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

BULLETIN 798 MARCH 23, 1948.

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In the Matter of the Seizure on August 23, 1947, of 24 bottles of beer, 72 empty beer bottles, and a Wurlitzer music machine, at 634 Sycamore Street, in the City of Camden, County of Camden and State of New Jersey.

Case No. 7167

ON HEARING
CONCLUSIONS AND ORDER

William C. Schwartz, Pro Se.
Harry Castelbaum, Esq., appearing for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

This matter comes before me pursuant to the provisions of Title 33, Chapter 1 of the Revised Statutes, to determine whether 24 bottles of beer, 72 empty beer bottles, and a Wurlitzer music machine and currency therein, seized on August 23, 1947 at 634 Sycamore Street, Camden, New Jersey, constitute unlawful property and should be forfeited.

It appears that Camden police officers seized the aforementioned property in the basement of Thomas Ford's dwelling at the above address, on the basis of written statements from three persons that they were admitted to the premises on August 23rd by Thomas Ford, and purchased beer at a bar in the basement from Mrs. Ford, who was behind the bar.

Mrs. Ford did not hold any license authorizing her to sell or serve alcoholic beverages and the premises were not licensed for the sale of alcoholic beverages. Mrs. Ford was arrested and held for action of the Camden County Grand Jury. The property seized by the police officers was turned over to the State Department of Alcoholic Beverage Control.

In the basement there was a large table, chairs, a beer cooler, the music machine, and a board placed across beer cases as a makeshift bar.

When the matter came on for hearing pursuant to R. S. 33:1-66, William C. Schwartz appeared and sought to recover the music machine. Thomas Ford and Thelma Ford also appeared but did not seek return of the beer and empty beer bottles, ostensibly because they were of little value. They said that they were at the hearing because they had received notice of the hearing.

Mrs. Ford admits that the three persons referred to obtained beer from her on August 23rd, but claims that they did not pay for the beer, and that she did not sell it; that there was a gathering or party at which beer, for which various of the group had "chipped in", was available for those in attendance; and that the three persons, strangers to him, had been admitted by Mr. Ford because they were accompanied by a person with whom Ford was acquainted.

Ford is employed by the municipality as a truck driver and says that he is associated with a social club which at one time held a liquor license; that since the loss or revocation of such license, the club has no regular meeting place, and hence the members come to his basement once or twice a month, where they eat and drink, the cost of which is defrayed by contributions from the members of the club.

The written statements, admitted in evidence without objection, clearly and definitely set forth that Mrs. Ford was paid for the beer, and that she was observed selling beer to other persons there at the time. This positive evidence negatives the claim that the beer was given away to those in attendance, and hence I conclude that the seized beer was intended for unlawful sale and is illicit. R. S. 33:1-1(i). Such illicit alcoholic beverages, and the empty beer bottles and music machine seized therewith, are subject to forfeiture. R. S. 33:1-1(y), R. S. 33:1-2, R. S. 33:1-66.

Schwartz, the owner of the music machine, claims that he did not know, or have any reason to suspect that illegal liquor activities were being carried on at the place. He testified that, on an average of once or twice a month, Mr. Ford obtained a coin-operated music machine from him for an overnight rental of $5.00, on the representation that there was to be a party at the place; that Schwartz left his machine at the place until it was convenient for him to pick it up; that whatever coins were in the machine when Schwartz removed it were turned over to Ford; and that the seized music machine was placed there, under such an arrangement, on August 15, 1947. Schwartz did not produce any documentary evidence supporting his claim that the machine in question was placed there on August 15th for an overnight rental of $5.00.

A person who seeks return of a music machine seized in a speakeasy must establish that although he exercised reasonable prudence in placing the music machine there, he did not observe anything to indicate that it was a speakeasy. <u>Re Seizure Case No. 6875,</u> Bulletin 716, Item 3. Where a music machine is placed in a private home, on a rental basis, for an extended period of time, the owner must present evidence that, although he exercised the utmost caution, he did not discover nor had any reason to suspect that the place was a speakeasy. The evidence presented does not establish that it was an overnight rental. On the contrary, Schwartz seems to have left his machine there for an indefinite period of time.

The home-made bar and other equipment in the basement was visible evidence that alcoholic beverages were being served. A reasonably prudent person would have sought to ascertain the nature of the activities being carried on there. Schwartz, however, when placing the machine, merely accepted Mr. Ford's word that parties were being held there. Such conduct was not that of a reasonably prudent person. Hence, Schwartz's application for return of the music machine is denied.

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

ERWIN B. HOCK
Commissioner.

Dated: March 11, 1948.

<u>SCHEDULE "A"</u>

24 - bottles of beer
72 - empty beer bottles
1 - Wurlitzer Music Machine, Serial #421146, and currency therein.

3. SEIZURE - FORFEITURE PROCEEDINGS - ALCOHOLIC BEVERAGES INTENDED FOR UNLAWFUL SALE ORDERED FORFEITED - MOTOR VEHICLE IN WHICH BEVERAGES WERE TRANSPORTED RETURNED TO INNOCENT LIEN CLAIMANT.

In the Matter of the Seizure on December 8, 1947 of 11 - 4/5 quart bottles of whiskey and a Cadillac coupe on the highway known as Route 29, in the Township of Springfield, County of Union and State of New Jersey.	Case No. 7211 ON HEARING CONCLUSIONS AND ORDER

Alfred J. Habig, Pro Se.
Harry Castelbaum, Esq., appearing for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

This matter comes before me pursuant to the provisions of Title 33, Chapter 1 of the Revised Statutes, to determine whether 11 - 4/5 quart bottles of whiskey and a Cadillac coupe, seized on December 8, 1947 on the highway known as Route 29, in Springfield, New Jersey, constitute unlawful property and should be forfeited.

It appears that on the above date Springfield police officers discovered the motor vehicle in question apparently abandoned on the highway. The bottles of whiskey were in the car. Robert Habig, the registered owner of the vehicle, was later located by the police. He gave them a signed statement which, among other things, sets forth that he purchased 25 bottles of alcoholic beverages from a friend and sold between 10 and 14 of these bottles to different friends in Newark and Lambertville, New Jersey; and that he had driven from Lambertville to Springfield, where he abandoned the car because of a "blowout" of one of the tires.

The motor vehicle and alcoholic beverages were turned over to the State Department of Alcoholic Beverage Control. Thereafter, ABC agents obtained an additional statement from Habig, in which he claimed that he paid $2.00 a bottle for the whiskey and sold it for the same price and that he made at least one sale of alcoholic beverages directly from the car shortly before he left Lambertville.

It is abundantly clear that Habig intended to sell the whiskey found in his car. His claimed purchase of the whiskey at $2.00 a bottle, far below any retail dealer's price, justifies the further inference that he purchased, or otherwise obtained, such whiskey unlawfully. The whiskey is therefore illicit on both scores. R. S. 33:1-1(i). Such illicit whiskey, and the vehicle in which it was transported, are subject to forfeiture. R. S. 33:1-1(y), R.S.33:1-2, R. S. 33:1-66.

When the matter came on for hearing pursuant to R. S. 33:1-66, Alfred J. Habig, father of Robert Habig, appeared and sought recognition of an alleged lien on the motor vehicle. No one has appeared to oppose forfeiture of the alcoholic beverages.

I have the discretionary authority to recognize a lien claim against property subject to forfeiture if I am satisfied that the claimant has a valid lien, has acted in good faith, and had no knowledge of the unlawful use to which the property was put, or of such facts as would have led a person of ordinary prudence to discover such use. R. S. 33:1-66(f).

A lien claim by the father or other close relative of the owner of the property subject to forfeiture will be closely scrutinized, but it is not necessarily invalid merely because they are related.

Alfred J. Habig testified that he has always been a resident of this state, has been in the automobile business for about 37 years, and has never been arrested on any charge, or accused of unlawful liquor activities.

He further says that in November, 1943, his son, then 18 years of age, went directly from high school to service in the armed forces; that the son was honorably discharged about June 1946 and returned to this state and renewed his residence with his parents around January 1, 1947.

The son obtained employment with a radio concern. In March 1947 his mother advanced him $150.00, which he used as a down payment on the car, the purchase price of which was $650.00. The son used the car in connection with his next two ventures; as an employee of a house insulation concern, and next as a salesman for vacuum cleaners, and was so employed at the time of the seizure.

The boy was not successful in any of his ventures. Most of his meagre earnings seemed to have been applied to obligations incurred after his discharge from the army. Consequently, he did not meet his obligation to pay $38.52 monthly to the Morristown bank which financed the purchase of the car. Only two payments were made, of which one was made by the father, who also paid $86.90 for tires for the car and installed a radio of the value of $50.00.

In September 1947, the account being in arrears, the bank demanded payment of the balance due, amounting to $454.01, which the father paid. While it is not clear whether legal title to the car was then conveyed to the father, nevertheless, father and son executed a conditional sales contract wherein the father was designated as seller and the son as the buyer of the car. Thereafter the son did not make any payment whatsoever on this contract, which fixed $984.22 as the purchase price. This represented the money advanced by the mother as a down payment on the car, the money advanced by the father directly for the car, and money advanced by the father to meet other obligations of the son. A new motor vehicle bill of sale was issued by the Commissioner of Motor Vehicles of this state, certifying that title to the car was in the son's name and that the father held an encumbrance thereon. It is immaterial whether the document executed between father and son is in legal effect a conditional sales contract or a chattel mortgage because in either event its execution to secure a precedent debt is valid. See Collerd v. Tully, 78 N. J. E. 557. Hence, if recognized, it is necessarily a lien for the full amount named.

I am satisfied from the evidence that the father's lien was not fraudulent in design, but represents actual monies advanced on the son's behalf. The boy did not have any criminal record, and there appears to be nothing in his background which should have led his parents to suspect that he would engage in the unlawful sale of alcoholic beverages.

I shall therefore recognize Alfred J. Habig's claim as a valid and subsisting lien in the amount of $984.22, and find that he acted in good faith and had no knowledge, or reason to suspect, that his son would violate the liquor laws.

The appraised retail value of the car is $725.00. It was purchased in March 1947 for $650.00. It is self-apparent that it is impractical for the state to retain the motor vehicle upon payment of the lien. It is further apparent that such lien and the costs of seizure and storage exceeds what can be realized at a public sale of the vehicle. The Cadillac coupe will therefore be turned over to Alfred J. Habig, the lien claimant, upon payment of the costs of its seizure and storage.

Accordingly, it is DETERMINED and ORDERED that if, on or before the 22nd day of March, 1948, Alfred J. Habig pays the costs of seizure and storage of the Cadillac coupe, it will be returned to him; and it is further

DETERMINED and ORDERED that the 11 - 4/5 quart bottles of whiskey constitute unlawful property, and that the same be and hereby is forfeited in accordance with the provisions of R. S. 33:1-66, and that it be retained for the use of hospitals and State, county and municipal institutions, or destroyed in whole or in part, at the direction of the State Commissioner of Alcoholic Beverage Control.

Dated: March 11, 1948.

ERWIN B. HOCK
Commissioner.

4. APPELLATE DECISIONS - EGAN v. CLINTON TOWNSHIP, KENT AND KLINGLER.

WILLIAM C. EGAN,
Appellant,
-vs-
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CLINTON, and HUGH KENT and WILLIAM C. KLINGLER, trading as CLINTON POINT PACKAGE STORE,
Respondents

ON APPEAL
CONCLUSIONS AND ORDER

William C. Egan, Esq., Pro Se.
Anthony M. Hauck, Jr., Esq., Attorney for Respondents Kent and Klingler.
Wesley L. Lance, Esq., Attorney for Respondent Township Committee.

BY THE COMMISSIONER:

This is an appeal from the action of respondent Township Committee in granting a plenary retail distribution license to respondents Hugh Kent and William C. Klingler, for premises at the intersection of State Highways 28 and 30 in the Township of Clinton.

Appellant sets forth numerous reasons for reversal, some of which were abandoned at the hearing. Of those remaining, the only reasons which require any consideration are the following:

(a) The license was issued for an uncompleted building;
(e) The license was issued without regard for the paramount issue of public necessity and convenience and the action of respondent issuing authority constituted an abuse of discretion;
(j) The action of respondent Township Committee was contrary to the provisions of c. 94 of the Laws of 1947.

As to (a): The evidence discloses that the building had been completed and the licensed premises inspected before the license was issued on October 4, 1947.

As to (e): The license in question is the only plenary retail distribution license in the Township of Clinton. The section of the township in which the licensed premises are located is sparsely settled, but there is very heavy traffic on both State Highway 28 and State Highway 30, and one witness characterized the intersection of these highways as "the hub of the roads of Hunterdon County". A large theatre has been erected near the intersection and there is evidence which indicates that this section may be developed as a shopping center for persons residing in nearby communities. Ten plenary

retail consumption licenses have been issued in the township, but it appears that there is no other plenary retail distribution license within a distance of ten miles from the premises operated by Kent and Klingler. The license in question was granted by the unanimous vote of the members of the Township Committee, and all of said members testified that in their opinion there is a real public need for said license. The only testimony to the contrary was given by various witnesses who hold plenary retail consumption licenses and who expressed the opinion that "there is no place in New Jersey where there is need for a new license".

The issuance of retail licenses is primarily entrusted to the sound discretion of the local issuing authorities. R. S. 33:1-19. In an appeal from the issuance of a license, the burden of proof rests upon appellant to establish that the local issuing authorities abused their discretion. The testimony presented by appellant is far from sufficient to sustain the burden of proof in showing that the action of the respondent issuing authority constituted an abuse of discretion. See Rule 6 of State Regulations No. 15.

As to (j): Section 2 of c. 94 of the Laws of 1947 provides:

> "Except as otherwise provided in this act, no new plenary retail consumption or seasonal retail consumption license shall be issued in a municipality unless and until the combined total number of such licenses existing in the municipality is fewer than one for each one thousand of its population as shown by the last then preceding Federal census; and no new plenary retail distribution license shall be issued in a municipality unless and until the number of such licenses existing in the municipality is fewer than one for each three thousand of its population as shown by the last then preceding Federal census."

Section 3 of c. 94 of the Laws of 1947 provides:

> "Nothing in this act shall prevent the issuance and existence of one plenary or seasonal retail consumption license and one plenary retail distribution license in a municipality whose population as shown by the last then preceding Federal census is less than one thousand."

The population of the Township of Clinton, according to the 1940 Federal census, was 2,349.

Appellant admits that, in a municipality having a population of less than 1,000, one plenary retail distribution license may be issued as provided in Section 3, but he argues that, because of the provisions of Section 2, no plenary retail distribution license may be issued in a municipality which has a population of more than 1,000 but less than 3,000. Such a construction of the statute would lead to the absurd result that a municipality with a population of 100 people could have one plenary retail distribution license, whereas a municipality with a population of 2900 could not have a plenary retail distribution license.

Statutes must be construed so as to establish their real intention. It is an established rule in the exposition of statutes that the intention of the Legislature is to be derived from a view of the whole and of every part of the statute taken and compared together. The real intention, when ascertained, will prevail over the literal sense of terms. Pine v. Okzewski, 112 N. J. L. 429. See also State v. Clark, 29 N.J.L. 96; DiAngelo v. Keenan, 112 N.J.L. 19, aff'd 115 N.J.L. 507. Considering all the sections of c. 94 of the Laws of 1947, it is clear that it was the purpose of the Legislature to prohibit the issuance of a new plenary retail distribution license where

the issuance of such license would result in the existence of more than one for each 3,000 of the population of the municipality. As I construe c. 94 of the Laws of 1947, there is nothing therein which prevented the issuance of the license in question.

For the reasons aforesaid, the action of respondent issuing authority is affirmed.

Accordingly, it is, on this 12th day of March, 1948,

ORDERED that the action of respondent Township Committee be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

ERWIN B. HOCK
Commissioner.

5. SEIZURE - FORFEITURE PROCEEDINGS - ILLEGAL STORAGE OF TAX-PAID LIQUOR BY HOLDER OF PLENARY RETAIL CONSUMPTION LICENSE WITH INTENT TO EVADE FEDERAL FLOOR TAX - FEDERAL TAX SUBSEQUENTLY PAID - LICENSEE ORDERED TO OBTAIN VALIDATING PERMIT ON PAYMENT OF $600.00 FEE AND COSTS OF SEIZURE.

In the Matter of the Seizure on July 16, 1946 of a quantity of alcoholic beverages at 229 Laurel Avenue, in West Keansburg, County of Monmouth and State of New Jersey.

Case No. 7016

ON HEARING
CONCLUSIONS AND ORDER

Meehan Brothers, Esqs., by John Meehan, Esq., Attorney for Martin J. Flynn.
Harry Castelbaum, Esq., appearing for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

This matter comes before me pursuant to the provisions of Title 33, Chapter 1 of the Revised Statutes, to determine whether 178 cases of various brands of alcoholic beverages, seized on July 16, 1946 at 229 Laurel Avenue, West Keansburg, N. J. constitute unlawful property and should be forfeited.

It appears that on the above date, ABC agents, investigating a complaint that a large quantity of alcoholic beverages were being stored in a dwelling at the above address, were permitted to search the cellar wherein they found and seized the alcoholic beverages in question.

Martin J. Flynn, who then held, and still holds, a retail consumption license in Keansburg, claimed that such alcoholic beverages were part of his stock, intended for resale at his tavern.

It is unlawful for a retail liquor licensee to store any part of his stock of alcoholic beverages at any place other than his licensed premises or a public warehouse licensed to store alcoholic beverages pursuant to R. S. 33:1-14, unless the licensee first obtains a permit from the State Commissioner of Alcoholic Beverage Control. Rule 25 of State Regulations No. 20. Seizure Case No. 6701, Bulletin 777, Item 2. Flynn did not hold any such permit and the aforesaid premises were not licensed.

Alcoholic beverages stored unlawfully, although tax paid, nonetheless are illicit and subject to forfeiture. R.S. 33:1-1(i) and (y), R. S. 33:1-66.

When the matter came on for hearing pursuant to R. S. 33:1-66, Martin J. Flynn appeared and sought return of the alcoholic beverages.

Unlawful storage of alcoholic beverages by a licensee, in ignorance of the law and without any fraudulent intent in other respects, is generally corrected by a validating permit rather than forfeiture of the alcoholic beverages. Flynn apparently did not know that the storage of the alcoholic beverages elsewhere than on the licensed premises was a violation of the Alcoholic Beverage Law.

It is claimed that a large quantity of alcoholic beverages was removed from the licensed premises during the hurricane in September 1944; furthermore that, since Flynn did a seasonal business, it was customary, at the close of the season, to remove whatever stock of liquor there was in the licensed premises to his manager's home.

I am not satisfied that the alcoholic beverages were stored "off" the licensed premises solely for the reasons stated. On the contrary, as to part of the liquor, it appears that such storage was prompted by an effort to evade the Federal "floor tax" imposed on April 1, 1944. The Federal Alcohol Tax Unit determined that a portion of the alcoholic beverages was subject to such tax and on April 28, 1947 Martin J. Flynn paid the sum of $1185.55 to the Federal authorities in payment of the "floor tax" and penalty.

The actual ownership of the liquor is not free from doubt. However, Flynn presented records from his wholesalers concerning his purchase of alcoholic beverages. Eighty cases, bearing serial numbers of the 178 cases of liquor seized, were traced and found to have been actually purchased by Flynn from the respective wholesalers. Items which bear no serial numbers cannot, of course, be definitely traced to the wholesalers but the records of the wholesalers disclose that Flynn purchased liquor from them of the brands seized. I am therefore satisfied that all of the alcoholic beverages are the property of Martin J. Flynn.

On July 30, 1947, the United States Attorney for this district advised the Federal Alcohol Tax Unit that he declined to prosecute Flynn on criminal charges because he felt that the facts in the case failed to show a flagrant attempt to defraud the Government of its tax. We have recently been advised by the Federal Alcohol Tax Unit that it regards the case as closed.

In view of these circumstances, I conclude that, as in previous similar cases, it would be unfair to reestablish the evasion of the Federal "floor tax" solely for the purpose of supporting a forfeiture. See <u>Seizure Case No. 6701</u>, <u>supra</u>, and cases cited therein.

I shall, therefore, in lieu of forfeiture, accept Martin J. Flynn's application for a permit retroactively validating the unlawful storage of the alcoholic beverages from September 1944 through June 30, 1945, and an additional permit from July 1, 1945 through July 16, 1946, at a fee of $300.00 for each permit. In addition, he is to pay the costs due, paid or incurred in connection with the seizure of the alcoholic beverages by this Department. The issuance of these permits will also serve in lieu of disciplinary proceedings on the score of unlawful storage. See <u>Seizure Case No. 6701</u>, <u>supra</u>.

Upon issuance of such permits and the payment of the costs of seizure, the 178 cases of alcoholic beverages referred to herein will be returned to Martin J. Flynn.

ERWIN B. HOCK
Commissioner.

Dated: March 12, 1948.

6. COURT DECISIONS - NEW JERSEY SUPREME COURT - ENGLISH v. HOCK - APPLICATION FOR WRIT OF CERTIORARI DENIED.

NEW JERSEY SUPREME COURT
No. 229 October Term, 1947.

CHARLES ENGLISH,
Prosecutor,
-vs-
ERWIN B. HOCK, Commissioner of the State Department of Alcoholic Beverage Control,
Defendant.

Submitted October 7, 1947. Decided March 16, 1948.

On application for writ of Certiorari.

For Prosecutor: Samuel S. Forster, Donal C. Fox.

For Respondent: Walter D. Van Riper, Attorney General, Samuel B. Helfand, Deputy Attorney General.

BURLING, J.

The Prosecutor was, on March 13, 1946, the holder of Plenary Retail Consumption License C-7 issued by the Township Committee of the Township of Livingston for premises at 343 W. Mt. Pleasant Avenue, Livingston, County of Essex and State of New Jersey.

Notice was given on April 10, 1946 to the Prosecutor of the presentment of the charge against him in the following language: "On March 13, 1946, you possessed illicit alcoholic beverages at your licensed premises viz. three 4/5 quart bottles labeled "Canadian Club Blended Canadian Whisky" all of which bottles contained alcoholic beverages not genuine as labeled; such possession being in violation of R. S. 33:1-50" and calling upon him to show cause why his license should not be suspended or revoked. The prosecutor pleaded "not guilty" to the charge and after the reception of the testimony he was adjudged guilty and his license was suspended for a period of twenty-five days by the Deputy Commissioner, Erwin B. Hock, now the Commissioner of the Department of Alcoholic Beverage Control.

Application was made to the Honorable Charles W. Parker, Justice of the Supreme Court, for a Writ of Certiorari and the writ was denied by him. Application was then made to the Supreme Court en banc.

With his present application, the prosecutor presented an affidavit dated the 7th day of April, 1947. There is printed in the State of Case an affidavit dated the 20th day of March, 1947, of Samuel B. Helfand. It is assumed that this affidavit was used on the application to Justice Parker on March 22nd, 1947, but is also again presented. In addition the testimony taken before the Hearer of the Department of Alcoholic Beverage Control on July 26, 1946, which was the basis for the order for which a review is desired is printed in the State of Case. In the briefs of both parties references are made to the affidavits referred to and the testimony. In disposing of this matter, consideration has been given to such affidavits and testimony upon the assumption that there was an agreement by them to that effect.

On March 13, 1946, an agent of the Department of Alcoholic Beverage Control made an inspection of the prosecutor's licensed premises, and in the course of such inspection, tested the contents of the prosecutor's open liquor stock. On the agent's preliminary test, three of

these bottles, each labeled "Canadian Club Blended Canadian Whisky", indicated a variance in color from a genuine sample of that product. These three bottles, together with a sealed bottle of the same brand of liquor obtained from the prosecutor for comparative purposes, were submitted to the Department's Chemist for formal analysis. The Chemist testified that the chemical formula for a genuine sample of Canadian Club Blended Canadian Whisky is as follows:

Acids - Not less than 19 grams per one hundred liters
Solids - Not more than 125 grams per one hundred liters
Color - Minute traces of artificial color

The chemist further testified that this formula had been obtained from the manufacturer of the product in question and as a result of analyzing the contents of more than 47 bottles of that brand. In addition, he had analyzed the contents of the genuine sealed bottle obtained from the prosecutor for comparative purposes.

The acid, solid and color content of the three illicit bottles were analyzed by the chemist as follows:

Acids - Two bottles contained 8.4 grams per one hundred liters and the third bottle contained 8.16 grams per hundred liters.

Solids - One bottle contained 300.4 grams per one hundred liters, another 265.8 grams per one hundred liters and the third, 322 grams per one hundred liters

Colors - Each bottle contained a large quantity of artificial coloring.

Because of the extreme variance between the genuine formula and the analysis of the illicit bottles, the chemist stated that none of the three illicit bottles contained genuine Canadian Club Blended Canadian Whisky as labeled.

The chemist further testified that he did not test for esters, aldehydes, furfural or fusel oil "because they (the three bottles) are so 'far off' I didn't think it was necessary to test anything else".

The prosecutor, the only witness for the defense, merely testified that neither he nor his sons had tampered with the contents of the three bottles. He further testified, however, that he also employed two other persons on his licensed premises.

No testimony was offered to refute the analysis made by the Department chemist, although the prosecutor indicated that he intended to have "(his) chemist analyze the contents". No such analysis was made, however, by any chemist on the prosecutor's behalf.

No reasons were especially enumerated by the Prosecutor but five points were argued in his brief.

Points One and Two raised by the prosecutor are as follows:

I. The three bottles of alcoholic beverages taken from the licensee by the A.B.C. agent bore labels which truly described their contents.

II. Even if the brand name were to be considered part of the descriptive matter on the label, the chemist's testimony does not establish any chemical standard of the product by which the contents of the three bottles taken by the A.B.C. Agent can be tested.

R. S. 33:1-50(e) provides that no person shall "possess, have custody of, offer for sale or sell any illicit beverage".

R. S. 33:1-88 provides that "Any alcoholic beverage in any *** bottle ** shall ** be deemed prima facie an illicit beverage when the container *** bears a label which does not truly describe its contents ***".

The Department proved that the acid, solid and color content of each of the three bottles, labeled Canadian Club Blended Canadian Whisky, differed materially and substantially from a genuine sample of that product and did not contain genuine Canadian Club Blended Canadian Whisky as labeled.

The prosecutor's contention is that this evidence did not meet the test of the statute. The Court of Errors and Appeals, however, has decided to the contrary in the case of The Panda v. Driscoll, 135 N.J.L. 164 (Court of Errors and Appeals 1946). In that case, the record indicates that the variance between the contents of the illicit bottle and a genuine bottle of Schenley Reserve Whisky was only in solid content. The Court held that "there was ample evidence to sustain the charge" and that the "chemical analysis of the contents of the seized bottle disclosed that it was not genuine Schenley Reserve Whiskey as labeled". In this connection, the Court further said, at page 166:

> "The evidence disclosed that the appellant possessed a bottle containing an alcoholic beverage bearing a label which did not truly describe its contents, which under Pamph. L. 1939, ch. 177, p. 530, § 1, R. S. 33:1-88, was prima facie evidence that the bottle contained an illicit beverage."

Points three and four are as follows:

III. Even if it were established that the contents of the bottle are not genuine "Canadian Club Blended Canadian Whisky" and hence not truly described by the label, with the consequent presumption of being illicit, such presumption has been fairly and fully overcome by the evidence presented by the prosecutor.

IV. Knowledge that the alcoholic beverages were illicit is essential to guilt.

The prosecutor urges that he has overcome the presumption of the illicit character of the alcoholic beverages in question by testimony that neither he nor his sons had tampered with the contents of the three bottles. It has already been pointed out, however, that the prosecutor admitted that he had employed two other persons on his licensed premises.

In any event, this evidence indicated only that the prosecutor had no knowledge of the illicit nature of the alcoholic beverages contained in the three bottles. This Court has held that the violation of possessing illicit alcoholic beverages is complete without proof of such knowledge. Cedar Restaurant & Cafe Co. v. Hock, 135 N.J.L. 156 (Supreme Court 1947).

Point five is as follows:

V. The charge served upon the Prosecutor does not set forth any offense for which Prosecutor's license can be suspended.

The prosecutor contends that the instant charge does not set forth any such accusation, in that it merely calls upon the Prosecutor to meet the issue as to whether or not the alcoholic beverage in his

possession are illicit solely because they are not genuine "Canadian Club Blended Canadian Whisky" and that the alcoholic beverages were not necessarily illicit merely because they were not genuine "Canadian Club Blended Canadian Whisky", and prosecutor's motion for dismissal of the charge should have been granted.

In The Panda case, supra, the Court of Errors and Appeals held to the contrary. The charge against the prosecutor is similar to that approved by the Court of Errors and Appeals in that case. At page 165 of the opinion, it is said: "The Panda was notified of a hearing before the Commissioner on a charge that it had violated the provisions of R. S. 33:1-50 in that it had possessed 'alcoholic beverage not genuine as labeled'.", and further at page 166: "The possession of such illicit beverage is a misdemeanor under R. S. 33:1-50."

Our study of the affidavits and testimony and arguments in support of and in opposition to the application leads us to the conclusion that no reasonably debatable question of fact or law is presented. A writ is denied.

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7. COURT DECISIONS - NEW JERSEY SUPREME COURT - BILLY URBANSKI, INC. v. HOCK - CERTIORARI DENIED.

NEW JERSEY SUPREME COURT

BILLY URBANSKI, INC., a New Jersey corporation, Petitioner,)	
-vs-)	ON APPLICATION FOR WRIT OF CERTIORARI
ERWIN B. HOCK, Commissioner of the State Department of Alcoholic Beverage Control of the State of New Jersey,)	MEMORANDUM DECISION (Decided March 18, 1948 - not officially reported)
Defendant)	

Albert W. Seaman, Esq., Attorney for Petitioner.
Samuel B. Helfand, Esq., Deputy Attorney General, Attorney for Defendant.

COLIE, J.:

Billy Urbanski, Inc., a New Jersey corporation, applied to the court for a writ of certiorari to review an order of Erwin B. Hock, Commissioner, suspending the petitioner's license for a period of ten days.

A reading of the testimony taken before the Deputy Commissioner on December 19, 1947 indicates that there was ample testimony that the petitioner permitted gambling on the licensed premises in violation of Rule 7 of Regulation 20. On the application it was urged that the licensee was without knowledge of the fact that gambling was being carried on on the premises. Assuming, without deciding, that none of the officers of the defendant corporation had such knowledge, nevertheless such lack of knowledge, assuming it to be so, is of no avail. See Essex Holding Corp. v. Hock, 136 N.J.L. 28.

The denial of the application for a continuance is also advanced as a ground for the allowance of a writ. Whether or not a continuance should be granted was in the discretion of the hearer and the court finds no abuse in denying the application.

The application for a writ of certiorari is denied.

Counsel for the defendant commissioner may call for the transcript of the hearing at his convenience.

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8. APPELLATE DECISIONS - DeSHIELDS v. CINNAMINSON TOWNSHIP.

CHESTER DeSHIELDS, Appellant, -vs- TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CINNAMINSON, Respondent	ON APPEAL CONCLUSIONS AND ORDER

Edward A. Reid, Esq., Attorney for Appellant.
Walter Carson, Esq., Attorney for Respondent.
Robert W. Criscuolo, Esq., Amicus Curiae.

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail distribution license for premises located at Broad Street and Bellview Avenue, in the Township of Cinnaminson.

Respondent contends that the application was properly denied because no license fee for a plenary retail distribution license had been fixed by the governing board of the township.

Although appellant has enumerated sundry grounds for reversal of the respondent's action, the primary question is whether the respondent board had jurisdiction to issue a license when no fee had at any time been fixed by ordinance or resolution.

By fixing a fee for a class or classes of licenses, the municipality indicates its willingness that such class or classes of licenses may be issued in that municipality. Until the municipal volition has thus been manifested, in respect to a particular class of retail license, no license of that class may be issued. That applies both to the municipality and to the State Commissioner. The Commissioner has neither original nor appellate power to fix those fees. Cf. Miller v. Greenwich Township, Bulletin 57, Item 9; Lysaght v. Denville, Bulletin 250, Item 1.

Since this issue is dispositive of the entire appeal, it is unnecessary to consider the other grounds upon which respondent rested its denial of license to the appellant.

I might add that on March 2, 1948, subsequent to the hearing in the instant case, an ordinance was adopted which prohibited the issuance of any plenary retail distribution licenses in the municipality. It has been settled by the courts of this state that an appellate authority is controlled by the law which prevails at the time such authority renders its decision. Westinghouse Electric Corp. v. United Electrical, etc., 139 N. J. Eq. 97, 105, 106. Socony-Vacuum Oil Co., Inc. v. Mt. Holly Twp., 135 N.J.L. 112.

The action of respondent is affirmed.

Accordingly, it is, on this 15th day of March, 1948,

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

ERWIN B. HOCK
Commissioner.

9. DISCIPLINARY PROCEEDINGS - POSSESSION OF OBSCENE CARDS - PRIOR RECORD - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)
)
FRANK PAULA)
T/a SHERRY'S CAFE) CONCLUSIONS AND ORDER
140 Tonnele Avenue)
Jersey City 6, N. J.,)
)
Holder of Plenary Retail Consumption License C-32 issued by the Board of Commissioners of the City of Jersey City.)
- - - - - - - - - - - - - - - - - - -)

Peter P. Artaserse, Esq., Attorney for Defendant-licensee.
Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant has pleaded non vult to a charge alleging that on February 26, 1948 he allowed, permitted and suffered lewd and indecent pictures on his licensed premises, in violation of Rule 17 of State Regulations No. 20.

The cards which are the cause for the charge are basically business cards. At the bottom thereof there is an "invitation" to see the "art photo" on the reverse side, together with instructions as to how to "develop" this "photo". I believe that the defendant, as he contends, may not have had personal knowledge of this illegal activity on his licensed premises. He is, however, fully responsible for the action of his manager who purchased the "articles of art".

In 1944 defendant's license was suspended for fifteen days for possession of illicit liquor. Considering this prior record, I shall suspend the license for fifteen days. Remitting five days thereof because of the plea will leave a net suspension of ten days.

Accordingly, it is, on this 16th day of March, 1948,

ORDERED that Plenary Retail Consumption License C-32, issued by the Board of Commissioners of the City of Jersey City to Frank Paula, t/a Sherry's Cafe, for premises 140 Tonnele Avenue, Jersey City, be and the same is hereby suspended for a period of ten (10) days, commencing at 2:00 a.m. March 22, 1948, and terminating at 2:00 a.m. April 1, 1948.

ERWIN B. HOCK
Commissioner.

10. DISCIPLINARY PROCEEDINGS - SUSPENSION FOR BALANCE OF TERM, WITH LEAVE TO PETITION TO LIFT UPON EXPIRATION OF 35 DAYS AND CORRECTION OF ILLEGAL SITUATION - TRANSFER HAVING BEEN GRANTED BY MUNICIPAL ISSUING AUTHORITY - APPLICATION TO LIFT GRANTED.

In the Matter of Disciplinary Proceedings against)
)
MILDRED SANTASIERE
T/a CLUB 88)
88 - 14th Avenue
Newark 3, N. J.,)
)
Holder of Plenary Retail Consumption License C-906, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.)

ON PETITION
ORDER

- -

Stanley Blasi, Esq., Attorney for Petitioners Rocco Craparotta and Joseph Taccetta.

BY THE COMMISSIONER:

On January 21, 1948, I suspended defendant's license C-906 for the balance of its term, effective at 2:00 a.m. January 27, 1948, after she had pleaded <u>non vult</u> to charges alleging in substance that she was holding the license as a "front" for her husband, Alfred Santasiere. <u>Re Santasiere,</u> Bulletin 792, Item 6. In said order it was provided that, if the unlawful situation were actually corrected, a petition might be filed with me to lift the suspension after at least thirty-five days of the suspension had been served.

Pursuant to said leave, Rocco Craparotta and Joseph Taccetta have filed a verified petition wherein they set forth that on March 18, 1948 the Municipal Board of Alcoholic Beverage Control of the City of Newark transferred the license in question subject to the suspension heretofore imposed from Mildred Santasiere to the petitioners, Rocco Craparotta and Joseph Taccetta.

The petition further sets forth that the petitioners are the <u>bona fide</u> purchasers of the tavern business, and that Mildred Santasiere no longer has any interest in the license, and no interest in the business except to the extent of a chattel mortgage given to secure part of the purchase price.

It appearing from the facts set forth in the verified petition that the unlawful situation has been corrected, and it further appearing that the thirty-five day suspension has already expired, the suspension will be lifted, effective immediately.

Accordingly, it is, on this 19th day of March, 1948,

ORDERED that the suspension heretofore imposed be lifted, and that Plenary Retail Consumption License C-906, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby restored to full force and operation, effective immediately.

Erwin B. Hock
Commissioner.

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