Mr. MacIntosh

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

BULLETIN 462 MAY 29, 1941.

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STATE OF NEW JERSEY
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BULLETIN 462 MAY 29, 1941.

1. APPELLATE DECISIONS - BADER v. PATERSON.

TRANSFER TO PREMISES IN BUSINESS DISTRICT DENIED BECAUSE OF OBJECTIONS OF BUSINESS PEOPLE IN THE VICINITY AND THE DETERMINATION OF THE MUNICIPAL BOARD THAT THE LOCATION WAS UNDESIRABLE - DENIAL AFFIRMED.

ALBERT BADER, Appellant, -vs- ALCOHOLIC BEVERAGE CONTROL BOARD OF THE CITY OF PATERSON, Respondent	ON APPEAL CONCLUSIONS AND ORDER

George S. Grabow, Esq., Attorney for Appellant.
George Surosky, Esq., Attorney for Respondent.
Louis Schwartz, Esq., Attorney for Objectors.

Appellant appeals from denial of transfer of his plenary retail consumption license from 134 West Broadway to 268 Main Street, Paterson.

After receiving a written objection signed by ten business people in the immediate vicinity of the premises to which transfer was sought, respondent held a hearing on February 26, 1941, and adjourned the matter for two weeks so that the members of the Board might make a personal investigation. At the adjourned hearing held on March 12, 1941, the transfer was unanimously denied.

Appellant seems to contend, among other reasons, that the action of respondent should be reversed because each of the three Commissioners stated a different reason for denial of the transfer. It appears from the minutes of the meeting of March 12, 1941 that Commissioner Brady stated that he voted in favor of the denial because the applicant had been convicted, in 1936, of selling alcoholic beverages to a minor. The minutes of said meeting are silent as to Commissioner Fogarty's reason for denial, but it was stipulated at the hearing herein that at the meeting on March 12, 1941 he stated that he voted for denial because of the objections filed. The minutes show that Commissioner Wegner stated that he voted for denial because "I feel that a tavern in that neighborhood would be detrimental to the block itself as a business block."

In Rosenvinge v. Metuchen, Bulletin 249, Item 6, the Commissioner recommended to license issuing authorities that they state their reasons for adverse decision so that there could be no charge of afterthought or other disaffection against those in authority. In Bartole v. Harrison, Bulletin 304, Item 2, the Commissioner remanded the case for further consideration where it was impossible to determine the true reason why the various Councilmen voted to deny the transfer. If that were the situation here, I would not, solely on that ground, reverse respondent's action but would remand the case for further consideration.

It seems sufficiently clear, however, that the reason for denial herein was the location of the premises to which the transfer was sought. It may be that the reason stated by Commissioner Brady would not, in itself, be sufficient because the evidence shows that, in October 1940, respondent Board passed upon appellant's qualifications when it granted his application for a license at 134 West Broadway. Cf. Zicherman v. Newark, Bulletin 227, Item 7. But it appears also that each of the three Commissioners personally investigated the location of the premises at 268 Main Street. Moreover, since it appears that the objections were filed by businessmen in the immediate vicinity, at least some of whom still do not desire a saloon in the midst of their business premises, the reasonable inference is that at least Commissioner Fogarty and Commissioner Wegner voted to deny the transfer because of the location of the premises to which the transfer was sought. Hence, I shall not remand the case but decide it upon its merits.

Commissioner Wegner testified at the hearing that in view of the type of stores located on the same side of the block he thought that a tavern would be detrimental to the property and business on that particular street. Meyer Aylen, who conducts a ladies' furnishing and drapery store in the building adjoining 258 Main Street, testified that he has recently spent about $20,000.00 in improving his property and that he believes the granting of the transfer will hurt his business because women are his principal customers. It appears also that the owner of the Mayfair Shoe Store, which is located on the other side of 258 Main Street, has stated that he doesn't care too much about having a saloon directly next door, and that the owner of a dry goods store, on the same side of the street, has stated that he objects to the granting of the license because he doesn't like saloons. By consent of the parties, the Hearer viewed the premises and reports that, in addition to the stores already mentioned, five furniture stores, a millinery shop, and a theatre are located on the same side of the street in addition to other business places.

The right to transfer is not inherent in a license. The issuing authority may grant or deny a transfer in the exercise of a reasonable discretion. Grand v. East Orange, Bulletin 447, Item 5. While a business neighborhood, such as that which exists in the vicinity of 258 Main Street, is a proper place for licensed premises, an issuing authority may consider all the surrounding circumstances in deciding whether a license should be issued in or transferred from some other district to said business district. Thus, in D. A. Schulte v. Perth Amboy, Bulletin 58, Item 13, the Commissioner upheld the denial of an additional license at the "hub" of the city, and in Sanford Drug Co. v. Maplewood, Bulletin 71, Item 6, he upheld the denial of a license, among other reasons, because of the character of the business neighborhood in which the premises were located. See also Grand v. Orange, supra. This case is admittedly close because of the business character of the neighborhood, but, under all the circumstances, I do not believe that the action of respondent in denying this transfer to premises located in a high type shopping district, patronized largely by women, may be said to be unreasonable. There is insufficient evidence to sustain appellant's contention that the transfer was denied to protect the interests of a licensee located on the opposite side of Main Street.

The action of respondent is affirmed.

Accordingly, it is, on this 22nd day of May, 1941,

ORDERED, that the appeal be and the same hereby is dismissed.

E. W. GARRETT,
Acting Commissioner.

2. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGE BELOW FAIR TRADE MINIMUM - SECOND OFFENSE - 20 DAYS' SUSPENSION.

In the Matter of Disciplinary Proceedings against LICHTMANN LIQUOR DISTRIBUTORS, INC., 94 French Street, New Brunswick, New Jersey, Holder of Plenary Retail Distribution License D-9, issued by the Board of Commissioners of the City of New Brunswick.	CONCLUSIONS AND ORDER

Kasen, Schnitzer & Kasen, Esqs., by Daniel G. Kasen, Esq., Attorneys for the Defendant-Licensee.
Robert R. Hendricks, Esq., Attorney for the State Department of Alcoholic Beverage Control.

Licensee admitted that, as charged, it sold a fifth-gallon bottle of Wilson "That's All" Whiskey on August 19, 1940 for $2.00 instead of the then established minimum resale price of $2.10, in violation of Rule 6 of State Regulations No. 30.

It chose, however, to stand trial, rather than plead guilty, in an attempt to show that such sale was the result of an innocent and "accidental" mistake which, it asserted, warranted the imposition of no penalty.

Licensee's explanation at the hearing was that upon receipt of the July 1940 price list, the President's son and a clerk, on July 20 and 22, checked the prices of its products and conformed them with those appearing in that price list; that, for some unexplainable reason, the new price of $2.10 for the fifth-gallon of Wilson's whiskey was overlooked; that when the sale of that product was made to Departmental investigators on August 19, 1940 such item was tagged at $2.00 both in its show window and on its shelves.

Had the explanation stopped at such point, I might, perhaps, have given the licensee the benefit of the doubt and believed, as I did in Re Cooper, Bulletin 461, Item 6, that the sale was not the result of any intent to "chisel." However, licensee was not thus content. In its eagerness to impress this Department that it was wholly innocent of any deliberate violation, it made its story "too good." The son testified that when he and the clerk were going through the July 1940 price list, they were aided by a mimeographed index of the products contained in that price list. The only thing wrong with this testimony is that the mimeographed index, prepared by this Department, was not distributed to retail licensees until at least a week after the dates upon which the son testified he and the clerk checked the prices! Falsus in uno, falsus in omnibus. This maxim is here applicable and I am constrained, therefore, to disbelieve in its entirety licensee's explanation of the manner in which the violation allegedly occurred.

Moreover, licensee's previous and also subsequent record of infractions, brands it as having a particular disregard for proper observance of the minimum price regulations, or, at least, as being persistently and grossly negligent in the manner in which its products were offered for sale. This indicates that any attempt by it to prove lack of deliberate intent when committing such violation should be entitled to little, if any, weight. On January 21, 1940 it advertised Old Crow Whiskey at $2.25 per quart instead of $2.25 per fifth; on June 7, 1940 it advertised Royal Oak Rye at $1.29 per quart instead of $1.40 per quart; on June 7, 1940 and again on June 14, 1940 it advertised King William IV Scotch Whisky at $2.22 per fifth instead of $2.39 per fifth, and a purchase of this item at the lower price resulted in the licensee's pleading guilty to a charge covering such offense and receiving a five-day suspension of its license (see Bulletin 415, Item 10); on August 9, 1940 and repeated again August 16, 23 and 30 it advertised Seagram's "V.O." 100 proof whiskey instead of 86.8 proof; on March 7, 1941 it advertised Union Leader Whiskey at $3.60 per half-gallon in such manner as to definitely mislead the public into the belief that such price had reference to Wilson's whiskey which was then selling at $4.95 per half-gallon.

Since the licensee proceeded to a hearing, and no mitigating circumstances appear, it is entitled to no remission from the usual penalty imposed for Fair Trade violations. Re Balas, Bulletin 353, Item 8; Re Seidman, Bulletin 372, Item 11; Re Cooper, supra.

Licensee contends that, in fixing a penalty for the instant violation, there should be taken into consideration the fact that the similar violation which took place on June 14, 1940, but two months previous to the one at bar, was not motivated deliberately but was rather the result of false information given to it by the liquor salesman from whom it purchased the item sold below the fixed price. There is no merit to this contention, especially in view of the nature of the subsequent violation. Assuming, but not deciding, that the previous violation was wholly innocent, the penalty would have been the same, namely, five days, even if such fact had been proven after hearing rather than imposed pursuant to its guilty plea. Cf. Re The Tiger Food Co., Inc., Bulletin 377, Item 11. The licensee, therefore, received a penalty for such previous violation no greater than was commensurate with its degree of culpability therein.

When assessing penalties for a second similar offense where, as here, such offense is either made deliberately or through gross neglect, it is immaterial that the first offense was innocent or deliberate. Such a violator, it must be assumed, has not learned its lesson. Obviously, the first suspension in nowise deterred the commission of the second one and since the latter is not innocent, the licensee is not entitled to any consideration relating to the former. It may be that where both violations are innocent the same rule will pertain, but that is unnecessary here to determine.

The license will, therefore, be suspended for twenty days.

Licensee's further contentions that (1) an innocent sale should not be deemed to violate the Fair Trade regulations and that

(2) this Department lacks power to adopt such regulations penalizing a licensee where there is no showing that the offense was made "wilfully and knowingly," have heretofore been found lacking in substance. Re Cooper, supra.

Accordingly, it is, on this 22nd day of May, 1941,

ORDERED, that Plenary Retail Distribution License D-9, heretofore issued to Lichtmann Liquor Distributors, Inc. for premises 94 French Street, New Brunswick, be and hereby is suspended for a period of twenty (20) days, effective May 26, 1941, at 7:00 A.M. (D.S.T.).

E. W. GARRETT,
Acting Commissioner.

3. NEWARK LICENSEES - TEST BLACKOUT MAY 26, 1941.

The Public Safety Committee of the Newark Defense Council informs me that a test Blackout will be held at fifteen minutes after midnight this coming Sunday. The official time and duration is from 12:15 A.M. to 12:30 A.M., Monday, May 26, 1941.

I have been requested to direct your attention to these facts and to suggest that you be prepared to permit no light to show from your licensed premises during the Blackout period.

It is my patriotic duty to present this matter to you.

It is your patriotic duty to cooperate.

E. W. GARRETT,
Acting Commissioner.

4. MANUFACTURERS AND WHOLESALERS - WAREHOUSING - MAY WAREHOUSE ONLY IN CONNECTION WITH THEIR OWN BUSINESSES.

SALES BY WHOLESALERS TO RETAILERS - TAX INCREASES - EXCESSIVE CREDIT - TIED-HOUSES - HEREIN OF THE DANGERS OF OVERSTOCKING RETAILERS.

May 23, 1941

Austin, Nichols & Co., Inc.,
82 Poinier St.,
Newark, N. J.

Gentlemen:

Your plenary wholesale license authorizes the sale and distribution of alcoholic beverages to duly licensed retailers and wholesalers, and the maintenance of a warehouse and salesroom. But the statute does not prescribe in so many words just what this warehousing may be. Apparently, it does not contemplate general warehousing, or storage for the account of others, as there is provided in the statute a public warehouse license (R. S. 33:1-14) for this purpose. Thus, the particular warehousing privileges conferred upon wholesalers must be found in the general context and purpose of the law.

It is provided in R. S. 33:1-26 that licensees, except public warehouse licensees, may deliver alcoholic beverages in their own vehicles, but solely, however, for their own respective businesses in connection with and as defined in their respective licenses, without a transportation license, if the vehicles are properly marked with transportation insignia as required therein. But it is only transportation in connection with the business covered by the license that is allowed, and not for hire as a public or common carrier. Thus, deliveries may not be made for retailers, although they may be made to retailers, and such deliveries are in connection with the wholesaler's business, for until delivery the transaction is not completed.

It is the same, in principle, with the warehousing, and hence the same rule applies.

It follows that wholesalers may warehouse only in connection with, and within the scope of their respective licenses. That means warehousing for the wholesaler, not for the retailer or for anyone else; i.e., the storage of merchandise in which title is in the wholesaler or which is merely in transit on the way in or on the way out of his place; in other words, such warehousing as is incidental to the conduct of the licensed business of the wholesaler. Consequently, it is not permissible for a wholesaler to store on his premises merchandise which has been sold to a retailer, for in such case it is no longer the wholesaler's business, but the retailer's business in connection with which the warehousing is done. That is the reason for the ruling in Bulletin 50, Item 10, to the same effect.

The foregoing applies, of course, to your New Jersey license at 82 Poinier Street, Newark. It does not apply to your Brooklyn premises which are not covered by your New Jersey license and as to which you should consult the New York authorities.

You mention that the storage for retailers in which you engaged took place during the month of September 1940, when the retailers bought a quantity of merchandise in anticipation of the wholesale price and discount schedules which were to take effect on October 1, 1940.

Do I understand that so much merchandise was sold to retailers, in anticipation of these regulations, that the retailers could not even accept the merchandise, necessitating storage elsewhere?

My recollection is that the same stocking up occurred during June of 1940, prior to the Federal tax increase effective July 1, 1940.

In view that another Federal tax increase may shortly be imposed and the same situation created, I feel that I should caution you against sales which result in retailers' taking merchandise in a volume far beyond their business needs or credit facilities. While ordinary credit is unobjectionable and a normal business practice, there is no question but that the granting of excessive credit weakens the retailer's financial stability, brings him under the influence of the wholesaler and creates to a degree, a tied-house, which is the very thing Section 33:1-43 of the Act is designed to prevent. As the amount of credit increases, the influence of the wholesaler over the retailer also increases, in like or possibly greater proportion. To enforce collection of the account becomes hazardous to the retailer's existence and finally reaches the point where it would accomplish, substantially, the destruction of the retailer's business. With that prospect, the retailer becomes subservient to the wholesaler, as is wholly natural, and it is inevitable that the wholesaler's control over the retailer shall eventually become complete.

I therefore cordially recommend that your company, and the wholesale industry as a whole, consider this merchandising practice most carefully. The consequences will bear careful watching. I hope that because of such practices it will not become necessary to promulgate regulations to accomplish the purposes of Section 33:1-43.

Very truly yours,
E. W. GARRETT,
Acting Commissioner.

5. APPELLATE DECISIONS - RAYNOR v. WEST DEPTFORD.

SUFFICIENT LICENSES IN VICINITY - DENIAL AFFIRMED.

STANLEY RAYNOR, Appellant, -vs- TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WEST DEPTFORD, Respondent	ON APPEAL CONCLUSIONS AND ORDER

Hannold & Hannold, Esqs., Attorneys for the Appellant.
William J. McEwen, Township Clerk, Appearing on behalf of the Respondent.

Appellant appeals from respondent's refusal to transfer his plenary retail distribution license for premises on First Avenue, Mantua, to premises on Hessian Avenue, Colonial Manor, both sections being located in the Township of West Deptford.

This municipality is a rural agricultural community with a population of 4,000. There is no business district in the entire township but scattered here and there are various stores, and also different types of business carried on from private residences. In addition to nine consumption licenses issued in the municipality, there are two distribution licenses, one of which is issued to appellant. The other is about two miles from where appellant desires to locate.

The section known as Colonial Manor has approximately 600 people residing there. In this section there are now located two consumption licenses, one about three-tenths of a mile from the proposed site and the other about one-half mile therefrom. There is also a consumption license, although located in the adjoining township of Deptford, about 250 feet away.

Hessian Avenue is essentially a residential street. Appellant's new premises, a two-story dwelling, are located between 100 and 150 feet off the main highway known as Gateway Boulevard. On the corner of Hessian Avenue and Gateway Boulevard is a retail automobile business which is on the line dividing West Deptford Township from the City of Woodbury. Next to the automobile business there are, on Gateway Boulevard in Woodbury, six or seven stores, all catering to the immediate necessities of the residents.

The number of licensed places to be permitted in any particular area is a matter confided to the sound discretion of the issuing authority. Santoriello v. Howell, Bulletin 252, Item 8; Sudol v. Wallington, Bulletin 267, Item 10; Pitman v. Pemberton, Bulletin 277, Item 6; Boody v. Gloucester, Bulletin 300, Item 11; Smith v. Winslow, Bulletin 334, Item 1; Alpert v. Asbury Park, Bulletin 380, Item 2; Winslow v. Pennsauken, Bulletin 401, Item 11. The privilege of a place to place transfer of an outstanding license is subject, among other things, to the reasonable and bona fide exercise of that discretion. Lingelbach v. North Caldwell, Bulletin 180, Item 8; Ninety-One Jefferson St., Passaic, Inc. v. Passaic, Bulletin 255, Item 9; Polansky v. Millburn, Bulletin 258, Item 2; Mita v. Orange, Bulletin 266, Item 10; Gomulka v. Linden, Bulletin 294, Item 8; Smith v. Winslow, supra; Alpert v. Asbury Park, supra; Winslow v. Pennsauken, supra.

In view of the number of licensed establishments now located in the vicinity, it would appear that respondent's determination that sufficient licenses have been issued there and its consequent refusal to place an additional license there, albeit a distribution license, is not unreasonable.

As was said in Boody v. Gloucester, supra:

> "Determination of the number of liquor establishments to be permitted in any particular area is a matter confided to the sound discretion of the issuing authority. Santoriello v. Howell, Bulletin 252, Item 8; Mita v. Orange, Bulletin 266, Item 10; Sudol v. Wallington, Bulletin 267, Item 10. There is no proof that respondent abused that discretion in determining that a third liquor place - even though a 'package' store as distinguished from the existent consumption establishments - should not be permitted in the area in question.
>
> "Appellant contends, however, that there are, at present, only consumption places and no 'package' stores in the Township; that it is unreasonable to compel a man or woman seeking to purchase bottled liquor to walk into or through the barroom of a tavern; that, therefore, a 'package' store should be permitted in the Township.
>
> "This contention is without merit. In the first place, it does not appear that anyone in the Township is suffering inconvenience resulting from the lack of a 'package' store. Furthermore, even were appellant's argument well taken that there is need of such a store in the Township, it does not follow that the store must be located at the vicinity in question. As already stated, respondent was reasonable in determining that a sufficient number of liquor places already exist in that area."

This quotation from the Boody case also answers appellant's contention that it would be more convenient and desirable for the residents to purchase their liquor in a "package goods" store instead of a saloon. Moreover, such inconvenience, of itself, does not constitute such a public need as would here warrant a finding that respondent's denial of appellant's application was arbitrary. Cf. Ravitz v. Little Falls, Bulletin 403, Item 1.

The foregoing renders it unnecessary to pass upon the other reasons assigned by respondent for denying the transfer of appellant's license.

The action of respondent is affirmed.

Accordingly, it is, on this 23rd day of May, 1941,

ORDERED, that the petition of appeal be and the same is hereby dismissed.

E. W. GARRETT,
Acting Commissioner.

6. DISCIPLINARY PROCEEDINGS - DEVICE IN THE NATURE OF A SLOT MACHINE - DEVICE DESIGNED FOR GAMBLING - KEENEY'S "1938 TRACK TIME" - UNAUTHORIZED INSTALLATION ON LICENSED PREMISES BY MACHINE DISTRIBUTOR - CHARGES WITHDRAWN.

In the Matter of Disciplinary Proceedings against)
)
VALLATESE ASSOCIATION,) ORDER
800 Fourth Avenue,)
Elizabeth, N. J.,)
)
Holder of Club License CB-6, issued by the Municipal Board of Alcoholic Beverage Control of the City of Elizabeth, County of Union.)

On May 9, 1941 charges were preferred against the licensee, Vallatese Association, which alleged that it possessed, and allowed, permitted and suffered on or about its licensed premises a device in the nature of a slot machine and a device designed for the purpose of gambling.

These charges were preferred as a result of reports from investigators which disclosed that a Keeney's "1938 Track Time" machine had been found in the licensed premises. Supplemental reports from the participating investigators show that the machine when found was not connected to any electrical outlet (a prerequisite to operation), was not in working condition, and in fact did not operate when tried by an investigator.

The supplemental reports further disclose that subsequent to the arrival of the investigators the machine was called for and actually removed from the premises in the investigators' presence without any request or order from the investigators or any person connected with the premises.

In response to questioning by the investigators, it appeared that the Keeney's "1938 Track Time" machine had been installed without authority or direction from any responsible person connected with the licensed association because a pin ball bagatelle machine had not then been available. The Keeney's machine was removed and replaced voluntarily with a pin ball bagatelle in accordance with the apparent original intention.

The original reports did not disclose the full facts. In such a posture of circumstances it is evident that the licensed association should not be subjected to disciplinary proceedings and penalized for the unauthorized act of a machine distributor. The gun of Jersey Justice should shoot straight and fast, but it should not go off half-cocked.

Accordingly, it is, on this 23rd day of May, 1941,

ORDERED, that the charges heretofore preferred against Vallatese Association, holder of Club License CB-6, issued by the Municipal Board of Alcoholic Beverage Control of the City of Elizabeth, be and the same are hereby withdrawn.

E. W. GARRETT,
Acting Commissioner.

7. COURT DECISIONS - NEW JERSEY CHANCERY - PARAMOUNT REALTY COMPANY v. ROBERIK REALTY COMPANY.

TIED-HOUSES - ACCEPTANCE OF NEGOTIABLE PROMISSORY NOTE, APPARENTLY UNSECURED, IN PAYMENT FOR REAL PROPERTY USED AS RETAIL LICENSED PREMISES AND BOUGHT FROM BREWERY AFFILIATE BY PURCHASER APPARENTLY NOT INTERESTED IN SELLER, DOES NOT, IN CONTEMPLATION OF R.S.33:1-43, CREATE A DIRECT OR INDIRECT INTEREST OF BREWERY IN RETAILING OR REQUIRE DISCONTINUANCE OF SALE OF BREWERY'S PRODUCTS.

Between IN CHANCERY OF NEW JERSEY

PARAMOUNT REALTY COMPANY, a corporation,
Complainant,
-and-
ROBERIK REALTY COMPANY, a corporation,
Defendant.

On Bill.
Specific Performance.
Docket 139, page 30.

MEMORANDUM

(Not for print in the Official Reports).

(Decided May 19, 1941).

Appearances:
Mr. Milton M. Unger, solicitor for complainant.
Mr. Julius Stein, solicitor for defendant.

STEIN, V. C.

This case is before me on bill and answer. On April 4, 1941, the complainant agreed to sell to the defendant a parcel of real estate on Clinton Avenue, Newark, New Jersey, and to assign to the defendant the mortgage held by the complainant on property on Fabyan Place, Newark, New Jersey. The agreed purchase price for both real estate and mortgage was $17,552.00 which the purchaser agreed to pay by its negotiable promissory note in that sum payable to the order of the complainant in five years, with interest. The contract calls for the delivery of a warranty deed and an assignment of the bond and mortgage. The contract contains a clause which recites that the parties thereto understand that both the Clinton Avenue and Fabyan Place properties have buildings located thereon wherein there is lawfully carried on the business of the retailing of alcoholic beverages, including products of the G. Krueger Brewing Company of Newark, New Jersey, and that the complainant represents that the acquisition of the properties, or the mortgage thereon, contemplated by the agreement, will not make it unlawful for the purchaser or its tenants to continue the sale of liquor thereon in view of the statute known as, "'An Act concerning alcoholic beverages, Section 33:1-43 of the Revised Statutes', particularly as amended by the Laws of 1940, Chapter 234, Sec. 1, approved December 23, 1940,"* either now or after the effective date of this statute which is June 6, 1941.

The defendant concedes the validity of complainant's title to the realty and the bond and mortgage, but justifies its refusal to take title upon the ground that the complainant has stockholders and directors who are also stockholders and directors in the Brewing Company, and that the acceptance of the defendant's note by the complainant, pursuant to the contract, will vest in the complainant such an interest in the retailing of alcoholic beverages on the premises as is declared unlawful by the cited statute.

The complainant seeks the specific performance of the agreement, and inasmuch as it appears from the pleadings that the essential facts are not in dispute, the case is properly before the court on bill and answer and there remains to be considered only the rights of the respective parties thereunder in the light of the statute. The pertinent provisions of this statute, which become enforcible on June 6, 1941, read as follows:

> 33:1-43. "It shall be unlawful for any owner, part owner, stockholder or officer or director of any corporation, or any other person whatsoever interested in anyway whatsoever in any brewery, winery, distillery or rectifying and blending plant, or any wholesaler of alcoholic beverages, to conduct, own either in whole or in part, or be directly or indirectly interested in the retailing of any alcoholic beverages except as provided in this chapter, and such interest shall include any payments or delivery of money or property by way of loan or otherwise accompanied by an agreement to sell the product of said brewery, winery, distillery, rectifying and blending plant or wholesaler. Prior to December sixth, one thousand nine hundred and forty,** the ownership of or mortgage upon or any other interest in licensed premises if such ownership, mortgage or interest existed on December sixth, one thousand nine hundred and thirty-three, shall not be deemed to be an interest in the retailing of alcoholic beverages. On and after December sixth, one thousand nine hundred and forty,** the ownership of or mortgage upon or any other interest in licensed premises if such ownership, mortgage or interest existed on December sixth, one thousand nine hundred and thirty-three, shall not be deemed to be an interest in the retailing of alcoholic beverages; provided, none of the products of the brewery, winery, distillery, rectifying and blending plant, or wholesaler, is sold directly or indirectly at the licensed premises.

* "AN ACT concerning alcoholic beverages, and amending section 33:1-43 of the Revised Statutes", approved December 20, 1940 (P.L. 1940, c. 234).

** June sixth, one thousand nine hundred and forty-one.

"It shall be unlawful for any owner, part owner, stockholder or officer or director of any corporation, or any other person whatsoever, interested in any way whatsoever in the retailing of alcoholic beverages to conduct, own either in whole or in part, or to be a shareholder, officer or director of a corporation or association, directly or indirectly, interested in any brewery, winery, distillery, rectifying and blending plant, or wholesaling or importing interests of any kind whatsoever outside of the State.

"No interest in the retailing of alcoholic beverages shall be deemed to exist by reason of the ownership, delivery or loan of interior signs designed for and exclusively used for advertising the product of or product offered for sale by such brewery, winery, distillery or rectifying and blending plant or wholesaler."

The question presented is whether or not the consummation of the contract in question will vest in the complainant such an interest in the retailing of alcoholic beverages of the brewing company on the premises as to make the sale of such beverages unlawful. There is no contention that the defendant is connected with either the complainant or the brewing company in any capacity whatsoever. In fact, the only interest between the parties is that the defendant becomes the debtor of the complainant upon the consummation of the sale.

The New York Alcoholic Beverage Control Law (L. 1934, c.478, as amended by L. 1937, c. 595) is similar to the New Jersey statute. It provides:

"Sec. 101. Manufacturers and wholesalers not to be interested in retail places. 1. It shall be unlawful for a manufacturer or wholesaler licensed under this chapter to

"(a) Be interested directly or indirectly in any premises where any alcoholic beverage is sold at retail; or in any business devoted wholly or partially to the sale of any alcoholic beverage at retail by stock ownership, interlocking directors, mortgage or lien on any personal or real property, or by any other means. * * * *

"(b) Make, or cause to be made, any loan to any person engaged in the manufacturer or sale of any alcoholic beverage at wholesale or retail.

"(c) Make any gift or render any service of any kind whatsoever, directly or indirectly, to any person licensed under this chapter which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler.

"(d) Enter into any contract with any retail licensee whereby such licensee agrees to confine his sales to alcoholic beverages manufactured or sold by one or more such manufacturers or wholesalers. Any such contract shall be void and subject the licensee (sic) of all parties concerned to revocation.

"2. Any lien, mortgage, or other interest or estate, however, now held by a manufacturer or wholesaler on real property of a licensee, which lien, mortgage, interest or estate was acquired on or before December thirty-first, nineteen hundred and thirty-two, shall not be included within the provisions of this section but the burden of estimating the time of the accrual of the interest comprehended by this subdivision shall be upon the person who claims to be entitled to the protection and exemption afforded hereby."

Interpreting that section, the Attorney General of New York held that a stockholder secretary of a brewing corporation may lease his own realty to a lessee who is to engage in the sale of beer. See Op. Attorney-General (1933), 48 St. Dept. 16.

What is meant by the words "directly or indirectly interested"?

The Interstate Commerce Act (49 U.S.C.A., title "Transportation", Sec. 1 (8),) provides: "It shall be unlawful for any railroad company to transport (in interstate commerce) * * * any article or commodity * * * which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or intended for its use in the conduct of its business as a common carrier."

In United States ex rel. Attorney General v. Delaware & Hudson Co., (1909) 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, Mr. Justice White held that the ownership by a railroad carrier of stock, irrespective of the extent of such stock ownership, in a bona fide corporation manufacturing, mining, producing or owning the commodity carried, in that case coal, is not the "interest, direct or indirect," in such commodity forbidden to the carrier, but that such words are to be taken as embracing only a legal or equitable interest in the commodities to which they refer. The language of the Supreme Court at page 413 of that case embraces a most extensive examination of what is meant by "interest, direct or indirect." I quote:

> "It remains to determine the nature and character of the interest embraced in the words 'in which it is interested, directly or indirectly.' The contention of the government that the clause forbids a railroad company to transport any commodity manufactured, mined, or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. Pullman's Palace Car Co. v. Missouri P.R. Co. 115 U.S. 588, 29 L. ed. 499, 6 Sup. Ct. Rep. 194, Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct.

Rep. 728. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the government that, if the clause embraces only a legal interest in an article or commodity, it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined, or produced, or is owned by a corporation in which the carrier is a stockholder. The contention of the government substantially rests upon the assumption that, unless the words be given the meaning contended for, they are without significance. That this is clearly not the case is well illustrated by the New York, N. H. & H. R. Co. case, supra. In that case the Chesapeake & Ohio Railway Company it was shown at one time not only directly engaged in buying, selling, and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. * * * If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the government not well founded.

"We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: * * * (c) When the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder. * * *"

It seems to me that in order to determine the meaning of the word "interest," or "interested" as used in our statute, a financial as distinguished from a sentimental or prospectively remote interest is intended.

In the case under consideration there is no present or contemplated financial interest, nor a direct or indirect interest between the defendant and the brewing company. In its brief the defendant concedes that the mere giving of a note by the defendant to the complainant constitutes no lien on the premises and that the statute refers to an "interest in licensed premises." Interest is not to be confused with obligation. True it is that the defendant, by reason of the note which it is to give, has an obligation to the complainant and it may also be true that the non-payment of the note may give rise to a judgment which would ripen into a lien upon the premises, but that is not the situation before the court at the present time. It may be that if such a condition arose the situation would be altered. It is, however, one not contemplated or required by the contract.

Here the sale results in the acquisition of title by a total stranger with the resultant relationship of debtor and creditor arising as between the defendant and the seller. It neither violates the letter nor the intent and spirit of the statute. It is not one under which the statute in question would make it unlawful for the defendant or its tenants to use the premises for the sale of alcoholic beverages manufactured by the brewery in question.

This being the only question at issue, specific performance is not to be refused to the complainant. I will advise a decree for specific performance of the contract without costs or counsel fees.

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8. COURT DECISIONS - NEW JERSEY SUPREME COURT - SCHENLEY v. GARRETT - ENGLANDER AND KREMER v. ANDRUS.

DISCRIMINATORY PRICES AND DISCOUNTS - REGULATIONS NO. 34 - WRIT OF CERTIORARI GRANTED TO REVIEW CONSTITUTIONALITY OF P.L. 1939, C. 87 AND TITLE 33 OF THE REVISED STATUTES, AND TO DETERMINE THE AUTHORITY OF THE ACTING COMMISSIONER - WRIT OF CERTIORARI DENIED TO REVIEW LEGALITY OF ARRESTS FOR VIOLATION OF P.L. 1939, C. 87 PRIOR TO INDICTMENT.

NEW JERSEY SUPREME COURT

SCHENLEY DISTRIBUTORS, INC.,)
Prosecutor,)
-vs-)
E. W. GARRETT, ACTING COMMISSIONER OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF NEW JERSEY,)
Defendant.)
- - - -) OPINION
SAM ENGLANDER and EMANUEL KREMER,)
Prosecutors,)
-vs-)
M. ANDRUS, JUDGE OF THE POLICE COURT OF THE CITY OF PASSAIC,)
Defendants.)

Argued May 20, 1941; briefs submitted May 23, 1941; decided May 26, 1941.

On petitions for writs of certiorari.

Before Justice Heher, at chambers.

For the prosecutors: Milton, McNulty & Augelli; John Milton, of counsel.

For the defendants: Emerson A. Tschupp.

HEHER, J.

The motion papers present fairly debatable fundamental questions which warrant the issuance of a certiorari in the case of Schenley Distributors, Inc. The constitutionality of the underlying statutes is challenged, and, on the hypothesis of their validity, the authority of the Acting Commissioner is denied. And there are other substantial questions raised which it is not necessary to specify. In my view, the public interest demands that all these questions be determined at the outset; and, since they are jurisdictional, the writ should issue now. It is not a sufficient objection that the allowance of the writ at this time will interfere with the enforcement of the statute in this behalf. It is manifestly in the public interest that these questions be resolved as speedily as possible. Counsel for the prosecutors has agreed to waive the rules and otherwise to cooperate in the bringing on of the issue for an early hearing and determination. Moreover, the allowance of the writ after judgment would undoubtedly have the same result. It is conceded that, in such event, the writ should go.

But these considerations do not apply to the complaints made in the police court against Englander and Kremer. Their applications seem to proceed on the assumption that they are nonindictable offenses, but in the memorandum submitted by the acting commissioner as amicus curiae, it is maintained that the alleged violations are indictable and that the defendant judicial officer "has the jurisdiction of a justice of the peace, i.e., that of an examining and committing magistrate," and may only "conduct a preliminary hearing and hold prosecutors for action of the Grand Jury." In such circumstances, certiorari should not issue before indictment. Farrow v. Springer, 57 N. J. L. 353. A different situation would be presented if the magistrate asserted jurisdiction to proceed to final judgment. If an indictment should be returned, counsel may renew their motions for certioraris if they are so advised.

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E. W. Garrett

Acting Commissioner.