Mr. Macintosh

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

BULLETIN 442 JANUARY 31, 1941.

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ITEM

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

BULLETIN 442 JANUARY 31, 1941.

1. COURT DECISIONS - NEW JERSEY SUPREME COURT - WILDWOOD v. GARRETT, ACTING COMMISSIONER - A PLENARY RETAIL DISTRIBUTION LICENSE IS NOT A SEASONAL LICENSE, IN THE CONTEMPLATION OF THE ALCOHOLIC BEVERAGE LAW, EVEN THOUGH THE LICENSEE DOES BUSINESS ONLY DURING PART OF THE YEAR - ORDER OF THE ACTING COMMISSIONER IN KARPF v. WILDWOOD, BULLETIN 419, ITEM 2, AFFIRMED - WRIT OF CERTIORARI DISMISSED.

NEW JERSEY SUPREME COURT
No. 257 - October Term, 1940

CITY OF WILDWOOD,)
Prosecutor,)
-vs-)
E. W. GARRETT, Acting Commissioner of the Department of Alcoholic Beverage Control,)
Defendant)

- - - - - - - - - - - - - - - - - -

Submitted October 1st, 1940; decided January 21st, 1941.

On writ of certiorari.
Before Justices Case, Donges and Heher.
For the prosecutor: Irving Shenberg, Esq. and J. Victor D'Aloia, Esq.
For the defendant: Edward J. Dorton, Esq.

The opinion of the Court was delivered by

DONGES, J.

This writ of certiorari, prosecuted by the City of Wildwood, brings up an order of the acting alcoholic beverage commissioner which directed the issuance to Sam Karpf Co. of a plenary retail distribution license for the sale of alcoholic beverages in Wildwood, and set aside the action of the governing body of the city in granting a retail distribution license to one Perry R. Riefsnyder.

Sam Karpf Co. has held a license in Wildwood continuously since the year 1934, yearly renewals being obtained until the license which expired June 30, 1940. On June 6th, 1940, it applied for a renewal of its license for the year commencing July 1st, 1940. On June 11th, 1940, the Board of Commissioners of Wildwood adopted an ordinance limiting the number of retail distribution licenses in the city to three, with a provision, however, that the ordinance should not be a bar to the renewal of any existing licenses. This ordinance also provided that there should be no season retail consumption licenses and no limited retail distribution licenses issued. On June 20th, the application of Samuel Karpf Co. was denied for the reason, as stated by the Mayor, that: "Our regulations provide that there shall be no seasonal licenses issued. * * * To all interests and purposes the

application before us according to experience, is for a seasonal license, opening as it does, just prior to the season and closing immediately after the season."

Admittedly, the licensee had, throughout the years it was licensed, operated its liquor store only during the summer months when the number of persons resident in Wildwood, a summer resort, was greater than in the winter season. Its licenses, however, had been plenary retail distribution licenses entitling it to operate on any and all days when such establishments may be open. Its application which was denied was for a retail distribution license without limitation as to time of operation.

The contentions of the prosecutor are that the acting commissioner was without jurisdiction and that his action was without support in the facts. These arguments are based upon an insistence that the licensee was in fact seeking a seasonal or limited license because it kept its store open only a part of the year. The contention is that it was within the power of the municipality to prohibit seasonal licenses and beyond the power of the acting commissioner to overrule such a provision in the ordinance or to declare such a provision invalid. Citing Phillipsburg v. Burnett, 125 N. J. L. (157) 162. Further it is contended that in view of the fact that the licensee in the past did not operate year round, it was really seeking such a seasonal license as is barred by the ordinance.

We think the position of the prosecutor is without merit. The mere fact that the licensee did not avail itself of all the privileges conferred by its license did not alter the character of the license. An analogous case is that of South Jersey Retail Liquor Dealers Ass'n v. Burnett, 125 N. J. L. 105. There the licensee sought the transfer of a plenary retail consumption license although he intended to operate only by selling package goods and not by selling liquors for consumption on the premises. It was contended that this amounted to the issuance of a retail distribution license in excess of the maximum number permitted by ordinance. This contention was rejected by this court, which held that the transfer could not be refused solely because the applicant did not intend to avail himself of all the privileges conferred by the license.

We are of the opinion, therefore, that the facts do not justify a finding that Sam Karpf Co. sought a type of license barred by the ordinance, and that the acting commissioner did not disregard or overrule the provision of the ordinance. That provision had no application and there was no legal justification for the refusal of the renewal of the license.

The order of the acting commissioner is affirmed and the writ of certiorari is dismissed, with costs.

2. REGULATIONS NO. 34 - DISCRIMINATORY PRICES AND DISCOUNTS - THE TERMS AND CONDITIONS UNDER WHICH WHOLESALERS MAY SELL ALCOHOLIC BEVERAGES TO RETAILERS, LESS STATE AND FEDERAL TAXES AND DUTIES.

January 21, 1941

William Jameson & Company, Inc.,
New York, N. Y.

Gentlemen:

I have carefully considered yours of November 27, 1940, your further letter of December 12, 1940, your supplementary price list of December 1940, and your form of agreement covering the sale of merchandise "in bond."

You refer to the transaction as a "sale in bond." As I understand your letter and the agreement (much of which is contradictory), that term is a misnomer. If sold in bond, title would pass, evidenced by some form of paper, such as a warehouse receipt. But that would require a warehouse receipts license (R.S. 33:1-72) which you do not now hold and evidently do not intend to procure. You apparently contemplate taking an order for future delivery, accepting part payment, holding the merchandise for the specific account, and retaining title until the buyer pays the balance and takes the merchandise, at which time the actual sale will take place. Perhaps it is more exactly a form of contract to sell, or merchandise on order.

To accomplish this, you propose that King's Ransom and House of Lords imported scotch whiskey, in fifths, shall be duly listed pursuant to Regulations No. 34 and offered to retailers:

(1) At $42.00 and $32.00 per case, respectively, delivered, all taxes and other charges fully paid, and

(2) At $22.80 and $13.15 per case, respectively, on order for future delivery, the state and federal taxes and duties to be paid when sale and delivery is made, but with no additional charges for warehousing, handling, or delivery.

I understand the present aggregate prices, under scheme 2, adding $2.40 for state tax and $13.35 for federal taxes and duties, are $38.55 and $28.90, constituting reductions from the basic case prices of $3.45 and $3.10, respectively.

It is to be noted that these reductions amount to discounts of 9.68% and 8.21%, and are considerably in excess of the 2% for cash on orders under $100.00 allowed by Rule 5(a) of Regulations No. 34, the 3% for cash within 30 days allowed on orders of $100.00 to $500.00 by Rule 5(b), or the 5% for cash within 30 days allowed on orders of $500.00 or over by Rule 5(c).

To be sure, it is not discriminatory. Both prices are published and thereby made fully available to all. It is, rather, two ways of offering the same product which the retailer may elect as he wishes.

I see nothing wrong, however, with that alone.

The trouble is in the price differential.

As aforesaid, your basic prices, as established in supplemental price list of January 3, 1941, are $42.00 and $32.00 respectively, subject to the discounts allowed by Rules 5(b) and (c). Clearly, to offer the same merchandise at another and lesser price, whatever the method, constitutes an inducement, an incentive. The attraction is the saving to be achieved by buying in this other way, which transaction the retailer may complete at the same moment, or in the future, as he wishes. With no such price differential, or without the listing of the basic price, the second method, as proposed, would be unobjectionable. But, in conjunction with the basic price, it is an inducement which circumvents the maximum discount provisions.

To prevent this evasion, and pursuant to the power in Section 5 of Chapter 87, P.L. 1939 to promulgate rules and regulations pertaining to maximum inducements, it is ruled that the aggregate case price under the "on order" method (scheme 2), less whatever discounts may be allowed, may not be lower than the basic case price delivered fully paid, less the maximum discounts allowed by Rule 5, whether such discounts are afforded by the manufacturer or wholesaler or not. If the same discount is allowed under both methods, it will mean that the aggregate case price under both methods will be equal.

Thus, you may offer the merchandise by both methods, provided the offering conforms with this ruling, and both yourselves and the retailers will be thereby afforded the advantages you have set out in your letter; viz., that payment of state and federal taxes may be deferred, and the retailer given a hedge against the loss of his source of supply due to the European situation.

There are certain further matters involving the listing and form of order which your proposition raises.

In offering the merchandise at the so-called "on order" price, you have appended a statement "Federal and State Taxes Extra. Delivered. No Discount." You tell me these federal taxes come to $13.35 and the state taxes to $2.40. I am not bothered about the statement of state taxes. A case of twelve fifths is 2.4 gallons. The state tax is a flat $1.00 per gallon. I presume most retailers are aware of this and hence can ascertain that the state tax will be $2.40. The federal charges are not so simple. Through some effort, which has occupied the better part of a day and has required two visits to the Customs House, we find that the federal duty and tax of $13.35 on these items comprises $6.00 in import duty on the whiskey (2.4 gallons at $2.50), approximately 6¢ in import duty on the glass containers (1/3¢ per pound), a countervailing duty of some 7¢ or 8¢, and internal revenue tax of $7.20 (2.4 gallons at $3.00). The duty on the whiskey and the internal revenue tax are apparently subject to change, depending upon the age and proof, respectively. I doubt many retailers will have any clear or certain idea of what the federal taxes and duties involve, or any facilities for finding out. Hence, the statement will have to be much more specific for, as it now stands, there is no adequate disclosure of what the additional charges will be. No doubt you anticipate that if taxes or duties are subsequently raised, the retailer will absorb such increase. Such a statement, together with an itemization of the taxes and duties as of the date of publication of the price, will be necessary. You may submit a revision.

The form of contract will not do. You are not selling merchandise "in bond." If you were, as aforesaid, you would have to

be licensed to sell warehouse receipts. You are accepting an order, with a deposit, the sale to be consummated when the rest of the money is paid, at some time in the future. You may also submit a revision of the order form.

The prices of merchandise "on order", in comparison with the basic prices, are too low. If they are to be net, with no discount, as on your December 1940 price list, they will have to aggregate, in the minimum, the basic prices less the maximum discounts allowed by Rule 5 of Regulations No. 34. Hence, if you wish to continue both offerings, a price revision, in accordance with Regulations No. 34, will be necessary.

Orders for merchandise sold by the "on order" method, prior to your receipt of this letter, may be completed according to the terms thereof, upon two conditions; viz.,

(a) That you at once notify retailers from whom such orders have been taken of the full details of the transaction, as you will henceforth be required to disclose them, and offer each retailer the opportunity of cancelling his order or orders with proper refund, if he so elects, and

(b) That you furnish this office within 10 days with a statement that this has been done, and further, with an itemized list showing names, addresses, license numbers, dates, quantities, prices, etc., of all orders of this nature which have been placed since October 1, 1940.

You will stop soliciting or accepting any further such orders until the aforesaid corrections to your listings and order forms have been made and have taken effect.

Mr. Ash wrote you on December 3, 1940, suggesting your explanation of the apparent inference on page two of your letter of November 27, 1940 that warehouse receipts have been sold by you without a warehouse receipts license. To date your explanation has not been received.

Kindly acknowledge receipt of this letter by return mail.

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

3. ADVERTISING - BY NEW YORK RETAILERS IN NEW JERSEY PAPERS - PERMISSIBLE, AS A MATTER OF COMITY, PROVIDED THE ADVERTISEMENTS COMPLY WITH THE NEW JERSEY LAWS - NEW JERSEY PAPERS URGED NOT TO ACCEPT OR PUBLISH SUCH ADVERTISEMENTS UNLESS AND UNTIL APPROVED BY THE COMMISSIONER.

January 21, 1941

The Jersey Journal,
Jersey City, N. J.

Gentlemen:

The New Jersey Alcoholic Beverage Law does not prohibit a New York retailer from advertising in New Jersey newspapers.

The mere advertisement of alcoholic beverages is not a sale (R. S. 33:1-1-w) for which a New Jersey license is required (R. S. 33:1-2), and hence the mere advertisement need not be licensed. Re Batten, Bulletin 279, Item 11.

We would, in fact, display a narrow insularity in endeavoring to stop such advertising. As was said in Re McHugh, Bulletin 373, Item 1:

> "Interstate commerce has been sapped and mined by various kinds of state legislation. So far as alcoholic beverages are concerned, the tariff walls have been erected and the interference created by discrimination against out-of-state wine, beer and liquor vendors, their employees and their products."
>
> * * * * * * *
>
> "Assuming that there is nothing offensive, indecent or otherwise contrary to the laws of the State, why should not a New York licensee be able to place in a New Jersey newspaper the same kind of advertisement that our licensees may insert? Vice versa, why not a New Jersey licensee in New York?
>
> "Magazines, which carry liquor advertisements, cross state lines with impunity. So does the radio. So do newspapers, particularly in the metropolitan areas adjacent to New York and Philadelphia. Other commodities are frequently advertised in both states with reference to stores in one of them. What is wrong about advertising which offers goods for sale in New Jersey to residents of New York and such other places where the New York papers circulate? Why should its sanction depend on the State where the license was issued? If right for one, why not for all?"

A prohibition of advertising from outside the state is certainly an arbitrary barrier to interstate commerce.

But it is, as certainly, wholly reasonable to ask that the advertisement from the other state comply with our law. We may very well offer equal advantages, but our licensees should not be put at a disadvantage.

We shall expect, therefore, no advertising by out-of-state retailers in New Jersey publications below the New Jersey minimum Fair Trade prices, and further, a proper cautionary statement in the advertisement of the New Jersey importation limits, viz., that there may be imported into our State for personal consumption not more than one quarter barrel or one case of 12 quarts of malt beverages, and one gallon of wine, and one gallon of other alcoholic beverages, within any consecutive period of twenty-four hours. R. S. 33:1-2.

In order to insure compliance with these restrictions, I recommend that all advertising copy of out-of-state retailers proposed to be published in New Jersey be first submitted to this office.

I urge all New Jersey newspapers and other periodicals, in the interest of the proper administration of New Jersey affairs and for the protection of our licensees, to accept and publish no advertisements from out-of-state licensees unless and until the copy is submitted, the New Jersey laws and regulations are complied with, and the advertisements are formally approved.

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

4. DISCIPLINARY PROCEEDINGS - SALES OF ALCOHOLIC BEVERAGES DURING PROHIBITED HOURS - 5 DAYS' SUSPENSION - OPEN DURING PROHIBITED HOURS - 5 DAYS' SUSPENSION - TOTAL: 10 DAYS, LESS 5 FOR GUILTY PLEA.

In the Matter of Disciplinary Proceedings against NICHOLAS GRANDE, 246 Heller Parkway, Newark, N. J., Holder of Plenary Retail Consumption License C-895 issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	CONCLUSIONS AND ORDER

Nicholas Grande, Pro Se.
Richard E. Silberman, Esq., Attorney for the Department of Alcoholic Beverage Control.

The licensee pleaded non vult to charges that at about 3:50 A.M. on December 26, 1940 he sold and served alcoholic beverages, and his licensed premises, where the principal business is the sale of alcoholic beverages, was open in violation of Section 1 of Ordinance 3930 adopted by the Board of Commissioners of the City of Newark on December 21, 1938.

This matter was investigated by officers of the Newark Police. The police file discloses that, at approximately 3:50 A.M. on the date in question, two detectives passing by observed several cars parked in front of the licensed premises, which was fully lighted. The officers entered and found three men and two women standing in front of the bar and the bartender behind the

bar. Both women and one of the men were drinking beer. A signed statement was taken from the bartender admitting that the premises was open after 3:00 A.M. in violation of the local ordinance, and further admitting the service of beer after that hour. In explanation, the bartender stated that the persons served were friends of his and that he did not charge them for the drinks but had given them, on the house, "to be sociable", while they were all waiting to go out with another person who had not yet reached the tavern. The licensee was not in the premises at the time.

The Newark ordinance expressly prohibits the mere service of alcoholic beverages. It is therefore immaterial that no charge was made. Moreover, R. S. 33:1-1(w) defines "the gratuitous delivery or gift of any alcoholic beverage by any licensee" as a sale. The charge that the premises was "open" during prohibited hours requires only proof that the licensee "continues to entertain the public." Re Zenda, Bulletin 271, Item 5. The fact that the licensee was not personally present and that the violation was committed by an employee is no excuse. Re Malone, Bulletin 369, Item 1.

The minimum penalty for each charge is five days. Re Gamba, Bulletin 407, Item 6. The licensee has no previous record. His license will, therefore, be suspended for the minimum period of ten days.

By entering a plea in ample time before the date set for hearing, the licensee has saved the Department the time and expense of proving its case, for which five days of the total penalty will be remitted.

Accordingly, it is, on this 24th day of January, 1941,

ORDERED, that Plenary Retail Consumption License C-895, heretofore issued to Nicholas Grande by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for a period of five (5) days, effective January 27, 1941, at 3:00 A. M.

E. W. GARRETT,
Acting Commissioner.

5. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES BELOW FAIR TRADE MINIMUM - OVERSIZED PRICE SIGNS - 30 DAYS' SUSPENSION BECAUSE OF PREVIOUS RECORD - PETITION FOR RECONSIDERATION AND MODIFICATION OF PENALTY DENIED.

In the Matter of Disciplinary Proceedings against THEODORE P. JANULIS, 381 Springfield Ave., Newark, N. J., Holder of Plenary Retail Distribution License No. D-64, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	ON PETITION CONCLUSIONS

Anthony P. Bianco, Esq., Attorney for Defendant-Licensee.

On January 8, 1941 I suspended the defendant's plenary retail distribution license for thirty days commencing January 13, 1941, after the licensee had pleaded guilty to violating State regulations (1) by selling below Fair Trade and (2) by having an over-size liquor sign in his show window advertising price.

Such heavy penalty was imposed because defendant had a previous record (permitting lottery slips on his licensed premises in 1937 and selling below Fair Trade in 1940) and because he had in the past been specifically warned three times about improper price-advertising signs at his premises. Re Janulis, Bulletin 438, Item 3.

The defendant has now presented a petition for clemency and prays that the suspension be reduced.

In sum, this petition states that the defendant, who also operates a delicatessen and grocery business at his licensed premises, is suffering serious loss in his business because of the suspension of his liquor privileges; that he is saddled with obligations recently incurred in remodeling his premises; that he is a married man with two young children, and also supports his "mother and father-in-law"; that he has been compelled, as a result of the suspension, to "lay off" one of his five employees at his store and may have to lay off another.

In net, all that the petition really shows is that the penalty imposed upon the defendant actually pinches. Of course it does. That is the purpose of the penalty. In view of the defendant's past record, I see nothing unreasonable in the penalty for his violations in question.

Although I feel personally sorry for the defendant, nevertheless proper enforcement and respect for the observance of the liquor laws and regulations require that the present suspension stand. See Re Maire, Bulletin 435, Item 9.

Accordingly, the defendant's petition is hereby denied.

E. W. GARRETT,
Acting Commissioner.

Dated: January 25, 1941.

6. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - DISCREPANCIES IN COLOR, ACID AND SOLID CONTENT - 10 DAYS' SUSPENSION, WITH NO REMISSION FOR GUILTY PLEA.

In the Matter of Disciplinary Proceedings against

LEONARDO PERNA,
201 South St.,
Orange, N. J.,

Holder of Plenary Retail Consumption License C-12 issued by the Municipal Board of Alcoholic Beverage Control of the City of Orange.

CONCLUSIONS AND ORDER

Leonardo Perna, Pro Se.
Richard E. Silberman, Esq., Attorney for the Department of Alcoholic Beverage Control.

The defendant-licensee has pleaded guilty to a charge of possessing an illicit alcoholic beverage in violation of R. S. 33:1-50.

The Department file discloses that, on October 25, 1940, agents of the Alcohol Tax Unit of the U. S. Bureau of Internal Revenue inspected the licensed premises and seized one bottle labeled "Calvert Special Blended Whiskey." Analysis by the Federal chemist showed that the contents of the seized bottle varied in color, acid and solids from genuine samples used for comparative purposes. The analysis of the Federal chemist leads to the incontrovertible conclusion that the bottle, while labeled as a "blend", contained a "straight" whiskey - a complete refill.

The defendant admits possession of the beverage as charged, but offers an "explanation" of how the contents came to be refilled. He states that, the day before the inspection by the Federal agents, one of his employees sold a pint of the licensee's own brand of straight rye whiskey. This whiskey, the defendant states, is four and one-half years old and is a more expensive whiskey than that called for on the label of the seized bottle. At the time of this alleged sale, the purchaser accidentally dropped the bottle. In order to save some of the contents, the employee picked up the only empty bottle he could find handy, which happened to be the seized bottle, and poured into it the contents of the broken bottle. The employee then placed the refilled bottle on the back bar, where it was seized the following day by the Federal agents. This "explanation" was made in connection with a guilty plea and therefore not under oath and subject to cross-examination. The defendant-licensee does not explain why the employee took an admitted refill and placed it on the back bar, where it would be readily available for sale, nor did he submit a sample so that chemical analysis might determine whether or not the seized bottle in fact contained the particular straight whiskey as alleged.

For the purpose of this guilty plea, however, I shall give the defendant-licensee the benefit of all doubt. Nevertheless, the seized liquor, since it is an admitted refill and did not conform to label specifications, constituted an illicit alcoholic beverage. Re Haney, Bulletin 304, Item 13. The mere

possession of an illicit alcoholic beverage on licensed premises violates the Alcoholic Beverage Law (R. S. 33:1-50), for which a licensee is strictly accountable, regardless of personal innocence. See Re Orbach, Bulletin 406, Item 10, and the cases therein cited.

This is the licensee's first offense of any kind. The license will, therefore, be suspended for the minimum period of ten days. Re Orbach, supra.

Accordingly, it is, on this 27th day of January, 1941,

ORDERED, that Plenary Retail Consumption License C-12, heretofore issued to Leonardo Perna by the Municipal Board of Alcoholic Beverage Control of the City of Orange, be and the same is hereby suspended for a period of ten (10) days, effective February 3, 1941, at 2:00 A. M.

E. W. GARRETT,
Acting Commissioner.

7. DISCIPLINARY PROCEEDINGS - ALLEGED LACK OF FIVE YEARS' NEW JERSEY RESIDENCE - SEPARATE NEW JERSEY DOMICILE OF WIFE, MAINTAINED WITH CONSENT OF HUSBAND, SUFFICIENT TO SATISFY RESIDENCE REQUIREMENTS OF THE ALCOHOLIC BEVERAGE LAW - CHARGE DISMISSED.

DISCIPLINARY PROCEEDINGS - FRONT FOR NON-LICENSEE - HUSBAND AND WIFE - THE TRUE OWNER DISQUALIFIED THROUGH LACK OF FIVE YEARS' NEW JERSEY RESIDENCE - APPARENT DECEIT AND LACK OF CANDOR IN ATTEMPTING TO HIDE THE TRUTH - SUSPENSION FOR BALANCE OF TERM WITH LEAVE TO PETITION TO LIFT AFTER 30 DAYS IF SITUATION CORRECTED.

In the Matter of Disciplinary Proceedings against MARY B. BORETH, 801 S. Clinton Ave., Trenton, N. J., Holder of Plenary Retail Consumption License No. C-287, issued by the Board of Commissioners of the City of Trenton.	CONCLUSIONS AND ORDER

Leon L. Levy, Esq., Attorney for Defendant-Licensee.
Charles Basile, Esq., Attorney for Department of Alcoholic Beverage Control.

The defendant, holder of a plenary retail consumption license in Trenton, is, in substance, charged with violating the Alcoholic Beverage Law by:

(1) Falsely stating in her application for license that she had been residing in New Jersey for the five years immediately preceding such application. R. S. 33:1-25.

(2) Falsely denying in that same application that her husband had any interest in the tavern. R.S.33:1-25.

(3) Permitting her husband to exercise the rights and privileges of her license. R. S. 33:1-26, 52.

As to (1): The Alcoholic Beverage Law requires that a person, to obtain a retail liquor license in New Jersey, must, at time of applying for such license, be a five years' resident of this State. See R. S. 33:1-25. The defendant, in her application (filed in 1940), answered "Yes" to the question whether she was such a resident.

Now, "residence", as thus used in the Alcoholic Beverage Law, means -

> "...'domicile' or the place where a person maintains his permanent home to which, when he is absent, he has the intention of returning.....Temporary and even protracted absence from the State will not effect loss of domicile if it be accompanied by the intention presently to return, i.e., the so-called animus revertendi..... Notwithstanding such absence, the original domicile, once established, is presumed to continue until a new domicile is acquired."

Lilly v. Way, Bulletin 220, Item 1. Also see Breslow v. Way, Bulletin 345, Item 6; Re Case No. 328, Bulletin 410, Item 11; Re Case No. 338, Bulletin 421, Item 7.

In the present case the evidence shows that the defendant began her residence in Trenton as a child; that in November 1937, while still living there, she married Rubin C. Boreth, a Philadelphian; that, as a matter of convenience to themselves, the defendant, after this marriage, continued to live in Trenton with her mother, and Boreth in Philadelphia; that in April 1939, some sixteen months after their marriage, Boreth came to Trenton to live and there set up home with the defendant; that they remained at this home for about six months and then, in October 1939 (when Boreth lost his job), removed to Philadelphia where they lived with Boreth's mother; that their purpose in moving there was (so they claim) merely to stay temporarily with Boreth's mother until the defendant, who was then pregnant, had given birth; that the child was born in the middle of January 1940; that thereafter, in March, they returned to Trenton, the defendant at that time obtaining her first license for the tavern in question; that they have lived in Trenton continuously since.

I am satisfied that, so far as thus appears, the defendant has, within the meaning of the Alcoholic Beverage Law, been resident (i.e., domiciled) in this State since a child. Her marriage in 1937 to Boreth, a Philadelphian, in no way interrupted that domicil. For, while it is true that Boreth remained in Philadelphia and did not establish a home in Trenton until many months after the marriage, nevertheless, since the defendant, during those months, continued, with his consent, to live with her mother in Trenton, that city remained her actual domicil as theretofore. Floyd v. Floyd, 95 N. J. Eq. 661 (E. & A. 1923); Vorobioff v. Way, Bulletin 220, Item 8. Nor did the sojourn of the defendant and Boreth at his mother's home in Philadelphia from October 1939 to March 1940 interrupt the defendant's domicil in New Jersey. Such stay was apparently no more than a visit to Boreth's mother with intent (later actually carried out) to return to Trenton after the child was born.

Since the defendant thus appears to have been actually domiciled in this State for the requisite five-year period prior to filing of her application, charge (1) is dismissed.

As to (2) and (3): On September 11, 1940 the defendant virtually admitted, in a signed statement to investigators of this Department, that her husband had purchased and was the actual owner of the tavern business, and that the license was obtained in her name as a "front" for her husband because he (being a New Jersey resident since only April 1939) lacked the requisite five years' residence in this State to himself qualify for the license.

However, at the hearing thereafter in this case, the defendant, although admitting that she actually made and signed this statement, claimed that she was very upset when she gave it; that it does not in fact represent the truth; that actually it is she, and not her husband, who bought and owns the tavern.

Frankly, I do not believe this belated claim of ownership in the defendant. I see no reason why she would have made the serious admission to the investigators unless it was actually true. Moreover, her testimony in support of her present claim of ownership is at various points highly incredible. Thus, for example, she testified that she herself arranged the transaction of purchase of the tavern and knew all about the financial details of that purchase. Yet, when confronted with certain notes which had been given to the old proprietor as part of the purchase price, she showed an almost complete, if not actually total, lack of understanding about them.

Hence, I am satisfied that Boreth is the actual owner of the tavern, and that he, being barred because of lack of requisite residence, had his wife, the defendant, take out the license in her name as a "front" for him.

I thus find the defendant guilty on charges (2) and (3).

As to penalty: The defendant's attorney has written a letter to this Department stating that a purchaser is being sought for the tavern. The license, because of the "front" situation here found, will be suspended for the balance of its term, with leave, however, to petition to have such suspension lifted if the license is actually transferred to a bona fide purchaser. Now, had the defendant made full and honest disclosure at the hearing in this case, I would, as sufficient penalty for the "front", permit such lifting of the suspension after ten days thereof had been served. Re Silver Palm Corp., Bulletin 422, Item 8; Re Bowe, Bulletin 428, Item 2; Re McGrath, Bulletin 451, Item 7. However, since the defendant (and her husband) chose, instead, to repudiate her own prior admission to the investigators and to brazen the case out, there will, in penalty, be no lifting of the suspension for at least thirty days.

The present case is wholly distinguishable from Re Waldman, Bulletin 404, Item 11, and Re Mascolo, Bulletin 427, Item 7, where, in a husband-and-wife "front" situation, I dismissed disciplinary proceedings brought against the licensee. Such decision was there reached because (totally unlike the present case) it appeared that the husband and wife were both fully qualified to hold a retail liquor license; that, although the business was jointly owned by both, the license was taken out in the wife's name merely as a matter of personal convenience and without intent to deceive the

issuing authority or to evade the qualifications of the Alcoholic Beverage Law; that both husband and wife readily and honestly admitted everything, and, on learning that the license should properly be in both names, immediately and fully corrected the situation by obtaining a transfer of the license to themselves jointly. Those cases called merely for correction. On the other hand, the instant case, in view of the actual deceit in having the defendant "front" for her disqualified husband and their attempt to hide the truth even at the hearing, demands substantial penalty.

Accordingly, it is, on this 28th day of January, 1941,

ORDERED, that the plenary retail consumption license heretofore issued by the Board of Commissioners of the City of Trenton to Mary B. Boreth for premises at 801 S. Clinton Avenue, Trenton, N. J., be and hereby is suspended for the balance of its term, effective February 3, 1941 at 2:00 A.M., with leave reserved to seek by verified petition, to lift this suspension on showing that the license has actually been transferred by the Trenton Board to a bona fide transferee, provided, however, that such lifting shall not occur before thirty (30) days of such suspension have been served.

E. W. GARRETT,
Acting Commissioner.

8. DISQUALIFICATION - APPLICATION TO LIFT - GOOD CONDUCT FOR FIVE YEARS AND NOT CONTRARY TO PUBLIC INTEREST - APPLICATION GRANTED.

In the Matter of an Application to Remove Disqualification because of a Conviction, pursuant to R. S. 33:1-31.2 (as amended by Chapter 350, P.L. 1938).

Case No. 125

CONCLUSIONS AND ORDER

In 1908 the petitioner was convicted of Grand Larceny, first degree, and on June 23, 1913 was released from prison on parole. Petitioner's criminal record discloses no other convictions since that time.

At the hearing, petitioner testified that he is in the painting and decorating business, is married and has two minor children, and that for more than five years last past he has resided in New Jersey. He conducts his business from his home, and apparently it consists of obtaining a painting job here and there.

Three character witnesses testified on the petitioner's behalf: A commercial artist who occasionally worked with him and has known him for about five years; a truckman who has known him for about ten years and for the past six months has resided in the same dwelling as the petitioner; and an acquaintance with whom he boarded for a year and a half and who has known him for nine years. They testified that the petitioner has been leading an honest and law-abiding life during the last past five years. Although two of these witnesses base their conclusions on casual contacts rather than business dealings with, or residence near, the petitioner, nevertheless their evidence convinces me that their knowledge of petitioner is sufficient to justify their acceptance as character witnesses.

Petitioner's fingerprint record shows an arrest in September 1935, involving charges of assault and robbery, which were dismissed by the Magistrate, and another arrest in December 1935, involving a charge of felonious assault, which was dismissed by the Grand Jury on January 9, 1936. Since that time he has not been arrested on any occasion.

The Chief of Police in the municipality where petitioner had resided until about the summer of 1940, and the Chief of Police in the municipality where he now resides, both certify that there are no complaints or investigations pending against him.

It is concluded that petitioner has been law-abiding for at least five years last past. Aside from his arrests in 1935, which resulted in dismissals, it appears that his record for the past 27 years has been clear, and I conclude, therefore, that his association with the alcoholic beverage industry will not be contrary to public interest.

Accordingly, it is, on this 30th day of January, 1941,

ORDERED, that his statutory disqualification because of the conviction described herein be and the same is hereby lifted, in accordance with the provisions of R. S. 33:1-31.2 (as amended by Chapter 350, P.L. 1938).

E. W. GARRETT,
Acting Commissioner.

9. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES BELOW FAIR TRADE MINIMUM - 10 DAYS' SUSPENSION, LESS 5 FOR GUILTY PLEA.

In the Matter of Disciplinary Proceedings against ISIDORE BLUM, T/a Rickey's Dairy and Delicatessen, 124-126 Wanaque Avenue, Pompton Lakes, N. J., Holder of Plenary Retail Distribution License D-6 issued by the Mayor and Council of the Borough of Pompton Lakes.	CONCLUSIONS AND ORDER

Isidore Blum, Pro Se.
Richard E. Silberman, Esq., Attorney for the Department of Alcoholic Beverage Control.

The defendant-licensee has pleaded guilty to a charge of selling an alcoholic beverage at less than the Fair Trade price, in violation of Rule 6 of State Regulations No. 30.

The Department file discloses that, on January 11, 1941 two investigators observed a 4/5 quart bottle of Teacher's Highland Cream Scotch Whisky displayed in the show window of the licensed premises with a price tag of $3.59 attached. One of the investigators entered the licensed premises, asked for a fifth bottle of Teacher's Highland Cream Scotch Whiskey, and was told that the price was $3.59, which he paid. The investigators then identified themselves to the clerk who made the sale and to the

licensee, who was present at the time. They secured a signed statement from the licensee setting forth that he had marked the price tag at $3.59, under the impression that he was selling at twenty cents above what he thought to be the correct Fair Trade price, stating that he had looked up the price in the price list published last July (Bulletin 416), and that he had not noticed the change made in the October 1940 supplement (Bulletin 424). The minimum consumer price at which 4/5 quart bottles of this product could lawfully be sold at the time was in fact $3.75 (Bulletin 424).

The explanation of the defendant-licensee is somewhat corroborated by the fact that this product was listed in Bulletin 416 at $3.39 per fifth. However, carelessness in arranging price tags confers no immunity. Re Silverstein, Bulletin 441, Item 8. The State regulation prohibiting sale of an alcoholic beverage below Fair Trade does not require proof of 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."

The minimum penalty for sale below Fair Trade price has been fixed at ten days. In view of the possible good faith of the licensee and the fact that this is his first violation of record, the minimum penalty will be imposed.

By entering a guilty plea in ample time before the date set for hearing, the Department has been saved the time and expense of proving its case, for which five days of the penalty will be remitted.

Accordingly, it is, on this 29th day of January, 1941,

ORDERED, that Plenary Retail Distribution License D-6, heretofore issued to Isidore Blum, T/a Rickey's Dairy and Delicatessen, by the Mayor and Council of the Borough of Pompton Lakes, be and the same is hereby suspended for a period of five (5) days, effective February 3, 1941, at 7:00 A.M.

E. W. Garrett

Acting Commissioner.