

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

BULLETIN 461

MAY 23, 1941.

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

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MAY 23, 1941.

1. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - DISCREPANCIES IN
PROOF AND SOLID CONTENT - 10 DAYS' SUSPENSION.

In the Matter of Disciplinary Proceedings against)

THOMAS DI GIACOMO,)
30 Bloomfield Avenue,)
Newark, N. J.,)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption License No. C-606)
issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.)
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William P. Mason, Esq., Attorney for Defendant-Licensee.
Robert R. Hendricks, Esq., Attorney for State Department of Alcoholic Beverage Control.

The defendant has pleaded non vult to the charge of possessing an illicit alcoholic beverage at his tavern in violation of the Alcoholic Beverage Law (R. S. 33:1-50).

On January 10, 1941, while the defendant's bartender was in charge of the tavern, an agent of the Alcohol Tax Unit of the U. S. Bureau of Internal Revenue inspected the licensed premises and seized an open one-quart bottle labeled "Calvert Reserve Blended Whiskey." According to analysis by the Federal chemist, the contents of this bottle contained 807 grams of solids per 100 liters, or nearly six times as great as the solid content in a genuine sample of this brand of liquor.

This unusual and telltale amount of solids in the bottle in question cannot be explained on any theory of natural evaporation of part of the original contents, thus increasing the concentration of solids. For, if there were such evaporation as to account for this increase in solids, the proof would necessarily fall very substantially instead of being, as here, slightly higher than the listed proof.

It thus appears that, as concluded by the Federal chemist and as virtually admitted by the defendant's plea, the contents of this bottle were not genuine but were a "refill." Since "refilling" constitutes bottling within the meaning of the Alcoholic Beverage Law (R. S. 33:1-78) and since, so far as appears, the "refilling" in the instant case was an unlicensed bottling, the contents of the bottle in question constituted an illicit alcoholic beverage. Re Haney, Bulletin 304, Item 13.

The defendant, while admitting the accuracy of the chemical analysis and the above inference to be drawn therefrom, claims that he is unable to account for this "refilling"; that he has not performed or authorized any "refill" in this or any other bottle; and that he is unaware of any such "refill" by any of his employees.

Irrespective of the defendant's personal innocence as to the "refilling," his mere possession of this illicit liquor at the tavern is a violation (R. S. 33:1-50) for which he must necessarily be held to strict accountability. Re Perna, Bulletin 442, Item 6; Re Heuring, Bulletin 445, Item 12; Re Wnoroski, Bulletin 454, Item 6; Re Birban, Bulletin 457, Item 10.

Since there is nothing, however, to show any aggravating circumstances in the case and since the defendant has no prior record of conviction, his license will, in penalty for the present violation, be suspended, as in like cases, for ten days. See the cases above cited.

Accordingly, it is, on this 16th day of May, 1941,

ORDERED, that Plenary Retail Consumption License No. C-606, heretofore issued to Thomas DiGiacomo by the Municipal Board of Alcoholic Beverage Control of the City of Newark for premises at 30 Bloomfield Avenue, Newark, be and hereby is suspended for a period of ten (10) days, effective May 20, 1941, at 3:00 A.M. (Daylight Saving Time).

E. W. GARRETT,
Acting Commissioner.

- 2. DISCIPLINARY PROCEEDINGS - PURCHASE OF ALCOHOLIC BEVERAGES BY NEW JERSEY RETAILER OTHERWISE THAN FROM A NEW JERSEY MANUFACTURER OR WHOLESALER - TRANSPORTATION OF ALCOHOLIC BEVERAGES UNLAWFULLY IMPORTED INTO NEW JERSEY - POSSESSION OF ALCOHOLIC BEVERAGES ILLICIT BECAUSE UNLAWFULLY TRANSPORTED INTO NEW JERSEY - PRIOR CONVICTION OF THREE DISSIMILAR OFFENSES - 30 DAYS' SUSPENSION, LESS 5 FOR GUILTY PLEA.

In the Matter of Disciplinary Proceedings against
LUCY DECRESCENZI,
T/a NORGE RESTAURANT,
538-40-42 Boulevard,
Bayonne, N. J.,
Holder of Plenary Retail Consumption License C-144, issued by the Board of Commissioners of the City of Bayonne.
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CONCLUSIONS
AND ORDER

Ezra L. Nolan, Esq., Attorney for the Defendant-Licensee.
Robert R. Hendricks, Esq., Attorney for the State Department of Alcoholic Beverage Control.

The defendant-licensee has pleaded guilty to charges of (1) purchasing alcoholic beverages from a vendor who was not the holder of a New Jersey manufacturer's or wholesaler's license, in violation of Rule 15 of State Regulations No. 20; (2) transporting in this State in a vehicle under her control and within one consecutive period of twenty-four hours, more than one gallon of alcoholic beverages other than beer, ale, porter and wine which had been imported into the State, in violation of R. S. 33:1-2; and (3) possessing alcoholic beverages which were illicit because unlawfully transported into the State, in violation of R. S. 33:1-50.

The Department file on this matter discloses that on October 23, 1940 the defendant-licensee, while driving out of the Jersey City exit of the Holland Tunnel in a car operated by her son, was stopped by investigators of this Department. Search of the car disclosed seventeen bottles of assorted alcoholic beverages which, together with the car, were seized by the investigators. A hearing was held, thereafter, at this Department, to determine why the alcoholic beverages and the car in which they had been transported without license or permit, should not, because of the unlicensed transportation, be declared unlawful property and forfeited to the State in accordance with the provisions of R. S. 33:1-66. As a result of that hearing, the automobile, which belonged to the defendant-licensee's brother, who, apparently, was an innocent party to the unlawful transportation, was returned to him; the alcoholic beverages which were admittedly purchased in a New York department store, however, were found, despite the defendant-licensee's denial, to have been purchased by her for use in connection with her licensed business and, as a consequence, adjudged unlawful property and declared forfeit. For full statement of the facts and conclusions see Re Seizure Case No. 5888, Bulletin 436, Item 2.

The present disciplinary proceeding, while arising out of the same transaction, is directed at the defendant's license by way of disciplining her, in her capacity as a licensee, for purchasing the liquor from an unauthorized vendor and unlawfully transporting it.

The defendant-licensee, by entering a plea of guilty, has admitted the violations charged against her. She has asked, however, that in fixing the penalty the fact that "at the time of the violation, there existed in New York City, a sharp price war, and as a result the liquor dealers in the northern part of our State who were subjected to our 'Fair Trade prices', were forced to face unfair competition," be considered as a mitigating factor.

The fact that the New York price war may have subjected New Jersey retailers in the metropolitan area to unfair competition and may have tempted them to take advantage of the reportedly below-wholesale prices which were then being offered in the New York retail market, afforded no excuse for their attempting to circumvent the State regulations which specifically prohibit New Jersey retailers from purchasing alcoholic beverages from vendors other than the holders of New Jersey manufacturer's or wholesaler's licenses. Anything less than rigorous enforcement of this requirement would result, as pointed out in Re Susslin, Bulletin 458, Item 2, in loss to the State of both revenue and control and supervision over this highly important phase of liquor traffic in the State.

Were this the defendant-licensee's first offense of record, the minimum penalty for the instant violation would be suspension of license for fifteen days. Re Susslin, supra. The Department file, however, shows that the defendant-licensee has three times before been convicted by the local issuing authority for alcoholic beverage violations: Once in 1935, when her license was suspended for four days for selling alcoholic beverages on Primary Election Day; once in 1939, when her license was suspended for five days on charges of selling alcoholic beverages and being open during prohibited hours and employing a person disqualified by reason of non-age; and again in 1940, when her license was suspended for five days on a charge of being open during prohibited hours. In view of the defendant-licensee's past record, the instant offense calls for a penalty exceeding the minimum penalty of suspension prescribed for this type of violation. The license, therefore, will be suspended for thirty days instead of fifteen days.

By entry of the guilty plea the Department has been saved the time and expense of proving its case. Five days of the determined penalty will, therefore, be remitted.

Accordingly, it is, on this 19th day of May, 1941,

ORDERED, that Plenary Retail Consumption License C-144, heretofore issued to Lucy DeCrescenzi by the Board of Commissioners of the City of Bayonne, be and the same is hereby suspended for a period of twenty-five (25) days, effective May 23, 1941, at 3:00 A.M. (Daylight Saving Time).

E. W. GARRETT,
Acting Commissioner.

3. DISCIPLINARY PROCEEDINGS - DEVICE IN THE NATURE OF A SLOT MACHINE - DEVICE DESIGNED FOR GAMBLING - MILLS' "1-2-3" - 10 DAYS' SUSPENSION.

In the Matter of Disciplinary Proceedings against)
JOSEPH STAFFORD,)
3004 Black Horse Pike,)
West Collingswood,)
Haddon Township,)
P.O. Collingswood, N.J.,)
Holder of Plenary Retail Consumption License C-3, issued by the Township Committee of Haddon Township.)
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CONCLUSIONS
AND ORDER

Nathan Blank, Esq., Attorney for Licensee.
Charles Basile, Esq., Attorney for State Department of Alcoholic Beverage Control.

The licensee was charged with possessing on the licensed premises a Mills' "1-2-3" one-ball machine, alleged to be a device in the nature of a slot machine which might be used for the purpose of playing for money or other valuable thing, in violation of Rule 8 of State Regulations No. 20, and permitting on his licensed premises the same machine, alleged to be a device and apparatus designed for the purpose of gambling, in violation of Rule 7 of State Regulations No. 20.

The Mills' "1-2-3" machine involved comprises an inclined playing surface and a vertical backboard. Near the top of the backboard, facing the player, are three glass windows numbered 1, 2 and 3, behind which revolve reels bearing pictures of various animals. When the reels are at rest a picture of an animal appears at each window. On the backboard, directly below the windows, there appears the legend:

"3 elephants	- 60	3 tigers	- 8
3 lions	- 20	2 tigers, 1 elephant	- 8
2 lions, 1 elephant	- 20	2 monkeys, 1 lion	- 4
3 hippos	- 16	2 monkeys, 1 camel	- 4
2 hippos, 1 elephant	- 16	2 monkeys	- 2"

The machine is operated by placing a nickel in a slot which makes one ball available for play. By means of a plunger the player propels the ball to the top of the inclined table, whence it rolls to the bottom, striking vari-colored bumpers on the way which both deflect the course of the ball and cause the reels in the backboard to spin. While particular bumpers actuate particular reels, the extent of their spinning is beyond the player's control. On the backboard there is a register which records the number of "free games" that the player has won. So long as the register shows "free games" to the player's credit, he may, without the deposit of other nickels, propel the ball over the playing surface and, depending on the combinations shown by the reels each time, add to or subtract from the "free games" to which he is entitled.

The machine contains no cup into which money, tokens or anything of value is ejected in quantity dependent on the "free game" score, nor does it have any slot through which tickets are ejected in quantity or denomination dependent on that score. The machine does have a push button by means of which the cumulated player's score of "free games" may be cancelled, an internal meter meanwhile recording the total number of "free games" cancelled.

At the outset, two matters should be noted: First, Rule 8 of State Regulations 20 prohibits possession of both slot machines and devices in the nature of slot machines. The Department does not contend that the instant machine is a slot machine. If it did, the licensee would have been charged with possession of a slot machine. Instead he was charged with possession of a device in the nature of a slot machine. Second, Rule 7 of State Regulations 20 prohibits on licensed premises both gambling and the permitting and suffering of devices and apparatus designed for the purpose of gambling. The Department does not contend that the "free games" were actually redeemed in cash. If it did, the licensee would have been charged with permitting gambling on the licensed premises. Instead he was charged with permitting on the licensed premises a device designed for gambling purposes.

It is, therefore, immaterial that the investigators who played the machine obtained no cash payoff either from the machine or any person on the licensed premises, or that the "free games" that they won were not redeemed in cash or anything of value. It is likewise immaterial that during the two weeks that the machine had been on the licensed premises, no player (as the licensee claims) had ever received any money, merchandise or prize as a result of operating the machine.

The only meritorious questions are whether the Mills' "1-2-3" machine described herein is a device in the nature of a slot machine, or a device and apparatus designed for the purpose of gambling, or both.

The licensee contends that the machine is neither, citing State v. Brandt, 122 N.J.L. 488 (Sup. Ct. 1939). That case, however, merely holds that a common bagatelle machine is not a slot machine. This Department has never contended that such bagatelle machines are slot machines. See for example Magee v. Orange, Bulletin 234, Item 2, which describes a typical bagatelle machine.

Slot machines, as distinguished from devices in the nature of slot machines, pay out cash, tickets, tokens or merchandise in varying amounts depending on the working of interior mechanism beyond the player's control. See for example Re Ukrainian National Home,

Bulletin 433, Item 10, which describes the classic slot machine with its pull handle, its reels of bells and fruit and its pay-out cup. The only differences between the classic slot machine and the Mills' "1-2-3" machine are (1) in the former the reels are actuated by mechanical forces applied through the lever pulled by the player, whereas in the latter the reels are actuated by a combination of mechanical and electrical forces set in motion by the player through the instrumentality of the ball and the bumpers on the playing surface - a distinction that makes no substantial difference - and (2) the absence of a payoff receptacle - again a distinction without a difference. In view of the essential similarity of the instant machine to the classic slot machine, I conclude that whether slot machine or no, it is certainly a device in the nature of a slot machine and within the prohibition of Rule 8 of State Regulations No. 20.

Is the machine a device and apparatus designed for gambling purposes? The licensee contends that the machine was maintained solely for purposes of amusement and that the "free games" won by players were that and nothing more. I cannot be so credulous to believe that any sane adult would be so intrigued with the operation of the machine as to try to line up the three elephants and thereby obtain the priceless boon of watching the reels spin another sixty times, during which he might again line up the three elephants and so on ad infinitum, ad nauseam and ad mortem. Imagination quails at the prospect. The argument, were it tenable, would lead logically to the conclusion that a roulette wheel was not a device or apparatus designed for the purpose of gambling because held out as maintained solely to amuse those customers who liked to watch it spin! The plunger, ball, bumpers and playing surface, creating a superficial resemblance to the innocent bagatelle machine, are mere gimcrackery overlaid upon the basic mechanism which conceal its real purpose only from those who wilfully blind themselves. Just as the wolf is still a wolf despite its sheep's clothing, the gambling device is still a gambling device despite its bagatelle fripperies.

Whereas on a true bagatelle machine the hypothetical expert may obtain a predetermined score by hitting a particular bumper or bumpers, on the instant machine the "score" is determined by the final position of three reels which in turn is determined by purely mechanical means beyond the player's control. Although a player can cause a particular reel to spin by hitting a particular bumper, he cannot control the stopping point of the reel no matter how skillful he be. Thus it clearly appears that the numerals coupled with the various animal combinations are not scores to be obtained but odds to be paid by the "house," and that the alleged "free game" register (which, incidentally, is frequently present on harmless bagatelle machines) is, in the light of all other facts, nothing more than an indication of the extent of the player's winnings. The machine, despite its artful complexity, is primarily an indicator of the odds to be paid to the player, and secondarily a totalizer of the player's winnings and losses as determined by the odds.

Whether the "house" actually pays the indicated odds is immaterial. Rule 7 of State Regulations 20 prohibits not only the actual gambling in which the instant machine might be an instrumentality, but also the presence of such instrumentalities on licensed premises whether or not they are actually so used. I conclude, therefore, that the Mills' "1-2-3" machine is not only a device in the nature of a slot machine but also a device or apparatus designed for gambling purposes.

The licensee is, therefore, guilty as charged.

The minimum penalty for possessing a slot machine (Re Morrissey, Bulletin 423, Item 8), a device in the nature of a slot machine (Re Breslin, Bulletin 434, Item 10), or a device designed for gambling purposes (Re Hamburg Department Stores, Inc., Bulletin 436, Item 5), is ten days. In view of the licensee's unimpeached testimony that he did not in fact make any payoff according to the odds recorded by the machine nor redeem the "free games" in cash, I will impose only the minimum penalty. Department records indicate that in 1937 the licensee was charged with sale of alcoholic beverages to minors but the charges were dismissed and he was "placed on probation" for the balance of the then licensing period (Rev. 913). Further, in 1939 he was charged with permitting disorder and drunkenness on his licensed premises in violation of local regulation, whereupon he was "reprimanded" and fined \$50.00 and \$2.50 costs (Mun. Rev. 41). The concepts of placing licensees on probation, giving reprimands and imposing fines in disciplinary proceedings are all foreign to the system of punishments (revocation or suspension of the license) contemplated by R. S. 33:1-31. They do not indicate an unsullied record. Still, the licensee will be given the benefit of the doubt. I shall, therefore, suspend the license on the instant charges for ten days.

Accordingly, it is, on this 19th day of May, 1941,

ORDERED, that Plenary Retail Consumption License C-3, heretofore issued to Joseph Stafford by the Township Committee of Haddon Township, be and the same is hereby suspended for a period of ten (10) days, commencing the 26th day of May, 1941, at 2:00 A.M. (Daylight Saving Time).

E. W. GARRETT,
Acting Commissioner.

4. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - DISCREPANCIES IN PROOF, COLOR, ACID AND SOLID CONTENT - SIX WHISKEY REFILLS INDICATING CHEATING ON A LARGE SCALE - 30 DAYS' SUSPENSION.

In the Matter of Disciplinary Proceedings against)

EURLEE REEVES,)
241 Warren St.,)
Newark, N. J.,)

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License No. C-293, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.)
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Eurlee Reeves, Pro Se.
Richard E. Silberman, Esq., Attorney for the Department of Alcoholic Beverage Control.

The defendant-licensee has pleaded nolo contendere to the charge of possessing illicit alcoholic beverages in violation of R. S. 33:1-50, but pleaded not guilty to the charge of rebottling alcoholic beverages in violation of R. S. 33:1-78.

On December 13, 1940, inspectors of the Alcohol Tax Unit, Bureau of Internal Revenue, inspected the licensed premises and

gauged and tested about seventy-five or eighty bottles of open stock. As a result of the preliminary field inspection, the inspectors seized one bottle labeled "Gordon's Distilled London Dry Gin," one bottle labeled "Schenley's Distilled London Dry Gin," one bottle labeled "Calvert Special Blended Whiskey," one bottle labeled "Green River Blended Whiskey," two bottles labeled "Cream of Kentucky Straight Bourbon Whiskey," and two bottles labeled "Hiram Walker's Ten High Straight Rye Whiskey."

Analysis by the Federal chemist shows that the gin varied in proof from that indicated on the labels; that the contents of the open bottle of Calvert Whiskey varied in proof and solid content from a genuine sample analyzed for comparative purposes; that the contents of the open bottle of Green River Whiskey varied in acid and solid content from a genuine sample analyzed for comparative purposes and contained no artificial coloring, whereas practically all of the coloring of such genuine sample is artificial; that the contents of the open bottles of Kentucky Straight Bourbon Whiskey varied in proof, acid and solid content from a genuine sample analyzed for comparative purposes and was artificially colored, whereas the genuine sample contains no artificial coloring; that the contents of the open bottles of Hiram Walker's Straight Whiskey varied in proof from that indicated on the labels and was artificially colored, whereas the labels called for a "straight" or natural colored whiskey. The Federal chemist testified that in his opinion many of the seized bottles of whiskey were partly or completely refilled with another whiskey.

In view of this evidence, and the virtual admission of the licensee by her plea, I am satisfied that the contents of these bottles were not genuine, but were refills, either completely or in part, and hence constitute illicit liquor. Re Haney, Bulletin 304, Item 13.

However, the licensee contends that she does not know whether the bottles were "refilled" by her employees, or otherwise; that she did not personally tamper with the bottles, did not authorize any "refill" in these or any other bottles, and does not know how it had occurred.

Although it may well be that the licensee is personally innocent of the rebottling, it strains credulity to believe that some customer or stranger is accountable for all of these "refills"; on the contrary, in view of the large number of "refills" in her stock, the only plausible inference, so far as the evidence goes, is that an employee did the "doctoring." Regardless of personal innocence, the licensee is accountable for the acts of her employees. Re Heuring, Bulletin 445, Item 12.

Accordingly, I find the licensee guilty on both charges.

Licensee's record is clear of other convictions. While this is a circumstance to be considered in imposing penalty, nevertheless it cannot of itself counteract the fact that the presence of so many "refills" in her supply of liquor, without a satisfactory explanation (such as that given in Re Wnoroski, Bulletin 454, Item 6, or in Re Birban, Bulletin 457, Item 10), indicates that these refills were not accidental occurrences, but, on the contrary, are vivid evidence of an actual practice at the tavern. In view of such fact, the fit penalty is thirty days. Cf. Re Gypsy Camp, Inc., Bulletin 454, Item 2 and Re Kish, Bulletin 454, Item 3.

Accordingly, it is, on this 19th day of May, 1941,

ORDERED, that Plenary Retail Consumption License No. C-293, heretofore issued to Eurlee Reeves by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for thirty days, effective the 24th day of May, 1941, at 3:00 A.M. (Daylight Saving Time).

E. W. GARRETT,
Acting Commissioner.

5. DISCIPLINARY PROCEEDINGS - BRAWL ON LICENSED PREMISES - 15 DAYS' SUSPENSION - ALLOWING A KNOWN CRIMINAL ON LICENSED PREMISES - CHARGE DISMISSED.

In the Matter of Disciplinary Proceedings against ESPOSITO, INC., 47 Rutgers Street, Newark, N. J., Holder of Plenary Retail Consumption License C-247, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

Sidney Simandl, Esq., Attorney for Licensee.
Charles Basile, Esq., Attorney for Department of Alcoholic Beverage Control.

Charges served upon the licensee allege that:

"1. On or about October 12, 1940, you allowed, permitted and suffered a brawl and disturbance in and upon your licensed premises, in violation of Rule 5 of State Regulations No. 20.

"2. On or about October 12, 1940, and on divers days prior thereto, you allowed, permitted and suffered Lenzy Jones, alias "Lindsey Jones," "Lenzey Jones," who is a known criminal and person of ill-repute, in and upon your licensed premises, in violation of Rule 4 of State Regulations No. 20."

As to Charge (1): On the evening of October 12, 1940 the licensed premises were in charge of Robert Lewis, bartender. A patron, Lenz Jones, after being served a drink by the bartender, told him that he did not intend to pay. An argument followed, during the course of which the patron called the bartender a "rat" and said to him, "Come outside - I can lick you." The bartender admits that he took a gun from a drawer behind the bar and shot the patron in the arm. The patron then went to the City Hospital, where the bullet was extracted. The patron was later taken to Police Headquarters by the Newark Police, where he signed a statement which resulted in the institution of these proceedings. The patron made no criminal complaint against the bartender.

At the hearing herein Jones testified that he presumed the shooting was an accident. If it were necessary to decide whether the

firing of the shot was an accident or a deliberate act, the evidence would tend to show that the act was deliberate because Lewis admitted that he took the gun from the drawer with the intention of frightening Jones, who was coming toward him. It has been held in a number of cases that a licensee or an employee may use a reasonable degree of force to repel an attack by a patron. Where excessive force is used, it has been held that the licensee is guilty of permitting a brawl or disturbance. Re Polster, Bulletin 388, Item 10. Here there was no attack by the patron and no apparent justification for drawing a gun to frighten him, even if no shot had been fired. The frontier town has long since passed into history.

I find the licensee guilty of permitting a brawl and disturbance as charged.

On this charge the license will be suspended for fifteen days.

As to Charge (2): Jones had been convicted in June 1930 for stealing an automobile and sentenced to a reformatory where he remained for ten months. Since his release he has been steadily employed, has married and is the father of two children. There is nothing in the record to show that he should be classified as a known criminal or person of ill repute within the meaning of those terms as used in Rule 4 of State Regulations No. 20. Re Silver, Bulletin 441, Item 12. The bartender swears under oath that he did not know that Jones had ever been convicted of a crime. I shall accept his sworn testimony despite an alleged admission made to a police officer shortly after the shooting that he knew of Jones' conviction.

The second charge is dismissed.

Accordingly, it is, on this 20th day of May, 1941,

ORDERED, that Plenary Retail Consumption License C-247, heretofore issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Esposito, Inc. for premises at 47 Rutgers Street, Newark, be and the same is hereby suspended for fifteen (15) days, commencing May 22, 1941, at 3:00 A.M. (D.S.T.).

E. W. GARRETT,
Acting Commissioner.

6. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGE BELOW FAIR TRADE MINIMUM - APPARENT HONEST MISTAKE IN PRICE TAG WITHOUT INTENT TO CHISEL - 5 DAYS' SUSPENSION.

FAIR TRADE - WILFULNESS OR KNOWLEDGE OF LICENSEE NOT NECESSARY TO SUSTAIN A VIOLATION OF THE REGULATIONS.

DISCIPLINARY PROCEEDINGS - GUILTY PLEAS - THE CONDITIONS UNDER WHICH REMISSIONS ARE ALLOWED.

In the Matter of Disciplinary)
Proceedings against)

MAURICE H. COOPER,)
T/a BLOOMFIELD BEVERAGE CO.,)
312 Glenwood Ave.,)
Bloomfield, N. J.,)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Distri-)
bution License No. D-3, issued by)
the Town Council of the Town of)
Bloomfield.)
- - - - -)

Kasen, Schnitzer & Kasen, Esqs., by Daniel G. Kasen, Esq.,
Attorneys for Defendant-Licensee.
Richard E. Silberman, Esq., Attorney for Department of
Alcoholic Beverage Control.

The defendant is charged with sale of liquor below Fair Trade price at his "package" store in Bloomfield in violation of Rule 6 of State Regulations No. 30 (the so-called Fair Trade Regulations).

As to such charge, the defendant, although not pleading guilty, nevertheless frankly admits that, on August 21, 1940, his father, while working at the store, sold a pint of "Old Drum Blended Whiskey" to an investigator of this Department for \$1.10 although the then established Fair Trade price for such item was \$1.15.

In refusing to admit guilt for this sale, the defendant apparently does not in anywise contest the rule that, although the sale was made by an employee, he, as licensee, is strictly accountable therefor. Re Malyska, Bulletin 294, Item 2; Re Napp, Bulletin 299, Item 13; Re Jaskulski, Bulletin 312, Item 10.

His sole defense is that the sale was made under a bona fide mistake as to the Fair Trade price and not from any intent to "chisel." In explanation, defendant and his father thus testified, in sum, that on July 22, 1940 (about a month before the sale in question), the defendant and two helpers checked through the many price tags on the shelves to conform them with the new Fair Trade prices then becoming effective; that, through some slip, the price tag for pints of "Old Drum Blended Whiskey" continued, as theretofore, to read \$1.10 instead of being changed to \$1.15; that, however, the quarts of such whiskey were correctly marked at \$2.25; that the defendant's father, when selling the pint to the investigator on the occasion in question, relied on the "\$1.10" tag on such item as setting forth the correct Fair Trade price; that, although such sale occurred about a month after the check on the price tags and although throughout that period the tag for quarts of this whiskey listed a price more than double the price on the tag for pints, neither this inconsistency nor the erroneous marking of the pints' price tag had been detected since this whiskey is a slow seller.

In view of such testimony and also the testimony of the investigator who described how the sale occurred, I am satisfied that such sale was made below the established Fair Trade price, not as the result of any intent to "chisel," but from carelessness of the licensee and his employees as to the price tags.

However, I cannot agree with the defendant's contention that, in consequence, the sale should not be deemed to violate the Fair Trade regulations.

Such regulations, in providing for the enforcement of established Fair Trade prices in liquor, specifically prescribe, among other things, that the manufacturer or wholesaler setting such price shall notify every retailer thereof, that such price shall be published in the official bulletins of this Department, and that thereafter (with certain exceptions here not material) "no retail licensee shall sell or offer for sale" any liquor below such established Fair Trade price.

Now, this Department has consistently ruled that these regulations effectively and properly bar any actual sale below the established Fair Trade price, and that it is no defense that the licensee or an employee made a bona fide mistake because of erroneous check on the Fair Trade list. See, for example, Re Jacobs Drug Co., Bulletin 299, Item 10; Re Held, Bulletin 299, Item 11; Re Geisler, Bulletin 299, Item 12; Re Schwarz Drug Co., Bulletin 307, Item 5; Re Hughes, Bulletin 438, Item 9; Re Blum, Bulletin 442, Item 9; Re Sharr Drug Co., Bulletin 443, Item 6.

As was stated in Re Hughes, supra:

"This Department goes to considerable time and expense in seeing that Fair Trade lists are published and served upon licensees for their benefit. Carelessness in marking liquor stock from these price lists does not excuse a violation."

And as was significantly stated in Re Blum, supra:

"...carelessness in arranging price tags confers no immunity.....The State regulation prohibiting sale of an alcoholic beverage below Fair Trade does not require proof of (guilty) intent. Even though such sale be made in good faith and under misapprehension as to the correct Fair Trade price, nevertheless a violation is committed, once the sale is made. The personal innocence of a licensee in selling an alcoholic beverage below the minimum consumer price, while entitling him to a minimum penalty, does not excuse the violation. One of the evils sought to be remedied by the State regulation is unfair competition. Licensees who undersell innocently affect their more careful, law-abiding competitors in the same degree as those who deliberately 'chisel.'"

However, the defendant further contends that this Department actually lacks power to adopt Fair Trade Regulations which penalize a licensee when, as here, he sells below the established Fair Trade price because of his mistake in checking on that price. The gist of his argument is that these regulations are, in essence, authorized by Laws 1938, c. 208; that such statute provides that this Department may "prohibit or regulate the sale of alcoholic beverages....in violation of any Fair Trade contract" executed under the general Fair Trade Act (R. S. 56:4-4 et seq.); that, since the general Fair Trade Act, thus referred to, makes a retail dealer

responsible in civil court only when "wilfully and knowingly" selling below the Fair Trade price (R. S. 56:4-6), this Department, in adopting Fair Trade regulations, can hold a retail liquor licensee accountable in its disciplinary proceedings only in a like case.

This contention, although ingenious, is without merit. Laws 1938, c. 208, in specifically empowering this Department to regulate liquor sales which are "in violation of any Fair Trade contract," does not contemplate that the regulations may impose responsibility upon a licensee only in the cases where he would be civilly liable in the courts. Fairly construed, that statute is designed to enable this Department, in supervising the liquor industry for the common good, to bar any sale of liquor below the price established by proper Fair Trade contract, whether the licensee deliberately intends to "chisel" on that price or not.

Moreover, our State courts have specifically ruled that the existent Fair Trade regulations may, wholly apart from Laws 1938, c. 208, be sustained under this Department's general regulation-making powers in R. S. 33:1-39. See Gaine v. Burnett, 122 N.J.L. 39 (Sup. Ct. 1939), aff'd 123 N.J.L. 317 (E. & A. 1939). Those powers, which include authority for adopting regulations covering "unfair competition," "practices unduly designed to increase consumption of alcoholic beverages," and "such other matters whatsoever as are or may become necessary in the fair, impartial, stringent and comprehensive administration of" the Alcoholic Beverage Law, are ample to sustain the regulations in question even though such regulations bar "innocent" as well as deliberate sales below Fair Trade Price. Or, as was said by Justice Bodine in the Gaine case at p. 42 (of 122 N.J.L.), speaking on behalf of the Supreme Court as to these regulations:

"We regard the regulation in question as a valid exercise of the commissioner's inherent power under the Control act. The act of 1938 was unnecessary to confer power to enact the regulation in question."

Hence, I find the defendant guilty as charged.

As to penalty: The defendant has a heretofore clear record. Had he pleaded guilty and waived hearing on the charge in this case, his license would be suspended, at minimum, for ten days, with five being remitted for the guilty plea and waiver of hearing, thus resulting in a suspension of five days. Re Stein, Bulletin 444, Item 7. Such five-day remission is allowed because of the substantial saving to the Department in being spared the time and expense of hearing in these "run of the mill" Fair Trade cases. See the original and leading case of Re Polonsky and Kiewe, Bulletin 308, Item 9. Also see Re Tublitz, Bulletin 319, Item 8.

However, where, as in the present case, the licensee elects to go to hearing, whether pleading guilty or not, and for whatever purpose, he may obviously no longer claim the benefit of this five-day remission but, instead, stands wholly on what he may show at the hearing. Cf. Re Balas, Bulletin 353, Item 8; Re Gleeson, Bulletin 376, Item 11. In such case, if he is guilty and neither mitigating nor aggravating circumstances appear, proper penalty is suspension for ten days (see, e.g., Re Wardach, Bulletin 308, Item 11; Re Tarlow, Bulletin 308, Item 12; Re Colonial Wine & Liquor Stores, Bulletin 310, Item 4; Re Marcincin, Bulletin 315, Item 5; Re Aronow, Bulletin 382, Item 4); if aggravating circumstances appear, penalty is then stepped up accordingly (cf. Re Tarlow, Bulletin 326, Item 15, suspending for thirty instead of the usual twenty days on a second offense because of aggravating circumstances); if mitigating

circumstances appear, penalty is then correspondingly reduced (see, e.g., Re Guglielmi, Bulletin 299, Item 5; Re Geisler, Bulletin 299, Item 12; Re Campbell, Bulletin 303, Item 3; Re Jaskulski, Bulletin 312, Item 10; Re Tiger Food Co., Bulletin 377, Item 11; Re Anzevino, Bulletin 433, Item 4).

In the present case the defendant's frank admission of the sale and the fact, here found, that he had apparently tried to comply fully with the Fair Trade regulations and had violated such regulations merely because of an inadvertent slip in one of his numerous price tags when seeking to change them to conform to new Fair Trade prices are mitigating circumstances which, in accordance with past decisions in like cases, warrant fixing of penalty at five days. Re Guglielmi, supra; Re Jacobs Drug Co., supra; Re Held, supra. Cf. Re Jaskulski, supra; Re Tiger Food Co., supra. Had the defendant not adequately demonstrated these mitigating circumstances, penalty would have been fixed at ten days. See Re Balas, supra; Re Seidman, Bulletin 372, Item 11. Cf. Re Gleeson, supra.

Accordingly, it is, on this 20th day of May, 1941,

ORDERED, that plenary retail distribution license, heretofore issued by the Town Council of the Town of Bloomfield to Maurice H. Cooper, T/a Bloomfield Beverage Co., for 312 Glenwood Avenue, Bloomfield, N. J., be and hereby is suspended for a period of five (5) days, commencing May 26, 1941, at 2:00 A.M. (Daylight Saving Time).

E. W. GARRETT,
Acting Commissioner.

7. DISCRIMINATORY PRICES AND DISCOUNTS - REGULATIONS NO. 34 - HEARINGS IN DISCIPLINARY PROCEEDINGS ADJOURNED PENDING DECISION BY THE SUPREME COURT UPON APPLICATION FOR WRIT OF CERTIORARI.

May 21, 1941.

On May 20, 1941, application was made to New Jersey Supreme Court Justice Harry Heher by Schenley Distributors, Inc. of New York City for a writ of certiorari to review the legality of disciplinary proceedings, scheduled to be heard at this Department on May 21, 1941, in which it was required to show cause why its wholesale liquor license should not be suspended or revoked.

In the proceedings, Schenley Distributors, Inc. was charged with participating in the giving of unlawful discounts and the giving of free goods to a retail liquor licensee. Also named as defendants in the same proceedings were Belmont Distributing Co. of Newark, N. J., which holds a wholesale liquor license; Sam Englander of Passaic, N. J., a licensed solicitor formerly in the employ of Belmont Distributing Co., and Emanuel Kremer of Newark, N. J., a licensed solicitor in the employ of Schenley Distributors, Inc. All were charged with violating P.L. 1939, Chapter 87, the New Jersey Anti-Discriminatory Discount Law, applicable to wholesale sales of alcoholic beverages. In addition, the two wholesalers were charged with violating State Alcoholic Beverage Regulations No. 34, the discriminatory discount regulations applicable to wholesale sales of alcoholic beverages.

Decision on the application for the writ was reserved and an order has been signed by Justice Heher restraining this Department from hearing or taking any action in the proceedings against

Belmont Distributing Co., Schenley Distributors, Inc., Sam Englander and Emanuel Kremer, for one week from the date scheduled for hearing, that is, until May 28, 1941.

Common fairness dictates that no hearings should be held in the meantime in proceedings presently pending against Austin, Nichols & Co., Inc., of Brooklyn, N. Y.; Greenspan Bros. Co., of Perth Amboy, N. J.; Oldetyme Distillers Corporation of Jersey City, N. J.; and Joseph H. Reinfeld, Inc., of Newark, N. J., (all wholesalers) and against Julius Bergman, Lewis Castelbaum and Jack Rosenberg of Newark, N. J.; Mortimer W. Greenspan of Perth Amboy, N. J.; Charles H. Scofield of Bayonne, N. J.; and Jules J. Lubowitt of Hillside, N. J.; (all solicitors employed by the wholesalers) all of whom have been charged with similar violations.

Accordingly, hearings against all the wholesalers and solicitors above mentioned, scheduled for May 21, 22 and 23, 1941, have been adjourned to June 4, 5 and 6, 1941, the earliest available dates after the expiration of the one-week stay ordered by Justice Heher.

E. W. GARRETT,
Acting Commissioner.

8. DISCIPLINARY PROCEEDINGS - FRONT FOR NON-LICENSEE - SUSPENSION FOR BALANCE OF TERM, WITH LEAVE TO PETITION TO LIFT AFTER 10 DAYS IF SITUATION CORRECTED - 15 DAYS ELAPSED - SITUATION CORRECTED - PETITION TO LIFT GRANTED.

In the Matter of Disciplinary Proceedings against
JOSEPH DRESSLER,
22 North 3rd Street,
Hammonton, N. J.,
Holder of Plenary Retail Consumption License No. C-1, issued by the Mayor and Council of the Town of Hammonton.

ON PETITION
ORDER

Emerson A. Burdick, Pro Se.

On May 2, 1941 I suspended the defendant's license from May 6, 1941 for the balance of its term after he had pleaded guilty to charges that he was a "front" for Emerson A. Burdick. Leave was granted, at that time, to petition me for the lifting of said suspension, provided that said license was duly transferred by the Mayor and Council of the Town of Hammonton, subject to the lifting of the suspension, to Emerson A. Burdick or any other duly qualified person, provided, however, that in no event would said suspension be vacated prior to the expiration of ten days from the effective date thereof. Re Dressler, Bulletin 457, Item 6.

Pursuant to said leave, Emerson A. Burdick has filed a petition wherein he sets forth that he has made application to the Mayor and Council for transfer of said license to him and that he has complied with all requirements pertaining to said transfer.

On the date hereof, petitioner has presented to me a certified copy of a resolution of said Mayor and Council, dated May 19, 1941, granting transfer of said license from Joseph Dressler to Emerson A. Burdick and directing the Town Clerk to so transfer the license if and when the suspension is lifted by the State Department of Alcoholic Beverage Control.

In view of the grant of such transfer and since ten days have elapsed since the suspension became effective,

It is, on this 21st day of May, 1941,

ORDERED, that the suspension heretofore imposed be lifted, and that Plenary Retail Consumption License C-1 be and the same is hereby restored to full force and operation, effective immediately.

E. W. J. J. J.
Acting Commissioner.