limitation had been fixed but not reached at the time a given application is made.

Yours very truly,
ARTHUR B. SMITH
Borough Attorney,
Borough of Somerville

March 17th, 1936.

Reger & Smith,
Somerville, New Jersey.

Attention: Arthur B. Smith, Esq.

Dear Sir: Re: Borough of Somerville

Supplementing my letter to you of March 15th (Bulletin #110, Item 5) re the proposed amendment to your alcoholic beverage ordinance:

Inadvertently, while stressing the main point as to whether or not an ordinance could be amended by resolution if the ordinance so provides, I overlooked that part of Section 7A which provides for a numerical limitation of the aggregate number of all licenses to sell alcoholic beverages at retail, irrespective of class, which may be issued and outstanding at any one time.

That is disapproved because of the practical difficulties to the administration of such a rule. There is no test by which I could pass judgment on such a question should it come before me by way of an appeal. It does not indicate a clear and definite licensing policy. There is vast difference between consumption and distribution licenses. By limiting merely the total number of licenses, the question of how many of each class shall be issued remains open. The situation it permits is entirely too loose. I believe in flexibility but there must be definite rules defining the out-of-bounds even though these rules are subject to change. A mere aggregate is entirely too indefinite. Instead of limiting the total number of all licenses, the Borough Council should limit the number of licenses which may be issued in each specific class.

I also have your letter of the fourth supplementing yours of the third.

Bumball vs. Burnett, (Bulletin 79, item 9) does not dispose of the question whether or not an ordinance can be amended by resolution if the ordinance so provides. In Bernardsville, the ordinance was silent as to any limitation upon the number of licenses to be issued. The limitation was subsequently adopted by resolution. Authority for the resolution is found in Section 37 of the Control Act which says that such limitation may be adopted either by ordinance or by resolution. Hence, in that case, there was no repugnance or inconsistency between the ordinance and the resolution.

I am sure that Justice Parker in his decision did not mean to convey the thought that licenses could be arbitrarily denied regardless of whether there was a numerical limitation or not. I have ruled that licenses cannot be arbitrarily denied; that they can be denied only for good and sufficient cause. It was because of the absence of good cause that I reversed the issuing authorities in Colacuori v. Orange, Bulletin 87, item 8, and Jensen v. Manasquan, Bulletin 87, item 9. In Eisen v. Plainfield, Bulletin 68, item 12, I ruled that under an ordinance fixing the maximum number of distribution licenses an applicant who is personally fit and whose premises are suitable and properly located should receive a license so long as the maximum number fixed by the ordinance had not been issued; that to deny such an application without cause against person or place would be arbitrary and unreasonable; that to deny it because of the present opinion of an issuing authority that a sufficient number of licenses had already been issued was improper when that opinion conflicts with an ordinance; that to say that the municipality has changed its mind is not sufficient; that it was necessary to change the ordinance which was the only legal way in which the municipality could manifest its change of opinion. Of course, if good and sufficient cause exists, they should be denied. Citation of precedents is unnecessary. The Bulletins are replete with such decisions. But this is a far cry to granting or refusing licenses arbitrarily. I will not allow that to be done. What Justice Parker meant was that a license to sell alcoholic beverages was a privilege of a special nature, affected or impregnated with a public interest and, consequently, that there was no inherent right in citizens to obtain such a license.

Very truly yours,

D. FREDERICK BURNETT

Commissioner

7. SOLICITORS' PERMITS - MORAL TURPITUDE - FACTS EXAMINED - CONCLUSIONS.

March 16th, 1936.

RE: Application for Solicitor's Permit - Case No. 27

Application was filed for solicitor's permit pursuant to the provisions of P. L. 1935, c. 256. In his questionnaire applicant admitted he had been convicted about four (4) years ago in a Federal Court for selling alcohol; that after conviction he had been sentenced to and served thirty (30) days in jail. Notice was served upon him to show cause why his application should not be denied on the ground that he had been convicted of a crime involving moral turpitude, and a hearing was duly held.

It appears from our investigation and from the testimony given at the hearing that the applicant was arrested in May 1932 for violation of the Volstead Act; that at the time of the arrest he was employed as a bartender in the premises where the violation occurred; that he pleaded guilty to the charge and that he received and served the sentence set forth abov after said pleading.

There appear to be no aggravating circumstances and, in the absence thereof, a conviction for violation of the Prohibition Law does not involve moral turpitude. Bulletin #46, iten 3.

It is recommended that the license be granted.

Edward J. Dorton,
Attorney-in-Chief

Approved:
D. FREDERICK BURNETT
Commissioner

8. CERTIFICATE OF CHEMIST'S ANALYSIS - ADMISSIBILITY IN EVIDENCE PURSUANT TO STATUTE - DISCUSSION OF CONSTITUTIONALITY OF STATUTE.

March 12, 1936.

Dear Commissioner:

In one of our A. B. C. cases on trial before Judge J. Wallace Leyden, Judge of the Court of Quarter Sessions, your certificate certifying to the analysis of the ingredients of liquids seized by your men was refused in evidence because Judge Leyden believes that the 1935 Act permitting the introduction into evidence of such certificate denies the right of the defendant to be confronted by his witnesses.

I suggest that in all cases in Bergen County you have your chemist here to prove the alcoholic contents, etc., of liquids seized by them.

In all cases dealing with stills, will you be kind enough to furnish this office with a certificate certifying that the still in question was not registered as part of the records of your office.

Very truly yours,
NICHOLAS A. CARELLA
Assistant Prosecutor

March 16, 1936.

Hon. John J. Breslin, Jr.,
Prosecutor of the Pleas,
Court House,
Hackensack, N. J.

Att: Nicholas A. Carella,
Assistant Prosecutor

My dear Prosecutor:-

I have your letter of March 12th.

The Control Act in its original form contained no express authority for the reception, as evidence, of certificates of analyses made by the Department's chemist. Actual administration, however, soon displayed that in view of the numerous cases throughout the State it would be substantially impossible for the Department's chemist to testify personally at all prosecutions. To meet the situation and avoid the expense incident to the employment of a large group of chemists, the Legislature amended section 34 (P.L. 1935, c. 257) to provide that certificates of analyses made by a graduate chemist regularly employed by the Department would be received as evidence in all Courts of the State.

The authorities indicate that the foregoing amendment does not violate the constitutional sanction of confrontation. The defendant's right to subject opposing testimony to cross examination is the right to have the hearsay rule enforced. 3 Wigmore Evidence (2d Ed. 1923) sec. 1397, p. 101. And the right of confrontation merely means that "so far as testimony is required under the hearsay rule to be taken infra-judicially, it shall be taken in a certain way, namely, subject to cross-examination - not secretly or 'ex-parte' away from the accused". Ibid sec. 1397, p.101. Consequently, where evidence is admissible under an exception to the hearsay rule, the accused may not complain on the ground that he has not had the privilege of being confronted by his accuser. See Snyder vs. Massachusetts, 291 U.S. 97 (1934) where the United States Supreme Court said:

> "Nor has the privilege of confrontation at any time been without recognized exceptions, as, for instance, dying declarations or documentary evidence. Dowdell vs. U.S., 221 U.S. 325; Robertson vs. Baldwin, 165 U.S. 275; Motes vs. U.S., 178 U.S. 458. The exceptions are not even statis, but may be enlarged from time to time if there is no material departure from the reason of the general rule. Commonwealth vs. Slavski, 245 Mass. 405."

Within the recognized exceptions to the hearsay rule are "official statements". sometimes designated as "public documents or "documentary evidence". Wigmore Evidence, supra, sec. 1630, p. 384, et seq. Statutes rendering certificates of birth, marriage and death admissible in evidence have been readily sustained under this exception. Ibid, sec. 1642. The numerous Acts providing that certified copies of analyses by State chemists with respect to the physical properties of liquor shall be received in evidence have been sustained under the foregoing principles. See Commonwealth vs. Slavski, 245 Mass. 405 (1923); Commonwealth vs. Stoler, 259 Mass. 109 (1927); State vs. Torello, 103 Conn. 511 (1925); Bracey vs. Commonwealth, 119 Va. 867 (1916). Cf. Collins vs. Plant, 68 Fla. 337 (1914). In the

Slavski case, cited with approval by the United States Supreme Court in the Snyder case supra, the Court held that the Massachusetts statute permitting in evidence certificates signed by the analyst of the Department of Health did not violate the constitutional guarantee of confrontation. The Court, referring to the numerous cases sustaining statutes authorizing the admission in evidence of certificates of birth, marriage and death, said:

> "The principle which seems fairly deducible from them (referring to cases cited in the opinion) is that a record of a primary fact made by a public officer in the performance of official duty is, or may be made, by legislation, competent prima facie evidence as to the existence of that fact, but that records of investigation and inquiries conducted either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects and involving the exercise of judgment and discretion, expressions of opinions, and making conclusions, are not admissible as evidence as public records.****
>
> "The determination of the percentage of alcohol in liquor at a specified temperature is the ascertainment of a fact by well recognized scientific processes. Chemical action and measurements in such an analysis do not depend in general upon the quickness of apprehension, retentiveness of memory, temperament, surmises or conjectures of the individual. The admission in evidence of the record of such a fact made by a public officer pursuant to statutory obligation would be as likely to be accurate as many of the public records which have been held to be admissible."

In the Torello case the Court sustained the Connecticut statute admitting in evidence certified copies of records of the State chemist showing alcoholic content of seized liquor, saying:

> "The making of this certificate legal evidence of the facts required to be stated in the record kept by the State chemist is upon the same basis as the records of births, deaths and marriages which, since 1664, has been required to be kept by a public official, and duly certified copies of these admitted in evidence in proof of the facts required to be recorded.***
>
> "The public source from which the copy of the record before us came, the manner in which and the purpose for which it was made, and the complete absence of motive to warp the truth, take the place of that greatest aid to the trustworthiness of evidence, the right of cross-examination and bring it within an exception to the hearsay rule."

There are numerous New Jersey statutes authorizing the admission in evidence of official records and their validity has never been questioned. See State vs. Abdul Hamid Sulieman, 2 N.J. Misc. 1016, 126 Atl. 425 (Sup. Ct. 1924); Nestico vs. D. L. & W., 4 N. J. Misc. 418 (Sup. Ct. 1926); Vanderbilt vs. Mitchell, 72 N.J. Eq. 910 (E. & A. 1907).

It should be noted that section 34 does not make the chemist's findings conclusive, but merely provides that they shall be received in evidence. The defendant may controvert the analysis by independent proof and may indeed subpoena the Department's chemist. In substance, the Act merely places upon the defendant the burden of disproving the duly certified analysis. Cf. Morrison vs. California, 291 U. S. 82 (1934), where the United States Supreme Court said:

> "Decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecution and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

The Department will welcome a declaration by our Court of last resort as to the validity of the amendment to section 34. If the certificate were received in evidence, the defendant, upon conviction, would have the right to appeal but unfortunately the State would have no corresponding right in the event of a contrary ruling. May I, therefore, suggest that the foregoing authorities and considerations be presented to Judge Leyden with the request that he reconsider his determination that certificates with respect to analyses by the Department's chemist are inadmissible. Pending further consideration, the Department will, of course, comply with your suggestion that the State chemist appear to testify in all matters presented before Judge Leyden. We will also be pleased to furnish you with certificates relating to registration in all cases involving seizures of illicit stills.

I assume that from time to time in connection with your preparation of cases under the Control Act you will, as heretofore, advise when you desire the presence of the chemist and any certificates under the Act.

Very truly yours,
D. FREDERICK BURNETT
Commissioner

By: Nathan L. Jacobs
Chief Deputy Commissioner
and Counsel

9. LABELING - FALSE STATEMENT ON LABEL PROHIBITED - UNAUTHORIZED USE OF PHRASE "KOSHER FOR PASSOVER" AND ALLEGED ENDORSEMENT BY RABBI IS NOW CAUSE FOR REVOCATION - SUCH CONDUCT PRIOR TO ADOPTION OF LABELING REGULATIONS, ALTHOUGH MORALLY REPREHENSIBLE, IS NOT CAUSE FOR REVOCATION.

March 12, 1936.

Morris Sokolinsky, Esq.,
Brooklyn, N. Y.

Dear Sir: Re: Golden Gate Winery, Inc.

The records of the Department, including reports of investigators, with respect to your complaint against Golden

Gate Winery, Inc. have been carefully considered.

There is no substantial dispute as to the facts. The Golden Gate Winery, Inc. sold wine during March and April, 1935, bearing a label indicating that it was "Kosher for Passover" and endorsed by Rabbi S. Baskin, New Brunswick, New Jersey. The wine was actually a part of the licensee's regular stock and the use of the Rabbi's name was entirely without authority. No satisfactory explanation is advanced by the licensee and I am satisfied that its conduct was in complete disregard of any decent moral standard.

I have, however, been unable to find any legal authority for the suspension or revocation of the license. The Act itself is silent on the question. Revocation for violation of rules and regulations is permitted, but at the time the sales were effected no regulations pertinent to the subject had been promulgated by the Department. On May 28, 1935 the Department adopted labeling regulations promulgated by the Federal Alcohol Control Administration, pursuant to which any false statement on the label would be cause for revocation. There exists today, therefore, ample basis for action in the event any situation similar to that here presented should hereafter occur.

The Commissioner regrets that no basis for the institution of revocation proceedings exists, but is severely reprimanding the licensee and advising it that any future misconduct on its part will result in the loss of its license.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

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

10. SURRENDER - TRANSFER - SURRENDER OF ONE LICENSE AND ISSUANCE OF ANOTHER LICENSE MAY BE RESCINDED WHEN INDUCED BY MUTUAL MISTAKE OF LAW.

March 11, 1936.

Dear Sir:

As Attorney for the Borough of Dumont, I have been requested to obtain such information as is necessary to remedy the following situation.

I am advised by the Borough Clerk that Mr. Joseph Borrelli, to whom a plenary retail consumption license was issued on July 1, 1935, being desirous of selling his tavern business to a man by the name of Dominick Rucereto, applied to the Borough Clerk with Mr. Rucereto, for permission to transfer his license to Mr. Rucereto upon payment of the necessary fee, and that both Mr. Borrelli and Mr. Rucereto were informed inadvertently, because the Clerk only possessed a printed copy of the July 1934 Control Act, that the license of Mr. Borrelli was not transferable as provided by Section 23. This advice, of course, was erroneous because of the 1935 amendment which permitted transfers. Mr. Borrelli was advised that the best thing to do would be to surrender his license and Mr. Rucereto then to apply for a new license. I

understand that the Council, on February 24th, approved the surrender of the Borrelli license and issued a new license to Mr. Rucereto, who made due application and had duly published. We feel that the situation should be remedied and that everything that was done by action of the Council of February 24th in surrendering the Borrelli license and issuing a new license to Rucereto, should be undone, and the original application for transfer carried out in accordance with the request of the applicants and according to law.

Will you please advise me immediately, so that I might have the information for the Council meeting of March 16th, as to what you would suggest being done to properly rectify the situation?

Thanking you for your advice, I am,

Very truly yours,

ALBERT J. WUYTACK
Borough Attorney

March 13, 1936.

Albert J. Wuytack, Esq.,
Borough Attorney,
Dumont, N. J.

Dear Sir:-

I have your letter of March 11th.

The facts outlined in your letter indicate that both the surrender of Mr. Borrelli's license and the issuance of Mr. Rucereto's license were induced by mutual mistake of law. Equitable considerations dictate that under such circumstances the surrender and issuance be rescinded and the status quo ante restored. Ample analogies for such procedure exist in proceedings in courts of equity. Following the rescission of the surrender and issuance of the respective licenses a transfer of Mr. Borrelli's license may be effected pursuant to the provisions of section 23.

It is the ruling of the Commissioner that where a surrender of one license and the issuance of another were induced by the mutual mistake of the municipal issuing authority and the licensees that no transfer could lawfully be effected, the surrender and issuance may be rescinded and thereafter a transfer duly effected in accordance with law.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

By: Nathan L. Jacobs
Chief Deputy Commissioner
and Counsel

11. MUNICIPAL ORDINANCES -- PROHIBITING LICENSEES FROM SELLING TO POLICEMEN OR FIREMEN IN UNIFORM APPROVED -- DISAPPROVED AS TO OFFICERS ON DUTY BUT NOT IN UNIFORM.

March 19, 1936.

J. Cory Johnson, Town Clerk,
Bloomfield,
New Jersey.

Dear Mr. Johnson:

I have before me the resolution adopted by your Town Council on March 2, 1936, which provides that:

> "* * * neither the holder of a Plenary Retail Consumption License or any other type of license for the sale of alcoholic beverages, in the Town of Bloomfield, nor such licensee's agents or servants in the licensed premises, shall deliver or serve any alcoholic beverage from the licensed premises to any policeman, fireman, detective, police or fire chanceman, or superior officer or any police or fire department of any municipality while such policeman, fireman, detective, chanceman or superior officer is in uniform or on duty.
>
> "BE IT FURTHER RESOLVED that violation of this regulation by any licensee or the licensee's agents or servants in the licensed premises shall be cause for suspension or revocation of the license".

When a policeman or a fireman is on duty he ought not to drink and it makes no difference whether he is in uniform or not. The local police and fire authorities have it in their own power to discipline or discharge such men.

So far as your resolution demands that licensees shall refuse to sell liquor to a policeman or a fireman while in uniform, it is wholly approved.

When an officer is on duty, but not in uniform, the situation is entirely different. How is a licensee to know that fact? What inquiry could he make except from the officer himself? What would there be to put him on guard that the customer was, in fact, a fireman or a policeman? What test should or could any licensee, scrupulously anxious to comply with the law, make to determine whether a plainclothesman was on duty or not, even when he hails from his own town? And how would he determine the status of the visiting firemen and policemen?

It is unreasonable to place upon a licensee the burden of determining whether a policeman or a fireman is on duty when

there is no fair test at his command. It would be utterly unfair to punish a licensee for something which was not his fault and which no exercise of foresight or common sense could prevent. The resolution is, therefore, approved with the exception of the last three words of the first paragraph, viz: "or on duty". It is disapproved as to the latter.

I will be glad to consider, if you please, a further resolution covering officers who are known to licensees to be on duty or whom licensees have good reason to believe are on duty, or any other wording which comes within the spirit of this ruling.

Very truly yours,

D Frederick Burnett

Commissioner.