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The confusion engendered in liquor licensing by the exercise of state police power provides the nucleus of Professor Shuchman's discussion of the problems inherent in financing the purchase of a liquor license. Proceeding from the availability of judicial relief, the author describes the entire spectrum of remedial procedures, including corporate organization and limited partnership agreements. Professor Shuchman concludes with a significant analysis of the priority problems arising between a federal tax lien upon a liquor license and a financing creditor's security interest obtained in accordance with the Uniform Commercial Code.

I. The Nature and Qualities of the Liquor License

THE RETAIL liquor license might be termed the union card to a fairly well closed shop; the license is not quite a Ph.D. or admission to the Bar, but it does enable one to earn a living. Typically, the proprietor is a small businessman whose ownership interests in other taprooms are often restricted by law.[1] His purchase of the license for an amount in excess of the statutory renewal fee — virtually all such licenses are renewable annually — certainly represents an investment of capital, an investment which the licensee and those who finance his purchase wish to protect.[2]

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[1] See, *e.g.*, KAN. STAT. ANN. § 41-312 (1963); MD. ANN. CODE art. 2B, § 41(a) (Supp. 1965).

The New Jersey statute allows retail liquor licensees to hold only two licenses. See N.J. REV. STAT. § 33:1-12.31 (Supp. 1965), the validity of which was affirmed in Grand Union Co. v. Sills, 43 N.J. 390, 204 A.2d 853 (1964). Missouri permits ownership of as many as three licenses by a single person. MO. ANN. STAT. § 311.260 (1963). Nebraska allows ownership of two licenses, NEB. REV. STAT. § 53-124.02 (Supp. 1965), as do Connecticut, CONN. GEN. STAT. ANN. § 30-48a (Supp. 1965), Wisconsin, WIS. STAT. ANN. § 176.05(3) (1961), and Massachusetts, under certain circumstances, MASS. ANN. LAWS ch. 138, § 15 (1965).

However, the administrative agencies of some states limit the number of licenses held by one person, although the statutes or regulations have no such provision.

[2] The investment cannot be protected by an insurance policy against the revocation of the liquor license even for reasons not due to intentional acts of the licensee and his family and excluding actions by an employee acting with the knowledge and consent of the licensee. Such an insurance policy was deemed invalid as contrary to public policy by the attorney general of California. 21 OPS. ATT'Y GEN. No. 17, at 8094 (Cal. 1958).

Apart from the legal complexities of acquiring a retail liquor license,[3] the purchase price may be considerable, ranging from a few thousand dollars for the bare "ticket" without a location or accompanying business, to investments in six figures for a well-equipped business in a good neighborhood.[4] Ordinarily, the license in a particular location accounts for most of the value of the business enterprise. And, notwithstanding contractual recitations to the contrary, the fixtures, equipment, and inventory are rarely significant items in the total purchase price.

Although other security for the financing of the liquor license purchase may be available, the license itself usually constitutes a major item of security to the lender, one without which the loan is inadequately secured. What can a person financing the purchase of a retail liquor license do to secure and protect his investment?

There are different considerations confronting ordinary contract or judgment creditors and those whose claims originate from transactions in which the liquor license is all or part of the security sought. Those in the latter group seek, at the time of the loan or other financing transaction, to put themselves in the position of a secured creditor with rights as a lienor, arising at that time, good as against his debtor and subsequent creditors. Where for one reason or another the lien as such cannot be created, the financer will seek to be in the best possible position obtainable as an ordinary contract or judgment creditor. For the most part, these comments are directed to the financer, and at two points in time: when the transaction takes place and when the debtor-licensee is in default. As to the latter situation, a brief statement is presented of the respective rights of the financing creditor and third parties as creditors or as claimants to the liquor license. Most of the references which follow are to so-called "on-sale" licenses, those which permit drinks to be sold for consumption on the licensed premises.[5]

[3] The nonlegal difficulties of acquiring a license can also be overwhelming. See N.Y. Times, June 16, 1966, p. 1, col. 5 for the conclusion of the Playboy Club's efforts at procuring a liquor license in New York for $100,000. The former Republican state chairman was convicted of the bribery of the former chairman of the New York State Liquor Authority.

[4] The economics of the retail liquor business have been well discussed lately. See Barron, *Business and Professional Licensing — California, a Representative Example*, 18 STAN. L. REV. 640 (1966); Levin, *Economic and Regulatory Aspects of Liquor Licensing*, 112 U. PA. L. REV. 785 (1964). For a less academic but fully accurate and informative statement see Metz, *How To Run a New Bar on Chic East Side*, N.Y. Times, Nov. 12, 1966, p. 37, col. 4.

[5] See JOINT COMM. OF THE STATES TO STUDY ALCOHOLIC BEVERAGE LAWS, ALCOHOLIC BEVERAGE CONTROL table 11, at 98-99 (2d rev. ed. 1960) [hereinafter cited as ABC] for a listing of states permitting such sales by licensees.

II. THE PROBLEMS OF THE FINANCER: EFFECTS OF PUBLIC POLICY

The financing creditor must overcome both theoretical and statutory objections to his acquisition of a secured interest in his debtor's liquor license. He is confronted with statements of public policy which can result in consequences neither foreseen nor anticipated by any of the parties to the financing transaction.

As an example, a distinction has been made, either by statute or judicial decision, between the privilege of earning one's livelihood in a business or occupation regulated by the state and the right to do so; from this distinction courts have then questioned whether, if a business or occupation is a privilege, there is any property right conferred upon the person lawfully exercising that privilege.

A. Licensee

When the conduct of a licensed business or occupation is termed a *right*, the licensee gets considerable protection from arbitrary action by the state or its licensing agency. His gainful but regulated employment is said to constitute a property right of which he cannot be easily deprived. Persons holding such rights are entitled to all that due process has come to mean, including notice, specification of charges, full hearing, and the right to judicial review.[6] But, above all, there must exist some rational connection between the effort to prevent the holder from exercising his right and the nature of the right itself.[7]

However, when the victim is engaged in a lawful business or occupation termed a *privilege* by statute or judicial opinion, he has no property rights in his means of livelihood, and his activity is said to be subject to any degree of interference by the state, including the possibility of having the business legislated out of existence.[8]

Consequences of a very different nature attend the appellations, and although the question has been asked before, it seems appro-

[6] See, *e.g.*, City of Miami v. South Miami Coach Lines, Inc., 59 So. 2d 52 (Fla. 1952) (bus line franchise); Parker v. Board of Barber Examiners, 84 So. 2d 80 (La. Ct. App. 1955) (license to operate barber college); Hecht v. Monaghan, 307 N.Y. 461, 121 N.E. 2d 421 (1954) (license to operate taxicab). See generally 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.19 (1958), from which these examples are taken.

[7] See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). *But see* Barsky v. Board of Regents, 347 U.S. 422 (1954).

[8] See, *e.g.*, Nampa Lodge 1389 v. Smylie, 71 Idaho 212, 215-16, 229 P.2d 991, 993 (1951); Grand Union Co. v. Sills, 43 N.J. 390, 398, 204 A.2d 853, 857 (1964); Bungalow Amusement Co. v. City of Seattle, 148 Wash. 485, 491, 269 Pac. 1043, 1045 (1928). See generally Annot., 60 A.L.R. 173 (1928).

priate to inquire first into the names themselves, on the assumption that if we speak of something, it exists; if it does not, let us engender it, so that the class of things described by these names will not be empty. One can define these words by working backwards. If the activity is one which the state can entirely eliminate, it is a privilege. If the activity is not subject to such abridgment, but may still be regulated, it is a right.

Liquor licenses are consistently privileges,[9] but beauticians' licenses are rights.[10] And being a lawyer is a right,[11] or at least not a matter of grace,[12] but lobster fishing is a privilege.[13] Drivers' licenses are both rights[14] and privileges.[15] But insofar as the labels may be used to prevent persons from conducting licensed businesses[16] or engaging in licensed occupations[17] or to prohibit mere activities such as driving a motor vehicle,[18] there is a growing tendency to ignore such distinctions.

Although liquor licenses are privileges and not rights, the results of that choice are significant; therefore, why should this manner of earning a living be so easily eradicable, while other occupations which are also deemed to be privileges are not in any such danger? The usual answers given are that businesses involving the sale of liquor are privileges which any state could outlaw and that such business activities are separately categorized because they are at best of no advantage to the community and may actually be injurious to

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[9] See, *e.g.*, Nampa Lodge 1389 v. Smylie, 71 Idaho 212, 229 P.2d 991 (1951); Michael v. Town of Logan, 247 Iowa 574, 73 N.W.2d 714 (1955); Morse v. Liquor Control Comm'n, 319 Mich. 52, 29 N.W.2d 316 (1947).

[10] Gilchrist v. Bierring, 234 Iowa 899, 14 N.W.2d 724 (1944), which provides a valuable discussion of the distinction between various licensed businesses and occupations.

[11] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 379 (1867).

[12] Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957).

[13] State v. Cote, 122 Me. 450, 120 Atl. 538 (1923).

[14] Ratliff v. Lampton, 32 Cal. 2d 226, 195 P.2d, 792 (1948); Wignall v. Fletcher, 303 N.Y. 435, 103 N.E.2d 728 (1952). See generally Annot., 10 A.L.R.2d 833 (1948).

[15] Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408 (1939); Nulter v. State Rd. Comm'n, 119 W. Va. 312, 193 S.E. 549 (1937).

[16] Miskell v. Termplan, Inc., 381 S.W.2d 129, 133 (Tex. Civ. App. 1964) (rejecting the attorney general's analogy of small loan licenses to liquor licenses in the sense that they are both privileges).

[17] Bennett v. Arizona State Bd. of Pub. Welfare, 95 Ariz. 170, 388 P.2d 166 (1963) (license to operate day nursery).

[18] See State v. Moseng, 254 Minn. 263, 270-71, 95 N.W.2d 6, 12-13 (1959), with dictum to the effect that whether a driver's license is a "right" or a "privilege" is unimportant, since it is of "substantial value" to the holder and should not be revoked arbitrarily. *Ibid.*

the citizenry. These answers draw lines which obviously vary greatly from state to state and from one time to another.[19]

What conclusion follows from the state's policy that it could, if it wished, completely destroy the privilege? It is that the lawful business confers no property interest, because if it were a property interest it could not be so blithely destroyed. The doctrine has still another logical corollary: no one but the state can destroy the lawful business of the liquor licensee; hence, as regards much of the world, the license *does*, at least occasionally, confer property rights.[20]

Most regulatory statutes explicitly admonish liquor licensees and the world that does business with them that the license which they hold and from which they earn their livelihood is not property and confers no property rights.[21] The holder is told that he has a purely personal privilege to conduct a certain kind of business and that it is revocable at the discretion of the state by its licensing agency, although usually in conformity with the statutory requirements or the administrative rules and regulations.[22] The reported decisions in most states, no matter what they actually decide, usually contain a preamble consistent with this peculiar policy. The consequences of these statutory declarations are that for purposes of regulating by police powers the conduct of such businesses, the licensees cannot effectively, although they often attempt to do so, interpose any constitutional objections to the deprivation of their property without due process. Notwithstanding that most of the statutes incorporate to some extent the right to administrative hearings and often to judicial review as well,[23] the various statutes certainly manifest a desire to

[19] See generally Comment, *Occupational License Revocation*, 31 U. CHI. L. REV. 577 (1964).

[20] See Weller v. Hopper, 85 Idaho 386, 379 P.2d 792 (1963). Although as between the state and the licensee, the license is only a privilege, "as between the licensee and third persons [it] constitutes a right to which value as property and assignability is attributed. . . ." *Id.* at 394, 379 P.2d at 797.

[21] See CONN. GEN. STAT. ANN. § 30-14 (1960); IDAHO CODE ANN. § 23-514 (1948); ILL. ANN. STAT. ch. 43, § 119 (Smith-Hurd Supp. 1965); KAN. STAT. ANN. § 41-326 (1964); MASS. GEN. LAWS ANN. ch. 138, § 23 (1965); NEB. REV. STAT. § 53-149 (1960); N.J. REV. STAT. § 33:1-26 (Supp. 1965); OKLA. STAT. ANN. tit. 37, § 532 (Supp. 1965); ORE. REV. STAT. §§ 471.301(1)(a), (f) (1963); TEX. PEN. CODE ANN. art. 666-13 (1952). The 1960 Study of the Joint Committee of the States to Study Alcoholic Beverage Laws, Alcoholic Beverage Control, is in agreement and recommends that liquor licenses be held as privileges, asserting that "any statute which undertakes to create a property right in the terms of such license is inimical to and destructive of the public interest." ABC 66 (2d rev. ed. 1960).

[22] Usually, of course, these admonitions apply only insofar as the licensees might have better rights as against state action in revocation proceedings or in refusals to permit transfer or renewal.

[23] See ABC table 10, at 91-97.

deprive licensees of the constitutional rights which would otherwise be theirs if the license were taken to evidence a property right.

It is not too late to question what superior interest is served by trying to deny liquor licensees the usual constitutional protections granted other licensed businesses, occupations, and activities. Such statutes and judicial practices may be expedient, but they are inconsistent with reality and productive of a hodgepodge of fictions. And worse yet, they pose the question of why any state should prefer to deprive a small businessman of what might otherwise be his constitutional rights.

However, judges and legislators are aware that liquor licenses, with or without the tangible personal property which accompanies them, are bought and sold, bequeathed and financed, valued in a fairly flexible market place with brokers specializing in their purchase and sale, and are often the major economic asset of the small businessmen who own and operate package stores and taverns. Hence it is that the distinction arrived at in theory — that as against the state only, but not as against much of the world, is the license not property — is sometimes utilized in practice. But just as frequently are the property and non-property concepts confused and yet another good theory lost because of contrary facts.

So it has come to be the general rule, notwithstanding any possible confusion in application, that as between the state and the licensee, the liquor license is simply a personal, revocable privilege conferring no property, property right, or property interest upon the holder.[24] And that blanket, unlimited authority seems also to comprehend the commercial transactions of licensees whether or not the business in question or the particular bargain bears any relation to the purposes of regulation.[25]

Yet the courts of many states, in a variety of situations, have recognized that this right to do business is not so easily taken from the licensee, notwithstanding that the license is a privilege. In fact, the states and the administrative agencies have been warned that they must treat the license as though it were a property right,[26] and

[24] See Note, 40 NOTRE DAME LAW. 203 (1965).

[25] See Pacific Firestone Escrow Co. v. Food Giant Mkts., Inc., 202 Cal. App. 2d 155, 20 Cal. Rptr. 570 (Dist. Ct. App. 1962). "The state in the exercise of its police power properly may regulate the manner in which creditors of the licensee may seek some protection in the collection of their debts from the proceeds of the sale of a license." *Id.* at 158, 20 Cal. Rptr. at 572.

[26] People v. Stein, 236 N.Y.S.2d 703 (Westchester County Ct. 1962) (the lawful possession of a liquor license invests the holder with a property right); Lewis v. City of Grand Rapids, 222 F. Supp. 349 (W.D. Mich. 1963), *rev'd*, 356 F.2d 276 (6th Cir.

in some cases they have been compelled to provide greater protection to licensees[27] and other interested parties.[28] In addition, many of the regulatory statutes provide a fully adequate measure of protection for licensees against questionable fact-finding by administrative agencies as a part of the adjudicative process when penalties of suspension, revocation, or refusal to transfer or renew are possible results. And even the statutes can be questioned to determine whether there is a tenable relationship between the regulations imposed and the social purpose of the legislative body.[29]

B. Financers

The theoretical state privilege of the licensee has been qualified by statute and judicial decision, but as regards the interests of financers who most often are or could be secured creditors, there is far less recognition that the privilege of holding a license is property or a property right. That fact creates most of the problems.

(1) Prohibition Against Tied Houses.—Prior to Prohibition, the financial relations between manufacturers and distributors and the retail outlets had been so intimate that the latter were often termed "tied houses" both in the United States and in England. Most state statutes enacted immediately after the repeal of the eighteenth amendment[30] expressly forbade any financial interest in retail outlets by manufacturers and wholesalers.[31] The system may have been advantageous both to the brewers and wholesale outlets as well as to the saloonkeepers, with no public interest injured thereby.[32]

1965): "To deny the transfer [requested] without due process, on the ground that it is a privilege only, and not property . . . is to close the eyes of justice to realities . . . ." *Id.* at 385. Midwest Beverage Co. v. Gates, 61 F. Supp. 688 (N.D. Ind. 1945): "[T]he use of the permit, once granted, has the elements of property irrespective of what the Legislature may declare about the permit itself, and except for the omnipresent and unlimited power of the state to revoke or modify the terms of the permit in the interest of the public welfare, the use of such permit, if not the permit itself, is property within the meaning of the due process clause of the Federal Constitution." *Id.* at 691.

[27] Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) "Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements and allow them to exercise an uncontrolled discretion." *Id.* at 609.

[28] In Keating v. State, 173 So. 2d 673 (Fla. 1965), a mandamus action brought by the landlord of padlocked, but formerly licensed premises was permitted.

[29] See Reynolds v. Louisiana Bd. of Alcoholic Beverage Control, 248 La. 639, 181 So. 2d 377 (1965).

[30] The repeal was effectuated in 1933 by U.S. CONST. amend. XXI, § 1.

[31] The ABC Study indicates that thirty-four states prohibit "tied houses" by statute. ABC 35 & table 17, at 107. See the recent discussions in Grand Union Co. v. Sills, 43 N.J. 390, 407, 204 A.2d 853, 862 (1964) and Pickerill v. Schott, 55 So. 2d 716 (Fla. 1951), *cert. denied*, 344 U.S. 815 (1952).

[32] Friedrich, *Liquor Industry*, in 9 ENCYC. SOC. SCI. 495, 499-500 (1933).

The purpose of the statutes is clear,[33] although in many states there is a fairly consistent pattern of evasion. For example, loans are granted to retail licensees by financers not within the prohibited class,[34] and these loans are, in some informal or *sub rosa* manner, guaranteed by parties forbidden to have any financial interest in or dealings with retail outlets.[35]

(2) Rationale and Effect of the Prohibition.—Generally, public policy is opposed to the existence of any undisclosed financial interests in retail licenses.[36] It is felt that persons not subject to preliminary examination and approval and to the continuing scrutiny of the administrative agency should not be permitted to exercise any control by ownership or lesser financial interests over the operation of the licensed business.

The general mandate of full disclosure has been variously applied to undisclosed mortgagees,[37] ownership by corporations,[38] secret principals,[39] and lesser interests as forms of ownership.[40] Usually record ownership as shown on the renewal applications will be conclusive on the question of ownership of the license.[41] These decisions do seem to implement the public policy of full disclosure and the resultant proper imposition of responsibilities. But many

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[33] See generally Annot., 136 A.L.R. 1238 (1942).

[34] See Northcutt v. McKibben, 236 Mo. App. 605, 159 S.W.2d 699 (1942); Central Trust Co. v. Mann's Restaurants, Inc., 166 Misc. 381, 2 N.Y.S.2d 447 (Sup. Ct.), *aff'd*, 254 App. Div. 823, 6 N.Y.S.2d 151 (1938); Atlas Inv. Co. v. Christ, 240 Wis. 114, 2 N.W.2d 784 (1942).

[35] The writer has personal knowledge of many such arrangements.

[36] It is said that this policy arises from the desire to prevent undisclosed persons from having secret ownership or from otherwise exercising control over liquor licenses. Leshem v. Leshem, 31 Del. Ch. 37, 63 A.2d 673 (Ch. 1949); Smith v. Nix, 206 Ga. 403, 57 S.E.2d 275 (1950); Price v. Marcus, 199 Okl. 356, 185 P.2d 953 (1947) (and cases cited therein). To implement this policy, credit transactions where the license is made security for the debt are sometimes either absolutely forbidden or rendered unenforceable by statute. CAL. BUS. & PROF. CODE § 24076; KY. REV. STAT. ANN. § 243.660 (1963). If the foregoing causal relation seems to be a *non sequitur*, it is.

[37] Scranton v. Whitlock, 389 P.2d 1015 (Wyo. 1964).

[38] *Cf.* Myerson v. Myerson, 88 Ariz. 385, 387, 357 P.2d 133, 134 (1960). Arizona requires corporate licenses to be held by individually qualified agents of the corporation. ARIZ. REV. STAT. ANN. § 4-202 (Supp. 1966).

[39] Eisenman v. Seitz, 26 Del. Ch. 185, 25 A.2d 496 (Ch. 1942). See Clark v. Tinnin, 81 Ariz. 259, 263, 304 P.2d 947, 949-50 (1956); Romano v. Bono, 168 Misc. 897, 6 N.Y.S.2d 204 (Sup. Ct. 1938).

[40] Kalastro v. Duncan, 90 Ariz. 122, 366 P.2d 684 (1961). *Cf.* Kendzie v. O'Connell, 283 App. Div. 256, 127 N.Y.S.2d 380 (1954) (part of purchase price could have come from unknown objectionable sources).

[41] Myerson v. Myerson, 88 Ariz. 385, 357 P.2d 133 (1960); Romano v. Bono, 168 Misc. 897, 6 N.Y.S.2d 204 (Sup. Ct. 1938).

states permit corporate ownership and do not seem to encounter any major problems in imposing the same requirements upon the officers and shareholders of the corporate licensees that they would upon an individual or partnership.[42] More revealing perhaps is that corporations with publicly traded stock are sometimes exempted from the requirements imposed upon close corporations,[43] a situation which is some indication that the statutes are statements of a fictitious public policy.

Thus it is that the statutes which were designed to permit the unimpeded application of the police powers of the states and to prevent the control of retail licensees by manufacturers and brewers and persons unqualified to hold licenses have resulted in the liquor license often not being property for entirely unrelated purposes[44] and have thereby unnecessarily prejudiced the rights of financers and creditors of licensees.

III. STANDARD REMEDIES THROUGH JUDICIAL PROCESS

Setting aside the idea that what is strong and earnest public policy in one state may be thought insignificant in another, the financer must prevent the transfer of the license unless the proceeds are to be applied to the loan balance,[45] and he must do his best to prevent others from acquiring interests which may have priority over his debt. But above all, if the license is to be good security, the financer must have some means of compelling the sale of the license

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42 See ARIZ. REV. STAT. ANN. § 4-202(C) (Supp. 1966); D.C. CODE ANN. § 25-115(a)1 (1961); HAWAII REV. LAWS § 159-52(a) (Supp. 1962); ILL. ANN. STAT. ch. 43, § 120 (Smith-Hurd Supp. 1965); KY. REV. STAT. ANN. § 243.100(4) (1963); MICH. STAT. ANN. § 18.994 (Supp. 1965); N.H. REV. STAT. ANN. § 178:10 (1964); N.J. STAT. ANN. § 33:1-25 (Supp. 1965); N.Y. ALCO. BEV. CONTROL LAW § 110.2; PA. STAT. ANN. tit. 47 § 4-403(c) (Supp. 1952); TEX. PEN. CODE ANN. art. 666-18 (1952); WIS. STAT. ANN. § 176.05(13) (1957); WYO. STAT. ANN. § 12-9 (Supp. 1965).

43 CAL. BUS. & PROF. CODE §§ 23405, 24070; MASS. GEN. LAWS ANN. ch. 138, § 23 (Supp. 1966).

44 Some states even make the liquor license a special article of commerce and require that all creditors be paid in full as a condition of state approval of a requested transfer. CAL. BUS. & PROF. CODE § 24074; N.M. STAT. ANN. § 46-5-15.2.B (Supp. 1965); R.I. GEN. LAWS ANN. § 3-5-19 (Supp. 1965). It is unclear what rational connection such a policy has with the state's police powers, the basis for close and purposive regulation of the retail liquor business.

45 This can sometimes be accomplished in the lease or agreement for sale of the building approved for the license. See Fong v. Rossi, 87 Cal. App. 2d 20, 195 P.2d 854 (Dist. Ct. App. 1948); Frey v. Nakles, 380 Pa. 616, 112 A.2d 329 (1955). The license may be tied to a given location by contractual stipulation, or its transfer may be prohibited by contract. Greve v. Leger, Ltd., 42 Cal. Rptr. 464 (Dist. Ct. App. 1965) (as part of sale of license by owners of real estate).

so that the proceeds of the forced sale may be used to satisfy his obligation. The means of creating the maximum number of remedies for the creditor will vary by state, and the states may be conveniently grouped for analytical purposes.

A. Minority Procedures

A small number of states accept a liquor license as being property subject to execution process by the conventional devices: issuance of a writ of execution; levy, seizure, or both; and judicial sale. Usually these execution statutes are broadly drawn so that the definition of property upon which execution may be had is taken to include liquor licenses.[46] But even absent such statutes the courts view the creditors' problems realistically and will not deny the value of the license as an object of execution to satisfy a judgment.[47]

The liquor license may be subject to landlords' liens[48] and to the liens created by chattel mortgages.[49] In those states which are now under the Uniform Commercial Code, the liquor license, classified as a general intangible,[50] can presumably be the subject of a security interest.

In all these states the purchaser of the license at a judicial sale must meet the statutory requirements for holding a liquor license and must be approved by the state administrative agency as a transferee. He must qualify as a licensee in the same manner as one who is proposed by the transferor in a voluntary assignment. And all the states here considered do permit voluntary assignment of liquor licenses.[51] The question which naturally arises is what public interest suffers when the transfer is by operation of law instead.

[46] See D.C. CODE ANN. § 11-326 (1961); MONT. REV. CODES ANN. § 93-4306 (1964).

[47] See Duncan v. Truman, 74 Ariz. 328, 248 P.2d 879 (1952); Nelson v. Naranjo, 74 N.M. 502, 395 P.2d 228 (1964).

[48] Yarbrough v. Villeneuve, 160 So. 2d 747 (Fla. 1964).

[49] See, *e.g.*, Hubbard v. Jebb, 163 So. 2d 307 (Fla. Dist. Ct. App. 1964); Schieche v. Pasco, 88 Idaho 36, 395 P.2d 671 (1964); Focas v. Lampe, 4 CCH INST. CREDIT GUIDE ¶ 99156 (Md. Cir. Ct. 1963); Commercial Acceptance Corp. v. Benvenuti, 341 Mich. 100, 67 N.W.2d 129 (1954) (ordering specific performance to implement the terms of the chattel mortgage); Nicolini v. Langermann, 104 S.W. 501 (Tex. Civ. App. 1907). Roodvoets v. Anscer, 308 Mich. 360, 13 N.W.2d 850 (1944) held that a chattel mortgage for a term beyond the expiration of the liquor license necessarily refers to the renewals of the license. *But cf.* Niles v. Mathusa, 162 N.Y. 546, 57 N.E. 184 (Ct. App. 1900) holding a liquor tax certificate (the then license) not to be a chattel within the meaning of the chattel mortgage act.

[50] UNIFORM COMMERCIAL CODE § 9-106 [hereinafter cited as UCC].

[51] New Mexico also permits liquor licenses to be leased, with the usual qualification that the state must approve the lease agreement and the lessee. See Valley Country Club v. Mender, 64 N.M. 59, 323 P.2d 1099 (1958).

B. Majority Procedures

Since the new licensee is subject to the same investigation and requirements in both types of transfer, voluntary or by operation of law, the state is fully protected in either instance. But most of the statutes expressly prohibit any execution process against the liquor license.[52] The reasons seem to be twofold: the fear that if the license is subject to foreclosure on a judgment, the creditor will exercise a measure of control over the conduct of the licensed business; and the fear that the financing creditor who has not been approved by the regulatory agency,[53] may cause the licensee to do unlawful acts. Or perhaps it may be thought that merely the economic duress of owing money will cause the licensee to conduct his business unlawfully. In fact, quite the contrary is a far more accurate description of the creditor's interests and abilities. The financing creditor is aware that for violation of the statute or regulations the liquor license may be revoked and the most valuable item of his security lost entirely. Hence, the creditor is very much concerned with the proper operation of the licensed business. Also, it is simply not an accurate description of the creditor-debtor relationship at such a level when it is said that the creditor can exercise any significant measure of control over his debtor's conduct of the licensed business. It is usually all the creditor can do to make sure that the licensee's rent and taxes are paid in order to reduce the likelihood of there being superior competing creditors and lienors.

Another reason, discussed earlier,[54] for the prohibitive statutes and some of the interpretative cases arises from the confusion regarding the status of the liquor license as property where the police powers of the state are involved and its status as property as between the licensee and those with whom he does business.[55]

It is noteworthy that most of the statutes which either prohibit pledges of liquor licenses as security or make them immune to execution process for the reasons stated, specifically provide for the tem-

[52] See ARIZ. REV. STAT. ANN. § 4-204(A) (1956); CONN. GEN. STAT. ANN. § 30-14 (1960); IDAHO CODE ANN. § 23-514 (1948); ILL. ANN. STAT. ch. 43, § 119 (Smith-Hurd 1944); IOWA CODE ANN. § 123-29 (1958); KAN. STAT. ANN. § 41-326 (1963); MD. ANN. CODE art. 2B, § 56(15) (Supp. 1965); MASS. ANN. LAWS ch. 138, § 23 (1965); NEB. REV. STAT. § 53-149 (1960); N.J. STAT. ANN. § 33:1-26 (Supp. 1965); OKLA. STAT. ANN. tit. 37, § 532 (Supp. 1966); ORE. REV. STAT. § 471.301 (1)(h) (1963); TEX. PEN. CODE ANN. art. 666-13(b) (1952).

[53] By administrative regulation, the Pennsylvania Liquor Control Board must give prior approval to any person lending money to a liquor licensee.

[54] See text accompanying notes 6-29 *supra.*

[55] See statutes listed note 21 *supra.*

porary operation and subsequent sale of the license by personal representatives of decedents' estates and by receivers and trustees, whether appointed by the state courts or by bankruptcy courts.[56] At least receivers and trustees are certainly acting on behalf of creditors, about whom the state licensing agency may know nothing. Notwithstanding the court appointment or approval of the particular person, receivers and trustees as well as personal representatives would not necessarily have been approved by the state licensing agency as transferees, nor do they have to be so approved. But the public interests involved have not seemed to suffer by that lack.

IV. ALTERNATIVE METHODS OF RELIEF

A. Generally

The judgment creditor who cannot have direct execution against the liquor license (which includes the lender who could not or did not get a security interest[57] or other lien on the license) must seek other means of execution process. He is very likely limited to creditors' bills or execution proceedings supplemental to his judgment where such procedure is available. In many states special statutory provision is made for receivers,[58] but even without such authority, the court of execution can secure the debtor-licensee's signature on the transfer application forms by an order entered after the court has acquired in personam jurisdiction over the holder or other person who must sign. If the actual signature cannot be had, the court can order that as done which should have been done,[59] a common practice in actions for specific performance[60] and in other equity proceedings.[61] Although these procedures are contingent upon ap-

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[56] See text accompanying notes 103-21 *infra.*

[57] See text accompanying notes 163-75 *infra.*

[58] See ARIZ. REV. STAT. ANN. § 4-204 (1956); CAL. BUS. & PROF. CODE § 23102; HAWAII REV. LAWS § 159-94 (Supp. 1961); ILL. ANN. STAT. ch. 43, § 119 (Smith-Hurd 1944); IND. ANN. STAT. § 12-502 (1956); ME. REV. STAT. ANN. tit. 28, § 203.2 (1964); MD. ANN. CODE art. 2B, § 74(a) (Supp. 1965); MASS. ANN. LAWS ch. 138, § 23 (1932); MO. ANN. STAT. § 311.030 (1959); NEB. REV. STAT. § 53-150 (1960); N.J. STAT. ANN. § 33:1-26 (Supp. 1965); N.Y. ALCO. BEV. CONTROL LAW § 122; TEX. PEN. CODE ANN. art. 666-13(b) (1952); VA. CODE ANN. § 4-59 (1964).

[59] Campbell v. Bauer, 104 Cal. App. 2d 740, 232 P.2d 590 (Dist. Ct. App. 1951).

[60] *Cf.* Jubinville v. Jubinville, 313 Mass. 103, 46 N.E.2d 533 (1943) (license holder forced to cancel license which blocked sale of estate); Barr v. United States, 337 F.2d 693 (6th Cir. 1964) (recission of agreement of sale and retransfer of liquor license had been ordered by the state court due to fraud in the transaction).

[61] Saso v. Furtado, 104 Cal. App. 2d 759, 232 P.2d 583 (Dist. Ct. App. 1951) which is contrary to a number of decisions illustrated by Mencsik v. Mencsik, 118 N.E.2d 182 (Ohio Ct. App. 1952). But the Ohio courts have permitted receivers to take

proval of the proposed transferee by the licensing agency, even that can probably be dispensed with by appropriate court order directing the licensing agency to act as transferor and accept as transferee that person so designated by the court.[62]

B. *Ancillary Suit*

Even assuming a statute which either labels the liquor license not property subject to execution process[63] or one which, like the California and Kentucky statutes,[64] prohibits the pledging of liquor licenses, the judgment creditor still has the following remedies against the general property of the licensee: creditors' bills or execution proceedings supplemental to his judgment. They may not alone satisfy the lender, for problems of actual security and priority arise. But if coupled with a lien or security interest in the proceeds of sale, supplemental proceedings and creditors' bills will at least invoke execution process, and thus they are a satisfactory if cumbersome device for the lender. As against the debtor-licensee alone, the mere institution of such process may bring about the payment of the amount due. As against the rest of the competing world, such proceedings will at least usually establish the priority of the creditor's equitable lien as of either the date of the action's commencement or the date of service of process.[65] Since other private creditors and the federal government can do no better in such states, the institution of the ancillary suit is probably worthwhile. However, the execution creditor runs the risk of precipitating a petition in bankruptcy, as against which the equitable lien usually has not had time enough to season so as to avoid or override the rights of the trustee under section 70a of the National Bankruptcy Act.[66]

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possession and sell the businesses including the liquor license. See Little Shirley's, Inc. v. Board of Liquor Control, 120 Ohio App. 179, 201 N.E.2d 718 (1964); Rio Bar, Inc. v. State, 117 N.E.2d 522 (Ohio C.P. 1952).

62 Duncan v. Truman, 74 Ariz. 328, 248 P.2d 879 (1952) (by implication); Rigs v. Sokel, 318 Mass. 337, 61 N.E.2d 538 (1945) (by analogy); *cf.* Saso v. Furtado, *supra* note 61.

63 See authorities cited note 52 *supra.*

64 CAL. BUS. & PROF. CODE § 24076; KY. REV. STAT. ANN. § 243.660 (1963).

65 Metcalf v. Barker, 187 U.S. 165 (1902); United States v. Ruby Luggage Corp., 142 F. Supp. 701 (S.D.N.Y. 1954) (by implication); *In re* Miller, 40 F. Supp. 482 (E.D.N.Y. 1941). See Glenn, *Creditors' Rights — A Review of Recent Developments*, 32 VA. L. REV. 235, 240 (1946); Annot., 153 A.L.R. 211 (1944).

66 30 Stat. 566 (1898), as amended, 11 U.S.C. § 110(a) (1964). See *In re* Airmont Knitting & Under-Garment Co., 182 F.2d 740 (2d Cir. 1950).

C. *Creditor's Bill*

Traffic in liquor licenses appears now to exhibit about the same artificial impediments and obstacles to commerce which attended the common law restrictions on the issuance of writs of *fieri facias*[67] against choses in action. As late as the eighteenth century the chose in action was taken to be a personal, non-assignable right, not a tangible thing which admitted of levy on a writ of *fieri facias* and physical seizure.[68]

There were grants made and licenses issued by the English monarchs for the production of soap and saltpetre[69] and for the importation of playing cards.[70] A monopoly was given to the Vintners to sell wine and another given for the licensing of taverns.[71] These grantees and licensees often sold their privileges at high prices until virtually the entire practice was abolished because too many of the necessities of life came into the hands of the "patentees," who charged excessively high prices for manufacture or sale as the case might be.[72] But, like present day liquor licensees, although the grants, licenses, and monopolies were bought and sold, they were not subject to execution by the writ of a judgment creditor.[73] However, they do appear to have been considered property which would go to the assignees in bankruptcy of the holder.[74]

Judgment creditors in such cases secured the remedies they sought in the courts of chancery. Viewing these intangibles as equitable assets, chancery courts ordered the debtor to transfer the asset to his judgment creditor, the plaintiff in the equity action, or to a receiver appointed for that purpose. The asset was then valued or sold and the judgment satisfied from the proceeds. Of course, this is a description of creditors' bills which came to be applied to virtually all assets of value which the debtor had and upon which the judgment creditor could not make levy and have execution sale

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[67] "In practice, a writ of execution commanding the sheriff to levy and make the amount of a judgment from the goods and chattels of the judgment debtor." BLACK, LAW DICTIONARY (4th ed. 1951).

[68] 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW 541 (1925). Holdsworth's illustration makes it clear that even the document evidencing the chose in action could not be the subject of larceny.

[69] See Hulme, *The History of the Patent System Under the Prerogative and at Common Law*, 12 L.Q. REV. 141, 145 (1896).

[70] 4 HOLDSWORTH, *op. cit. supra* note 68, at 349.

[71] *Id.* at 347.

[72] Ladas, *Patents*, in 12 ENCYC. SOC. SCI. 19 (1934).

[73] 7 HOLDSWORTH, *op. cit. supra* note 68, at 543.

[74] *Ibid.*

at law.[75] In these proceedings the asset's value was then and is now a function of its transferability. If the debtor can sell it for money, then his creditors should be able to reach that value by creditors' bills[76] or by proceedings supplemental to the judgment which are intended as statutory substitutes for creditors' bills.[77] It is not only the historical basis for the creditor's bill which supports its use with liquor licenses, but a court assuming jurisdiction in equity will not ordinarily appoint a receiver to do what the judgment creditor could do himself. Hence, if execution at law can be had upon the liquor license there is usually no relief available in equity.[78] It does not usually matter — nor should it at all — that approval of both the sale and the buyer by the state licensing agency is required,[79] for many cases have held that despite the state restrictions, the liquor license is a valuable intangible asset which can be made available to creditors by means of the appointment of a receiver at the instance of a creditor.[80] In other states nothing is said of the value of the license, but the appointment of a receiver for execution process is accepted practice.[81]

V. ORGANIZATIONAL RELIEF

A. Partnerships as Liquor Licensees

Most states permit liquor licenses to be held by partnerships.[82]

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75 See 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 26 (1940). In *Ex parte* Butler, 1 Atk. 210, 26 Eng. Rep. 136 (Ch. 1749), the assignees in bankruptcy sold the bankrupt's governmental office as under-marshal of the city of London, for which the bankrupt had paid £900, although the office could not have been subjected to execution sale by writ of *fieri facias* and levy.

76 See Glenn, *supra* note 65, at 279.

77 Importers' & Traders' Nat'l Bank v. Quackenbush, 143 N.Y. 567, 38 N.E. 728 (1894).

78 Clark, *Receivers at the Instance of Judgment Creditors and Priorities Incident Thereto*, 17 VA. L. REV. 45, 46 (1930).

79 In bankruptcy proceedings, the failure to complete the transfer, if due to no fault of the buyer, entitles him to the return of his money. *Cf. In re* Comer & Co., 171 Fed. 261 (E.D. Pa. 1909); Snyder v. Bougher, 214 Pa. 453, 63 Atl. 893 (1906).

80 See, *e.g.*, Mollis v. Jiffy-Stitcher Co., 125 Cal. App. 2d 236, 270 P.2d 25 (Dist. Ct. App. 1954); Wolf v. Barstow, 38 So. 2d 689 (Fla. 1949) (by analogy); Rosenberg v. Borough Cordial Shop, Inc., 85 N.J. Super. 294, 204 A.2d 607 (Super. Ct. 1964). *Cf.* United States v. Blackett, 220 F.2d 21 (9th Cir. 1955).

81 Kuczek v. Kuczek, 190 Misc. 1005, 76 N.Y.S.2d (Sup. Ct. 1947); Allied Inv. Credit Corp. v. Stardust Lounge, Inc., 192 N.E.2d 801 (Ohio C.P. 1963). *Cf.* Leney & Sons, Ltd. v. Callingham & Thompson, 1 K.B. 79 (1907).

82 ALA. CODE tit. 29, § 1(a) (1958); ALASKA STAT. § 35-4-14 (1962); CAL. BUS. & PROF. CODE § 23008; COLO. REV. STAT. ANN. § 75-2-4 (21) (1963); CONN. GEN. STAT. ANN. § 30-1 (13) (1960); DEL. CODE ANN. tit. 4, § 101 (1953); D.C. CODE ANN. § 25-103(m) (1961); HAWAII REV. LAWS § 159-1 (Supp. 1961); IDAHO CODE

And, as a result, a common device used by financing creditors is the creation of a limited partnership to hold the license, the loan made by the financer constituting his "investment" in the partnership. Installment payments are provided for, and in the event those payments are not made the partnership may be terminated. Of course, there will usually be a recital that the liquor license has been contributed by the limited partner (whose money will in fact have been used to purchase the license). If the partnership is terminated, ownership of the license vests in the limited partner.[83]

(1) Advantages.—Except perhaps in California[84] and Kentucky,[85] there is no legal impediment to such an arrangement. The limited partner must, of course, be approved by the state agency. In addition to the usual registration of the limited partnership agreement,[86] the document may have to be shown to the state administrative agency,[87] and, for the protection of the financer, its existence should be made known to that state agency.[88] The rest is a matter of partnership law, with nothing in the arrangement contrary to

ANN. § 23-902(e) (Supp. 1965); ILL. ANN. STAT. ch. 43, § 120(9) (Smith-Hurd Supp. 1965); IND. ANN. STAT. § 12-448(b) (1956); KY. REV. STAT. ANN. § 243.100(4) (1963); LA. REV. STAT. ANN. § 26:79(B) (1951); ME. REV. STAT. ANN. tit. 28, § 201 (1964); MICH. STAT. ANN. § 18.994 (Supp. 1965); MO. ANN. STAT. § 311.030 (1963); MONT. REV. CODES ANN. § 4-402(6) (1957); NEB. REV. STAT. § 53-103(12) (Supp. 1965); NEV. REV. STAT. § 369.080 (1959); N.H. REV. STAT. ANN. § 181:3 (1964); N.J. STAT. ANN. § 33:1-1(r) (Supp. 1965); N.M. STAT. ANN. § 46-1-1 (1953); N.Y. ALCO. BEV. CONTROL LAW § 3(22); N.D. CENT. CODE § 5-05-03(4) (1959); OHIO REV. CODE § 4301.01(B)(8); OKLA. STAT. ANN. tit. 37, § 506(19) (Supp. 1966); PA. STAT. ANN. tit. 47, § 1-102 (1952); VT. STAT. ANN. tit. 7, § 2 (1959); WASH. REV. CODE § 66.04.010(21) (1962); WIS. STAT. ANN. § 176.01(13) (1961); WYO. STAT. ANN. § 12-2(1) (1957).

[83] Part of a typical limited partnership agreement is reprinted in the Report of the Subcommittee on Alcoholic Beverage Control to the 1959 Special Session of the California Legislature:

> The limited partner has contributed the liquor license; the agreed value of the license is $9,000; he is not required to make any further contribution to the partnership; the license shall be returned to him upon the termination of the partnership; he shall receive a guaranteed $200 per month; upon the termination of the partnership the license reverts to him; the general partners shall pay all debts of the partnership; the general partners shall not use the license to obtain any credit nor allow any liability to be placed against it. Subcommittee on Alcoholic Beverage Control, *ABC in California* (1953-55), Vol. 4, No. 1, California Legislature, Special Sess. 69 (1959).

[84] CAL. BUS. & PROF. CODE § 24076.

[85] KY. REV. STAT. ANN. § 243.660 (1963).

[86] UNIFORM LIMITED PARTNERSHIP ACT § 2 The hazards in failing to properly register the limited partnership agreement are well known. A recent reminder is Vidricksen v. Grover, 363 F.2d 372 (9th Cir. 1966) holding the negligent party liable as a general partner in bankruptcy proceedings. *Id.* at 373.

[87] See authorities cited note 89 *infra* and notes 37-41 *supra* concerning the requirements of full disclosure.

[88] *Ibid.*

public policy, provided that the state statute permits limited partnerships to hold liquor licenses and that all interested parties are of record with the state — silent partners and other undisclosed interests are usually deemed violative of public policy.[89]

(2) Disadvantages.—The limited partnership is obviously preferred so as to avoid the possible liability that a general partner might incur. Unless there is some statutory limitation on the number of ownership interests in liquor licenses,[90] the financer can do business in this manner and protect his interests as against the general partners (the "true" licensees). But the limited partner, assuming he can get no other rights as a lienor of the license, will have to "police" his security, the licensed business. For as against creditors of the partnership and its trustees in bankruptcy, his interest is apt to be subordinate, even though his interest will be prior to those of the general partners upon dissolution and liquidation of the partnership assets.[91] Hence, the financing creditor as a limited partner should, to the extent practical, try to prevent the creation of any major indebtedness and see to the payment of taxes and rent. The limited partner is helped in this regard by the usual alcoholic beverages statutes which severely limit[92] and sometimes entirely prohibit

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[89] See, *e.g.*, Price v. Marcus, 199 Okla. 356, 185 P.2d 953 (1947) (and cases cited therein). In Smith v. Nix, 206 Ga. 403, 57 S.E.2d 275 (1950), the executrix of an alleged silent partner was not able to maintain an action for receivership and an accounting of the partnership affairs. The court stated: "There can be no such thing . . . as a silent or dormant partner in the liquor business." *Id.* at 406, 57 S.E.2d at 278. See Romano v. Bono, 168 Misc. 897, 6 N.Y.S.2d 204 (Sup. Ct. 1938). *But see* Romanus v. Biggs, 214 S.C. 145, 51 S.E.2d 503 (1949) and the even more extreme decision in *Ex parte* Rosenfeld, 214 S.C. 39, 51 S.E.2d 88 (1948).

[90] See authorities cited note 1 *supra*. The Colorado statute makes it

> unlawful for any person or corporation holding any license . . . or any person who is a stockholder of any corporation holding a license . . . to be a stockholder or to be interested, directly or indirectly, in any banking, loaning, or financing company, or any company of any kind whatsoever which company shall make or own, or be interested, directly or indirectly, in any loan to any licensee . . . or for any [licensed] person or corporation . . . to make any loan, or be interested, directly or indirectly, in any loan to any other licensee . . . . COLO. REV. STAT. ANN. § 75-2-15(5) (1963).

Any agreement arising out of the prohibited transactions is made void and unenforceable. COLO. REV. STAT. ANN. § 75-2-15(7) (1963).

[91] See Klebanow v. New York Produce Exch., 344 F.2d 294, 297 (2d Cir. 1965).

[92] See, *e.g.*, FLA. STAT. ANN. § 561.42(2) (1963) (permitting credit for ten days after the calendar week during which the sale was made); IND. ANN. STAT. § 12-530 (Supp. 1966) (allowing fifteen days credit after which "no wholesaler shall sell to any such retailer except for cash on delivery"; WIS. STAT. ANN. § 176.01(23) (1961) (permitting purchase by retail licensees on not more than thirty days credit). See generally Note, *Illinois Liquor Control Act Credit Restrictions*, 1 DEPAUL L. REV. 287 (1952) which briefly surveys the statutes in Illinois, Michigan, Kentucky, Massachusetts, Rhode Island, and Connecticut.

purchases on credit by licensees[93] and which may even penalize wholesalers and manufacturers who extend credit to the retail liquor licensee.[94]

B. Corporations as Liquor Licensees

(1) Avoidance of Prohibition Against Pledges of the License. —Where corporations may be licensees,[95] the impediment that the liquor license itself cannot be pledged or given as security may be overcome. The corporation can execute the various evidences of the debt and, upon default, execution may be had upon all its valuable assets, including the liquor license. The means of execution may vary from creditors' bills and supplemental proceedings with the appointment of receivers, to direct execution by issuance of a writ, or by levy and seizure of the license, depending upon the applicable state law.

(2) Organization of the Corporation.—The financing creditor can sometimes take a pledge of the stock and reserve voting privileges to his nominees. He can then create a board of directors of his own choosing and select enough directors and officers to protect his interests.[96] The registered office of the corporation may, if it need not be at the principal place of business, be at the office of the financing creditor. And, in addition, some administrative agencies will, upon request, notify financing creditors, as parties in interest, of

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[93] See, *e.g.*, KAN. STAT. ANN. § 41-702 (1964); KY. REV. STAT. ANN. § 244.040 (1) (1963); ME. REV. STAT. ANN. tit. 28, § 304 (1964); OHIO REV. CODE § 4301.24 (Supp 1965); OKLA. STAT. ANN. tit. 37, § 535(6) (Supp. 1966).

[94] See, *e.g.*, IND. ANN. STAT. § 12-530 (Supp. 1966).

[95] Most of the regulatory statutes define persons eligible to hold licenses to include corporations, or make special provision for corporate licensees. See ALA. CODE tit. 29, § 5 (1955); ALASKA STAT. § 35-4-14 (1958); ARIZ. REV. STAT. ANN. § 4-202(b) (Supp. 1965); CAL. BUS. & PROF. CODE § 23008; COLO. REV. STAT. ANN. § 75-2-4 (21) (1963); DEL. CODE ANN. tit. 4, § 101 (1953); D.C. CODE ANN. § 25-103(m) (1961); HAWAII REV. LAWS § 159-1 (1955); IDAHO CODE ANN. § 23-902(e) (1948); ILL. ANN. STAT. ch. 43, § 120(10) (Smith-Hurd 1965); IND. ANN. STAT. § 12-448(b) (1956); KY. REV. STAT. ANN. § 243.100(4) (1963); LA. REV. STAT. ANN. § 26:79(B) (1950); ME. REV. STAT. ANN. ch. 28, § 201 (1964); MICH. STAT. ANN. § 18.972(11) (1957); MO. ANN. STAT. § 311.030 (1965); MONT. REV. CODES ANN. § 4-402(6) (1965); NEB. REV. STAT. § 53-103(12) (Supp. 1965); NEV. REV. STAT. §369.190 (2)(b) (1957); N.H. REV. STAT. ANN. § 181:3 (1964); N.J. STAT. ANN. § 33.1-1 (1937); N.M. STAT. ANN. § 46-1-1 (1953); N.Y. ALCO. BEV. CONTROL LAW § 3(22); N.D. CENT. CODE § 5-05-03(5) (1959); OHIO REV. CODE § 4301.01(B)(8); OKLA. STAT. ANN. tit. 37, § 506(19) (Supp. 1965); PA. STAT. ANN. tit. 47, § 1-102 (1952); VT. STAT. ANN. tit. 7, § 2 (1959); WASH. REV. CODE ANN. § 66.04.010(21) (1961); WIS. STAT. ANN. § 176.01(13) (1961); WYO. STAT. ANN. § 12-2(1) (1957).

[96] See Flomar Bar Corp., 201 Pa. Super. 25, 191 A.2d 912 (1963) wherein the financer also accepted the signed, undated resignation of the officers of the corporate licensee, merely having a majority of the directors during the term of the loan.

any action or proceedings which the agencies may take regarding the license.

If the statute or administrative regulations are realistic, little of the foregoing will present serious problems of administration and control or of public policy. Usually, all the directors or officers and sometimes the major stockholders of the corporate liquor licensee will be required to obtain the approval of the licensing agency,[97] and ordinarily that would include pledgees of the stock as well. Thus, public policy favoring full disclosure of all interested parties has been implemented.[98]

(3) Default.—In the event of default, the financing creditor's nominees, as directors, can change the officers and replace the manager of the licensed business. He can sell the pledged stock, presumably in any commercially reasonable manner.[99] Any of these remedies as efforts at debt collection are usually subject to the approval of the state administrative agency; certainly the sale of the license will be, even if that sale takes place indirectly by selling or assigning the capital stock of the corporation in whose name the license is issued.[100]

One practical problem of administration arises in the approval of the sale or transfer of a liquor license to a publicly held corporation, or to one with a large number of stockholders and officers. As it does not seem worthwhile to investigate all those who in a small or close corporation would be examined as regards their individual suitability to hold a liquor license, a statutory exception is sometimes provided for corporations, the stock of which is publicly traded or who must file reports with the Securities and Exchange Commission.[101] Thus, the California prohibition against pledging the stock of a corporate licensee also excepts such corporations.[102]

[97] See, *e.g.*, Commonwealth v. Price Bar, Inc., 203 Pa. Super. 481, 201 A.2d 221 (1964); Roxy Wines & Liquor Corp. v. New York State Liquor Authority, 5 Misc. 2d 343, 159 N.Y.S.2d 926 (Sup. Ct. 1957). *Cf.* Flomar Bar Corp., *supra* note 96.

[98] An action brought by the administratrix of the alleged secret owner of stock in a corporate licensee was dismissed because the secret ownership of the decedent violated the Alcoholic Beverage Control Law. Flegenheimer v. Brogan, 259 App. Div. 347, 30 N.E.2d 591, 19 N.Y.S.2d 343 (1940).

[99] UCC § 9-504.

[100] See CAL. BUS. & PROF. CODE § 24070. HAWAII REV. LAWS § 159-41 (Supp. 1961) prohibits changes without state approval of more than twenty-five percent of the capital stock or lesser changes which give the transferee twenty-five percent or more of the outstanding capital stock; LA. REV. STAT. ANN. § 26:79B (1950); MASS. ANN. LAWS ch. 138, § 23 (1965); MICH. STAT. ANN. § 18.994 (Supp. 1965).

[101] CAL. BUS. & PROF. CODE § 24070; MASS. ANN. LAWS ch. 138, § 23 (1965); N.M. STAT. ANN. § 46-5-15G (Supp. 1965).

[102] CAL. BUS. & PROF. CODE §§ 23405, 24070.

Apart from the question of whether small and close corporations are not being denied the equal protection of the laws, a financer can presumably avoid the California statute by simply becoming a large enough corporation. But again, as in financing by limited partnership, the creditor must pay rather close attention to the conduct of the licensed business, at least insofar as is necessary to avoid other large debts which might have priority in the event of sale, either voluntarily or judicially, of the liquor license or of the entire licensed business. This follows from the fact that, by hypothesis, no direct lien or security interest can be had upon the liquor license itself; hence, the financing creditor cannot by the conventional means — were a liquor license not involved — gain a position of priority over other creditors.

VI. EFFECTS OF LICENSEE'S BANKRUPTCY

A. Generally

If the individual or corporation is insolvent and has been adjudicated a bankrupt, the right of the trustee or receiver to sell the license as an asset of the bankrupt estate is rarely questioned. Some statutes make specific provision for the sale of the liquor license and for temporary operation of the licensed business by the trustee in order to expedite his sale of the license pursuant to statutory authority.[103] But even absent explicit statutory rights, section 70a of the National Bankruptcy Act[104] was immediately interpreted as giving the trustee the power to sell, even though the transferability of the liquor license depended upon the consent of an administrative body which was not then a party to the proceedings.[105]

There had been ample precedent for this interpretation in that stock exchange seats were consistently held property which the bankrupt could by any means have transferred[106] within the meaning of section 70a.[107] Such property could be ordered assigned to the

[103] See ARIZ. REV. STAT. ANN. § 4-204A (1956); CAL. BUS. & PROF. CODE §§ 24071, 23102; CONN. GEN. STAT. REV. § 30-14 (1958); HAWAII REV. LAWS § 159-94 (Supp. 1961); ILL. ANN. STAT. ch. 43, § 119 (Smith-Hurd 1944); IND. ANN. STAT. § 12-502 (1956); KY. REV. STAT. ANN. § 243.640 (1963); LA. REV. STAT. ANN. § 26:75 (Supp. 1965); ME. REV. STAT. ANN. ch. 28, § 203.2 (1964); MD. ANN. CODE art. 2B, § 74(a) (Supp. 1963); NEB. REV. STAT. § 53-149 (1960); N.J. STAT. ANN. § 33:1-26 (1965); TEX. REV. CODE ANN. art. 666-13(b) (1952); VA. CODE ANN. tit. 4, § 59 (Supp. 1964).

[104] 30 Stat. 566 (1898), as amended, 11 U.S.C. § 110(a) (1964).

[105] Fisher v. Cushman, 103 Fed. 860 (1st Cir. 1900).

[106] 30 Stat. 566 (1898), as amended, 11 U.S.C. § 110(a)(5) (1964).

[107] *Ibid.*

trustee from the holder or directly to the purchaser from the trustee.[108] These decisions were interpreted as having firmly established that if the asset was transferable by the bankrupt's sale for a valuable consideration, then the bankruptcy court could order such a sale and compel the bankrupt to sign the appropriate forms. The fact that a liquor license is subject to the police powers of the states and, unlike a stock exchange seat, is not a privately created right was not considered decisive.[109] The liquor license, insofar as it had a transfer value in excess of its annual renewal fee, was taken to represent capital; as such it ought to be made available to the bankrupt's creditors.[110] At the same time, another bankruptcy court had no stated reservations about the sale of a liquor license by the trustee and the application of the proceeds to the bankrupt's estate.[111] Since that decision there has been almost no impediment to liquor licenses being taken as part of the bankrupt's estate and sold by the trustee or receiver.[112]

Of course, the sale by the trustee is subject to the approval of the appropriate licensing agency or, in some cases, to police approval, since any proposed transferee must meet the same requirements as the original licensee.[113] But by analogy to the stock exchange seat cases,[114] a bankruptcy court presumably could compel the licensing agency to accept a buyer as a licensee so long as he met the statutory and administrative requirements; to the extent that such rules and regulations unjustifiably prevented the transfer, the bankruptcy court could probably declare them a nullity.[115]

B. Termination of License Upon Showing of Insolvency

Note that at least one statute provides for termination of the liquor license upon a showing of insolvency.[116] The result is that an adjudication in bankruptcy destroys the very asset which would be

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[108] Sparhawk v. Yerkes, 142 U.S. 1 (1891); Hyde v. Woods, 94 U.S. 523 (1877).

[109] Fisher v. Cushman, 103 Fed. 860, 863 (1st Cir. 1900).

[110] *Id.* at 865.

[111] *In re* Myers, 102 Fed. 869 (E.D. Pa. 1900).

[112] *E.g.*, Tracy v. Ginzberg, 205 U.S. 170 (1907); *In re* Brewster-Raymond Co., 344 F.2d 903 (6th Cir. 1965); Citrigno v. Williams, 255 F.2d 675 (9th Cir. 1958); *In re* Quaker Room, 90 F. Supp. 758 (S.D. Cal. 1950); *In re* Fuetl, 247 Fed. 829 (D. Conn. 1917); *In re* Johnson, 224 Fed. 180 (W.D. Wash. 1915).

[113] See *In re* Fuetl, *supra* note 112, at 832. Most of the present regulatory statutes have the same requirement.

[114] Sparhawk v. Yerkes, 142 U.S. 1 (1891); Hyde v. Woods, 94 U.S. 523 (1877).

[115] *Cf.* Londheim v. White, 67 How. Pr. 467, 471-73 (N.Y. City Ct. 1884).

[116] PA. STAT. ANN. tit. 47, § 4-468(b) (1952).

sold for the benefit of the bankrupt's creditors.[117] Chapter XI proceedings,[118] which do not necessarily evidence true insolvency but merely the inability to pay debts as they mature,[119] do not result in the loss of the license, and it may therefore be sold by the receiver, trustee, or the debtor in possession. By definition of the problem, except in those states which do allow liens or execution process on licenses,[120] there will be no secured creditor to object as far as the license is concerned. And, notwithstanding the admonition of the cases interpreting section 313(2),[121] the writer has seen several such sales accomplished without untoward difficulty in Chapter XI proceedings.

VII. COMPETING FEDERAL TAX LIENS

A. Property v. Privilege

With the conspicuous exception of *Paramount Fin. Co. v. S & C Tavern, Inc.*,[122] of which more needs to be said, the federal and state courts appear to have uniformly construed the language of section 6321 of the Internal Revenue Code of 1954[123] as giving the federal government the status and rights of a lien creditor of the delinquent taxpayer from the date the taxpayer receives notice of the tax lien.[124] As against other lien creditors or secured parties, the tax lien is notice to them as of the date of record filing[125] and takes its priority position at that time,[126] based on the federal common law rule so often reiterated that it is now described as a cliche:[127] the first lien in time is first in right.[128] Although there has been much dispute as to

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117 *In re* Union Foods, Inc., 54 F. Supp. 421 (E.D. Pa. 1944).

118 30 Stat. 544 (1898), as amended, 11 U.S.C. §§ 701-99 (1964).

119 See Paragraph 3 of Form 48, 11 U.S.C. 2048 (Appendix 1964).

120 See authorities cited note 44 *supra.*

121 National Bankruptcy Act § 313(2), added by 52 Stat. 906 (1938), 11 U.S.C. § 713(2) (1964). See generally Annot., 24 A.L.R.2d 1214 (1952).

122 245 F. Supp. 766 (N.D. Ohio 1965).

123 The language is as follows: the federal tax lien "shall be a lien . . . upon all property and rights to property." INT. REV. CODE of 1954, § 6321.

124 INT. REV. CODE OF 1954, § 6321 (formerly INT. REV. CODE OF 1939, § 3670, 53 Stat. 448). Many of the case references are to this earlier enactment.

125 INT. REV. CODE OF 1954, § 6323 (formerly INT. REV. CODE OF 1939, § 3672, 53 Stat. 449).

126 *Ibid.*

127 United States v. Harris, 249 F. Supp. 221, 223 (W.D. La. 1966).

128 See United States v. City of New Britain, 347 U.S. 81, 85 (1954); United States v. Crest Fin. Co., 291 F.2d 1, 3 (7th Cir.), *vacated and remanded*, 368 U.S. 347 (1961).

whether a liquor license consitutes property or a right to property,[129] and notwithstanding existing state law to the contrary,[130] liquor licenses have been subject to seizure and sale by the federal government, and the state courts passing on the question have upheld this practice.[131] Perhaps this inconsistency occurs because such matters are removable to the federal courts[132] which make short shrift of the privilege-property distinction as a barrier to the collection of federal taxes.[133]

In most of the state court cases, the liquor license was questionable property for purposes of execution process by any private judgment creditor. The statutes, at least, were fairly explicit on that point.[134] However, the courts have generally granted motions for the appointment of receivers in supplemental proceedings by judgment creditors, a procedure followed in *United States v. Blackett*,[135] in which distribution of the sale proceeds as between the competing private judgment creditor and the federal tax lien was finally determined by the federal courts.[136]

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129 See Golden v. State, 133 Cal. App. 2d 640, 285 P.2d 49 (Dist. Ct. App. 1955); Mollis v. Jiffy-Stitcher Co., 125 Cal. App. 2d 236, 270 P.2d 25 (Dist. Ct. App. 1954). In Boss Co. v. Board of Comm'rs, 40 N.J. 379, 192 A.2d 584 (1963), the court ordered sale to the transferee of the Internal Revenue Service although explicitly stating that liquor licenses in New Jersey are not subject to "lien, levy, attachment, execution, seizure for debts or the like." *Id.* at 388, 192 A.2d 588.

130 State law is supposedly determinative of the question as to what is property. See United States v. Bess, 357 U.S. 51, 55-57 (1954); United States v. Sullivan, 333 F.2d 100, 111 (3d Cir. 1964); United States v. American Nat'l Bank, 255 F.2d 504, 507 (5th Cir. 1958), *cert. denied*, 358 U.S. 835 (1958); Note, *Property Subject to the Federal Tax Lien*, 77 HARV. L. REV. 1485 (1964).

131 See cases cited note 129 *supra*.

132 28 U.S.C. § 1441 (1964). See *Hearings on H.R. 11256 and H.R. 11290 Before the House Committee on Ways and Means*, 89th Cong., 2d Sess. 20 (1966).

133 Barr v. United States, 337 F.2d 693, 696 (6th Cir. 1964); Division of Labor Law Enforcement v. United States, 301 F.2d 82, 84-85 (9th Cir. 1962); United States v. Blackett, 220 F.2d 21 (9th Cir. 1955); Deitsch v. Board of Liquor License Comm'rs, 58-1 U.S. Tax Cas. 68334, 68336 (Baltimore Md. City Ct. 1958).

134 With reference to Deitsch v. Board of Liquor License Comm'rs, *supra* note 133, MD. ANN. CODE art. 2B, § 72 (1957) provides that "licenses . . . shall not be regarded as property or as conferring any property rights." With reference to Boss Co. v. Board of Comm'rs, 40 N.J. 379 192 A.2d 584 (1953), see N.J. STAT. ANN. § 33:1-26 (Supp. 1958) and concerning Golden v. State, 133 Cal. App. 2d 640, 285 P.2d 49 (1955), see CAL. BUS. & PROF. CODE § 24076 (Supp. 1965). However, in California, liquor licenses had been held not to be personal property for purposes of taxation by the state. Roehm v. County of Orange, 32 Cal. 2d 280, 196 P.2d 550 (1948).

135 220 F.2d 21 (9th Cir. 1955).

136 The later change in CAL. BUS. & PROF. CODE § 24076 prohibiting the pledging or use of liquor licenses as security probably would not have made any difference, since there appeared to be no agreement creating the debt between the judgment creditors and the licensee that pledged the license for security in United States v. Blackett, 220 F.2d 21 (9th Cir. 1955).

B. *Confusion*

There is consistency only in the results: the federal tax lien does attach; the liquor license can be sold to create a fund. But whether the lien attaches to the liquor license or to the proceeds of its sale — and that does make a difference — does not seem finally determined. Moreover, as against what other liens the tax lien will have priority is not answered by recourse to any general rule relating to liquor licenses.[137]

The state regulatory statutes seem to preclude any seller, lender, or creditor from acquiring a lien under state law. And the federal government is quite bold enough to argue that a liquor license is property subject to execution sale for payment of tax liens (*i.e.*, federal law applies) and at the same time argue that the license is not property as to which a private creditor, chattel mortgagee, or secured party can have any interest which will entitle him to invoke execution process and compete with the federal tax lien (*i.e.*, state law applies).[138] Admittedly, private judgment creditors have not failed to use the converse of that argument,[139] but one expects more consistency of the Commissioner.

C. *Confusion Resolved?*

The problem posed is not one of a state-created exemption which cannot interfere with the right of the federal government to collect taxes[140] but rather concerns which law will determine what is property, and for what purpose, and also relates to whether the competing parties have the right to invoke the law of their pleasure at the moment of contest. The Ninth Circuit did seem to answer part of that compound question, suggesting that if the liquor license was not property under federal law and, therefore, not subject to the federal

137 Where a federal tax lien is asserted, priorities between liens is a federal question. United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950). See Note, *Federal Priorities and Tax Liens*, 63 COLUM. L. REV. 1259 (1963).

138 Paramount Fin. Co. v. S & C Tavern, Inc., 245 F. Supp. 766, 769 (N.D. Ohio 1965).

139 In United States v. Blackett, 220 F.2d 21 (9th Cir. 1955), the judgment creditor argued that the license was not property or a right to property subject to a federal tax lien, but the creditor had presumably conceded it to be something of value, for purposes of supplemental proceedings, as a result of which the license was sold for $1620. The court took yet a third position, namely, that the government had not imposed its lien on the liquor license "but upon the sale taking place" which constituted the right to property; the proceeds of the sale were then the property of the delinquent taxpayer and subject to all valid liens, of which the first in priority was held by the federal government. *Id.* at 23.

140 See generally Annot., 174 A.L.R. 1373, 1384-86 (1948).

tax lien (as argued by the execution plaintiff in the supplemental proceedings equivalent to a creditors' bill),[141] then neither was it property subject to execution process in the state courts.[142] But several state appellate courts have refused to consider the license property subject to private execution process, while conceding its value as property or a right to property subject to seizure and sale by the federal government.[143] Other state courts have merely held the license not to be property, not having had the federal government as execution creditor in their courts.[144]

Of course the federal government in seizing the liquor license is asserting either that the license is property or a right to property or that the proceeds of the sale constitute property.[145] In the usual case the federal government asserts either or both depending upon its priority and the nature and status of the competing liens.

However, faced squarely with the question of whether the federal government could seize and sell an Ohio liquor license, a federal district court recently held that according to state law a license could not be subject to any type of execution process to satisfy a debt — quite ignoring the appointment of receivers in foreclosure in at least three earlier-reported state cases.[146] Reciting the usual liturgy that the license is a mere personal privilege,[147] the court concluded that the liquor license was not property (nor presumably a right to property) within the meaning of section 6321 of the Internal Revenue Code.[148] Thus, the chattel mortgagee, with a broad recitation of personal property covered by the mortgage, prevailed and was held to have the only right to the fund created by the sale of the entire business, including its tangible personal property and the liquor license.[149]

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141 United States v. Blackett, 220 F.2d 21, 23 (9th Cir. 1955).

142 *Ibid.*

143 See, *e.g.*, Boss Co. v. Board of Comm'rs, 40 N.J. 379, 192 A.2d 584 (1963).

144 See, *e.g.*, Abraham v. Fioramonte, 158 Ohio St. 213, 107 N.E.2d 321 (1952); Papatheodoro v. Department of Liquor Control, 118 N.E.2d 713 (Ohio C.P. 1954).

145 These are the explicit limits of the statute, INT. REV. CODE OF 1954, § 6321.

146 Allied Inv. Credit Corp. v. Stardust Lounge, Inc., 192 N.E.2d 801 (Ohio C.P. 1963). *Cf.* Little Shirley's, Inc. v. Board of Liquor Control, 120 Ohio App. 179, 201 N.E.2d 718 (1964); Rio Bar, Inc. v. State, 117 N.E.2d 522 (Ohio C.P. 1954).

147 Paramount Fin. Co. v. S & C Tavern, Inc., 245 F. Supp. 766, 768-69 (N.D. Ohio 1965).

148 *Id.* at 772.

149 While the Ohio courts have held that a liquor license could not be the subject of a chattel mortgage and could not be levied upon, Abraham v. Fioramonte, 158 Ohio St. 213, 107 N.E.2d 321 (1952); Allied Inv. Credit Corp. v. Stardust Lounge, Inc., 192 N.E. 2d 801 (Ohio C.P. 1963), one would have thought the distinction between the

The result of these decisions is that although there can be no lien or security interest in the liquor license, a chattel mortgagee or secured party as to the tangible personal property can compel full execution process by a receivership and have the proceeds of the entire sale, including the liquor license and the tangible personal property, paid over to him. Perhaps, as the court indicated, the license without the business is in fact valueless. It is also true that the business without the license is of little value. The synergism, however, does create an asset of considerable value.[150]

Yet Ohio is not alone in this phantasy. California prohibits the sale of the liquor license itself for a price in excess of six thousand dollars,[151] while the licensed businesses are in fact sold for prices ranging up to at least forty thousand dollars.[152] Either the value of the tangible personal property and the cost of procuring or assigning a lease are simply inflated to conform with the statutory mandate or the seller of the liquor license must resort to unlawfully taking consideration much in excess of the six thousand dollar limitation.[153]

The federal government, however, seizes only the rights which its delinquent taxpayer had, including the right to transfer the license to a designated person, if approved, and it takes the taxpayer's rights subject to their alienation prior to the recording of the tax lien.[154] If the delinquent taxpayer has validly assigned the right to the proceeds of sale, when and if that sale takes place, the rights of the federal government may be diminished to that extent, for its rights can rise no higher than those of the person whose property or right to property is seized.[155] Hence, if the delinquent taxpayer could not, at the time the tax lien was recorded, have kept the proceeds of sale as against a secured party whose collateral consisted

levy and the execution process by means of receiverships was sufficiently idle to have been easily finessed.

150 Together, the tangible personal property and the liquor license were sold for $11,600 in Allied Inv. Credit Corp. v. Stardust Lounge, Inc., *supra* note 149.

151 CAL. BUS. & PROF. CODE § 24079.

152 ALCHIAN & ALLEN, UNIVERSITY ECONOMICS 301 (1964), as cited in Barron, *Business and Professional Licensing-California, A Representative Example*, 18 STAN. L. REV. 640, 648 (1966). See the "Business Opportunities" section of the Sunday New York Times which usually advertises taprooms for sale at prices up to $250,000, exclusive of the real estate.

153 Barron, *supra* note 152, at 660. A similar practice existed under the prior statute. See Comment, *The State Board of Equalization and Liquor Control*, 38 CALIF. L. REV. 875, 879-81 (1950).

154 United States v. Lester, 235 F. Supp. 115 (S.D.N.Y. 1964).

155 See Equitable Life Assur. Soc'y of the United States v. United States, 331 F.2d 29 (1st Cir. 1964) in which it was stated: "[I]n matters of substance the government's lien cannot rise above the rights of the taxpayer." *Id.* at 33.

solely of those proceeds, neither perhaps can the federal government retain them as against the perfected security interest of a competing creditor.

VIII. Possible Application of Article 9 of the Uniform Commercial Code

The privileges of a liquor licensee include not only the right to conduct a certain kind of business but also — and most important for creditors' purposes — the exclusive right to choose his successor as the next holder of the license. Although the right is qualified in that the proposed assignee or transferee must be approved by the state licensing agency,[156] it is certainly a valuable right, one which, without more, has been held an asset subject to state inheritance tax.[157]

In the usual course of buying and selling liquor licenses, the holder will execute and file the applications for transfer pursuant to an agreement of sale with the proposed transferee, who must then see to his own approval by the state licensing agency. Of course, upon the execution of the agreement of sale, there is a bilateral contract in existence, the assignment of which — including the right to proceeds as collateral — presents no difficulties under the Uniform Commercial Code[158] or at common law.[159]

More important than questions of collateral is the question of whether a private lender can have a security interest in the proceeds of the sale of a liquor license, even if he cannot have any kind of lien on the license itself,[160] either because of a blanket prohibition, as in California[161] and Kentucky,[162] or because the license is not property for that purpose under the state law.

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156 See authorities cited note 100 *supra.*

157 Feitz Estate, 402 Pa. 437, 167 A.2d 504 (1961), holding that the value of the statutory right to apply after death for the transfer of a restaurant liquor license owned by a decedent at the time of his death is taxable for inheritance tax purposes. The court felt that "to hold otherwise, is to ignore the practicalities of the situation and to substitute abstract theories for the realities of the market place." *Id.* at 445, 167 A.2d at 508.

158 UCC § 9-105(c) provides that "Collateral" includes contract rights, and "Contract right" as defined in UCC § 9-106 includes the rights of the transferor to payment not yet earned by performance.

159 Great Am. Indem. Co. v. Allied Freightways, Inc., 325 Mass. 568, 91 N.E.2d 823 (1950) (dealing with ICC Franchise).

160 UCC § 9-306(3) seems to require that there be a perfected security interest in the collateral in order that a security interest may be obtained in the proceeds.

161 Cal. Bus. & Prof. Code § 24076.

162 Ky. Rev. Stat. § 243.660 (1963).

A. General Impediments to Such Security

The impediment to a security interest in the proceeds of a sale — that no lien of a chattel mortgage or security interest can be created in property not then in existence[163] — remains a problem in states prohibiting the direct imposition of consensual liens upon liquor licenses.[164] Although financing statements covering the proceeds of sale of a liquor license could be filed beforehand,[165] the security interest is probably not perfected until the collateral (the proceeds of sale) comes into existence. Since the chattel mortgagee or secured party is not apt to have a perfected lien until the sale takes place, his right to the proceeds will be deemed to have been created immediately before the filing of a petition in bankruptcy and is, therefore, subject to being set aside as a preferential transfer under section 60a(2) of the National Bankruptcy Act.[166] An analogous situation exists in regard to rebates of liquor license fees where the assignment of the license fee to be rebated, whether recorded or not, creates only an equitable lien[167] which will be subordinate to the liens of judgment creditors instituting execution proceedings[168] and may be set aside as a preferential transfer by a trustee in bankruptcy.[169] The rebate of license fees not yet in existence may be indistinguishable in principle from the situation in which the creditor attempts to obtain a security interest in the proceeds of the sale of the liquor license

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163 In the Matter of Farmers Fed'n Co-op., Inc., 242 F. Supp. 440 (W.D.N.C. 1965).

164 See notes 46, 52 *supra* and accompanying text. Since statutes and case law label the liquor license a privilege and and not property (see authorities cited notes 20-21 *supra* and accompanying text), a consensual lien — and, to be consistent, any lien — is impossible.

165 In the Matter of United Thrift Stores, Inc., 242 F. Supp. 714 (D.N.J. 1965) *aff'd*, 363 F.2d 11 (3d Cir. 1966).

166 *Cf.* Matter of Ideal Mercantile Corp., 143 F. Supp. 810, 813-14 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 828 (2d Cir.), *cert. denied*, 355 U.S. 856 (1957).

167 Alchar Realty Corp. v. Meredith Restaurant, 256 App. Div. 853, 854, 8 N.Y.S. 2d 733, 734 (1939).

168 City of New York v. Bedford Bar & Grill, Inc., 285 App. Div. 1202, 140 N.Y.S. 2d 762 (1955) (and cases cited therein), *aff'd*, 2 N.Y.2d 429, 141 N.E.2d 575, 161 N.Y.S.2d 575 (1957); Atlas Advertising Agency, Inc. v. Casa Cubana, Inc., 259 App. Div. 951, 19 N.Y.S.2d 900 (1940). *But cf.* Capitol Distribs. Corp. v. 2131 Eighth Ave., Inc., 285 App. Div. 541, 139 N.Y.S.2d 117 (1955), *aff'd*, 1 N.Y.2d 842, 135 N.E.2d 726, 153 N.Y.S.2d 222 (1956).

169 See *In re* Silver Cup Bar & Grill, Inc., 50 F. Supp. 528 (S.D.N.Y. 1942); Calligar, *Subordination Agreements*, 70 YALE L.J. 376, 396 (1961) (and cases cited therein). *Cf. In re* Wechsler, 27 F. Supp. 301 (S.D.N.Y. 1939).

The same result obtains where the competing claimants are the licensee's assignee for benefit of creditors and a creditor who took a prior assignment of any monies which might become due to the licensee if the license were terminated. The prior assignee had only an equitable lien. In the Matter of Guarino, 285 App. Div. 1161, 140 N.Y.S.2d 370 (1955).

where there is not yet a contract of sale in existence, to say nothing of the proceeds of such an expected sale. But where there are no third-party claimants, the equitable lien which attaches when the proceeds come into being will be good as between the parties.[170]

B. *A Security Interest Under Article 9*

Prior to any contract of sale and transfer, the license might be termed a "general intangible" within the meaning of section 9-106 of the Uniform Commercial Code, and thus validly be the subject of a security interest[171] even though the license did not then represent any right to the payment of money upon any specific performance so as to become an account, nor could it reasonably be categorized as a contract right in the sense of some called-for performance, the completion of which would then create a right to the payment of money. It appears that the drafters of article 9 intended the category of "general intangibles" to cover such similar valuables for purposes of commercial collateral as stock and commodity exchange seats.[172] Some commentators suggest a classification of intangibles which do not directly involve the payment of money and do not arise under a conventional contract and that a subdivision into rights which cannot be fully transferred without approval by some public authority is comprehended by section 9-106.[173] Even if its validity is questionable as against other creditors, nothing is lost by an attempt to obtain a se-

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170 See Capitol Distribs. Corp. v. 2131 Eighth Ave., Inc., 285 App. Div. 541, 139 N.Y.S.2d 117 (1955), *aff'd*, 1 N.Y.2d 842, 135 N.E.2d 726, 153 N.Y.S.2d 222 (1956).

171 The right to create liens in franchises existed under the chattel mortgage acts. *In re* Rainbo Express, Inc., 179 F.2d 1 (7th Cir.), *cert. denied*, 339 U.S. 981 (1950); First Nat'l Bank v. Holliday, 47 F.2d 67 (5th Cir. 1931). *Cf.* Freiderick v. Dockery, 209 F.2d 677 (8th Cir. 1944) (the certificate of public convenience was not listed in chattel mortgage; the court implies that had it been done, the chattel mortgagee would have had a valid lien); In the Matter of Independent Truckers, Inc., 226 F. Supp. 440 (D. Neb. 1963) (failure to record assignment of certificate of public convenience created a mere equitable lien not valid as against a trustee in bankruptcy). And it appears that something closely resembling a security interest could be created by the assignment of rights in an agreement to sell ICC certificates of convenience and the proceeds which might come due to the assignor under the agreement. Great Am. Indem. Co. v. Allied Freightways, Inc., 325 Mass. 568, 91 N.E.2d 823 (1950). However, in the *Allied* case the creditor took an assignment of an existing contract right, the agreement to sell the certificate of convenience, and the state court held the assignee to be a secured creditor in state receivership proceedings. The same factors obtain in these cases as with liquor licenses: the value of the "collateral" is entirely dependent upon the approval of one not a party to the agreement creating the assignee's interest—the licensing or other administrative agency.

172 1 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 12.5, at 380 (1965).

173 COOGAN, HOGAN & VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 21.02(3) (1964).

curity interest. If the security interest is not perfectable or is perfected but empty under state law, the creditor is simply out of pocket the filing fees. And if the liquor license is property or the right to property *in the federal courts*,[174] such a security interest is apt to be good as against a competing federal tax lien.[175]

C. *Effect of a Security Interest*

The effect of a lien or security interest in the proceeds of sale is something quite apart from the possible or at least prohibited control exercised by the lender-creditor in other legal settings where he can perhaps force a sale or compel certain business activities to protect his interest and insure repayment. Here, presumably, the secured party can do nothing but wait. Perhaps he cannot have execution process in the direct conventional way, but as against other lienors — and especially the federal government — he may get priority in the proceeds of sale whether voluntary or not. Also, the secured party may, without violating the usual liquor license statute, be able to bring about an execution sale of the license by supplemental proceedings on his judgment or by a creditor's bill and the appointment of a receiver.[176]

D. *Priority Problems*

(1) Judgment Creditor.—There need be nothing to prevent the judgment creditor from proceeding on his judgment against the licensee by instituting an action to compel the sale of the license which is not subject to a writ of execution at law and could not itself be subject to a lien or be the collateral of the judgment creditor's security interest.

The judgment creditor alleges in the usual manner of supplemental proceedings[117] or in a creditor's bill, that the debtor has prop-

[174] Barr v. United States, 337 F.2d 693 (6th Cir. 1964); Division of Labor Law Enforcement v. United States, 301 F.2d 82 (9th Cir. 1963); United States v. Blackett, 220 F.2d 21 (9th Cir. 1955).

[175] *Cf.* United States v. Blackett, *supra* note 174.

[176] More often than not, receivers will be permitted to exercise all of the holder's rights in the liquor license. See *e.g.*, Rosenberg v. Borough Cordial Shop, Inc., 85 N.J. Super. 294, 204 A.2d 607 (Super. Ct. 1964); Wolf v. Barstow, 38 So. 2d 689 (Fla. 1949); Rio Bar, Inc. v. State, 117 N.E.2d 522 (Ohio C.P. 1954); Little Shirley's, Inc. v. Board of Liquor Control, 120 Ohio App. 179, 201 N.E.2d 718 (1964). *Cf.* Leney & Sons, Ltd. v. Callingham & Thompson, 1 K.B. 79 (1907).

However, Mencsik v. Mencsik, 118 N.E.2d 182, 183 (Ohio Ct. App. 1952) held that a liquor license was not property which could be reached in receivership proceedings.

[177] *E.g.*, N.Y. CIVIL PRACTICE LAW AND RULES § 5225(c), which gives the court

erty not subject to execution process at law and that the license is saleable for a valuable consideration. He requests that a receiver be appointed to arrange such sale and that the judgment debtor be ordered to sign the appropriate transfer forms. Apart from any questions of when the priority of the creditor, as moving party, commences,[178] that creditor, who also holds a perfected security interest in the proceeds from the sale of the license — if it is possible to have that — should have the rights of a lien creditor from the date of perfection. Since by hypothesis no other creditor in such a jurisdiction can have a lien in the license or have execution at law on the license, the secured party should have a valid and prior claim to the proceeds, which would be good as against other creditors and claimants and might also be successfully asserted as against later federal tax liens and trustees in bankruptcy.

(2) Federal Tax Liens.—It is unlikely that the courts or the licensing agency will consider that a physical seizure of the actual license will give the execution creditor any rights in the privileges of the licensee,[179] nor will the purchaser at execution sale acquire the statutory rights and privileges granted to licensees. Apart from those statutes which render licenses immune or exempt from execution and attachment process,[180] there is mixed authority as to whether the piece of paper which is the license itself is subject to seizure under a writ of execution.[181]

But as private creditors discover to their dismay, even though they cannot direct the sheriff to levy upon and seize the liquor license because state law prohibits that practice, the Internal Revenue

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authority to order that the judgment debtor execute and deliver any document necessary to effect payment or delivery to implement execution process. The Pennsylvania rule of procedure, PA. STAT. ANN. tit. 12, § 3118(a) (1966), seems to have much the same sufficient authority, perhaps even before any other effort at direct execution.

178 This usually begins upon the date of service. See United States v. Ruby Luggage Corp., 142 F. Supp. 701 (S.D.N.Y. 1954); Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 54 N.E.2d 336 (1944); Annot., 153 A.L.R. 208, 211 (1944).

179 *Cf.* In the Matter of Brewster-Raymond Co., 344 F.2d 903 (6th Cir. 1965); Division of Labor Law Enforcement v. United States, 301 F.2d 82 (9th Cir. 1962).

180 See, *e.g.*, CONN. GEN. STAT. REV. § 30-14 (1961); ILL. ANN. STAT. ch. 43, § 119 (Smith-Hurd Supp. 1965); IOWA CODE ANN. § 123.27 (1958); KAN. STAT. ANN. § 41-326 (1964); N.J. STAT. ANN. § 33:1-1 (1937); WYO. STAT. ANN. § 12-13 (1957).

181 This was permitted in Rowe v. Colpoys, 137 F.2d 249 (D.C. Cir.), *cert. denied*, 320 U.S. 783 (1943); Stallinger v. Goss, 121 Mont. 437, 193 P.2d 810 (1948); Nelson v. Naranjo, 74 N.M. 502, 395 P.2d 228 (1964). It was not permitted in McNelley v. Welz, 166 N.Y. 124, 59 N.E. 697 (1901); Walsh v. Walper, 3 Ont. L.R. 158 (1901).

Service is not similarly inhibited; the United States Marshall will seize the license which will then be offered to prospective purchasers at auction sale.[182] That is a considerable tactical advantage,[183] even if the private judgment creditor can later make claim to the proceeds. The sale may be completed and his interest wiped out before the private creditor has any notice unless (1) the applicable statute requires public notice;[184] (2) the private creditor can place himself in a class of interested parties such that he must be given notice;[185] and (3) the effect is mitigated because a lien or security interest in the proceeds of the sale has been created in his favor.

But if the federal government gets a lien on the license and the secured party has only an interest in the proceeds of the sale of the license but prior in time to the federal tax lien, who will be paid first from the proceeds of the sale? The equities of such a situation seem to favor the private lender who, although he takes the risk of there being no sale at all, has done all that can be done to perfect his security interest in the proceeds. But unless the liquor license is viewed as a "general intangible" which, because of the circumstances and a prohibitory statute, cannot itself be the collateral, there may not be a security interest in the proceeds good as against an actual federal tax lien on the license itself.

(3) Bankruptcy.—Much the same considerations apply in the bankruptcy cases. Where the licensee is insolvent and an adjudication of bankruptcy follows, the trustee has all the rights of the licensee, including that of transfer for a valuable consideration[186] (*i.e.*, the proceeds of the sale). Again the question arises whether the proceeds will be subject to the creditor's "secured" claim in the

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182 Division of Labor Law Enforcement v. United States, 301 F.2d 82 (9th Cir. 1962) states that "the sufficiency of a levy made by a federal officer under a statute of the United States is a matter of federal law, not state law." *Id.* at 85. Division of Labor Law Enforcement v. United States, *supra*, was then cited in Barr v. United States, 337 F.2d 693 (6th Cir. 1964), for the questionable proposition that the federal tax lien on the liquor license, served on the Michigan Liquor Control Commission, was an authorized method of levy on a liquor licensee. *Id.* at 696. *Contra*, Paramount Fin. Co. v. S & C Tavern, Inc., 245 F. Supp. 766 (N.D. Ohio 1965).

183 It is generally thought, however, that a liquor license is property subject to attachment and seizure only if local law provides a statutory procedure for such execution. See Roehm v. County of Orange, 32 Cal. 2d 280, 285, 196 P.2d 550, 552 (1948), citing Rowe v. Colpoys, 137 F.2d 249 (D.C. Cir.), *cert. denied*, 320 U.S. 783 (1943).

184 ABC table 16, at 106 indicates that thirty-two states require some public notice of an original application. Ordinarily, a transfer application will have the same requirements.

185 See text accompanying note 96 *supra.*

186 Most of the states have explicit priorities for operation and sale by a trustee or receiver. See authorities cited note 103 *supra.*

bankruptcy proceedings. It is more likely that such a claim will be viewed as though the license were tangible personal property.[187]

IX. CONCLUSION: THE SITUATION IS DAMNED BY FAINT PRAISE

Although much of the foregoing may look like a guide for lenders' counsel, it is also a suggestion that the realities of commerce in liquor licenses be fully accepted. These "rights" or "privileges," but above all, businesses, are bought and sold in a market place, and those purchases are financed — all at their true values. There is no need for pontification and fictional statements by legislators and judges. If some other licensed businesses are so personal in nature that their licenses are not and should not be assignable and the businesses not salable, that is not true of the taproom. A responsible party may be a better owner than bartender, and no special skill is needed to sell a drink of whiskey or pour a glass of beer.

To the laity — as perhaps it should be to lawyers — it is strange that the existence of a remedy is requisite to achieve a meaningful right, and the creation of procedural remedies by oblique legal devices is the necessary condition for the enforcement of those rights. That should not be necessary.

The purposes of state regulation will not be hampered by an acceptance of the retail liquor license as an item of commerce. The true intent of the several state legislatures may be furthered by more candor. That should include approval of the practice of financing purchases of liquor licenses, instead of pretending that financing by indirect and even questionable devices does not exist. Such arguments have met with generally sympathetic responses in the courts, and even that kind of judicial legislation helps accommodate the symbols of law to empirically based reality.

[187] *Cf. In re* Wechsler, 27 F. Supp. 301 (S.D.N.Y. 1939).