STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, 2, N. J.

BULLETIN 697 FEBRUARY 28, 1946.

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STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, 2, N. J.

BULLETIN 697 FEBRUARY 28, 1946.

1. APPELLATE DECISIONS - PETERS v. BLOOMFIELD.

EDWARD C. PETERS,	)	
Appellant,	)	
-vs-	)	ON APPEAL CONCLUSIONS AND ORDER
TOWN COUNCIL OF THE TOWN OF BLOOMFIELD,	)	
Respondent	)	

Thomas J. Markey, Esq., Attorney for Appellant.
Edward C. Pettit, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This appeal is from the action of the Town Council of the Town of Bloomfield denying a transfer of appellant's plenary retail consumption license from 338 Broad Street, Bloomfield, to 336-338 Broad Street, Bloomfield. The purpose of the proposed transfer was to add premises designated as 336 Broad Street to the presently licensed premises.

Prior to March 1, 1945, appellant held a license for 50 James Street, Bloomfield. On that date respondent granted an application to transfer appellant's license from 50 James Street to 338 Broad Street. An application for the renewal of the license at 338 Broad Street was subsequently granted for the current license year. Thereafter, on June 21, 1945, appellant filed his application for the transfer, which is the subject of the present application.

336-338 Broad Street is a two-story brick building, having a frontage of 30 feet and containing two stores on the ground floor, with two apartments on the second floor. The two stores are separated by the street entrance leading to a narrow hall and stairway to the second floor. Store No. 338 has a frontage of 15 feet, while store No. 336 has a frontage of 12 feet.

After the appellant moved into 338 Broad Street, he was advised by the local health officer that it was necessary for him to provide separate sanitary facilities for men and women. Appellant states that because of the difficulty of securing labor and materials, he was unable to make the necessary alterations in No. 338 and, therefore, rented No. 336, cut a doorway between the two stores (in the rear of the hall and stairway mentioned above) where they adjoin, and since that time has been using the sanitary facilities of No. 336 so as to comply with local health regulations.

Appellant alleges as grounds for appeal (1) the action of respondent "was not predicated upon objections substantial in fact or in law"; (2) that the proceedings before the respondent did not comply with the Alcoholic Beverage Law; (3) respondent "accepted statements not made under oath and not predicated upon written objections"; (4) respondent "acted without legal or persuasive evidence to justify" its action; and (5) that the action of respondent is "arbitrary and unreasonable."

It is unnecessary to consider the second and third grounds for reversal since the appeal was heard de novo with full opportunity for

counsel to present testimony under oath and to examine and cross-examine the witnesses. Cf. Rule 6 of State Regulations No. 15.

Appellant asserts that the proposed premises were approved by the local police department and the local board of health. Mere approval of the premises by these agencies did not relieve the local issuing authority of its responsibility "to investigate applicants and to inspect premises sought to be licensed", and to determine whether additional facilities for the sale of alcoholic beverages were required to meet public convenience and necessity.

Respondent urges that the denial should be sustained on the ground that there are ample facilities for the sale and consumption of alcoholic beverages in the neighborhood and that the enlargement of the presently licensed premises would result in increased noise and in other activities objectionable to persons living in the neighborhood.

While a number of individual objectors appeared and testified at the hearing before the respondent and on appeal, the objection voiced by these witnesses appeared to be largely speculative in character. Appellant has apparently conducted his present premises in an orderly manner. Appellant has, however, failed to demonstrate any public need for additional facilities. He frankly states that he does not plan to make any use of the enlarged premises in the immediate future other than to decorate the window and "to put a few tables in there *** not right away." The rental of No. 336 by the appellant was apparently dictated by necessity.

While technically the transfer of appellant's license would not increase the number of licenses outstanding, the practical effect of the transfer would be to increase the available facilities for the sale of liquor by the glass. It is now well settled that a municipal issuing authority may refuse to issue an additional license where, in the exercise of its judgment, it determines that there are sufficient licenses presently outstanding in the community to meet public convenience. Laschitzki v. Fieldsboro, Bulletin 685, Item 13. By the same token, a municipal issuing authority, in the exercise of its discretionary authority, may refuse to grant a transfer designed to increase the extent of licensed premises where, in its judgment, there are already ample facilities in the neighborhood for the sale of alcoholic beverages. Each case must, of course, stand upon its own merits. With respect to the instant case, the denial of the appellant's application, under the circumstances, has not been shown to be unreasonable and, therefore, respondent's action must be affirmed.

Accordingly, it is, on this 14th day of February, 1946,

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

ALFRED E. DRISCOLL
Commissioner.

2. APPELLATE DECISIONS - KLEIN v. ALLENHURST.

FRANK KLEIN, Appellant, -vs- BOARD OF COMMISSIONERS OF THE BOROUGH OF ALLENHURST, Respondent	ON APPEAL CONCLUSIONS AND ORDER

Robert Friedlander, Esq., Attorney for Appellant.
Stout & O'Hagen, Esqs., by William J. O'Hagen, Esq.,
Attorneys for Respondent.

BY THE COMMISSIONER:

This is an appeal from the action of the respondent denying the application of the appellant for a plenary retail distribution license.

On July 30, 1945, appellant applied to the respondent for a plenary retail distribution license for premises located at 411 Main Street, Allenhurst, New Jersey. A "public hearing" on the application was held by the Board of Commissioners on August 14, 1945. At that time written objections were received from local property owners and, after the letters had been read, there was a motion that the application be "declined." Only two of the three members of the local governing body were present. One voted in favor of the motion and the other against. The motion was accordingly not carried. Thereafter, on motion, the decision on the application was continued for further consideration at the next regular meeting of the Board. On August 28, 1945, the application again came up for consideration and, on motion, the application was denied by a vote of two to one.

Immediately after the denial of the application, an ordinance was introduced limiting the number of plenary retail distribution licenses that may be issued and outstanding at one and the same time in the Borough of Allenhurst to three. This ordinance was adopted on final reading on September 11, 1945 and is now in effect.

Appellant advances as his grounds for appeal (1) the proceedings at the meeting on August 28th were not in conformity with Rules 6 and 7 of Regulations No. 2 of the Rules and Regulations of this Department; (2) that the objections of the local residents and the reason for the refusal of the license are insufficient in law to sustain the Borough's position; (3) that the appellant was denied the right to examine objectors; (4) that, at the time the application was filed, the ordinance allowed four licenses and that three had been issued and that, by reason thereof, he contends that he is entitled to the fourth license as a matter of right.

In view of the fact that the appellant sought and obtained a hearing _de novo_ on the appeal, his first and third grounds are without merit. On appeal, counsel for appellant was freely permitted to examine and cross-examine witnesses.

With respect to the fourth ground, it is now well settled that a license is a privilege and that no one is entitled to a license as a matter of right. I have consistently held that the mere fact that the full number of licenses authorized by an ordinance (or resolution adopted prior to July 1, 1937) has not been issued and that a vacancy

exists does not require the granting of an application where there is no public need or necessity supporting the granting of an additional license. Houtkin v. Lakewood, Bulletin 646, Item 1; Re Morris, Bulletin 684, Item 12; Bumball v. Burnett, 115 N. J. L. 254, 255. As Mr. Justice Parker stated in the latter case: "If the ordinance had fixed one hundred as a limit, still the council, in its discretionary power to license or not to license, could stop short of that number at any point, or could (where the facts warranted) license A and refuse B." (Language in parenthesis mine.)

There remains to be considered, therefore, only the second ground for appeal. Allenhurst is purely a summer community, located north of Asbury Park. Its all-year-round population is about 520, and its summer population has been estimated at about 2,500. Its business section is located along Main Street and is confined to about four blocks. At the time the application was filed there were three plenary retail distribution licenses issued and outstanding, although there was, as appellant contends, in existence at that time a resolution, adopted in 1934, permitting the issuance of four licenses. This was due to the fact that at one time four plenary retail distribution licenses had been issued. The testimony discloses that the fourth license was abandoned in 1934. At present there are no plenary retail consumption licenses outstanding in the Borough. The three distribution licenses are located practically within the same block, and are held, respectively, by a grocery store, a drug store and a delicatessen store.

Appellant does not plan to operate his license, if granted, in connection with any other business, and his attorney stressed during the hearing that there was a need for a store devoted exclusively to the sale of liquor by the bottle.

The municipality contends that there is no need for an additional license. It takes the position that its introduction and passage of the ordinance limiting the number of plenary retail distribution licenses that may be issued and outstanding in the Borough to three constitutes a declaration of policy that may not be ignored. With this contention I agree.

The Mayor of the Borough, Commissioner Selby, appeared and testified at the hearing. He stated that, in his opinion, three plenary retail distribution licenses are sufficient. Further, that there were objections raised by residents which, as Mayor, he felt he had to take care of; and that, further, four licenses would not help the municipality -- although he did qualify that part of his statement by stating, on cross-examination, that his views in that respect might change if the granting of an additional plenary retail distribution license would attract some big business, such as a super market or large chain store, to the municipality. Commissioner Tilton appeared and stated that he had no objection to four licenses and that he had told the appellant prior to the hearing that he had no objection to granting his application "owing to the fact that there was a vacancy." He further stated, however, that, when the Klein application was denied, he felt that an ordinance limiting the number to three plenary retail distribution licenses should be adopted, and voted in favor of such an ordinance.

The mere fact that one of the Commissioners indicated that he might change his views on the controversial subject of the number of licenses that should be issued and outstanding if a substantial business enterprise could be attracted to the community is not, in itself, sufficient to establish prejudice or bias against the appellant.

The action of the respondent is affirmed.

Accordingly, it is, on this 14th day of February, 1946,

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

ALFRED E. DRISCOLL

3. COURT DECISIONS - NEW JERSEY SUPREME COURT - ZICHERMAN v. STATE COMMISSIONER OF ALCOHOLIC BEVERAGE CONTROL - WRIT OF CERTIORARI DISMISSED (SEE BULLETIN 676, ITEM 12).

NEW JERSEY SUPREME COURT
No. 254, October Term, 1945

BERTHA ZICHERMAN, trading as)
BERT'S HORSESHOE BAR,)
Prosecutor,)
-vs-)
ALFRED E. DRISCOLL, Commissioner)
of the State Department of Alcoholic)
Beverage Control of the State of New)
Jersey,)
Respondent)

Argued October 3, 1945; decided February 5, 1946.

On Certiorari.

Before Brogan, Chief Justice, and Justices Parker and Oliphant.

For the prosecutor, Schotland & Schotland (Philip J. Schotland, of counsel).

For the respondent, Walter D. Van Riper, Attorney General.

The opinion of the court was delivered by

OLIPHANT, J.

The prosecutor, Bertha Zicherman, was the holder of a plenary retail consumption license issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark (hereafter called the Municipal Board) for premises at 174 West Kinney Street, Newark, for the licensing year which began on July 1, 1943 and terminated on June 30, 1944. She had been a licensee continuously for over ten years. She was charged by the Municipal Board with violations on April 10, 1943 and July 13, 1943 of the Alcoholic Beverage Control Act. A hearing upon said charges was held before the Municipal Board in accordance with the provisions of R. S. 33:1-31 and her license was revoked. An appeal from such action was taken to the State Commissioner of Alcoholic Beverage Control, and after hearing the Municipal Board was reversed in its findings as to some charges and sustained as to others. The Commissioner modified the action of the Municipal Board in revoking the license and ordered a suspension thereof for the balance of the term ending June 30, 1944, effective April 21, 1944. As a result of that order the prosecutor did not conduct any business under her license during that time.

The prosecutor applied to the Municipal Board for a renewal of her license for the licensing year beginning July 1, 1944 and terminating June 30, 1945. This application was denied and she again appealed to the Commissioner of Alcoholic Beverage Control from such denial. This appeal was dismissed by the Commissioner by an order dated the 15th day of January, 1945. This writ brings up for review that order.

The primary question presented is the right of a holder of a plenary retail consumption license to a renewal of that license for a subsequent term.

The question of a forfeiture of any property right is not involved. R. S. 33:1-26. A liquor license is a privilege. A renewal license is in the same category as an original license. There is no inherent right in a citizen to sell intoxicating liquor by retail, Crowley v. Christensen, 137 U. S. 86, and no person is entitled as a matter of law to a liquor license. Bumball v. Burnett, 115 N. J. L. 254; Paul v. Gloucester, 50 N. J. L. 585; Voight v. Board of Excise, 59 N. J. L. 358; Meehan v. Excise Commissioners, 73 N. J. L. 382, aff'd 75 N. J. L. 557. No licensee has a vested right to the renewal of a license. Whether an original license should issue or a license be renewed rests in the sound discretion of the issuing authority. Unless there has been a clear abuse of discretion this court should not interfere with the actions of the constituted authorities. Allen v. City of Paterson, 98 N. J. L. 661; Fornarotto v. Public Utility Com's, 105 N. J. L. 28. We find no such abuse. The liquor business is one that must be carefully supervised and it should be conducted by reputable people in a reputable manner. The common interest of the general public should be the guide post in the issuing and renewing of licenses.

There was abundant evidence before both the Municipal Board and the Commissioner to support their actions. Under R. S. 33:1-19 it was the duty of the Municipal Board to administer the issuance of such licenses and under R. S. 33:1-24 it was its duty to investigate applicants for licenses. Under the duty imposed upon it the board is required to consider an applicant's past record as a licensee. That of the prosecutor indicated that she had been found guilty in 1935 of possessing illicit alcoholic beverages, that subsequently she or her agents had been found guilty of permitting a minor to consume alcoholic beverages upon her licensed premises, that persons of questionable character frequented her place, that there were disturbances there and that there had been a violation of R. S. 33:1-35.

Prosecutor argues further that there was both a suspension and a revocation of the license, a double penalty and as the statute R. S. 33:1-31 authorized a suspension or revocation such action was invalid. There was no revocation, the license was suspended and then not renewed for the next licensing period, an entirely different situation.

We find no merit in the remaining contentions of the prosecutor.

The writ is dismissed with costs.

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4. SEIZURE - FORFEITURE PROCEEDINGS - ALCOHOLIC BEVERAGES, FIXTURES AND FURNISHINGS IN SPEAKEASY ORDERED FORFEITED - GOOD FAITH ESTABLISHED BY OWNER OF JUKE BOX, MACHINE ORDERED RETURNED.

In the Matter of the Seizure) Case No. 6927
on December 9, 1945, of a)
quantity of alcoholic beverages,)
a music machine, a cash register,) ON HEARING
and furniture and furnishings,) CONCLUSIONS AND ORDER
at 205 West Washington Street,)
in the Borough of Paulsboro,)
County of Gloucester and State)
of New Jersey.)

Fred A. Gravino, Esq., Attorney for Robert W. Collis and Frank Collis, t/a Garden State Distributing Co.
Harry Castelbaum, Esq., appearing for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

This matter comes before me pursuant to the provisions of Title 33, Chapter 1, of the Revised Statutes, to determine whether a quantity of alcoholic beverages, a music machine, a cash register, and furniture and furnishings, itemized in a schedule attached hereto, seized at 205 West Washington Street, Paulsboro, New Jersey, constitute unlawful property and should be forfeited.

On December 9, 1945 an ABC agent entered a small restaurant located on the first floor of the dwelling at the above address. He observed a number of men and women seated at tables drinking alcoholic beverages. Other patrons were drinking alcoholic beverages at a counter. The agent purchased a bottle of beer from Dorothy Holmes, who was behind the counter and who appeared to be in charge of the premises. The stock of beer was kept in a Coca Cola cooler and the whiskey was kept underneath the counter.

The agent left the premises and returned within a short time with another ABC agent and two Paulsboro police officers. There were many patrons purchasing alcoholic beverages when these officers entered and identified themselves.

Dorothy Holmes told the officers that Harold Green, who was on the premises, was the proprietor of the establishment.

Neither Green nor Dorothy Holmes held a license authorizing them to sell or serve alcoholic beverages.

The ABC agents seized the alcoholic beverages and other articles above described. Dorothy Holmes was arrested and charged with the unlawful sale of alcoholic beverages. Harold Green was arrested and charged with possession of alcoholic beverages with intent to sell such beverages in violation of the law. They have since pleaded non vult in the Special Sessions Court of Gloucester County and each of them has been fined $100.00.

Harold Green was convicted in 1930 and again in 1932 for violating the liquor law (Hobart Act). In 1937 he was given a sixty-day jail sentence on a disorderly person charge.

The evidence establishes that the seized alcoholic beverages were intended for sale at the speakeasy. Hence such alcoholic beverages, intended for sale without a license, are illicit. Such

illicit alcoholic beverages, together with the music machine, cash register and other personal property seized therewith in the building, constitute unlawful property and are subject to forfeiture. R. S. 33:1-1(i) and (y), R. S. 33:1-2, R. S. 33:1-66.

When the matter came on for hearing, pursuant to R.S. 33:1-66, Robert W. Collis appeared with counsel and sought return of the music machine. No one appeared to oppose forfeiture of the other seized property.

Collis maintains that he did not know that speakeasy activities were being carried on at the premises, and that so far as he could observe the place where his machine was kept appeared to be nothing more than a little place where food was served. He acknowledges that he did not investigate Green's character or background.

According to Collis' testimony, he purchased the machine, which was in Green's restaurant, in October 1945, from another dealer. He visited the place to check the description and serial number of the machine and thereafter was at the premises from time to time to service the machine. On these visits he observed a number of tables and chairs, a cigarette machine, a stock of candy, and a counter about twenty feet in length, in the room where his machine was kept. He noticed a Federal tax stamp on the wall covering the use of the music machine and what appeared to be licenses of other types, the exact nature of which he did not check. On some of his visits he observed patrons eating but did not at any time see any alcoholic beverages there.

On his first visit to the premises a woman in the restaurant told him that her husband was the owner of the establishment. On his subsequent visits he merely serviced the machine, removed its receipts and turned over the owner's share to the person who appeared to be in charge of the premises.

The ABC agents confirm the fact that it was actually a restaurant, although perhaps of limited appeal. The counter was without any equipment such as is usually associated with a bar.

It is evident that any reasonable person would have concluded, from what was visible, that it was merely a small restaurant.

Under R. S. 33:1-66(e) and (f), I have discretionary authority to return property subject to forfeiture to a person who has satisfied me that he acted in good faith and had no knowledge of the unlawful use to which the property was put or of such facts as would have led a person of ordinary prudence to discover such use.

A person who seeks return of a music machine, under these provisions of the law, must establish that he made an adequate independent investigation of the character and background of the person to whom he leased the machine, and of the nature of the business being carried on at the place where the machine was kept. He must exercise reasonable prudence to determine that he is not placing his machine in a speakeasy. Re Seizure Case No. 6898, Bulletin 687, Item 1.

This does not necessarily mean that it must be established in every case that both the person and the place were investigated. Where, as here, there is nothing in the appearance of the place to lead a reasonably prudent person to suspect that speakeasy activities are being carried on there, he is not required to make inquiry as to the owner's reputation unless it appears that such inquiry

would have revealed that the owner had a reputation for unlawful alcoholic beverage activities. Cf. Seizure Case No. 6769.

In the instant case, even if Collis, upon inquiry, could have discovered that Green was convicted in 1930 and in 1932 for violating the liquor laws, it does not follow that the only logical conclusion therefrom was that despite a lapse of thirteen years Green was still a bootlegger. It would be equally logical to assume, from the absence of any further conviction for violating the liquor laws, that Green was no longer a bootlegger.

A somewhat similar conclusion was reached in Seizure Case No. 4535. In that case a finance company, claiming a lien on a motor vehicle, made an inadequate investigation, and thus did not discover that the person with whom it did business had twice been convicted of crime, the last offense having occurred some six years before the seizure. Commissioner Burnett said in that case:

> "It is doubtful whether Leone's past record was sufficient to brand him as a person of such ill-repute that anyone dealing with him could anticipate that he would further engage in illegal activities. Therefore, even if the finance company had discovered Leone's record, and notwithstanding that fact had extended credit to him, it could not be said that its action would be unreasonable."

I therefore find that Robert W. Collis and Frank Collis acted in good faith and did not know or have any reason to suspect that their music machine was in a speakeasy. Such machine will therefore be returned to them upon payment of the costs of its seizure and storage.

Accordingly, it is DETERMINED and ORDERED that, if on or before the 1st day of March, 1946, Robert W. Collis and Frank Collis pay the costs of seizure and storage in the case, the music machine will be returned to them; and it is further

DETERMINED and ORDERED that the balance of the seized property, more fully described in Schedule "A" attached hereto, constitutes unlawful property, and that the same be and hereby is forfeited in accordance with the provisions of R. S. 33:1-66, and that it be retained for the use of hospitals and State, county and municipal institutions, or destroyed in whole or in part at the direction of the Commissioner.

ALFRED E. DRISCOLL
Commissioner.

Dated: February 19, 1946.

SCHEDULE "A"

48 - bottles of beer
2 - bottles of other alcoholic beverages
4 - wooden tables
14 - wire back chairs
1 - National cash register, Serial No. S328095 K/7-11
1 - Coca Cola ice box
28 - glasses

5. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - LICENSE SUSPENDED FOR A PERIOD OF 20 DAYS.

In the Matter of Disciplinary Proceedings against LEO ROCKMAN 63 Randolph Street Carteret, N. J., Holder of Plenary Retail Consumption License C-32, issued by the Borough Council of the Borough of Carteret.	CONCLUSIONS AND ORDER

Morris M. Schnitzer, Esq., Attorney for Defendant-licensee.
Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant-licensee pleads not guilty to a charge alleging that, on December 10, 1945, he possessed one quart bottle labeled "XXXX Paul Jones Rye A Blend of Straight Whiskies", one 4/5 quart bottle labeled "Four Roses A Blend of Straight Whiskies" and one 4/5 quart bottle labeled "Seagram's Seven Crown Blended Whiskey", all of which bottles contained alcoholic beverages not genuine as labeled, in violation of R. S. 33:1-50.

Analyses by the Department Chemist of the three bottles of whiskey in question discloses variations in solid contents and color in the "Paul Jones" and "Four Roses" whiskey and variations in solid content and acids in the "Seagram's" when compared with analyses of genuine samples.

A chemist employed by defendant to analyze the suspected whiskey concurred in the finding of the Department Chemist.

Defendant and his wife and son who occasionally help him testified that they have no knowledge of the fact that the bottles had been refilled. Although defendant may be personally innocent of the violation, a licensee is strictly responsible for any "refills" found in his stock of liquor. Re Kurian, Bulletin 517, Item 2.

Defendant has no previous adjudicated record. A minimum suspension of his license for a period of twenty days will be imposed. Re Aronoff, Bulletin 682, Item 4.

Accordingly, it is, on this 20th day of February, 1946,

ORDERED, that Plenary Retail Consumption License C-32, issued by the Borough Council of the Borough of Carteret to Leo Rockman, for premises 63 Randolph Street, Carteret, be and the same is hereby suspended for a period of twenty (20) days, commencing at 2:00 a.m. February 27, 1946, and terminating at 2:00 a.m. March 19, 1946.

ALFRED E. DRISCOLL
Commissioner.

6. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES DURING PROHIBITED HOURS, IN VIOLATION OF MUNICIPAL REGULATION - LICENSE SUSPENDED FOR A PERIOD OF 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

OSCAR SCOTT
97 Prospect Street
Paterson 1, N. J.,

Holder of Plenary Retail Consumption License C-185 issued by the Board of Alcoholic Beverage Control of the City of Paterson.

CONCLUSIONS AND ORDER

Oscar Scott, Defendant-licensee, Pro se.
Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant-licensee pleads non vult to a charge alleging that, on Saturday, January 19, 1946, between 3:00 a.m. and 3:20 a.m., he sold and served alcoholic beverages upon his licensed premises in violation of a resolution adopted by the Board of Aldermen of the City of Paterson on June 28, 1935, as amended June 30, 1939, which prohibits such sales between 3:00 a.m. and 7:00 a.m. on weekdays.

The Department file discloses that two ABC investigators were sold and served with beer by an employee during prohibited hours on the morning of January 19, 1946. Two patrons, in the presence of the ABC agents, questioned the bartender why the price of beer was increased from ten to fifteen cents a glass after 3:00 a.m. and were told that it was compensation for the risk that was being taken in keeping the premises open after the regular closing hour. The defendant also tended bar on the morning in question.

Defendant has no previous adjudicated record. I shall, therefore, suspend his license for a period of fifteen days, less five days' remission for the plea entered herein, or a net suspension of ten days. Re Disbrow, Bulletin 540, Item 3.

Accordingly, it is, on this 20th day of February, 1946,

ORDERED, that Plenary Retail Consumption License C-185, issued by the Board of Alcoholic Beverage Control of the City of Paterson to Oscar Scott, for premises 97 Prospect Street, Paterson, be and the same is hereby suspended for a period of ten (10) days, commencing at 3:00 a.m. February 26, 1946, and terminating at 3:00 a.m. March 8, 1946.

ALFRED E. DRISCOLL
Commissioner.

7. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - LICENSE SUSPENDED FOR A PERIOD OF 15 DAYS.

In the Matter of Disciplinary Proceedings against

MAX MINDLIN
T/a MOXIE'S TAVERN
State Highway 23
Franklin Borough (Sussex Co.), N.J.,

Holder of Plenary Retail Consumption License C-5, issued by the Mayor and Common Council of the Borough of Franklin.

CONCLUSIONS AND ORDER

William A. Dolan, Esq., Attorney for Defendant-licensee.
Harry Castelbaum, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The defendant pleaded non vult to a charge alleging that he possessed on his licensed premises a 4/5 quart bottle labeled "Four Roses A Blend of Straight Whiskies", which contained an alcoholic beverage not genuine as labeled, in violation of R.S. 33:1-50.

On November 26, 1945 an agent of the Federal Alcohol Tax Unit seized the above mentioned bottle when it appeared that the contents thereof were not genuine as labeled. Analysis by the chemist of the Alcohol Tax Unit disclosed a distinct variation in the acids, solids and color found in the contents of the seized bottle from the acids, solids and color found in the contents of a genuine sample of the product. The analysis warrants the conclusion that the bottle had been refilled.

I find defendant guilty.

Defendant has no previous adjudicated record. In the absence of aggravating circumstances, I shall suspend the license for a period of fifteen days. Re Rudolph, Bulletin 680, Item 1.

Accordingly, it is, on this 20th day of February, 1946,

ORDERED, that Plenary Retail Consumption License C-5, issued by the Mayor and Common Council of the Borough of Franklin to Max Mindlin, t/a Moxie's Tavern, for premises on State Highway 23, Franklin Borough, be and the same is hereby suspended for a period of fifteen (15) days, commencing at 3:00 a.m. February 27, 1946, and terminating at 3:00 a.m. March 14, 1946.

ALFRED E. DRISCOLL
Commissioner.

8. APPELLATE DECISIONS - McNAMARA, PEDICINI AND FLOOD v. SUMMIT.

JOSEPH McNAMARA, ANTHONY J. PEDICINI and LAWRENCE C. FLOOD, Appellants,

-vs-

COMMON COUNCIL OF THE CITY OF SUMMIT, Respondent

ON APPEAL CONCLUSIONS AND ORDERS

Jacob R. Mantel, Esq., Attorney for Appellants.
Frederick C. Kentz, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

These appeals, which were instituted and heard separately, are here joined for convenience in rendering Conclusions, since they involve a common issue. They are taken from respondent's refusal to renew the plenary retail consumption license of the respective appellants on the ground that they "are not conducting a bona fide restaurant or hotel wherein food is prepared and served regularly to the public, as prescribed by the resolution of the Common Council adopted June 5th, 1934."

This resolution, as amended, limits to six the number of consumption licenses that may be outstanding at one time, and provides that they "shall be issued only to bona fide hotels and restaurants wherein food is prepared and served regularly to the public."* Three licensees were found by the respondent to comply with this resolution and their licenses were renewed. For the reason stated, however, the applications of the three appellants for renewals of their licenses were denied on June 29, 1945.

None of the appellants operates a bona fide hotel. The only question, therefore, is whether, within the meaning of the cited resolution, they operated "restaurants wherein food is prepared and served regularly to the public." After carefully reviewing the record in each case, I have arrived at the conclusion that neither of the three establishments in question, for a considerable period of time prior to June 29, 1945, conducted a restaurant as defined by the local resolution.

The appellant, McNamara, testified that, prior to 1939, while in partnership with another, his premises were operated as a restaurant, with a chef regularly employed for the preparation of meals. When the partnership was dissolved in 1939, McNamara "took the restaurant part out, the grills and stools, and put a shuffleboard in there."

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*R. S. 33:1-1(t) defines "restaurant" 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."

Thereafter he served only "sandwiches, pigs' feet and hard-boiled eggs." He had no menu and prepared no hot meals.

While the appellant, Pedicini, served a greater variety of food than McNamara, it is apparent that the great bulk of his business consisted of sandwiches with very little, if any, prepared food. On June 20, 1945 he admitted to an ABC agent that he had no kitchen for the preparation of meals and was then "setting one up", and that all the cooking was done at a small gas burner at the end of the bar. The agent reported that this licensee possessed very few of the usual concomitants of a restaurant, viz., "no cups and saucers, no potatoes, coffee, tea, milk or dessert;.....no dinner service sets,.....sugar bowls, napkins or tablecloths." No menu was available.

The appellant, Flood, admitted that he had discontinued the service of "hot meals" more than two years prior to July, 1945 and that, during that time, he had no cook and served only sandwiches and beverages (preferably alcoholic).

It is clear that all of the three premises involved herein fell far short of meeting the definition of a restaurant embodied in either the local resolution or the statute. None of them qualified as an establishment where "food is prepared." Respondent was, therefore, warranted in denying all three renewals.

Under the circumstances, I have no alternative other than to affirm the action of the respondent in each case. This conclusion has been reached after considerable deliberation and, I am frank to say, somewhat reluctantly. What has given me pause is the fact that these appellants have been issued renewals of their liquor licenses for several years last past despite the fact that an investigation of their premises would have disclosed their obvious failure to meet the requirements of the resolution. In view of this background, an unconditional affirmance of the respondent's legally proper denial of the renewal applications would not be tempering justice with the mercy called for by the unfortunate positions in which the appellants find themselves.

There is an indication in the records that each appellant has taken steps since June 29, 1945 to establish himself as the operator of a bona fide restaurant within the contemplation of the local requirement. In order that the respondent may determine whether such steps constitute a sufficient compliance with the resolution and whether, in its discretion, it desires to grant applications for consumption licenses to these appellants in the event such applications are made, I have decided to delay the effective date of my order herein for a period of thirty days from date. During that period, the appellants may proceed to file new applications for licenses and attempt to demonstrate to respondent that such applications should be granted. In the interim, and until the expiration of the thirty-day period, the orders heretofore entered extending the term of the licenses issued to the appellants for the last fiscal year will continue in effect.

Accordingly, it is, on this 20th day of February, 1946,

ORDERED, that the action of respondent in refusing to grant the renewal applications of the appellants herein be and the same is hereby affirmed, upon condition, however, that this affirmance shall not become effective until March 22, 1946; and it is

FURTHER ORDERED, that the orders, each dated June 30, 1945, extending the term of the licenses issued to the respective appellants for the last fiscal year, shall continue in effect until March 22, 1946.

ALFRED E. DRISCOLL,
Commissioner.

9. APPELLATE DECISIONS - PAWLUKOVICH v. NEWARK.

ANTON PAWLUKOVICH, Appellant,

-vs-

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK, Respondent

ON APPEAL
CONCLUSIONS AND ORDER

Arthur J. Connelly, Esq., Attorney for Appellant.
Thomas L. Parsonnet, Esq., by George B. Astley, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

The appellant was found guilty by the respondent of a charge alleging that he permitted gambling on his licensed premises, in violation of Rule 7 of State Regulations No. 20. Respondent thereupon suspended his license for a period of ten days. Hence this appeal.

By agreement of the parties, the appeal has been submitted solely upon the stenographic transcript of the proceedings had before the respondent. See Rule 8 of State Regulations No. 15.

From that transcript it appears that, on Saturday night, November 3, 1945, a policeman in uniform entered the licensed premises on a "duty call" and observed a group of men seated at a table playing stud poker. The game stopped immediately and the men dashed for the rear exit. The policeman, however, was able to arrest three of the men who participated in the game and seized some money that was left on the table.

The licensee was not on the premises at the time. The tavern was in charge of a bartender, who also was arrested and subsequently pleaded guilty to a criminal complaint of maintaining a gambling house.

The table at which the game took place was "three to five feet" from the bar, which was "stacked" with patrons. Because he was so busy at the bar, the bartender asserts that he was unable to observe what was taking place at this table.

One of the participants in the stud poker game testified that he asked the bartender for a "straight deck" of cards, which the latter gave to him. While there is nothing in the record to indicate how long the game was in progress prior to the policeman's arrival, this witness testified that whenever a player desired a drink, he "walked up to the bar" and obtained it from the bartender

and the game was stopped until the player returned to the table. The stakes were "ten to a quarter."

The only issue in this case is whether the bartender, for whose acts the licensee is responsible, "permitted" gambling on the licensed premises within the meaning of Rule 7 of State Regulations No. 20. The bartender admitted that he had provided the deck of cards, which is kept "on the side bar", but denied any actual knowledge that the men were playing for money. Questioned as to the purpose of having the cards on the premises, he replied, "just for pass time." The licensee also admitted that "We have cards on the place" and that he permits his patrons to play "but not for money."

It is unnecessary to decide whether the bartender was actually aware that a card game for stakes was taking place at the table in front of the bar. The respondent's determination of guilt must be sustained if it appears that the circumstances were such that the bartender should have known that the men were playing cards for money. Cf. Engel v. Belleville, Bulletin 694, Item 5. In other words, a licensee's responsibility for an infraction of the law may not be evaded by a plea that he, or his employee, was "too busy" to observe what occurred on the licensed premises. On the contrary, "licensees (and their employees) must use their eyes and ears, and use them effectively, to prevent the improper use of their premises." Re Bilowith v. Passaic, Bulletin 527, Item 3; see also Kolaska v. Newark, Bulletin 582, Item 13. A failure to comply with this affirmative duty not only does not excuse the offense but "is good ground for additional censure." Re Silverstein, Bulletin 637, Item 11. This is particularly apt in the situation presented herein where the gambling took place at a table in such close proximity to the bar with cards furnished to the patrons by the licensee's employee.

The action of respondent is affirmed and the ten-day suspension, held in abeyance pending the outcome of this appeal, will be reimposed.

Accordingly, it is, on this 21st day of February, 1946,

ORDERED, that the petition of appeal be and the same is hereby dismissed, and that Plenary Retail Consumption License C-230, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Anton Pawlukovich for premises 234 Ferry Street, Newark, be and the same is hereby suspended for a period of ten (10) days, commencing at 2:00 a.m. February 26, 1946, and terminating at 2:00 a.m. March 8, 1946.

Alfred E. Driscoll
Commissioner.

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