

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

BULLETIN 454

APRIL 16, 1941.

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

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APRIL 16, 1941.

1. APPELLATE DECISIONS - STRAUSS v. SOMERS POINT AND HAGENBUCHER.

ISSUANCE OF LICENSE APPEALED ALLEGING ERRONEOUS ISSUANCE OF PRIOR LICENSE, IMPROPER MOTIVE IN OBTAINING PRESENT LICENSE, LACK OF SUFFICIENT INTEREST IN PREMISES, APPLICANT UNFIT, AND PARTICIPATION IN ISSUANCE OF COUNCILMAN DISQUALIFIED BECAUSE OF PERSONAL INTEREST - OBJECTIONS FOUND WITHOUT MERIT - ISSUANCE AFFIRMED.

MARY STRAUSS,)	
)	
Appellant,)	
)	
-vs-)	
)	
COMMON COUNCIL OF THE CITY OF)	ON APPEAL
SOMERS POINT and RICHARD J.)	CONCLUSIONS AND ORDER
HAGENBUCHER,)	
)	
Respondents.)	

Edison Hedges, Esq., Attorney for Appellant.
Enoch A. Higbee, Esq., Attorney for Respondent, Common Council.
Richard J. Hagenbucher, Pro Se.

This appeal is from the renewal of Richard J. Hagenbucher's Plenary Retail Consumption License for the current fiscal year for premises at Maryland and Sunny Avenues, City of Somers Point.

Hagenbucher has already been before this Department on three prior appeals. Originally the holder of a Plenary Retail Consumption License for 528 Shore Road in the City, his renewal of such license for 1935-6 by the City Council was reversed on appeal to this Department. Marsteller v. Hagenbucher and Somers Point, Bulletin 95, Item 10. The Council's refusal, in the subsequent year (1936-7), to issue a new license to him and his wife for those same premises was affirmed on appeal to this Department. Hagenbucher v. Somers Point, Bulletin 192, Item 6.

However, in the next year (1937-8) the Council granted a license to Hagenbucher for the premises in question at Maryland and Sunny Avenues. On appeal by an objector, the Council's action was affirmed by this Department. Marsteller v. Somers Point and Hagenbucher, Bulletin 244, Item 7.

Hagenbucher has, since such time, successively renewed his license for these premises at Maryland and Sunny Avenues for 1938-9, 1939-40 and the current 1940-1 fiscal years. Mary Strauss, who resides near 528 Shore Road (Hagenbucher's original site), here takes appeal from the current renewal.

Her contentions may, for convenience, be summarized as follows: (1) the building which Hagenbucher put on the premises in question in 1937-8 did not actually conform to the plans which he had filed with his application for that year; (2) his real purpose in obtaining renewal of his license for the current term is to seek transfer of that license to his original site at 528 Shore Road;

(3) Hagenbucher lacks sufficient interest in the premises in question to warrant issuance of his present license; (4) Hagenbucher is unfit to hold a liquor license in this State; and (5) a disqualified councilman took part in the granting of Hagenbucher's current renewal.

As to (1): Hagenbucher's original (i.e., 1937-8) application for his present site was for a building to be constructed on the then vacant land in accordance with plans submitted with the application. Hence the Council, in granting such application, imposed the proper condition that the license itself not actually issue until the building was erected. At the hearing on appeal in that case in January 1938, Hagenbucher testified that he actually intended to erect such a building. However, in March 1938, while the appeal was still pending, Hagenbucher, claiming that his financial backing had failed, obtained the express consent of the Council to move an already constructed and comparatively small building onto the site instead.

The Council acted erroneously in consenting to such a change, because the case was then still on appeal before this Department and because, further, the change was so substantial as to require that Hagenbucher file a new application.

However, there is no evidence that the change was in any way actually fraudulent or that the building which was moved onto the premises must be deemed unfit for a liquor license. In view of such facts, and the further fact that Hagenbucher, after putting such building on the premises, has continuously been applying for and receiving his license for several successive years for that very building, it would be wholly without point now to reverse his present (1940-1) license merely because of the said change of building plans back in 1937-8. However defective such change may have been, it related solely to the 1937-8 license and in no way vitiated or affected the licenses issued thereafter.

As to (2): This is apparently the chief ground for the present appeal. Appellant, living alongside 528 Shore Road, is fearful lest Hagenbucher will seek a transfer of his license to those premises (which are located in a different neighborhood) and thus re-establish his old business there.

This very issue was also raised when appeal was taken from the original granting of Hagenbucher's license for the premises in question for 1937-8. Hagenbucher testified on that appeal that he did not intend to seek any transfer to 528 Shore Road. However, it is clear that Hagenbucher, after abstaining for some two years from any such plan, then made distinct overtures to appellant in the spring of 1940 to sound out whether she would object to his seeking the transfer. Apparently the response cooled his nope; in any event, he never filed any application for such transfer.

Hagenbucher's recurring desire of being able some day to locate again at 528 Shore Road is no reason for denial of renewal of his license for his present and apparently bona fide business which he has now been operating for several years at the premises in question at Maryland and Sunny Avenues. He cannot get a transfer to 528 Shore Road without making a regular application therefor. The proper time to fight out the case whether he should be granted such transfer is when he actually applies. Should the Council, after hearing objectors, grant that transfer, appeal may be taken to this Department to determine whether or not such action is erroneous.

As to (3): At the last appeal Hagenbucher further testified that he planned to finance himself in setting up business at the premises in question by raising a mortgage on such premises. He now testifies that he is not actually the owner; that, when he testified at the last appeal, he had planned to buy the property from the owner and then raise additional money by giving a mortgage on such premises; that he did not go through with this plan because of the failure of his financial backing; that he, therefore, has been occupying the premises ever since as a tenant.

Although an applicant for a retail liquor license, whether original or renewal, must have color of right to immediate and exclusive possession of the premises for which he seeks license, it is not necessary that he actually own the premises. It is sufficient if, as here, he is a tenant, whether at will or for a term. See Re Backer, Bulletin 449, Item 4, and rulings there cited.

As to (4): The issue of Hagenbucher's fitness for a retail liquor license was squarely raised on the last appeal (viz., from the granting of Hagenbucher's license for the premises in question in 1937-8). It was there held that Hagenbucher's conviction in February 1934 for possessing a slot machine, and also his misconduct with respect to his licensed business when located at 528 Shore Road, did not mandatorily disqualify him from any license thereafter; that hence it was within the Council's discretion to give him "another chance" by granting him a license at the premises in question; that, however, it was the Council's special responsibility to see to it that, if Hagenbucher relapsed into any misconduct, suspension or loss of his license would be "sure and swift."

So far as appears, Hagenbucher, ever since obtaining such license for the premises in question, has been guilty of no misconduct in connection with his business there.

Appellant's contention apparently is that, despite such fact, Hagenbucher should nevertheless be deemed necessarily unfit for a license because, in addition to his previous record, he actually gave false testimony in January 1938 at the hearing on the last appeal.

In net, the testimony in question, most (if not all) of which has already been mentioned in discussion on the above points of this appeal, is Hagenbucher's statement of his various plans, designed to show that he was in earnest in seeking a license for the premises in question and actually wanted to establish business there and that he had no intent to seek any immediate transfer of his license to 528 Shore Road.

The very fact that Hagenbucher actually did set up business at the premises in question, has now been in business there for some three years, and abstained for two years from making any move about seeking a transfer to 528 Shore Road, is strong indication that his testimony was given in good faith.

In any event, I cannot say that the evidence in the case is sufficiently clear and convincing to warrant any finding that Hagenbucher actually perjured at the 1938 hearing when testifying as to his then plans.

As to (5): Appellant contends that one of the councilmen, Claude Nickerson, who participated for a time at the meeting on Hagenbucher's application for current renewal, was actually disqualified from such participation, thus vitiating the Council's action in granting that application.

Nickerson became a councilman in January 1939. He is apparently friendly with Hagenbucher, and is a draftsman by profession. In the course of his private business as such draftsman, he twice drew building plans for Hagenbucher - first in 1937, when he drew the plans for erection of the building which Hagenbucher had originally intended for the premises in question; and later, in 1940, when he drew tentative plans for Hagenbucher for proposed remodeling of 528 Shore Road in the event Hagenbucher could obtain transfer there. There is no evidence that payment for these plans was contingent in any way, directly or indirectly, upon the outcome of Hagenbucher's application for the current renewal of his license for his present site.

When Nickerson started to speak at the Council's hearing in favor of the application for such renewal, protest was made that he was disqualified from any voice or vote in the matter. The city's attorney suggested that, to avoid criticism and confusion of the issues, Nickerson actually leave the meeting. The councilman somewhat reluctantly acceded, thus taking no further part in the discussion nor any part whatsoever in the vote on the application. The remaining six councilmen voted unanimously to grant the renewal.

A member of a local issuing authority is disqualified from voice or vote on an application for license when he has some direct financial interest in the outcome or when, because of his relation with the applicant (such as, for example, being an actual employee), he cannot be considered a "free agent." See Re Kerner, Bulletin 298, Item 9, and rulings there cited. Thus, in the first appeal involving Hagenbucher and 528 Shore Road, his then license for such premises was reversed because, among other things, one of the councilmen who voted for the license was an employee of Hagenbucher.

However, in the present case, the mere fact that Nickerson is a friend of Hagenbucher and in fact spoke out for him at the meeting did not disqualify him. Nor did the fact that, in his business as draftsman, he drew occasional plans for Hagenbucher. Such interest or relationship must be deemed legally remote. See Re Grant, Bulletin 124, Item 7 (ruling a councilman to be qualified despite his having acted as real estate agent in the letting of the premises for which license was sought and also having placed insurance on such premises so long as payment for such services was in no way contingent on the application's being granted). Also see Re Gallaher, Bulletin 138, Item 6 (reaching a similar result with respect to a councilman employed by a concern which sold bar fixtures to an applicant).

However, Nickerson's removal from the meeting, even though technically he was not disqualified, was nevertheless a praiseworthy measure for avoiding criticism and also to prevent confusion on the real merits of the case.

While on this point of ethical demeanor, I note from the record in this case that Nickerson and two other councilmen visited appellant during the spring of 1940 to see whether she would not drop her opposition to Hagenbucher's getting a transfer of his license to 528 Shore Road. Although there is nothing to impugn the good faith of the councilmen, nevertheless it is extremely poor policy for members of a local issuing authority, no matter how well-intentioned they may be, to advocate a licensee's cause in this way, thus departing from their true function of being merely a judge in the matter.

However, there is nothing in such conduct of these councilmen which in any way vitiates the Council's action in granting Hagenbucher a renewal for his present site.

Appellant's grounds of appeal being thus without merit, and no reason appearing for reversal, the Council's action in renewing Hagenbucher's license for the current year is affirmed.

Accordingly, it is, on this 8th day of April, 1941,

ORDERED, that the present appeal be and hereby is dismissed.

E. W. GARRETT,
Acting Commissioner.

2. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - DISCREPANCIES IN PROOF, ACID AND SOLID CONTENT - FIVE REFILLS FOR THE APPARENT PURPOSE OF SUBSTITUTING CHEAPER WHISKEY - 30 DAYS' SUSPENSION.

In the Matter of Disciplinary)
proceedings against)
GYPSY CAMP, INC.,)
1288 South Broad St.,)
Trenton, N. J.,)
Holder of Plenary Retail Consump-)
tion License C-214 issued by the)
Board of Commissioners of the)
City of Trenton.)
-----)

CONCLUSIONS
AND ORDER

William Reich, Esq., Attorney for Defendant-Licensee.
Charles Basile, Esq., Attorney for the Department of Alcoholic Beverage Control.

The defendant-licensee was charged with possession of illicit alcoholic beverages in violation of R. S. 33:1-50 and re-bottling alcoholic beverages in violation of R. S. 33:1-78.

The licensee admits the facts.

The Department file discloses that, on December 30, 1940, investigators of this Department inspected the licensed premises and gauged and tested the open stock of alcoholic beverages. As a result of the preliminary field investigation, the investigators seized three quart bottles labeled "Wilson 'That's All' Blended Whiskey" and two quart bottles labeled "Calvert Special Blended Whiskey," all partly full, and one sealed, unopened bottle of "Calvert Special blended Whiskey" and one sealed, unopened bottle of "Special Rose of Baltimore Brand Blended Whiskey." Analysis by the Department chemist shows that the contents of all of the open bottles varied in proof and that four of the five varied in solids or acids, or both, from genuine samples of the same brands used for comparative purposes.

At the time of their investigation, the investigators secured a voluntary signed statement from Stephen Gelentser, President of and employed as bartender by the licensee corporation. In this statement Gelentser admits that he refilled the bottles,

allegedly with Special Rose of Baltimore Brand Blended Whiskey. As his excuse for this admitted refilling, he states that it was done "for the reason that I suddenly found myself out of Wilson & Calverts Special Whiskeys which are my two best sellers, & did not realize the seriousness of the violation....." The lameness of the excuse is apparent. The investigators' report further discloses that, while they found no unopened bottles of Wilson "That's All" Whiskey in stock, there were three full, sealed, unopened bottles of Calvert Special Blended Whiskey on the stock shelf beneath the back bar, in the very same place where the two refilled bottles of this product were found. A check of the invoices of the licensee corporation disclosed that Special Rose of Baltimore costs the licensee \$17.50 a case whereas the Calvert and Wilson cost \$23.00 a case -- convincing and pertinent evidence of deliberate intent to "chisel."

It is now argued, on behalf of the defendant-licensee, that the refilling was not done with the knowledge or consent of the licensee corporation and that "for his improper conduct, which no doubt is injurious to the business of the corporation, said Stephen Gelentser, the bartender, was discharged by the corporation." This argument is completely untenable. Gelentser was the President of the corporation. Department records disclose that, as President, he was the holder of 9% of the corporate stock. The action of a corporate officer on behalf of the corporation is tantamount to action by the corporation itself. Knowledge is clear. Cf. Re Club Murray Corporation, Bulletin 452, Item 3. Moreover, there is no explanation whatsoever as to just how the corporation discharged Stephen Gelentser, its President, or who became the new President, or what happened to Gelentser's stock. Investigation of the corporate set-up will therefore be made.

It is further argued that, although Chapter 177, P.L. 1939 (R. S. 33:1-1.2) provides, among other things, that any alcoholic beverage in any bottle shall, in any proceeding pursuant to the Alcoholic Beverage Law, be deemed prima facie an illicit beverage where the container bears a label which does not truly describe its contents, this is "merely a rule of evidence" and that "there is no room for any presumption that the bottles contain illicit beverage" since the bottles had been refilled with Special Rose of Baltimore, a tax-paid whiskey. It is further argued that refilling from one bottle to another for the purpose of selling by the drink over the bar, as distinguished from sale by the bottle, does not constitute rebottling within the meaning of R. S. 33:1-78.

These arguments are likewise untenable, both in fact and in law.

The fact is that there is no proof whatsoever that the seized bottles were refilled with tax-paid liquor. The licensee claims that the refilling was done with Special Rose of Baltimore, a tax-paid whiskey. The chemist's report of analysis, however, discloses that while in some instances the refilled bottles approximate Special Rose of Baltimore, they do not in other instances. It is quite possible that, even though the chemical components approximate a particular tax-paid product, the contents may in fact be bootleg whiskey of similar chemical components.

In Re Haney, Bulletin 304, Item 13, it was ruled that:

"The comprehensive legislative restrictions against rectification, blending and bottling by retail licensees are salutary in purpose and effect. They are aimed not only against the use of 'bootleg' liquor on which tax has not been paid, but also against 'refills' of all kinds. Customers are entitled to receive the liquor which they order....."

Refilled liquor constitutes an illicit beverage, whether tax-paid or bootleg. Re Haney, supra; Re Orbach, Bulletin 406, Item 10; Re Perna, Bulletin 442, Item 6; Re Heuring, Bulletin 445, Item 12. Refilling of an alcoholic beverage from one container to another constitutes bottling within the meaning of R. S. 33:1-78. Re Heuring, supra, and the items therein cited.

In Re Orbach, supra, I ruled that a minimum penalty of ten days would be given in illicit liquor cases where the licensee was personally innocent and where there were no aggravating elements present. I then said:

"Where the licensee performs or authorizes or acquiesces in the 'refill', or where there is a practice of 'refill' at the tavern (whether or not the licensee disclaims knowledge of such), or where the evidence shows that the 'refilled' liquor is bootleg, the penalty must and will be heavy-fisted."

In the present case the licensee, through its President, performed the refill, and, since the facts are admitted, the licensee is guilty as charged. A severe penalty is warranted in order to stamp out this insidious practice of deliberate tampering with liquor stock.

The license will be suspended for a period of thirty days.

Accordingly, it is, on this 7th day of April, 1941,

ORDERED, that Plenary Retail Consumption License C-214, heretofore issued to Gypsy Camp, Inc. by the Board of Commissioners of the City of Trenton, be and the same is hereby suspended for a period of thirty (30) days, effective April 14, 1941, at 2:00 A.M.

E. W. GARRETT,
Acting Commissioner.

3. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - DISCREPANCIES IN ACID AND SOLID CONTENT - ELEVEN REFILLS CONCEALED ABOUT THE PREMISES SHOWING CHEATING ON A LARGE SCALE - 30 DAYS' SUSPENSION, WITH NO REMISSION FOR GUILTY PLEA.

In the Matter of Disciplinary Proceedings against

JULIA KISH,
119 Genesee St.,
Trenton, N. J.,

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption License C-201, issued by the Board of Commissioners of the City of Trenton.

Julia Kish, Pro Se.
Charles Basile, Esq., Attorney for the Department of Alcoholic Beverage Control.

The defendant-licensee has pleaded guilty to charges of possession of illicit alcoholic beverages in violation of R.S.33:1-50 and rebottling alcoholic beverages in violation of R. S. 33:1-78.

The Department file discloses that, on May 29, 1940, investigators of this Department inspected the licensed premises and gauged and tested the open stock of alcoholic beverages. As a result of the preliminary field investigation, the investigators seized six quart bottles labeled "Wilson 'That's All' Blended Whiskey," one quart bottle labeled "Calvert Bar Private Stock Blended Whiskey," three quart bottles and one half-gallon bottle labeled "Schenley's Red Label Blended Whiskey," all partly full, and sealed, unopened bottles of the same products. Analysis by the Department chemist shows that the contents of all eleven open bottles varied considerably in both solids and acids from genuine samples of the same brands used for comparative purposes.

At the time of the investigation, the licensee denied knowledge of any wrongdoing. However, the investigators' report discloses that the "refills" were hidden, having been distributed separately in cases containing sealed, unopened bottles of alcoholic beverages rather than being placed on the back bar, available for immediate use. Thus, a perfunctory check of the licensee's open stock of alcoholic beverages would not have resulted in a discovery of the refilled liquor. It clearly appears from the great number of "refills" and the deliberate attempt at concealment by their scattered distribution about the premises, that not only did the licensee or her employees, or both, know what was going on, but also that the cheating was on a large scale.

Refilled liquor constitutes an illicit beverage. Its possession is in violation of R. S. 33:1-50. Refilling is in violation of R. S. 33:1-78. See Re Gypsy Camp, Inc., Bulletin 454, Item 2, and the items therein cited.

Since the present case involves aggravated circumstances, a severe penalty is warranted. See Re Gypsy Camp, Inc., *supra*. The license will, therefore, be suspended for a period of thirty days.

Accordingly, it is, on this 7th day of April, 1941,

ORDERED, that Plenary Retail Consumption License C-201, heretofore issued to Julia Kish by the Board of Commissioners of the City of Trenton, be and the same is hereby suspended for a period of thirty (30) days, effective April 14, 1941, at 2:00 A.M.

E. W. GARRETT,
Acting Commissioner.

4. APPELLATE DECISIONS - QUARELLO v. RARITAN, JANSEN AND TURNER.

ISSUANCE OF LICENSE APPEALED ALLEGING RESIDENTIAL NEIGHBORHOOD, NO PUBLIC NECESSITY, IMPROPER CONDUCT OF LICENSED PREMISES, AND BIAS AND ABUSE OF DISCRETION OF THE LOCAL BOARD - NO ABUSE OF DISCRETION SHOWN - LOCAL REGULATION REQUIRING THREE YEARS' RESIDENCE IN THE MUNICIPALITY - DECISION RESERVED FOR TEN DAYS PENDING DISPOSITION OF DISQUALIFIED PARTNER'S INTEREST.

AURELLO L. QUARELLO,)	On Appeal
Appellant,)	
-vs-)	CONCLUSIONS
Board of Commissioners of the)	
Township of Raritan, Middlesex)	
County, and Joseph Jansen and)	
Edward Turner, t/a "The Hideaway",)	
Respondents.)	

Biunno & Rothberg, Esqs., by Ferdinand J. Biunno, Esq.,
Attorneys for Appellant.

Thomas L. Hanson, Esq., Attorney for Respondent Board.

Roger M. Yancey, Esq., Attorney for Joseph Jansen and Edward Turner.

Appellant appeals from the action of respondent, Board of Commissioners, in granting a plenary retail consumption license to respondents, Joseph Jansen and Edward Turner, for premises on the north side of Inman Avenue, Piscatawaytown, Township of Raritan. The alleged reasons for reversal may be summarized as follows:

- (a) The licensed premises are located in a strictly residential community;
- (b) Public need, necessity or convenience did not require the granting of said license;
- (c) The licensed premises were improperly maintained and constitute a nuisance;
- (d) The members of the Board were biased and prejudiced and the hearing before them was unfairly, unjustly and improperly held and conducted;
- (e) The granting of said license was a gross abuse of discretion by respondent Board.

As to (a): Joseph Jansen erected the premises in 1925 and conducted a general store there until May 10, 1938, when he and a former partner obtained a consumption license for said premises. They renewed the license for the fiscal year beginning July 1, 1938. The premises were not licensed for the fiscal year beginning July 1, 1939 and apparently were not licensed during the current fiscal year until July 23, 1940, when the present license was issued.

Appellant owns his home, directly across the road from Jansen's building, and lives there with his father and mother. He testified that on the side of the road on which the licensed premises are located, the nearest house is four hundred feet from the licensed premises in one direction and at least one-half mile in the other direction; that on the side of the road on which his home is located, the nearest house is one hundred and thirty feet in one direction and one thousand feet in the other direction; that there are about twenty-seven homes within a radius of a mile from the licensed premises. Respondent Jansen testified that there are three houses in the vicinity of his premises and that the others are "pretty well spread apart". There are no other business places in the neighborhood. The only question is whether the action of the board in granting the present license was arbitrary and unreasonable.

It is true that licensed premises are out of place in a strictly residential neighborhood. Vannozzi vs. Trenton, Bulletin 35, Item 7; Lavelle vs. Way, Bulletin 140, Item 1; Farley vs. High Bridge, Bulletin 151, Item 13. This case, however, differs from the cases cited, in all of which licenses were sought in closely built up residential sections. They are also distinguished because in each of the cases cited the local issuing authorities, exercising their discretion, decided that the licenses should not be issued, which action was affirmed on appeal; whereas, in the present case, the local issuing authorities, exercising their discretion, have decided that the license should issue, and I am now asked to set aside the action of the local Board as arbitrary and unreasonable. On the evidence I cannot say that such action was arbitrary or unreasonable. Cf. Sears Roebuck & Co. vs. Absecon and Jones, Bulletin 185, Item 10; Carnart vs. Clark, Bulletin 453, Item 7.

As to (b): Inman Avenue is a paved, county road, with a fairly large volume of traffic connecting two main roads. There is a large colored settlement in a section of the township known as Potters Station and the members of the Board who testified said that they considered the needs of the colored residents of the township in granting the license to Jansen and Turner, whose patronage, to a large extent, consists of colored persons. In view of this evidence and the fact that the premises were previously licensed, I cannot say that respondent Board abused its discretion in determining that public convenience required the granting of this license.

As to (c): The evidence on this point consists of testimony given by appellant and a number of residents of the township that a large amount of unnecessary noise is caused by patrons leaving the premises, particularly on Sunday mornings, and by motorcycles racing up and down Inman Avenue. Most of this testimony concerns alleged events occurring after the issuance of the present license. Jansen testified that during the terms of his previous licenses no charges had ever been preferred against him and that he heard of no complaints. No charges have been preferred against the present licensees. The evidence is not sufficient to show that respondent Board improperly granted the license. If the premises are being improperly conducted,

appellant may request the local Board to prefer charges against the licensees and may also object to renewal of the license.

As to (d): There is no evidence that the members of the Board were biased or prejudiced. Two hearings were held at which all objectors were given an opportunity to be heard. Appellant seems to complain because when the Board retired to confer after the first hearing, it called Jansen and Turner into the conference room. It appears, however, that the only purpose in doing so was to ascertain if they had entered into a written partnership agreement. It might have been better practice to discuss this matter with the licensees at the open hearing, but the evidence does not show that the hearings were unfairly, unjustly or improperly held and conducted.

As to (e): From what has already been said, it appears that the Board did not abuse its discretion.

Under ordinary circumstances, therefore, I would affirm the action of the Board in granting the license to Jansen and Turner.

However, it developed at the hearing of the appeal that Edward Turner has been a resident of the township only since June 1940. Section 12 of Raritan Township Ordinance, adopted September 10, 1935, and still in effect, provides:

"No license shall be issued to any person, firm, corporation, group or partnership, not fully qualified under the provisions of said Act and said rules and regulations. No license shall be issued to any applicant who has not been a legal resident of the Township for a period of at least three (3) years nor to any applicant who has not been in business in the Township for a period of at least one (1) year."

The contention that the Township cannot require three years' local residence is without weight. This question was discussed at length by the Commissioner in Iamello vs. Rumson, Bulletin 77, Item 9, wherein the Commissioner pointed out that Section 29 of the Control Act (now R.S. 33:1-32) provides that:

"Each issuing authority, by resolution first approved by the Commissioner, may impose any condition or conditions to the issuance of any license deemed necessary and proper to accomplish the objects of this act (now chapter) and secure compliance with the provisions hereof",

and wherein the Commissioner further said:

"The ordinance is not repugnant to the Control Act. It does not lessen the requirements - it strengthens them by adding an additional qualification. It does not tie the hands of the State, for the State has committed the issuance of retail licenses to the several municipalities.

Mere silence by the State Act on the point of local residence is not inconsistent with a local requirement on this score. The Borough ordinance does not deny, as contended, to a class of citizens, the constitutional guaranties of every citizen that, in the words of appellant's counsel, 'these guaranties are that every citizen of the State has the same right which every other citizen of the State has. Among these rights is the right to establish any business in any particular municipality without being subjected to additional restrictions which are not imposed upon all citizens.' The learned attorneys of the appellant in their excellent and helpful brief have, at this point, fallen into the error of treating as a right that which is only a privilege. See Bumball vs. Bernardsville, Bulletin #66, Item #9; Krause vs. Freehold, Bulletin #76, Item #8. As was said in the Bumball case, supra,

'No one has a "right" to a license. It is, at most, a privilege conferred by the State which the issuing authority may deny in the exercise of sound discretion. Meehan v. Jersey City, 73 N.J.L. 382.'

"Appellant's theory, if sound, would make it mandatory for an issuing authority to issue a license to any person who came within the terms of the Act. In this he errs. For the Act is permissive and not mandatory. It defines the persons to whom, and the conditions under which, an issuing authority may issue a license but does not compel the issuance of such a license to anyone simply because he is not disqualified.

"The requirement that a person be a resident of the municipality from which he seeks a license, for a period of time, so that he may become known and a basis laid to judge his character has a direct and immediate connection with the proper administration of licenses. In Re Piscataway, Bulletin #75, Item #9, the Commissioner said: 'I can see a good reason why a person may be required to reside in a Township for three years as a condition precedent to obtaining a liquor license. Because of his residence, opportunities would be afforded to form some estimate of his character.'"

Respondent Turner and respondent Board further contend that the requirement of three years' residence set forth in Section 12 of the ordinance does not apply because the license has been issued to a partnership and not to an individual applicant. The argument might have some weight

if the licensee were a corporation. Cf. Sachs vs. Trenton, Bulletin 321, Item 12; Lido, Inc. vs. Raritan, Bulletin 454, Item 3. However, the law does not recognize a partnership as a separate legal entity. R.S. 33:1-25 provides, among other things, that "no license shall be issued unless all of the partners shall qualify as individual applicants". I conclude, therefore, that the ordinance is reasonable and applies to individual members of partnerships. It follows that, prior to June 1943, Edward Turner is not qualified to hold a license in the Township, either individually or as a member of a partnership.

The question as to Turner's eligibility to hold a license under the terms of the ordinance does not appear to have been raised below. Aside from lack of required residence in the township, he seems to be fully qualified. Jansen appears to be fully qualified to hold a license. If the Board of Commissioners had denied the application because Turner was not qualified, I would affirm the action on appeal. However, they have granted the license and I believe that an undue hardship would be worked upon the fully qualified partner if the action of the Board were reversed at this time without giving the parties an opportunity to correct the situation. Accordingly, no final order will be entered at this time. Proof may be presented to me within ten (10) days from the date hereof that Edward Turner has completely severed his connection with the licensed premises and that Joseph Jansen is now the sole owner of the business. If satisfactory proof is so presented, a final order will be entered herein affirming the action of the Board of Commissioners and requesting the Clerk to note the change of ownership on the face of the original license, in accordance with the procedure set forth in Re Markey, Bulletin 19, Item 6, and in Re Hafner, Bulletin 20, Item 7; otherwise, after the expiration of the ten day period, a final order will be entered herein reversing the action of respondent Board of Commissioners in granting the license to Joseph Jansen and Edward Turner.

The rulings herein are based upon the powers conferred upon the Commissioner by R.S. 33:1-38.

E. W. GARRETT,
Acting Commissioner.

Dated: April 10, 1941.

5. DISCIPLINARY PROCEEDINGS - SALES OF ALCOHOLIC BEVERAGES DURING PROHIBITED HOURS - SECOND OFFENSE - 10 DAYS' SUSPENSION, LESS 5 FOR GUILTY PLEA.

In the Matter of Disciplinary Proceedings against)

ANTHONY GAGLIARDI,)
723 Frelinghuysen Ave.,)
Newark, N. J.,)

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License No. C-346)
issued by the Municipal Board of Alcoholic Beverage Control)
of the City of Newark.)
-----)

Leo Ertag, Esq., Attorney for Defendant-Licensee.
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 after 3:00 A.M., in violation of Section 1 of Ordinance 3930 adopted by the Board of Commissioners of the City of Newark on December 21, 1938.

The Department file discloses that the principal business of the licensed premises is that of a restaurant, so that the Newark ordinance in question does not prevent the premises from being open for purposes other than the sale of alcoholic beverages. Two investigators entered the licensed premises shortly before 4:00 A.M. on Sunday, March 16, 1941 and observed customers consuming alcoholic beverages. At 4:30 A.M. the investigators ordered and were served alcoholic beverages, and identified themselves to the bartender in charge. The latter admitted the sale of alcoholic beverages after 3:00 A.M. and further admitted that he was aware that no sales could be made after that hour. The licensee was not present in the premises.

The fact that the licensee was not personally present and that the violation was committed by an employee is no excuse. Re Lilakos, Bulletin 443, Item 1, and the items therein cited.

The minimum penalty for this violation is five days. Re Belmont Tavern, Inc., Bulletin 451, Item 1. The Department files disclose, however, that on January 26, 1939 I suspended the license then held by this licensee for a period of five days for a similar violation. In view that this is the licensee's second offense of the same nature, the penalty will be doubled and the license suspended for ten days.

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. Five days of the penalty will therefore be remitted. Cf. Re Lilakos, supra.

Accordingly, it is, on this 9th day of April, 1941,

ORDERED, that Plenary Retail Consumption License C-346, heretofore issued to Anthony Gagliardi by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for five (5) days, effective April 14, 1941, at 3:00 A.M.

E. W. GARRETT,
Acting Commissioner.

6. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - DISCREPANCIES IN COLOR, ACID AND SOLID CONTENT - STRAIGHT WHISKEY IN A BOTTLE CALLING FOR A BLEND - 10 DAYS' SUSPENSION - PENALTIES IN ILLICIT LIQUOR CASES REVIEWED.

In the Matter of Disciplinary Proceedings against THEODORE WNOROSKI, 205 Vanderpool St., Newark, N. J., Holder of Plenary Retail Consumption License C-744, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

Sol L. Kesselman, Esq., Attorney for Defendant-Licensee. Richard E. Silberman, Esq., Attorney for the Department of Alcoholic Beverage Control.

The defendant-licensee has pleaded non vult to charges of possessing an illicit alcoholic beverage in violation of R. S. 33:1-50, and rebottling an alcoholic beverage in violation of R. S. 33:1-78.

The Department file discloses that, on December 17, 1940, agents of the Alcohol Tax Unit of the U. S. Bureau of Internal Revenue inspected the licensed premises and gauged and tested the open stock. As a result of the preliminary field investigation, the investigators seized a one quart bottle labeled "Wilson 'That's All' Blended Whiskey 90 Proof." Analysis by the Federal chemist shows that the contents of the open bottle varied in color, acids and solids from genuine samples analyzed for comparative purposes. The chemical analysis further discloses that the open bottle, while labeled a "blended" whiskey, in fact contained a natural colored or "straight" whiskey - so that the seized open bottle obviously contained a complete refill.

In connection with his plea, the licensee states that he does not know how or in what manner the illicit liquor came to be in the bottle in question, except that one of the porters "may have broken some bottle and poured the contents into a Wilson bottle." The licensee further denies that he himself actually rebottled an alcoholic beverage or that it was done by any of his employees with his knowledge or consent. He further states that if "it is intended that he is responsible for the acts of his agents, servants or employees, then, of course, the charge is correct." That is exactly what is intended.

Since the seized liquor does not conform to label specifications, it constitutes an illicit alcoholic beverage. Re Haney, Bulletin 304, Item 13. Its mere possession on licensed premises violates the Alcoholic Beverage Law. R. S. 33:1-50. Moreover, the beverage is a refill, and refilling from one container to another constitutes bottling within the meaning of R.S. 33:1-78. For this the licensee is strictly accountable, regardless of personal innocence. Re Heuring, Bulletin 445, Item 12.

This is the licensee's first offense of any kind. No aggravating circumstances appear. In previous similar cases the penalty for this offense has been ten days. See Re Orbach, Bulletin 406, Item 10; Re Perna, Bulletin 442, Item 6; Re Heuring, Bulletin 445, Item 12. The same penalty will be imposed herein. Had there been a previous warning, the penalty would have been jumped to fifteen days. Re Novak, Bulletin 406, Item 11; Re Kalfus, Bulletin 437, Item 11; Re DeVita, Bulletin 438, Item 10. Had there been aggravating circumstances or any evidence of large scale cheating, the penalty would have been thirty days, because such cheating must be stamped out. See Re Gypsy Camp, Inc., Bulletin 454, Item 2 and Re Kish, Bulletin 454, Item 3, which supersede Re LaCorte, Bulletin 420, Item 4, in which a mere ten-day suspension was imposed and which experience has shown to be utterly inadequate in cases of this kind. Had there been previous similar and dissimilar adjudicated violations, the penalty would have been as much as forty days. Re Lotcpeich, Bulletin 443, Item 11.

Accordingly, it is, on this 10th day of April, 1941,

ORDERED, that Plenary Retail Consumption License C-744, heretofore issued to Theodore Whoroski by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for ten (10) days, effective April 14, 1941, at 3:00 A.M.

E. W. Garrett

Acting Commissioner.