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cient to satisfy a court which did not draw the testimonial-physical evidence distinction or a court which followed the federal exclusionary evidence rule.<sup>52</sup> Indications are, however, that the

<sup>52</sup> The decisions thus far are concentrated at the trial court level, and it should be pointed out that New York draws the testimonial-physical evidence distinction with respect to the self-incrimination privilege and does not follow the federal exclusionary rule with

courts will favor it and, by so doing, will strengthen the statutes which prohibit driving while under the influence of alcohol.<sup>53</sup>

respect to illegally seized evidence. *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

<sup>53</sup> Note the favorable remarks by the Court in footnote to the majority opinion in *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957); and see Weinstein, *Statute Compelling Submission to a Chemical Test for Intoxication*, 45 J. Crim. L. 541 (1955).

## INDIRECT CONTROL OF ORGANIZED CRIME THROUGH LIQUOR LICENSE PROCEDURE

MALCOLM M. GAYNOR

Since gambling is the life blood of organized crime,<sup>1</sup> any method through which gambling can be combatted is of great importance to law enforcement officials.

In order for large gambling establishments to operate successfully, they usually have to provide for the service of intoxicating liquor to their patrons. Observation of legalized gambling casinos in Nevada discloses that operators consider liquor a stimulant to gambling inasmuch as it is distributed free to patrons. It should be noted, however, that liquor is a detriment to some types of gambling. For example, in the case of horse parlors the patrons have sufficient interest in the gambling itself that consumption of liquor serves only to intensify dissatisfaction in the losing inebriate.

In addition to liquor being served in gambling establishments, it is sometimes true that taverns are used as fronts for gambling activities conducted on the premises. Most of the important gambling places in the Chicago area are licensed to sell liquor.<sup>2</sup> Where a gambling establishment is licensed to sell liquor, the state statutory liquor license procedure assumes significance to the law enforcement officer. This procedure provides an inherently effective weapon against criminal organization.<sup>3</sup>

<sup>1</sup> Senate Special Committee To Investigate Organized Crime In Interstate Commerce, *Third Interim Report*, S. REP. NO. 307, 82d Cong., 1st Sess. 2 (1951).

<sup>2</sup> Interview with Virgil Peterson, Operating Director of the Chicago Crime Commission, July 1, 1957.

<sup>3</sup> Note should be made of the fact that there are three distinct theories of liquor control systems: (1) The revenue system, in which the primary concern is the enforcement of revenue raising provisions of the law, and the suspension of illegal sale is left to the local police. (2) The regulatory system, under which the primary duty of the state administrative agency is the

Basically, there are two ways in which the liquor license procedure can be used to attack gambling: the first, is by seeking revocation of the license; the other method is to employ the procedure with a view to putting the illegal enterprise itself out of business. The latter may be accomplished either by prosecution of the violators for a crime, or by the ancillary means of publicity and harassment, factors tending to weaken substantially the alliance between illegal activity and politics.<sup>4</sup>

As long ago as the seventeenth century it was held that a license to sell liquor passes no vested interest to the licensee, but only makes lawful an act which otherwise would be unlawful.<sup>5</sup> Behind this rule was a desire to keep criminal elements out of the taverns and inns where liquor

regulation of the industry, and the collection of fees is left to another branch of government. (3) The monopoly system, under which the state combines its functions as revenue raiser, regulator, and proprietor. These theories are, in practice, combined in the systems in effect in most of the states, and it is sometimes hard to tell which motive has the primary expression in any given statutory scheme. Shipman, *State Administrative Machinery for Liquor Control*, 7 LAW & CONTEMP. PROB. 602 (1940). However, it is clear that those states which put a premium upon revenue suffer in regulation of the industry.

<sup>4</sup> Publicity is the natural enemy of organized crime, since the officials connected with criminal organizations cannot politically afford to have their names associated with crime.

<sup>5</sup> *Thomas v. Sorrell*, 7 Vaughn 330, 124 Eng. Rep. 1098 (1674). See Johnson & Kessler, *The Liquor License System—Its Origin and Constitutional Development*, 15 N.Y.L.Q. 210 (1938) for an excellent exposition of the development of the doctrine that the liquor license is a mere privilege rather than a vested right.

was sold.<sup>6</sup> Thus, attempts to control criminal activity through the liquor laws are not a new innovation. Examination of the cases and other materials, however, reveals that even though law enforcement agencies have had liquor license laws available to them for over three hundred years, rarely has the powerful device of liquor license control been used for the suppression of organized crime.

The scant use of liquor license laws for the enforcement of the criminal laws may be accounted for in part by the unfortunate fact that many of the persons charged with the responsibility of enforcement and administration of the criminal laws have fallen into the error of believing that the privilege to sell liquor is in fact a property right. The distinction is critical, since a property right may not be taken away without due process of law, while a license with a privilege may lose that privilege at the pleasure of the licensing agency.<sup>7</sup> Often this misconception is the result of an honest though erroneous interpretation of the law; the property right theory, however, has been used frequently as an escape hatch for those attempting to undermine law enforcement.

Inasmuch as the license to sell liquor is a privilege, rather than a vested right, the licensee, in accepting the license, becomes amenable to regulation which otherwise would be illegal.<sup>8</sup> For example, many state statutes provide that the premises licensed to sell liquor may be searched at

<sup>6</sup> *Resolution Concerning Inns*, Hutton 100, 123 Eng. Rep. 1129 (1625). Also note that from 1736 to 1760 the purpose of the extension of the liquor license laws was to suppress crime. Johnson & Kessler, *op. cit. supra* note 5 at 229.

<sup>7</sup> *Darling Apartment Co. v. Springer*, (Del.) 22 A. 2d 397 (1941); *Fitzpatrick v. Liquor Control Commission*, 316 Mich. 83, 25 N.W. 2d 118 (1946); *Blum v. Ford*, 194 Ark. 393, 107 S.W. 2d 340 (1937); *People v. McBride*, 234 Ill. 146, 84 N.E. 865 (1908); *State v. Williams*, 173 Ind. 414, 90 N.E. 754 (1909); *Harding v. Bd. of Equalization*, 90 Neb. 232, 133 N.W. 191 (1911); *State v. Corron*, 73 N.H. 434, 62 Atl. 1044 (1905); *Voight v. Bd. of Excise*, 59 N.J.L. 358, 36 Atl. 686 (1896); *Re Grant*, 44 Utah 386, 140 Pac. 226 (1914).

*c.f.* Connecticut cases such as *Quinnidiac Brewing Co. v. Hackbarth*, 74 Conn. 392, 50 Atl. 1023 (1902); *Sayer's Appeal*, 89 Conn. 315, 94 Atl. 358 (1915); and *Cordand's Appeal*, 91 Conn. 718, 101 Atl. 85 (1917) holding that the quality of property in a license to sell liquor is recognized to the fullest extent. Although these cases use language of the broad brush, it must be noted that they were decided on such questions as validity of transfer of a liquor license, and validity of an attachment of a liquor license. Therefore, these cases in no way restrict the rights of the state of Connecticut as to revocation, and do not hold that a liquor license is property in the constitutional sense.

<sup>8</sup> ILL. REV. STAT. c. 43 §119 (1955); N.Y. ALCOHOLIC BEVERAGE CONTROL LAW §114(4)(d). Also see notes 5 & 7 *supra*.

any time without the permission of the licensee, as an exercise of the state police power.<sup>9</sup> Implied in such a provision is the circumvention of the constitutional privilege of freedom of search and seizure without a proper warrant.<sup>10</sup> It has been the experience of some law enforcement officers that asking for a warrant to search a gambling house is equivalent to a direct warning to the operators of the establishments that a raid is to be instituted.<sup>11</sup> Under the provisions of the various alcoholic beverage control acts relating to search and seizure, the officer need not trouble himself with the formality of a warrant. These provisions put teeth into the efforts of the liquor control laws to control illegal gambling activity.<sup>12</sup>

Furthermore, though there is a sparsity of cases on this point, it is submitted that evidence seized during such permissive searches of licensed premises is admissible in a subsequent criminal action against the licensee for gambling, independent of the license revocation proceedings, on the grounds that the evidence was obtained through lawful search. Similarly, such evidence should be available against patrons of the gambling house since they lack the necessary proprietary interest in the evidence to have standing to object to its admission in court.<sup>13</sup>

<sup>9</sup> CAL. CODES ANN., Business and Professions §§25753; *Sandelin v. Collins*, 1 Cal. 2d 147, 33 P. 2d 1009 (1934); ILL. REV. STAT. c. 43 §§108, 112, 148, 162, 190 (1955); N.Y. ALCOHOLIC BEVERAGE CONTROL LAW §17(7); WIS. STAT. §§139.06, 176.63 (1955).

<sup>10</sup> This only applies to those jurisdictions following the so called federal rule of privilege. See *Weeks v. U. S.*, 232 U. S. 383 (1914), where it was held that evidence secured by means of an illegal search and seizure was inadmissible. The other view is the majority and common law rule, that the method of obtaining evidence has no bearing upon the admissibility of that evidence, and that the party offended may seek his remedy in trespass only. See 8 WIGMORE, EVIDENCE §§2183-2184 (3d ed. 1940).

<sup>11</sup> Interview with Mr. Peterson, see note 2 *supra*.

<sup>12</sup> For a unique provision relating to search warrants see WIS. STAT. sec. 963.03(2) (1955) which provides that "Upon application of an employee of the commissioner of taxation or the attorney general to a court of record, a warrant may be issued to search for gambling devices . . . or intoxicating liquors believed to be concealed on premises located in the county where the warrant is issued, or any county adjacent thereto. . . ." This statute recognized the fact that gamblers may control the politics of their county, and therefore make an ordinary search with warrant completely unproductive.

<sup>13</sup> Criminal prosecution of customers of a gambling house may be an effective means of closing the operation. See note 2 *supra*. On the proprietary interest requirement see *Agnello v. United States*, 269 U. S. 20 (1925) where the court held that a can of narcotics was admissible against defendants who had no constitutional right in it. *c.f.* *McDonald v. United States*, 335 U. S. 451 (1948) where even those with no proprietary interest were allowed to exclude evidence.

The most commonly used method for the elimination of the criminal element from the retail liquor business is a statutory provision that no license shall be granted to an applicant who has been convicted of a felony or other crime involving moral turpitude.<sup>14</sup> These grounds also are specified as a basis for the revocation of a license already issued, or refusal to renew an expired license.

In practical application, however, these provisions have not been very satisfactory in attaining their objectives. It is an easy matter for criminal elements to procure a person with previously unimpeachable character to apply for a license and thus lend an air of respectability to the licensed premises. Moreover, it is rather apparent that some of the most active members of the criminal syndicate show a remarkable ability to avoid both arrest and conviction. A partial solution to this problem would be a statute providing that no license shall be granted to an applicant who has a reputation for criminal activity in the community.<sup>15</sup> Although this type of statute might be challenged on due process grounds, it should be kept in mind that there is no right to sell liquor, and that even where the licensee is not himself a criminal, the fact that he has a reputation for criminal activity might attract violators to his door. California, Illinois, and Wisconsin do have statutory provisions of this type.<sup>16</sup> In a jurisdiction having such a provision, not only is it unnecessary to prove conviction for a crime, but the fact of bad reputation need only be proven by substantial evidence, as opposed to the requirement in criminal case of proof of guilt beyond a reasonable doubt. The reason for the distinction is that proceedings for revocation of a liquor license are administrative and civil in nature, rather than criminal. It is thus possible to attack an illegal enterprise without being limited by the strict requirements of a criminal trial. Furthermore, it is not necessary that an actual crime be proved, but only conduct deemed violative of the public

<sup>14</sup> CAL. CODES ANN., Business and Professions §2 3952; ILL. REV. STAT., c. 43 §120 (1955); KAN. GEN. STAT. §41-311 (1949); N.Y. ALCOHOLIC BEVERAGE CONTROL LAW §110; WIS. STAT. §176.05(9) (1955); N.J. REV. STAT. §33: 25 (1937).

<sup>15</sup> A somewhat similar provision is found in CAL. CODES ANN., Business and Profession §24200(e) where it is stated that the fact that the premises or the licensee are a resort for certain stipulated illegal activities may be proven by general reputation in the community.

<sup>16</sup> CAL. CODES ANN., Business and Professions sec 24200(a); ILL. REV. STAT. c. 43 §2(2) (1955); WIS. STAT. §176.05(9) (1955).

morals.<sup>17</sup> Some courts have gone so far as to hold that hearing and notice need not be extended to the licensee.<sup>18</sup>

Some jurisdictions attack the problem of gambling on licensed premises by statutes providing that gambling itself is a ground for license revocation.<sup>19</sup> Such provisions vary as to whether they require that the licensee have knowledge of the gambling on his premises, but a few jurisdictions requiring proof of such knowledge impute it to the licensee upon a finding that his agent had actual knowledge.<sup>20</sup> There might be some question as to the legality of imputing the agent's knowledge to the principal in these implied knowledge provisions, but any doubt is belied by the civil nature of the enforcement proceedings. Hence, it is permissible to use the conventional doctrine of respondeat superior in this aspect of enforcement of the gambling laws. The purpose of the statutory scheme is protection of the public and not punishment of the individual. This is an area in which individual liberty to conduct a business must yield to the highest public policy. One wishing to sell liquor, which is a privilege and not a right, must be held responsible for the proximate results of his business conduct.

The "clear view" provision in the Illinois Liquor Control Act is an example of a law which, if conscientiously enforced, can be extremely useful in the suppression of organized crime through gambling control legislation. The essence of the "clear view" provision is that there must be a clear view of the licensed premises from the street.<sup>21</sup> There may be no obstructions placed in the windows to conceal activity taking place on the premises. Since gambling is an illegal activity, it is necessary that it be hidden from view. Under the

<sup>17</sup> Maxwell Cafe v. Dept. of Alcoholic Beverage, 142 A.C.A. 81, 298 P. 2d 64 (1956); Cornell v. Reilly, 127 C.A. 2d 178, 273 P. 2d 572 (1954); Avon Bar & Grill v. O'Connell, 301 N.Y. 150, 93 N.E. 2d 573 (1950).

<sup>18</sup> This is a question of statutory construction. Where the statute expressly permits revocation without hearing, the only question is one of constitutionality. Cases cited here are only to be read for illustration, since the statute in each jurisdiction is controlling. State Bd. of Equalization v. Superior Court, 5 Cal. App. 2d 374, 42 P. 2d 1076 (1935); Abeln v. Shakopee, 224 Minn. 262, 28 N.W. 2d 642 (1947); Hornstein v. Illinois Liquor Control Commission, 412 Ill. 365, 106 N.E. 2d 354 (1952).

<sup>19</sup> KAN. GEN. STAT. §41-311(g) (1949); N.Y. ALCOHOLIC BEVERAGE CONTROL LAW §106; WIS. STAT. §176.90(1) (1949).

<sup>20</sup> ILL. REV. STAT. c. 43 §185 (1955); KAN. GEN. STAT. §41-903 (1949); N.Y. ALCOHOLIC BEVERAGE CONTROL LAW §106; Stevinsville Lake Holding Co. v. O'Connell, 269 App. Div. 804, 55 N.Y.S. 2d 638 (1945).

<sup>21</sup> ILL. REV. STAT. c. 43 §141 (1955).

"clear view" provision, the mere existence of the hiding place is a violation of the act, subjecting the licensee to revocation proceedings. It is unnecessary to catch the gamblers in the illegal act itself. This provision, coupled with provisions granting search without a warrant, if properly enforced, can be a powerful weapon in the hands of law enforcement officers.

The foregoing discussion presupposes that the officers charged with the enforcement of the liquor license laws are honest and conscientious. Unfortunately, however, there are many exceptions to the rule. Even where the officials are not actually dishonest, they are often responsive to outside illegal influences in the form of bribes or political rewards. In recognition of this situation, some jurisdictions have enacted laws designed to insure that their laws will be administered by honest officials. The standard statute of this type provides that the persons administering alcoholic control laws should have no interest in any business subject to those controls, and should accept neither gifts nor employment from one so subjected.<sup>22</sup> One means of ameliorating the danger of submission to illegal pressures is to pay the law enforcement officers sufficient compensation for their services. In some states the rate of compensation for public officials is much too low. Almost all states have provisions for bonds to insure faithful performance, and for prosecution for malfeasance, misfeasance, or nonfeasance in office.

Wisconsin has a rather unique provision directed toward honest administration of its liquor laws. An officer receiving a complaint of a violation must report it to the district attorney within ten days of its receipt. The district attorney is then required either to prosecute, or report his failure to do so to the attorney general, who in turn has the option to prosecute. The status of such cases is to be reported to the governor.<sup>23</sup> This procedure limits dishonesty to the unlikely case where four individuals can be bribed.

Illinois has a provision in its liquor control laws

<sup>22</sup> CAL. CODES ANN., Business and Professions §23960; ILL. REV. STAT. c. 43 §103 (1955); N.J. REV. STAT. §33: 1-5 (1937).

<sup>23</sup> WIS. STAT. §176.90 (1949). Kansas has a similar statute under which the county attorney is guilty of a misdemeanor, may be fined and imprisoned, and removed from office for failure to prosecute. If he is unable, neglects, or fails to enforce the act, it is the duty of the attorney general to do so. KAN. GEN. STAT. §41-1107 (1949).

which allows any five residents to file a complaint with their local board.<sup>24</sup> The great potential inherent in this provision has never been fully realized, principally for two reasons: first, the public does not know that this remedy is available to it; and secondly, in nearly every case where a complaint was registered, all five complaining residents were non-lawyers. Usually the action has been initiated or conducted by an informal group led by a housewife or a minister. Because of this, reversible error was found in the complaints, and the board has been forced to find for the licensee, due to a lack of a proper presentation of adequate evidence.<sup>25</sup>

In almost every jurisdiction there is an adequate liquor control statute. Although it is true that some jurisdictions have provisions superior to others, generally speaking, all are powerful tools in the hands of able, honest law enforcement officers. Most of the trouble can be traced to the fact that these statutes are not being used to their full capacity. While dishonesty among officials is one cause, more often this failure is due to the fact that officers are not sufficiently familiar with the laws themselves to enable them to employ the various statutory provisions with maximum effectiveness. There is no complete remedy for either of these conditions. It is submitted, however, that provisions similar to the Wisconsin "report" provision will increase official awareness of and responsibility for the diligent prosecution and enforcement of liquor control laws. But perhaps the ultimate solution lies with the public and the press. An intense campaign must be conducted to insure capable, reputable, and well informed legislatures, courts, and law enforcement agencies.

<sup>24</sup> ILL. REV. STAT. c. 43 §151 (1955).

<sup>25</sup> Interview with W. Willard Wirtz, former Illinois Liquor Commissioner.

Under the previous Illinois State Liquor Control Act, the State Commission had no power to initiate a proceeding for revocation of a state license, and its jurisdiction was limited to reviewing orders of local commissions, and to revoking state licenses automatically upon revocation of local licenses by local commissioners. That section has been amended so that specific power is now granted to the State Commission to revoke retail licenses on its own initiation. ILL. REV. STAT. c. 43 §109 (1955). This provision was upheld in *Plaikos v. Illinois Liquor Commission*, Docket No. 46919, (1957).

This provision enables the State Commission to take affirmative steps in cases where the local authority does not, for one reason or another, want to bring action against a violator.