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

BULLETIN 663 APRIL 23, 1945.

1. NEW LEGISLATION - COMMISSION ON ALCOHOLISM AND PROMOTION OF TEMPERANCE.

Senate Bill No. 231 was approved by Governor Edge on April 4, 1945, and thereupon became Chapter 94, P. L. 1945.

It reads as follows:

"AN ACT concerning the preparation and administration of a program for the rehabilitation of alcoholics and the promotion of temperance education by the Commissioner of Alcoholic Beverage Control, the Commissioner of Institutions and Agencies, the Commissioner of Education and the Director of Health, constituted the Commission on Alcoholism and Promotion of Temperance.

"WHEREAS, the health of its people is a primary concern of the State; and

"WHEREAS, alcoholism is recognized as a disease and the alcoholic as a sick person; and

"WHEREAS, pursuant to section 33:1-3 of the Revised Statutes, a primary task and duty of the Commissioner of Alcoholic Beverage Control is the promotion of temperance; and

"WHEREAS, pursuant to section 18:14-86 of the Revised Statutes, the development of temperance education is recognized as desirable; therefore,

"BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

"1. The Commissioner of Alcoholic Beverage Control, the Commissioner of Institutions and Agencies, the Commissioner of Education and the Director of Health, are hereby constituted a commission, to be known as the Commission on Alcoholism and Promotion of Temperance, and empowered to prepare and administer a program for the rehabilitation of alcoholics and the promotion and furtherance of temperance and temperance education in this State; to utilize such facilities in this State, including equipment, and professional and other personnel, as may be made available for said purposes; and to expend such sums for said purposes as may, from time to time, be appropriated therefor by the Legislature.

"2. This act shall take effect immediately."

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2. APPELLATE DECISIONS - KAVOOKJIAN, THOMPSON, FREUND, DeGIOVANNI, THOMPSON AND O'CROWLEY v. HIGHLANDS AND DeVIVO.

HAIK KAVOOKJIAN, EDWARD A. THOMPSON, PETER FREUND, PETER DeGIOVANNI, WILLIAM H. THOMPSON and IRENE R. O'CROWLEY,

Appellants,

-vs-

BOROUGH COUNCIL OF THE BOROUGH OF HIGHLANDS and FANNIE DeVIVO,

Respondents

ON APPEAL
CONCLUSIONS AND ORDER

Snyder, Roberts & Pillsbury, Esqs., by John M. Pillsbury, Esq., Attorneys for Appellants.
William L. Parker, Esq., Attorney for Respondent, Borough Council of the Borough of Highlands.
Pearce R. Franklin, Esq., Attorney for Respondent, Fannie DeVivo.

BY THE COMMISSIONER:

This is an appeal from the issuance of a plenary retail consumption license for the present fiscal year to the respondent, Fannie DeVivo, for premises at 88 Portland Road, Highlands.

The premises in question were last licensed for the sale of alcoholic beverages during the 1939-40 fiscal year. In October 1939 the respondent, Fannie DeVivo, having purchased the premises, applied for a transfer to herself of the license, then issued in the name of one Aida Libretti. This application was denied. In June 1940 Fannie DeVivo submitted an application for license for the fiscal year 1940-41, with similar result.

Upon appeal from the latter action, the then Acting Commissioner sustained the refusal upon the grounds that the evidence disclosed that "the area.....is highly residential in character", and because of the improper manner in which the premises had been conducted by the prior licensee, Aida Libretti. See DeVivo v. Highlands, Bulletin 427, Item 5.

Approximately four years later, in May 1944, Fannie DeVivo filed another application for license for the balance of that licensing year, expiring on June 30, 1944. After a hearing held before the local Council on June 2, 1944, this application was denied. Shortly thereafter, she applied for a license for the current fiscal year and another hearing was scheduled for July 18, 1944, at which time the respondent Council approved the application.

The appellants are property owners on Portland Road in the vicinity of the licensed premises. They contend that because of the highly residential character of the neighborhood that the license should have been denied.

The municipality is a small seashore community having a permanent population of approximately two thousand inhabitants. During the summer season, the population is considerably increased. The premises in question are conducted as a hotel and restaurant.

On behalf of the appellants, the evidence presented by the property owners discloses that they have no serious objection to the manner in which the premises have been conducted since their acquisition by the respondent, Fannie DeVivo, in October 1940. Before that time, during the tenure of Libretti, it appears that "at frequent intervals during the summer months, busloads of picnickers visited the premises and created undue noises and disturbances; that many of these persons became intoxicated and trespassed on their property." See DeVivo v. Highlands, supra. During the past four years, however, the only specific evidence of misconduct occurred during the latter part of June, 1944, when a group of soldiers, leaving the premises after midnight, caused some noise and commotion when they had some difficulty in starting their automobile.

It is apparent from the record that the major objection to the granting of the license is, as expressed by one of the property owners, that the neighborhood "is a private residential section" and they "don't want it commercialized."

In view of the change of the attitude of the respondent Council, as evidenced by its denial in June 1944, and its subsequent approval during the following month of the license for the premises in question, I have given most careful consideration to the testimony of the members of the issuing authority. In sum, they testified that, at the meeting of June 1944, the applicant had failed to show any material change either in the character of the neighborhood or in the conduct of the premises since the affirmance of the denial of the license in June 1940. See DeVivo v. Highlands, supra. At the meeting of July 1944, however, the respondent, Fannie DeVivo, having retained her present counsel, presented evidence which satisfied the Councilmen that the area was not so highly residential as they had theretofore been led to believe, and that the premises had been conducted in a proper manner for many years last past. In the language of one of the Councilmen, "the lawyer at the previous hearing (in June, 1944) presented a weak case."

With respect to the type of neighborhood, the evidence shows that a riding stable is maintained in the vicinity, a stretch of about ten bungalows across the road are rented for the summer season and that several of the property owners, whose homes were previously characterized as of the "estate" type in the prior appeal case, also lease them during many months of the year. While admitting that these factors did not necessarily convert the neighborhood to a business area, the Councilmen testified that they felt that these encroachments in the vicinity reduced, to a considerable extent, the "highly residential" character of the neighborhood.

The members of the local authority further testified that, at the July 1944 meeting, a petition favoring the issuance of the license and bearing some two hundred signatures was presented. In addition, various residents had personally approached several of the Councilmen between the meetings of June and July 1944 and urged the approval of the application.

In the prior appeal case, the burden rested upon the then appellant, Fannie DeVivo, to prove that the action of the local Council in denying her application was unreasonable. The situation in the instant appeal is reversed. It is now incumbent upon the appellant property owners to sustain the burden of showing an abuse of discretion on the part of the local issuing authority in granting the present application for license. Unless this burden is met, the granting of the application must be considered reasonable, at least in the absence, as here, of any charge of discrimination, or bad faith against the members of the issuing authority.

Were I a member of the local authority, I might well have cast my vote in the negative. However, there is room for latitude of opinion in cases of this kind. My function on appeals of the type now before me is not to substitute my personal opinion for that of the issuing authority but rather to determine if reasonable cause exists for its opinion, and if so, to affirm irrespective of my personal view on the subject. Curry v. Margate City, Bulletin 460, Item 9; Northend Tavern, Inc. v. Northvale, Bulletin 493, Item 5; Mulcahy v. Maplewood, Bulletin 658, Item 4.

Giving due consideration to the evidence produced before the Council at its July 1944 meeting concerning the true character of the neighborhood, the almost complete absence of any improper conduct for more than four years last past and the substantial sentiment in favor of the issuance, I cannot say that the only conclusion open to the Council was to deny the application. That being so, neither can I say that its action in voting to grant the application is so arbitrary and unreasonable as to amount to an abuse of discretion warranting a reversal of its action. Cf. Howard v. Somers Point, Bulletin 193, Item 1; Northend Tavern, Inc. v. Northvale, supra.

Accordingly, it is, on this 9th day of April, 1945,

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

ALFRED E. DRISCOLL
Commissioner.

3. DISCIPLINARY PROCEEDINGS - PERMITTING THE CONSUMPTION OF ALCOHOLIC BEVERAGES DURING PROHIBITED HOURS, IN VIOLATION OF RULE 1 OF STATE REGULATIONS NO. 40 - LICENSE SUSPENDED FOR A PERIOD OF 10 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)
)
WILLIAM CHARLES WAGNER)
T/a WAGNER'S INN)
Cor. United States Ave. and Berlin Road) CONCLUSIONS AND ORDER
Gibbsboro, N. J.,)
)
Holder of Plenary Retail Consumption License C-1 issued by the Borough Council of the Borough of Gibbsboro.)
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William Charles Wagner, Defendant-licensee, Pro Se.
Harry Castelbaum, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant pleaded non vult to a charge that he sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages and permitted the consumption thereof on his licensed premises after twelve o'clock midnight Saturday and before 7:00 a.m. the next morning, in violation of Rule 1 of State Regulations No. 40.

On the morning of Sunday, March 18, 1945, at about 1:20 a.m., agents of the State Department of Alcoholic Beverage Control noticed that defendant's premises were fully lighted.

Investigation made by them disclosed that five persons were in the premises, at least one of whom was consuming alcoholic beverages. It was admitted that at least two others of those present at 1:20 a.m. had been served and had consumed alcoholic beverages.

Defendant alleges that he had closed his premises to the public promptly at twelve o'clock midnight Saturday, March 17; that those present other than himself were his wife and three employees (one bartender and two waitresses), and that the apparent activity was a result of his practice of permitting his employees food and drink (alcoholic or non-alcoholic) after closing hours, without charge; that ordinarily this activity would have long since been over had he not been discussing certain alterations in his premises with his bartender. Each of the persons present was identified by the State Department agents and was proved to be listed as a bona fide employee of the defendant in his licensed business and carried on his payroll and social security records.

Defendant further said that, having closed to the public promptly at twelve, he believed that he was obeying the regulation to the full meaning of both its spirit and letter.

It is, however, to be noted that even a gift of alcoholic beverages by a licensee is, under the law, a sale (R.S. 33:1-1(w)), and that, in any event, consumption of alcoholic beverages was permitted during prohibited hours.

I must find defendant guilty.

The suspensions heretofore imposed for violation of State Regulations No. 40 resulted, in general, from charges that both Rule 1 and Rule 2 of said Regulations had been violated. However, in Re Tomarchio, Bulletin 662, Item 1, I dismissed the charge based on Rule 2 of said Regulations and imposed a suspension of ten days because consumption had been permitted in violation of Rule 1 of said Regulations. In the present case I shall suspend defendant's license for ten days, with a remission of five days for the plea, making a net suspension of five days. This does not indicate any change in my general policy of suspending a license for a minimum period of fifteen days where sales to the public during prohibited hours are involved.

Accordingly, it is, on this 9th day of April, 1945, -

ORDERED, that Plenary Retail Consumption License C-1, issued by the Borough Council of the Borough of Gibbsboro to William Charles Wagner, t/a Wagner's Inn, for premises at cor. United States Ave. and Berlin Road, Gibbsboro, be and the same is hereby suspended for a period of five (5) days, commencing at 12:01 a.m. April 16, 1945, and terminating at 12:01 a.m. April 21, 1945.

ALFRED E. DRISCOLL
Commissioner.

4. DISCIPLINARY PROCEEDINGS - CLUB LICENSEE - FALSE ANSWER IN LICENSE APPLICATION CONCEALING MATERIAL FACT - AIDING AND ABETTING NON-LICENSEE TO EXERCISE THE RIGHTS AND PRIVILEGES OF THE LICENSE - ILLEGAL SITUATION CORRECTED - LICENSE SUSPENDED FOR A PERIOD OF 10 DAYS.

In the Matter of Disciplinary Proceedings against)

PLAINFIELD GESANG & TURN VEREIN, INC.)
220 Somerset Street) CONCLUSIONS AND ORDER
North Plainfield, N. J.,)

Holder of Club License CB-1 issued by the Borough Council of the Borough of North Plainfield.)

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John W. Lyness, Esq. and Joseph I. Bedell, Esq., Attorneys for Defendant-licensee.
Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

The defendant pleads non vult to charges that (1) it falsely concealed in its license application that Fritz Haeussler (Friedrich or Fred Haussler) had an interest in its license and business; and (2) since September 1, 1941 it permitted Fritz Haeussler to exercise the rights and privileges of its license.

The departmental file discloses that defendant club was organized in the year 1888 and has held a club liquor license each year since 1933. It appears that in 1941 the club was losing money in the operation of the liquor bar and, on advice of an attorney, an agreement was drawn up whereby one Fritz Haeussler was to operate the bar thereafter. The agreement provided that said Fritz Haeussler was to pay a stipulated sum of money each month to the club and, from the residue taken in from the sale of alcoholic beverages, was to pay the current expenses and bills incurred, retaining the balance, if any, for his own use.

When the nature of the charges was explained, the defendant, through its duly elected officers, rescinded the agreement aforementioned in its entirety and immediately discontinued the unlawful practice.

Inasmuch as the club acted upon the advice of an attorney, there appears to be no deliberate intent to circumvent the Alcoholic Beverage Law. It might be added that the attorney who drew the agreement is not the same attorney who appears for defendant in this case.

The defendant has no previous adjudicated record. Under all of the circumstances, I shall suspend the defendant's license for a period of ten days. Re Criscenzo, Bulletin 611, Item 11.

Accordingly, it is, on this 11th day of April, 1945,

ORDERED, that Club License CB-1, issued by the Borough Council of the Borough of North Plainfield to Plainfield Gesang & Turn Verein, Inc., for premises 220 Somerset Street, North Plainfield, be and the same is hereby suspended for ten (10) days, commencing at 12:01 a.m. April 17, 1945, and terminating at 12:01 a.m. April 27, 1945.

ALFRED E. DRISCOLL
Commissioner.

By: Edward J. Dorton
Deputy Commissioner.

5. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO A MINOR, IN VIOLATION OF R. S. 33:1-77 AND RULE 1 OF STATE REGULATIONS NO. 20 - LICENSE SUSPENDED FOR A PERIOD OF 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against IRVING MEYERS and FANNIE SCHULMAN 642 Broadway Bayonne, N. J., Holders of Plenary Retail Consumption License C-83 issued by the Board of Commissioners of the City of Bayonne.	CONCLUSIONS AND ORDER

Irving Meyers, Esq., Attorney for Defendant-licensees.
Anthony Meyer, Jr., Esq., appearing for Department of Alcoholic Beverage Control.

Defendant-licensees plead non vult to charges that alcoholic beverages were sold to and permitted to be consumed by a minor on their licensed premises, in violation of R. S. 33:1-77 and Rule 1 of State Regulations No. 20.

The investigation made in the instant case discloses that on April 2, 1945, between fifteen and twenty drinks of whiskey were served to and consumed by Seaman James ----, nineteen years of age.

Defendants have no previous adjudicated record. The fact, however, that the minor was permitted to consume so large a quantity of alcoholic beverages warrants the imposition of a fifteen-day penalty. Five days will be remitted because of the non vult plea, leaving a net suspension of ten days.

Accordingly, it is, on this 11th day of April, 1945,

ORDERED, that Plenary Retail Consumption License C-83, issued by the Board of Commissioners of the City of Bayonne to Irving Meyers and Fannie Schulman, for premises 642 Broadway, Bayonne, be and the same is hereby suspended for a period of ten (10) days, commencing at 12:01 a.m. April 17, 1945, and terminating at 12:01 a.m. April 27, 1945.

ALFRED E. DRISCOLL
Commissioner.

By: Edward J. Dorton
Deputy Commissioner.

6. DISCIPLINARY PROCEEDINGS - FALSE ANSWER IN LICENSE APPLICATION CONCEALING MATERIAL FACT, IN VIOLATION OF R. S. 33:1-25 - ILLEGAL SITUATION CORRECTED - LICENSE SUSPENDED FOR A PERIOD OF 10 DAYS.

In the Matter of Disciplinary Proceedings against

NOAH KUENSELL
T/a PIG'N WHISTLE INN
W/S Lakehurst Road
Pemberton Township
P.O. Browns Mills, N. J.,

Holder of Plenary Retail Consumption License C-16 issued by the Township Committee of the Township of Pemberton.

CONCLUSIONS AND ORDER

Daniel Lichtenthal, Esq., Attorney for Defendant-licensee.
Harry Castelbaum, Esq., appearing for Department of Alcoholic Beverage Control.

Defendant pleaded non vult to the following charge:

"In your application filed with the Pemberton Township Committee, upon which you first obtained your plenary retail consumption license, effective July 1, 1944, for premises W/S Lakehurst Road, Pemberton Township, you falsely stated 'No' in answer to Question 31, which asks: 'Have you agreed to pay any employee, or other person, any percentage of the profits derived from the business to be conducted under the license applied for?', whereas in truth and fact at the time of such application and continuously thereafter until January 1, 1945, you had an agreement with Libro Bonanni, employed by you as manager, to pay him 50 per cent of the profits of the licensed business; such false statement being in violation of R. S. 33:1-25."

At a hearing held herein as to the manner in which the business is presently being conducted, defendant testified that the agreement with Libro Bonanni had been cancelled on January 1, 1945, at which time Bonanni severed all connection with the licensed premises. Defendant further testified that at the present time he receives all the profits from the sale of alcoholic beverages at his premises. From the evidence presented, it appears that the unlawful situation has been corrected.

Applicants for liquor licenses must learn to answer each question in the application frankly and honestly. Because of the false statement in the application, defendant's license will be suspended for a period of ten days. Re Woods, Bulletin 576, Item 7.

Accordingly, it is, on this 12th day of April, 1945,

ORDERED, that Plenary Retail Consumption License C-16, issued by the Township Committee of the Township of Pemberton to Noah Kuensell, t/a Pig'n Whistle Inn, for premises W/S Lakehurst Road, Pemberton Township, be and the same is hereby suspended for ten (10) days, commencing at 12:01 a.m. April 17, 1945, and terminating at 12:01 a.m. April 27, 1945.

ALFRED E. DRISCOLL
Commissioner.

By: Edward J. Dorton
Deputy Commissioner.

7. FAIR TRADE - OPINION OF THE UNITED STATES SUPREME COURT IN THE CASE OF UNITED STATES v. FRANKFORT DISTILLERIES, INC. ET AL., DECIDED MARCH 5, 1945.

"Mr. Justice Black delivered the opinion of the Court:

"Respondents are producers, wholesalers, and retailers, of alcoholic beverages, who were indicted in a Federal district court for having conspired and combined to restrain commerce in violation of § 1 of the Sherman Act as amended. [July 2, 1890] 26 Stat 209, c 647; [August 17, 1937] 50 Stat 673, 693, c. 690, 15 USCA § 1, 4 FCA title 15, § 1. Their demurrers and motion to quash having been overruled, respondents pleaded nolo contendere to one count of the indictment. On these pleas they were adjudged guilty by the District Court and fined. 47 F Supp 160. The Circuit Court of Appeals reversed, on the ground that the indictment failed to show that the conspiracy charged was in restraint of interstate commerce. 144 F (2d) 824. The importance of the questions involved prompted us to grant certiorari.[1]

"The indictment alleged that 98% of the spirituous liquors and 80% of the wines consumed in Colorado were shipped there from other states. The annual shipments into the state were 1,150,000 gallons of liquors and 800,000 gallons of wine. Seventy-five per cent of these beverages were handled by the defendant wholesalers. Respondents were charged with conspiring, in violation of the Sherman Act, to raise, fix and maintain the retail prices of all these beverages by raising, fixing, and stabilizing retail markups and margins of profit.

"To accomplish the objects of the conspiracy, it is alleged that they adopted the following course of action. All of the respondents agreed amongst themselves to (1) discuss, agree upon and adopt arbitrary non-competitive retail prices, markups, and margins of profit; (2) defendant retailers and wholesalers agreed to persuade and compel producers to enter into fair trade contracts on every type and brand of alcoholic beverage shipped into the state, thereby to establish arbitrarily high and non-competitive retail markups and margins of profit, agreed upon by defendants; (3) the retailers were to prepare and adopt forms of fair trade contracts, and agree with producers and wholesalers upon these forms; (4) a boycott program was adopted by all of the defendants under which retailers would refuse to buy any of the beverages sold by wholesalers or producers who refused to enter into or enforce compliance with the terms of the price fixing agreements, and non-complying retailers would be denied an opportunity to buy the goods of the defendant producers and wholesalers. Machinery was set up to make the boycott program effective.

"The facts alleged in the indictment, which stand admitted on demurrer, and on the plea of nolo contendere, indicate a pattern which bears all the earmarks of a traditional restraint of trade. The participants are producers, middlemen, and retailers. They have agreed among themselves to adopt a single course in making contracts of sale and to boycott all others who would not adopt the same course.

"The effect, and if it were material, the purpose of the combination charged, was to fix prices at an artificial level. Such

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[1] 323 US —, ante, 88, 65 S Ct 132.

combinations, affecting commerce among the states, tend to eliminate competition, and violate the Sherman Act per se. United States v. Socony-Vacuum Oil Co. 310 US 150, 223, 224, 84 L ed 1129, 1168, 1169, 60 S Ct 811. Price maintenance contracts fall under the same ban. Ethyl Gasoline Corp. v. United States, 309 US 436, 458, 84 L ed 852, 862, 60 S Ct 618, except as provided by the 1937 Miller-Tydings Amendment to the Sherman Act. 50 Stat 693, c 690. The combination charged against respondents does not fall within this exception. It permits the seller of an article which bears his trademark, brand, or name, to prescribe a minimum resale price by contract, if such contracts are lawful in the state where the resale is to be made and if the trademarked article is in free and open competition with other articles of the same commodity. This type of 'Fair Trade' price maintenance contract is lawful in Colorado. Session Laws of Colorado 1937, c 146. But the Miller-Tydings Amendment to the Sherman Act does not permit combinations of business men to coerce others into making such contracts, and Colorado has not attempted to grant such permission. Both the Federal and state 'Fair Trade' Acts expressly provide that they shall not apply to price maintenance contracts among producers, wholesalers and competitors. It follows that whatever may be the rights of an individual producer under the Miller-Tydings Amendment to make price maintenance contracts or to refuse to sell his goods to those who will not make such contracts, a combination to compel price maintenance in commerce among the states violates the Sherman Act. United States v. Bausch & L. Optical Co. 321 US 707, 719-723, 88 L ed 1024, 1033-1035, 64 S Ct 805; United States v. Univis Lens Co. 316 US 241, 252, 253, 86 L ed 1408, 1419, 1420, 62 S Ct 1008. Consequently, respondents were properly convicted, unless as they argue, their conduct is not covered by the Sherman Act, either because the price fixing applied only to retail sales which were wholly intrastate, or because the state's power to control the liquor traffic within its boundaries makes the Sherman Act inapplicable.

"These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which take place within a state. In resolving them, there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states. It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents[2] fall within this category. All of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions. On the other hand, the sole ultimate object of respondents' combination in the instant case was price fixing or price maintenance. And with reference to commercial

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[2]Industrial Asso. v. United States, 268 US 64, 69 L ed 849, 45 S Ct 403; Levering & G. Co. v. Morrin, 289 US 103, 77 L ed 1062, 53 S Ct 549; United Leather Workers International Union v. Herkert & M. Trunk Co. 265 US 457, 68 L ed 1104, 44 S Ct 623, 33 ALR 566; cf Local 167, I.B.T. v. United States, 291 US 293, 297, 78 L ed 804, 808, 54 S Ct 396; and United States v. Hutcheson, 312 US 219, 85 L ed 788, 61 S Ct 463.

trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' Apex Hosiery Co. v. Leader, 310 US 469, 495, 84 L ed 1311, 1324, 60 S Ct 982, 128 ALR 1044.

"The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance.[3] Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts. Nor did the boycott used merely affect local retail business. Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will. It may be true, as has been argued, that under Colorado law, retailers are prohibited from buying from out-of-state producers, but this fact has no relevancy. The power of retailers to coerce out-of-state producers can be just as effectively exercised through pressure brought to bear upon wholesalers as though the retailers brought such pressure to bear directly upon the producers. And combinations to restrain, by a boycott of those engaged in interstate commerce, through such indirect coercion is prohibited by the Sherman Act.[4]

"It is argued that the Twenty-first Amendment to the Constitution bars this prosecution. That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.[5] It has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries. Granting the state's full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there, it does not follow from that fact that the United States is wholly without power to regulate the conduct of those who engage in interstate trade outside the jurisdiction of the State of Colorado.

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[3] See, e. g., Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 US 373, 404, 55 L ed 502, 517, 31 S Ct 376; Ethyl Gasoline Corp. v. United States, 309 US 436, 84 L ed 852, 60 S Ct 618; United States v. Univis Lens Co. 316 US 241, 244, 245, 86 L ed 1408, 1414, 1415, 62 S Ct 1008.

[4] Fashion Originators' Guild v. Federal Trade Commission, 312 US 457, 465, 85 L ed 949, 953, 61 S Ct 703; Loewe v. Lawlor, 208 US 274, 52 L ed 488, 28 S Ct 301, 13 Ann Cas 815.

[5] Carter v. Virginia, 321 US 131, 88 L ed 605, 64 S Ct 464; Ziffrin, Inc. v. Reeves, 308 US 132, 138, 84 L ed 128, 135, 60 S Ct 163; State Bd. of Equalization v. Young's Market Co. 299 US 59, 81 L ed 38, 57 S Ct 77.

"The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado. Those combinations which the Sherman Act makes illegal as to producers, wholesalers and retailers are expressly exempted from the scope of the Fair Trade Act of Colorado, and thus have no legal sanction under state law either.[6] We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

"It is so affirmed.

"The Chief Justice took no part in the consideration or decision of this case.

"Mr. Justice Frankfurter, concurring:

"The Twenty-first Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority. Before that Amendment -- disregarding the interlude of the Eighteenth Amendment -- alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-first Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders. The course of legal history which made necessary the Twenty-first Amendment in order to permit the States to control the liquor traffic, according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce, was summarized in my concurring opinion in Carter v. Virginia, 321 US 131, 139, 88 L ed 605, 612, 64 S Ct 464.

"As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the

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[6] The Colorado Fair Trade Act, 1937 Colo Sess Laws, c 146, provides that under certain conditions sellers of commodities can contract with buyers not to resell, and to require subsequent purchasers not to resell, at less than the minimum price stipulated by the seller. But that Act specifically provides that it shall not apply to horizontal agreements, 'to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale price.' The Colorado Unfair Practices Act, 1941 Colo Sess Laws, c 227, amending and re-enacting 1937 Colo Sess Laws, c 261, makes it unlawful to sell goods below cost to injure or destroy competition, and states that the express purpose of the Act is 'to safeguard the public against.....monopolies and to foster and encourage competition.'

Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy. If an agreement among local dealers not to buy liquor through channels of interstate commerce does not offend the Sherman Law though a like agreement as to other commodities would, an agreement among liquor dealers to abide by state policy for a uniform price -- which is far less restrictive of interstate commerce than a comprehensive boycott -- can hardly be a violation of the Sherman Law.

"Thus the question in this case, as I see it, is whether in fact the policy of Colorado sanctions such an arrangement as the indictment charges. Such a policy may be expressed either formally by legislation or by implied permission. Unless state policy is voiced either by legislation or by state court decisions, it is precarious business for an outsider to be confident about the legal policy of a State. So far as our attention has been called to materials relevant for ascertaining the policy of Colorado toward such a price arrangement as is here charged, it would be temerarious to suggest that Colorado does sanction it. Indeed, the legislation of Colorado looks in the opposite direction. And we have no guidance from state decisions to suggest that the apparent condemnation of such an arrangement under the Colorado Fair Trade Act, § 2, Colo Stat Anno, c 165, § 20(2), does not condemn the price arrangements before us. Although the Attorney General of Colorado has filed a brief as amicus curiae on the side of the respondents, his argument is not based on the contention that the policy of Colorado sanctions that which it is claimed the Sherman Law forbids. In the view I take of the matter, if a State authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. For, in any event, if state policy did so authorize it, conformity with the state policy could not be deemed an "unreasonable" restraint of interstate commerce. But I do not find that Colorado has done so.

"The decision of the court below is not without support in what has been said in the past in holding that, apart from the Twenty-first Amendment, this was a restraint local in its nature and therefore outside the scope of the Sherman Law. But price-fixing is such an immediate restraint upon trade that I do not think that the reach of the consequences of such an obvious restraint should be determined by drawing too nice lines as a matter of pleading. The case is before us, in effect, on demurrer to the indictment and judged abstractly, as a matter of pleading, I cannot say that the indictment was demurrable.

"Mr. Justice Roberts concurs in this opinion."

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8. DISCIPLINARY PROCEEDINGS - PERMITTING THE CONSUMPTION OF ALCOHOLIC BEVERAGES DURING PROHIBITED HOURS, IN VIOLATION OF RULE 1 OF STATE REGULATIONS NO. 40 - LICENSE SUSPENDED FOR A PERIOD OF 10 DAYS, LESS 5 FOR PLEA.

DISCIPLINARY PROCEEDINGS - CHARGE OF PERMITTING LICENSED PREMISES TO REMAIN OPEN, IN VIOLATION OF RULE 2 OF STATE REGULATIONS NO. 40, DISMISSED.

In the Matter of Disciplinary Proceedings against)

MICHAEL GRANATELL)
T/a PREAKNESS BAR & GRILL)
Hamburgh Turnpike)
Preakness, Wayne Township)
P. O. RFD 1, Paterson, N. J.,)

Holder of Plenary Retail Consumption License C-23, issued by the Township Committee of the Township of Wayne.)

CONCLUSIONS AND ORDER

Milton Schamach, Esq., Attorney for Defendant-licensee.
Harry Castelbaum, Esq., appearing for Department of Alcoholic Beverage Control.

Defendant pleaded non vult to charge (1), which alleges that:

"1. Between 12 o'clock midnight, Saturday, March 3, 1945 and 7:00 a.m. Sunday, March 4, 1945, viz., until at least 1:30 a.m. of the latter date, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages and permitted the consumption of alcoholic beverages upon the licensed premises, in violation of Rule 1 of State Regulations No. 40."

Defendant pleaded not guilty to charge (2), which alleges that:

"2. Between 12 o'clock midnight, Saturday, March 3, 1945 and 7:00 a.m. Sunday, March 4, 1945, viz., until at least 1:30 a.m. of the latter date, you failed to have your entire premises closed and you permitted persons other than yourself and your bona fide employees to be and remain on the licensed premises, in violation of Rule 2 of State Regulations No. 40."

Defendant conducts a bar and grill. When the ABC investigators arrived at the licensed premises they observed that the grill was in darkness but that some people were consuming drinks in the barroom.

Defendant testified that the various persons in the barroom at the time the ABC investigators entered were his employees. He produced payroll and social security records to substantiate this fact. Furthermore, several of the persons on the licensed premises at the time in question testified that they were employed by defendant, and the defendant produced several other persons in court at the time of the hearing prepared to so testify. Their testimony was admitted by stipulation entered into by the respective attorneys.

In view of the testimony adduced herein, it appears that the persons on the premises were bona fide employees. Under these circumstances, no violation of Rule 2 of Regulations No. 40 has been shown. Therefore, charge (2) is dismissed.

The case is otherwise similar in its facts to Re Wagner, Bulletin 663, Item 3, wherein it appeared that drinks had been served to employees after midnight. Defendant has no prior adjudicated record. Defendant's license will be suspended for ten days because of his violation of Rule 1 of State Regulations No. 40, with a remission of five days for the plea of non vult entered to that charge, or a net suspension of five days. Re Wagner, supra. This does not indicate any change in the general policy of suspending a license for a minimum period of fifteen days where sales to the public during prohibited hours are involved.

Accordingly, it is, on this 13th day of April, 1945,

ORDERED, that Plenary Retail Consumption License C-23, issued by the Township Committee of the Township of Wayne to Michael Granatell, t/a Preakness Bar & Grill, for premises on Hamburgh Turnpike, Preakness, Wayne Township, be and the same is hereby suspended for a period of five (5) days, commencing at 12:01 a.m. April 23, 1945, and terminating at 12:01 a.m. April 28, 1945.

ALFRED E. DRISCOLL
Commissioner.

By: Edward J. Dorton
Deputy Commissioner.

9. RETAIL LICENSES - ISSUANCE - VALIDITY - NEW JERSEY MUNICIPALITIES WERE NOT REQUIRED, UPON REPEAL OF EIGHTEENTH AMENDMENT, TO TAKE ACTION BY LOCAL OPTION REFERENDA BEFORE RETAIL LICENSES COULD BE ISSUED.

MUNICIPAL ORDINANCES AND LOCAL OPTION REFERENDA - VALIDITY - SUPERSEDING EFFECT OF CONTROL ACT UPON MUNICIPAL ORDINANCES AND LOCAL OPTION REFERENDA ADOPTED UNDER PRIOR LAWS.

April 23, 1945

Edward J. Inglesby, Esq.
Merchantville, N. J.

Dear Mr. Inglesby:

I have your letters of March 16th and April 6th, relating to local option referenda in New Jersey, the earlier letter reading in pertinent part:

> "It is my impression that following the repeal of the Eighteenth Amendment, each Municipality within the State of New Jersey was required to take affirmative action by Municipal Referendum to determine whether the Municipality was to be 'wet' or 'dry.'
>
> "Is it correct to state that if no referendum was had the governing body has the authority to accept applications for licenses and to issue licenses applied for, or if no referenda was had, the governing body has no right to accept applications for or to issue licenses?
>
> "It seems to me that a mere reading of the statutes without the knowledge of the legislative history of the Alcoholic Beverage Control leaves the determination of this question in doubt."

In specific answer to your questions: New Jersey municipalities were not required, following repeal of the Eighteenth Amendment, to take action by local option referendum before retail alcoholic beverage licenses could be issued.

Our existing Alcoholic Beverage Law (R. S. 33:1-1 et seq.) contemplates a comprehensive scheme of alcoholic beverage control in New Jersey, fully covering the subject matter. Clearly our present statute was intended to lay down the only rules and delimit all public action -- state and local -- dealing with alcoholic beverage control. It follows, as a matter of law, that the adoption of the Control Act on December 6, 1933, operated to repeal by implication all alcoholic beverage legislation -- state and local -- theretofore in effect in New Jersey. Furthermore, the various New Jersey pre-Prohibition and pre-Repeal laws dealing with alcoholic beverages were expressly repealed by P. L. 1934, c. 32.

In short, New Jersey municipal alcoholic beverage regulations and local option referenda under former laws have no efficacy. The repeal of those laws has taken it away. The subject is discussed and fully covered in Re Haight, Bulletin 211, Item 3, and Re Delker, Bulletin 314, Item 12.

The duty to administer the issuance of retail alcoholic beverage licenses (R. S. 33:1-12) is placed upon the various municipal issuing authorities by R. S. 33:1-19. Except as hereinafter indicated, the determination to grant or deny a retail license application rests in the first instance with the municipal issuing authority with which it is filed (R. S. 33:1-19 and 33:1-24); and the municipal action is subject to review by the State Commissioner on appeal pursuant to R. S. 33:1-22.

Our Alcoholic Beverage Law provides for five types of local option referenda (R. S. 33:1-44, 33:1-45, 33:1-46, 33:1-47 and 33:1-47.1) and a municipal authority may not issue licenses in violation of a referendum election held under one of those sections. Further, one or more of the various types of retail licenses authorized to be municipally issued by R. S. 33:1-12 may be prohibited by ordinance and, of course, licenses may not be issued in violation of such ordinance; nor may a municipal authority issue a license in violation of an ordinance adopted pursuant to R. S. 33:1-40 -- limiting the number of retail licenses to be issued and outstanding in the municipality.

But even in the absence of a referendum or of a restrictive ordinance or resolution, the law does not require that a municipal issuing authority grant a retail license application filed with it. A municipal authority may, in the first instance and in the bona fide exercise of its sound discretion, deny an application on the ground that a sufficient number already exists. Generally speaking, our problem is one of far too many licenses rather than too few.

If there are questions, please call upon me further.

Very truly yours,

Alfred E. Driscoll

Commissioner.