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LIQUOR LICENSE—PRIVILEGE OR PROPERTY?

I. Introduction—A Brief Historical Survey of Liquor Control.

To facilitate full understanding of the central problem of this note—that is, what is and what should be, the nature of a liquor license—a brief historical survey of liquor control is appropriate. Society has long recognized that to permit the uncontrolled sale of alcoholic beverages is not in the best interests of its members. It is well known that certain evils will most probably follow if the manufacture, distribution and sale of intoxicants is not subjected to control by the governmental authorities. Prior to the passage of the eighteenth amendment, alcoholic beverage control in the United States ran the gamut from total inaction to direct intervention on the part of the political authorities. We learned from the Prohibition experiment that a system of control was needed which would not only promote temperance, but also foster observance of the law. The year 1933 saw the repeal of the ill-starred eighteenth amendment. The system of alcoholic beverage control which was subsequently adopted, and which exists today, may be generally classified as a “licensing system” set up under various state and municipal administrative agencies. The control of the licensing function in some jurisdictions resides exclusively in the state. In other states the authority is shared by the state and local authorities, and, in a few states, license issuance is the primary responsibility of the local authorities.¹

II. The Property-Privilege Dichotomy as Applied to Liquor Licenses.

When faced with a problem involving a liquor license, most courts start with the premise that such a license is a governmental grant which authorizes the grantee to engage in a business which would otherwise be unlawful. Thus, the license is not “property,” but rather only a personal “privilege.”² This proposition is perhaps well founded in the light of the language utilized by Mr. Justice Field in the early Supreme Court decision in Crowley v. Christensen:³

> The police power of the State is fully competent to regulate the business —to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States.

Despite an imposing body of authority, and the words of the Supreme Court to

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¹ For a more complete discussion of licensing see Joint Committee of the States to Study Alcoholic Beverage Laws, Alcoholic Beverage Control, 23-40 (1950).
³ 137 U.S. 86, 91 (1890).
the contrary, it is the writer's basic premise that the "privilege-property" dichotomy built up around liquor license law should be abolished in favor of recognition of such licenses as property, in the broadest sense of the word. At the outset, the term "property" must be given content as it is to be used in this note. "Property" may signify either the subject matter in which certain rights exist, or it may signify valuable rights and interests protected by law. The essential attributes of property include the rights of acquisition, possession, use, enjoyment and disposition. There can be no conception of property apart from its control and use.4

A. Liquor Licenses May Have the Qualities of Property

Despite their basic approach that a liquor license represents a personal privilege to do that which would otherwise be unlawful, courts have held in a wide variety of situations that such licenses are "property," or that they at least partake of the "qualities" of property. The Federal District Court for the Northern District of Indiana has taken the position that while a liquor license may not itself be property, the use and enjoyment of the license may vest in the holder something which is valuable and has all the qualities of property. In Midwest Beverage Co. v. Gates,5 the Court was faced with a situation where an injunction was sought to keep the state from enforcing a legislative provision which would cause a revocation of a beer-wholesaler's permit. The application for the injunction was denied, but the Court did note that:

While a permit or license as such may not be property, the use and enjoyment of it may give to its possessor something that is valuable and which has all the qualities of property. . . . [T]he use of such permit, if not the permit itself, is property within the meaning of the due process clause of the Federal Constitution.6

It is also noteworthy that the Court chose to use such language despite the presence of an Indiana statute specifically stating that holders of beer permits have no property rights in their permits.7

A similar stand was taken in a well-reasoned dissenting opinion in the Indiana Supreme Court.8 Here a permittee sought to enjoin the Alcoholic Beverage Commission from allowing package store dealers to sell cooled beer. The majority held that no injunction would issue, relying on the familiar language that a permittee has no property rights in his permit. The two dissenting judges (a 3-2 decision) cited the above language in the Midwest Beverage Co.9 case, and argued that the relationship between the holder's permit and his investment in property and equipment should be recognized. The dissenters found that the permittee had vested in himself property rights in the ownership and operation of his business; and, certainly, the business could not lawfully function without a permit. Thus, the permittee had stated a cause of action falling within the purview of equity's injunctive power.

B. Property With Respect to the Rest of the World—Privilege With Respect to the Issuing Authority

Some courts, in order to reach what they feel are desirable and just results in liquor license cases, have made the following distinction: as between the holder of a license and the issuing state, the license is a mere "privilege"; however, between the holder and the rest of the world this same license is "property."10 This distinc-

4 73 C.J. Property § 1 (1951).
5 61 F. Supp. 688 (N.D. Ind. 1945).
6 Id. at 691.
7 IND. ANN. STAT., § 12-443 (1956).
8 State v. Superior Court of Marion County, 197 N.E.2d 634, 641-46 (Ind. 1964) (dissent).
tion was the basis upon which the Supreme Court of Idaho recently rendered its decision in *Weller v. Hooper*. Here, in a mandamus proceeding to compel the allowance of a license transfer from a decedent’s personal representative, the Court held a statute unconstitutional. The statute in question forever barred a convicted felon from obtaining a liquor license if he possessed a license at the time of his conviction, whereas if he held no license at the time of his conviction, he might again obtain a grant in five years. After noting Idaho authority to the effect that a liquor license is a mere personal privilege, the *Hooper* Court stated:

The provisions of the two referred to sections of the statute connote that a liquor license as between the licensee and third persons constitutes a right to which value as property and assignability is attributed and, therefore, as between the licensee and third persons such right upon death of the licensee becomes assignable by the personal representative.

In a 1964 case, the Supreme Court of Arizona, while upholding the validity of a statute terminating the leasing of liquor licenses, noted that while a liquor license as between the licensee and the state is a mere privilege: “as between the licensee and third persons, a liquor license is a property right with unique value.”

C. *Property for Purposes of Taxation*

Another area in which liquor licenses have been magically turned into “property” is the tax field. It has been recognized that such licenses are “property” within the meaning of section 6321 of the Internal Revenue Code. In Maryland recently the Director of Internal Revenue seized and sold the license of a holder who was delinquent in the payment of his taxes. The Maryland Board of Liquor License Commissioners, however, refused to transfer the license to the purchaser on the grounds that since the license was not “property,” the government had no right to seize and sell it. The Board based its position primarily upon a Maryland statute specifically holding that liquor licenses are not property. However, the Maryland Court reversed, noting that the term “property” is to be given a broad construction in tax law, and holding that the liquor license was “property” within the meaning of section 6321. The Court said that the license had definite value and that it at least had the “attributes” of property. Thus, while the license might not be considered “property” for the purposes of the applicable Maryland statute, it should be considered “property” for other purposes. This result may be contrasted with the much older case of *Harding v. Board of Equalization*, where the Nebraska Supreme Court ruled that since a liquor license was purely a privilege, it was not subject to assessment for purposes of taxation under Nebraska law.

The Supreme Court of New Jersey has also determined that a liquor license constitutes “property” within the meaning of section 6321 of the Internal Revenue Code. This Court also was faced with the argument that a statute stating that liquor licenses are not property meant that they were not subject to tax liens.
The Court ruled that state legislative pronouncements are not sufficient to determine the existence or nonexistence of property under section 6321.21

The Court did note that while the state statute could not immunize a liquor license from attachment to satisfy a federal tax lien, the vitality of the statute was in no way diminished. The obvious import of the decision is that liquor licenses are "property" and are subject to federal tax liens when a holder is deficient in his tax payments; yet, the very same license holder may be far behind in his rent, or have executed a chattel mortgage which cannot be paid, and his license, being a mere "privilege" as to these creditors, will be beyond their reach. While section 6321 of the Internal Revenue Code compels a liberal construction of the term "property," there is no good reason why liquor license should not also be "property" as to the holder's landlord and his chattel mortgagee. While the New Jersey decision appears fundamentally sound, its possible implications trouble one's sense of justice.

D. Property Such That Equity Will Recognize a Suit for Specific Performance of a Contract to Convey

The right of a party to bring an equitable action for specific performance of a contract to convey a liquor license has gained recognition. Here we have another situation where a liquor license has the quality and value of property. In the case of Horn Moon Jung v. Soo,22 the Supreme Court of Arizona focused upon the Arizona statute permitting the transfer of liquor licenses with the consent of the appropriate commission, and held that specific performance was proper since a liquor license was a "property" right.

The Supreme Court of Pennsylvania rendered a similar decision in Cochrane v. Szpakowski.23 Here specific performance of a contract to sell a restaurant and retail liquor business was sought. The Court decreed specific performance, noting that while such a remedy would not ordinarily lie for breach of a contract since damages are ascertainable, an exception exists for contracts dealing in commodities, such as liquor licenses, which cannot readily be purchased in the open market. While the Court did not openly state that liquor licenses are "property," this appears to be a tacit assumption.

The Soo and Cochrane courts focused upon the factors of transferability and limitation on the number of outstanding licenses as rendering peculiar value and quality to liquor licenses. The Arizona Court, as previously stated, emphasized the element of transferability, noting that this certainly adds value to a liquor license. This consideration has frequently been cited by other courts when they hold that a liquor license is "property," or at least has the "qualities of property."24 Transfers of liquor licenses from one person to another are permitted in roughly twenty-eight states. Transfer of a license from one premise to another is allowed in some forty-one states.25 This element of transferability in a majority of states does add value to the license.

The Pennsylvania Court in Cochrane was impressed by the fact that since the state limited the number of liquor licenses outstanding and there were many

22 64 Ariz. 216, 167 P.2d 929 (1946).
25 The reference source for this and other figures is the data compiled by the Joint Committee of the States to Study Alcoholic Beverage Laws. These statistics are offered as generally illustrative rather than necessarily precise.
26 JOINT COMMITTEE OF THE STATES TO STUDY ALCOHOLIC BEVERAGE LAWS, ALCOHOLIC BEVERAGE CONTROL, 117, Table 16 (1950).
applicants for the available licenses, the license had a very peculiar value to the prospective purchaser, a value so unique that it could not be measured by any ordinary theory of damages. This limitation on the number of outstanding licenses is fairly common. Thirty-three states either have direct numerical restrictions, or vest discretion in the state or local authorities to set up such limitations.

E. Property for Purposes of Computation of Inheritance Tax

An interesting question came before the Pennsylvania Supreme Court in a proceeding to appraise a decedent liquor licensee's personal estate for inheritance tax purposes. The Court overturned a case decided only eight years before, and held that the value of the statutory right to apply for the transfer of a liquor license after the death of the holder is subject to inclusion as part of the decedent's estate for the purpose of computing inheritance tax. The Court accepted the basic proposition that a liquor license is, per se, a personal privilege and not a property right. It noted that a distinction could be made between the license itself and the statutory right to apply for transfer of the license formerly held by the deceased. While the license itself was not "property," the value of the right to apply for the license in the name of the surviving spouse or a personal representative, and the consequent power of sale and transfer, was "property" which enhanced the estate and was subject to inheritance taxation under the applicable Pennsylvania statute. The Court relied heavily upon the dissenting opinion of Justice Chidsey in the case of In re Ryan's Estate. There this same distinction between the right of transfer and the actual license was made.

The decision in the Pennsylvania case appears sound but the distinction made is troublesome. The statutory right to apply for a transfer and the actual license are perhaps two distinct things, but what is it that renders this right so valuable? It is precisely the license itself, not the right to apply for a transfer, which is the property. As in the federal income tax cases, the court is forced into a conceptual inconsistency of a kind which tends eventually to beget injustice.

F. Constitutional — Commercial Dichotomy

While a liquor license may not be "property" in a constitutional sense, it may be "property" in a commercial sense. In a Florida case decided last year a liquor license, validly issued by the state and owned by a lessee of real property, was subjected to a landlord's lien for rent and the lien of a chattel mortgage. The Court noted a Florida precedent that a liquor license is a mere personal privilege and is not property in a constitutional sense, but went on to hold that it was nonetheless property in a commercial sense. Another Florida Supreme Court case was utilized for its holding that due to the numerical limitations placed upon license issuance, such governmental grants had come to have the quality of property with value far in excess of the license fees exacted.

Thus, in Yarbrough v. Villeneuve the Court emphasized again the factors of transferability and limited issuance as giving quality and value to a license.

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27 Id. at 98-99, Table 9.
34 State v. Fuller, 136 Fla. 788, 187 So. 148 (1939).
35 House v. Cotton, 52 So. 2d 340 (Fla. 1951).
Although on the point of law involved there is authority to the contrary, it appears that the Villeneuve Court reached a just result.

Another in this line of cases recognizing a liquor license as property for commercial purposes is Rowe v. Colpoys. Here the District of Columbia Circuit held that a liquor license was subject to a levy under execution to satisfy a court judgment. The Court urged that the common law rule forbidding a levy upon licenses should be confined to non-transferable licenses and argued that a liquor license was a valuable right with the attributes of property. As such the Court could find no sound reason why this property right should be immunized from the same process to which other property rights were subjected. Here the "commercial-constitutional" distinction was not explicitly made. However, its presence is certainly implicit as the case did recognize the Crowley v. Christensen doctrine.

In a similar vein, the Supreme Court of Montana has held that a liquor license is property and may be made subject to attachment. The appellation "property" has also been applied to a liquor license to hold that a trustee in bankruptcy might reach the proceeds realized from a transfer of the license. In Fisher v. Cushman, the First Circuit reached such a decision when faced with a situation where a license holder, immediately before he went into bankruptcy, transferred his license and personally realized the proceeds. The Court cogently noted the impossibility of giving "any categorical definition to the word 'property,' . . ." and of attaching to it "in certain relations the limitations which would be attached to it in others." While the license was not itself property, the Court felt that since it represented a substantial part of the bankrupt's capital investment which would otherwise be subject to the claims of his creditors, and since it could be converted into money at the holder's option, the license should not be withheld from his creditors.

This reasoning is both sound and compelling, although somewhat confusing, since the Court first says that the license is not property, and then turns right back and says that which it represents is property. This distinction is tenuous and should not be recognized. Why not simply call the license "property"?

In a like context the Supreme Court of Washington has enjoined a proposed transfer and denominated a liquor license "property" in order to permit a receiver to realize its benefit for attaching creditors.

In all of these cases the message is basically the same. While there may be precedent to the effect that a liquor license is not "property," it can be overcome when it is expedient to do so by utilizing a "commercial" definition of property, as opposed to a "constitutional" definition. This "constitutional-commercial" dichotomy has been used to attain sound results. But, if it is admitted that a liquor license is a "commercial property right," then why should not such a right, as lawfully conferred by the licensing process, be considered a vested right in the constitutional sense?

G. Conclusion

The doctrine that liquor licenses are mere "privileges" stands contradicted by a substantial body of law. Many courts have made a tentative step forward and have gone so far as to state that a liquor license partakes of the "qualities" of

38 137 F.2d 249 (D.C. Cir. 1943), cert. denied, 320 U.S. 783 (1943).
39 Id. at 251.
40 Crowley v. Christensen, 137 U.S. 86 (1890).
42 103 F. 860 (1st Cir. 1900).
43 Id. at 864.
44 Id. at 865.
property. Other courts have declared that a liquor license is property with peculiar and special value. The language utilized is typically unequivocal: “There is no question that the lawful possession of a liquor license invests one with a property right.”

Liquor licenses have been recognized as “property” in a large variety of situations:

A. While a person may not have a vested property right in a liquor license itself, he does have such a right in the use and enjoyment of the license while it is in effect.

B. As between the holder of a liquor license and the issuing authority, the license is a mere privilege; but, the same license, as between its holder and the rest of the world represents property.

C. A liquor license constitutes property within the meaning of section 6321 of the Internal Revenue Code.

D. A party may bring an equitable action for specific performance of a contract to convey a liquor license since the license qualifies as property.

E. The value of a statutory right to apply for transfer of a liquor license at the death of its holder is property and, as such, is subject to inclusion as part of the decedent’s estate.

F. While a particular liquor license may not be property in a constitutional sense, the same license may be property in a commercial sense. While the cited cases have probably achieved substantial justice, nevertheless the perpetuation of this “property-privilege” dichotomy renders litigation a free-wheeling, guessing game. Thus, a statute describing a liquor license as a privilege is not necessarily dispositive. This conceptual ambidexterity may permit courts and boards summarily to revoke liquor licenses without due process. This problem will be dealt with at length in the next section of this note.

Consider a liquor license in terms of the definition of “property” previously formulated. The essential elements of property include the rights of acquisition, possession, use, enjoyment, and disposition. Local governmental bodies and states have a wide latitude in enacting reasonable standards to determine who shall acquire licenses. But, the licensing authority does not have an uncontrolled discretion in doling out licenses, and, so long as a person can measure up to the prescribed standards and there are licenses available, he may not be arbitrarily refused. There is a “qualified right” of acquisition in the law of liquor licensing. In most states it is recognized that the holder of a liquor license has a right of possession invariably for one year, which may not be arbitrarily taken away. Given that the applicant is licensed, he also has the right of use and enjoyment of his license subject, of course, to the regulatory powers of the governing authorities. Here it might be argued that the essence of property is freedom from regulation. But this argument seems fallacious in the light of our practical experience. An owner certainly has a “property right” in his automobile for which he has paid the required

46 See Boss Co., Inc. v. Board of Comm'rs, 40 N.J. 379, 192 A.2d 584 (1963); Kline v. State Beverage Dept., 77 So. 2d 872 (Fla. 1955); House v. Cotton, 52 So. 2d 340 (Fla. 1951); Burton v. LeFebvre, 72 R.I. 478, 53 A.2d 456 (1947).
50 See text accompanying footnote 4.
52 See JOINT COMMITTEE OF THE STATES TO STUDY ALCOHOLIC BEVERAGE LAWS, ALCOHOLIC BEVERAGE CONTROL, 118, Table 17 (1950).
sum. Yet, he is subjected to very extensive regulation in the use of this property, and he may even see a constructive revocation of his property by the authorities through the removal of his license. And, finally, in some forty states, as was previously noted, a qualified right of disposition is recognized. Thus, within this general definition of “property,” it is submitted that a liquor license does qualify as such.

The reluctance of some state courts to recognize a liquor license as property is somewhat baffling. Perhaps it is simply a refusal to recognize a constitutional right in an industry which bears the scars of the Prohibition Era and is classified by many as an “evil” business. There are no well-reasoned opinions stating precisely why a liquor license should be a mere “privilege.”

III. The Privilege-Property Dichotomy: A Basis for a Procedural Injustice.

A. Introduction

This section of the note is concerned with the following question: Does the Constitution entitle a holder of a liquor license to notice and hearing before his license is revoked? There is a large body of decisional law to the effect that statutes and municipal ordinances providing for summary revocation, without notice and hearing, are not unconstitutional. The courts reason that one who obtains a license authorizing participation in what would otherwise be an unlawful business takes this personal privilege subject to all its infirmities, including the possibility that it might be summarily revoked if the governing statutes so provide. Today most states have statutes requiring notice and hearing on the part of the administrative body handling license revocations, and it is possible that the rules of law laid down by some of the cases cited above have been altered by these statutes. However, no court has specifically overruled any of these decisions and, to the extent that they represent the existing law in their respective jurisdictions, exception is taken to the proposition of law for which they stand.

Consider the Iowa case of Walker v. City of Clinton. Here a licensee had his beer permit revoked by a town council for alleged sales to minors. The council acted upon its own motion without notice or hearing. The evidence against the permittee consisted of written statements of two minors and oral, unsworn testimony of a council member and the chief of police. Despite this slim evidence, and the fact that the license holder had no opportunity to be heard or to cross-examine, the Supreme Court of Iowa upheld the revocation, noting that had the council acted under a statute relating to complaints filed by citizens or police officers notice and hearing might have been required. However, since the council acted on its own motion, summary revocation was permissible. The reasoning employed by the Court was that outlined in the preceding paragraph: all that the permittee had was


54 The only states in which such requirements are not specifically enumerated are Arkansas, Georgia, Mississippi and Utah.

55 244 Iowa 1099, 59 N.W.2d 785 (1953).
a “privilege,” and this he took subject to the possibility of summary revocation.\textsuperscript{56}

Professor Kenneth Culp Davis, in his treatise on administrative law, refers to this \textit{Walker} case as “a clear case of procedural injustice.”\textsuperscript{57} Davis directly attacks the “privilege doctrine” and soundly reasons that once a liquor license has been issued, the licensee’s business is in fact lawful, and, after he has invested time and money in his operation, he should be accorded fair treatment. The logic of this reasoning is compelling and does comport with one’s fundamental sense of justice. To permit local officials summarily to pronounce a death sentence upon a person’s lawful livelihood requires a better reason.

Professor Gellhorn\textsuperscript{58} suggests that the assignment of license occupations to the “privilege” category is based to a great extent on the relative undesirability of the particular activity in question. Those occupations which are not traditionally regarded as “respectable” may be carried on only by the permission of the authorities, and they are not to be accorded the same constitutional protection as the more dignified professions. Gellhorn, like Professor Davis, feels that the “privilege-property” dichotomy has no place in the field of licensing. He argues:

It is only by an act of faith . . . that one reaches the conclusion that a quack doctor or shyster lawyer has less opportunity “for the infliction of general and substantial injury” to the public than has, let us say, the proprietor of a tavern; or that the latter does not serve a purpose which potentially is socially as useful as that of the insurance broker or the manufacturer of near beer.\textsuperscript{59}

The conflicting interests in the area of license revocation must be recognized. The need for protection of the public when a licensee violates the regulations attendant to his business cannot be disputed. Yet, the right of a person to engage in his lawful occupation must also be weighed in the balance. There is the ever-present danger of corruption, favoritism and patronage by local administrative officials. Where summary revocation is allowed, even an honest mistake may spell ruination for the former licensee. An additional consideration, and it is one of the primary arguments advanced in defense of the administrative process, is the speed with which the administrative machinery is to work. The writer has trouble conceiving of a situation so gross that immediate revocation is necessary, rather than providing the license holder with a few days’ notice and a hearing. These considerations, plus the arguments advanced by Professors Davis and Gellhorn, lead to the conclusion that summary revocation of a liquor license ought never be countenanced. The license should be recognized as “property” within the meaning of the Fourteenth Amendment such that it may not be removed by the states without due process of law.

As already noted, the great majority of the states today do have statutes requiring notice and hearing before a commission or governmental authority may revoke a liquor license. Many of the cases allowing summary revocation on the basis of the “privilege-doctrine” are old,\textsuperscript{60} while several of the statutes incorporating due process requirements into the liquor license revocation are relatively new.\textsuperscript{61} It could be argued by inference from these facts that there is a trend on the part of state legislatures to recognize liquor licenses as “property” in a constitutional sense. Where a statute expressly requires notice and hearing before revocation, compliance with these prerequisites is essential to the validity of the administrative

\textsuperscript{56} The decision in this case might be different under Iowa Code Ann., § 123.32 (Supp. 1964).
\textsuperscript{57} Davis, Administrative Law, 140 (1959).
\textsuperscript{58} Gellhorn, Administrative Law, 273-283 (2d ed. 1947).
\textsuperscript{59} Id. at 277.
\textsuperscript{60} Cases cited note 53 supra.
\textsuperscript{61} The Iowa statute cited at note 56 supra is an example.
action. Yet, as the Walker case illustrates, such statutes are sometimes circumvented with the aid of the "privilege doctrine."

B. Judicial Displeasure With Summary Revocation

It is fair to say that many courts have evinced their displeasure with the summary revocation of liquor licenses. It has been held that where a statute requires a hearing prior to revocation, a license may not be summarily revoked even though it was originally unlawfully issued. In Zimmerman v. Mulrooney, an applicant paid the prescribed sum, obtained a license and equipped her liquor store at considerable expense. Eighteen days later the authorities repossessed the license claiming that it had been issued through error and inadvertence. The court held that no summary power had been given to revoke such licenses even though unlawfully or erroneously issued: "Before the plaintiff can be deprived of her money, property, and rights, she is entitled to be heard before some tribunal concerning the validity of the license issued to her."

Other courts have attempted to reach just results by reading a hearing requirement into statutory language permitting revocation "for cause," or where the statute is wholly silent on the question. In the case of Burton v. Lefebvre, the Supreme Court of Rhode Island was faced with a statute limiting the power of local licensing boards to revocations "for cause." The Court held that even if a statute did not specifically require a hearing, such a requirement might be implied when the revocation of a lawfully issued license was at stake. It was argued that the revocation powers of the board were not merely administrative, but rather judicial or quasi-judicial, and the Court fell back upon an "aspects of property" argument saying that, "[the] holder of such a license should have protection from [the] arbitrary interference ... [of] the local licensing board."

The Supreme Court of California has rendered a similar opinion under a statute allowing revocation for "good cause," and the Court of Appeals of New York, dealing with the revocation of a taxi driver's license without notice or hearing, has noted that: "Where the exercise of a statutory power adversely affects property rights — as it does in the present case — the courts have implied the requirement of notice and hearing, where the statute was silent. ..." While this case does arise in a different context, the analogy between a cab driver's license and a liquor license appears strong. It is also noteworthy that the New York court focused upon the fact that a revocation proceeding involves fact-finding, a determination of rights and liabilities based upon this fact-finding, and, thus, must be considered a judicial act.

Some courts have even gone so far as to argue that it really does not matter whether we call a liquor license "property" or "privilege." Due process should be accorded in any case.

While these cases do not hold that a liquor license is "property" — and, thus, do not support the basic contention of this note — they do contradict the idea

64 Zimmerman v. Mulrooney, supra note 63 at 603 (Emphasis added).
66 Burton v. Lefebvre, supra note 46, at 460.
69 Irvine v. State Bd. of Equalization, 40 Cal. App. 2d 280, 104 P.2d 847, 850 (1940): "under the American system of justice it is the policy of our law that a person should not be deprived even of a 'permit' to engage in a legitimate business without a fair and impartial hearing and without an opportunity to present competent evidence for consideration by the licensing authority in opposition to the proposed revocation of his permit." Accord, Glicker v. Liquor Control Comm'n, 160 F.2d 96, 100 (6th Cir. 1947).
that summary revocation is allowable when the court is dealing with a mere "privilege."

C. A Guidepost

A 1964 decision may, hopefully, serve as a guidepost to the state courts. Although the Fifth Circuit, in Hornsby v. Allen, was dealing with a license application rather than a revocation case, the Court stated principles which are applicable in either area. Here the unsuccessful applicant for a liquor license alleged that she had met all of the statutory requirements and claimed that the denial of her application represented a deprivation of her civil rights. The Fifth Circuit held that the plaintiff had stated a good cause of action. The Court observed that licensing is an adjudicative process. "Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion." The Court then went on to argue:

The potential social undesirability of the product may warrant absolutely prohibiting it, or, as the Aldermanic Board has done to some extent here, imposing restrictions to protect the community from its harmful influences. But the dangers do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards. Indeed, the great social interest in the liquor industry makes an exceptionally strong case for adherence to proper procedures and access to judicial review in licensing the retail sale of liquor.

The Court, citing Glicker v. Liquor Control Comm'n, stated that it saw no valid distinction between the revocation of the license involved in the Glicker case and the denial of the license application involved in the Hornsby case.

This reasoning is sound and persuasive. Although the Fifth Circuit seems to say that it does not matter whether or not the license is called a "privilege," it is submitted that there is certainly an implicit recognition of the liquor license as "property." The applicant may not be deprived of or denied the license without the process which is her due. Further, if the beneficial results of the Hornsby doctrine are to be fully realized, there must be an explicit recognition of liquor licenses as "property."

D. Recognition of Property Right in Lawful Continuation of Business

In another recent case, the Federal District Court for the Western District of Michigan advanced a proposition which ties in closely with the Hornsby doctrine. In Lewis v. City of Grand Rapids, the chief of police and city commission of Grand Rapids had denied a transfer and ultimately revoked the only class-C liquor license owned and operated by a Negro in the city. The Court found racial discrimination and voided the denial of transfer and the revocation. Significantly, the Court argued: "Liberty includes the right to pursue a lawful occupation. To prevent this without due process is to violate the Fourteenth Amendment to the United States Constitution."

In other occupational areas it has been similarly recognized that a person has a "property right" in the continuation of a lawful business. In a 1961 decision the Supreme Court of North Carolina held that: "A license to engage in business or practice a profession is a property right that cannot be taken away without due process of law. The granting of such license is a right conferred by an administrative act, but the deprivation of the right is a judicial act requiring due process. . . ." The license involved in this decision was a bondsman's license. But the language

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70 326 F.2d 605, aff'd on rehearing, 330 F.2d 55 (5th Cir. 1964).
71 Hornsby v. Allen, supra note 78, at 609.
72 Id. at 609.
73 Glicker v. Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947).
75 Lewis v. City of Grand Rapids, supra note 74, at 386.
quoted above does not seem limited in its application. Here the words of Professor Gellhorn seem quite appropriate. For it is only by an act of faith that we can arbitrarily determine that a bad doctor or a shyster lawyer, or a bad bondsman, would have less opportunity for the infliction of substantial injury to the public than would the proprietor of a tavern. In a case involving another bondsman's license, the Court of Appeals for the District of Columbia also focused upon the fact that it was dealing with a revocation situation rather than the denial of a license application, and stated: "But, once granted, the license becomes a right, and due process of law must be followed to achieve deprivation. This is true even though the license is a severely qualified one. . . ." This same Court of Appeals, when faced with a case involving a refusal to renew an insurer's certificate to operate, rendered a like opinion. The Court held that once a business has been established on the basis of a license, "property rights" attach, and the license may not be revoked, nor renewal denied, without due process of law.

The New York Court of Appeals dealt with the summary revocation of a taxi driver's license in *Hecht v. Monaghan.* But again, by analogy, the reasoning of the Court is valuable in consideration of the nature of liquor licenses. The police commissioner's order of revocation was reversed as the court noted that "a person has a property right in the continuation of his business. . . ." Similar decisions have been rendered with respect to licenses authorizing operation as a pawnbroker, and engaging in the practice of dentistry. No good reason commends itself for distinguishing liquor licenses.

E. Procedural Irregularities Denounced in Revocation Proceedings

There is a substantial line of cases which support the proposition that the holder of a liquor license is entitled to due process before his license is revoked, and nothing less will do. Thus, procedural irregularities will not be countenanced in revocation or suspension proceedings. It has been held that where a provision required a hearing officer, the State Board of Equalization exceeded its jurisdiction in suspending a liquor license without such an officer present at a rehearing, even though the original hearing had been held before a hearing officer. Similarly, a suspension for sales to minors was annulled where the licensee's attorney was unduly restricted on cross-examination, despite what the court termed "clear evidence" sustaining the suspension. An Ohio Court of Appeals has overturned the revocation of a license where the permittee was denied the right to have certain witnesses testify. Again, revocation of a license and forfeiture of a bond were reversed when a judge proceeded *ex parte* without providing notice to the licensee, although notice and a hearing were provided to the surety on the licensee's bond. The Idaho Supreme Court has held that notice of determination to suspend a license for sale to minors did not meet minimum standards of due process when the names of the minors were not included in the commission's written determination. Finally, it has been held that a charge that a liquor permittee failed to carry on a club solely in the interest of dues-paying members was so general that it failed to give adequate notice as per due process requirements.

77 GELLHORN, ADMINISTRATIVE LAW, 277 (2d ed. 1947).
81 Hecht v. Monaghan, supra note 80, at 424 (Emphasis added).
83 Bruce v. Department of Registration, 26 Ill.2d 612, 187 N.E.2d 711 (1963).
86 Codosky v. Department of Liquor Control, 74 Ohio S. Abs. 150, 139 N.E.2d 690 (1956).
These cases clearly stand for the proposition that a liquor licensee is entitled to due process, and nothing less, before his license may be either suspended or revoked. This line of authority stands directly opposed to the idea that a liquor license is a "mere privilege" which may be revoked or suspended at the whim or caprice of the issuing authorities. It is submitted that these cases come much closer to obtaining substantial justice than those cases decided mechanically on the basis of the "privelege-property" dichotomy.

F. Suspension Proceedings As Compared to Revocation Proceedings

On occasion a distinction has been made between the process that is due when it is suspension at stake, and the process due when revocation is attempted. For example, the Supreme Court of Vermont upheld a fifteen-day suspension of a liquor license when the only hearing accorded the holder was an informal one in which no witnesses were sworn and no formal testimony taken. The Court noted that the only statutory direction for a hearing was with regard to revocation cases. Professor Gellhorn advocates this distinction as a scheme which would both protect the public and the license holder by permitting summary suspension, yet making hearings mandatory before revocation. This suggestion is somewhat appealing, but still objectionable where suspension for a long time is possible. After all, it should not be forgotten that the administrative process involved should never be all that cumbersome or time-consuming.

G. Recognition of Continuing Interest in Liquor License

Most courts seem to take the position that there is no continuing interest in a liquor license. That is, in the absence of statutory provisions to the contrary, the former holder of a license has no rights different from those of any other person when applying for renewal of his license, and, upon expiration, the holder is not entitled to renewal as a matter of right. However, at least one federal court and a number of Pennsylvania courts take the position that the discretion of an administrator should not be as broad in refusing renewal of a license as it is in passing upon the original application and, by implication, that there is a continuing right in a liquor license. Preference for a holder over an applicant would seem just in the light of the substantial investment which the holder has made. Concededly, a limitation on the number of licenses issued may create a monopoly, but all licensing systems create monopolies to a greater or lesser extent. In the Doran v. United States case, while the Court did uphold the administrator's refusal to renew, it noted that the brewery's holding a permit for many years was of "much significance." The Court stated that "property rights" had grown up under the.

91 Gellhorn, op. cit. supra note 85, at 279.
93 Kaer Co. v. Doran, 42 F.2d 923 (E.D.Pa. 1930).
94 Pennsylvania Distilling Co. v. Pennsylvania Alcoholic Permit Bd., 20 Pa. D. & C. 385 (1933); Erie Licenses, 4 Pa. Dist. 167 (1933); Helling's License, 2 Pa. County Ct. 76 (1886); In re Justin, 2 Pa. County Ct. 22 (1886); License of Schantz, 1 Pa. County Ct. 361 (1886); O'Brien's License, 1 Pa. County Ct. 363 (1886).
granted permit and the value of the holder’s investment should not be destroyed unless his conduct clearly warranted forfeiture of the license.\textsuperscript{95}

While the above cases could not be called a powerful body of precedent, they are correctly decided, and therefore must be respected.

\textit{H. Conclusion}\\

Despite the substantial precedent to the effect that statutes and ordinances providing for summary revocation of a liquor license are not unconstitutional, there is a great deal of authority, both statutory and judicial, which suggests that courts and legislatures have at least implicitly recognized that liquor licenses are “property” within the meaning of the fourteenth amendment. Today the vast majority of the states do have statutes requiring notice and hearing before revocation. To this extent it might be said that the arguments advanced here simply amount to “whipping a dead horse,” and that really there is no need to attach the appellation “property” to liquor licenses, since the courts are adequately protecting the rights of holders. However, the devious tactics utilized by the Iowa court in \textit{Walker v. City of Clinton},\textsuperscript{96} suggests that so long as the “property-privilege” dichotomy is viable, it may serve as a springboard for summary revocation and a basis for circumventing notice and hearing requirements.

In the light of the \textit{Hornsby}\textsuperscript{97} and \textit{Lewis}\textsuperscript{98} cases, decided in 1964 and 1963 respectively, it would appear that there is a trend toward the recognition of liquor licenses as property within the constitutional sense of the term. It is submitted that there are no sound reasons why liquor licenses should not be recognized as property and that such recognition should no longer be withheld.

\textit{James J. Leonard, Jr.}

\textsuperscript{95} \textit{Kaier Co. v. Doran}, 42 F.2d 923, 924 (E.D.Pa. 1930).
\textsuperscript{96} 244 Iowa 1099, 59 N.W.2d 785 (1953).