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INTOXICATING LIQUOR—POSSESSION—SUFFICIENCY OF EVIDENCE—CREDIBILITY OF WITNESSES—ORAL ARGUMENT—Appellant was convicted, after trial, upon affidavit charging unlawful possession of liquor under Sec. 4, Chap. 45, Acts 1925, Burns' Ann. St., Sec. 2717, and sentenced to serve not less than one and not more than two years in the State Prison.

State's evidence, besides an agreed stipulation showing two prior convictions, consisted of the testimony of the arresting officer, that in searching appellant's house he found two gallons of moonshine whiskey in a hideout under a closet in a room occupied by appellant. Appellant denied knowledge of the whiskey and testified that he had moved into that room the day before, when it was vacated by Fennoff, who had occupied it theretofore. Fennoff testified for appellant that he found the whiskey and put it in the hideout. Appellant assigns as error the overruling of motion for new trial based on the insufficiency of the evidence to sustain the finding of the court. *Held*: Affirmed. *Malich v. State*, Supreme Court of Indiana, January 15, 1930, 169 N. E. 531.

The first question raised is what constitutes possession under the statute. *Branam v. State*, 165 N. E. 314, decides it means actual physical control and that ownership and exclusive possession are not essential elements, and that the possession must be conscious. The Indiana cases so holding have been considering the statute covering possession with intent to sell. This case involves the same elements of possession without regard to intent or motive required under that statute. The cases from other jurisdictions support the proposition that knowledge is an essential element under statutes similar to the one in question. *State v. Harris*, (Ore.) 211 Pac. 944; *Nelson v. State*, (Wis.) 203 N. W. 343, and *State v. Gates*, (N. D.) 204 N. W. 350, in which an instruction, "that if liquor was taken from a room vacated by a lodger and put in defendant's room without his knowledge by his wife, that defendant would not be in possession, but if that claim was believed to be a subterfuge and you are satisfied beyond a reasonable doubt that defendant knew of its presence, then you will convict," was upheld. 33 Corp. Juris. 585 supports the principle that knowledge is an essential element under a statute making possession alone a crime.

Appellant put the question of knowledge in issue by his testimony and that of Fennoff, in rebutting the acknowledged presumption of knowledge arising from actual possession. In determining whether evidence was sufficient to sustain a finding or verdict, only evidence favorable to the prevailing party can be considered with inferences and conclusions drawn therefrom, and the court will not weigh the evidence. *McDonough v. U. S.*, 299 Fed. 30; *Sloan v. U. S.*, 287 Fed. 91; *Moore v. State*, (Ark.) 267 S. W. 769; *State v. Brown*, (Mo.) 198 S. W. 177; *Dennison v. State*, 191 Ind. 232; *Bohan v. State*, 194 Ind. 237; *State v. Sullivan*, (W. Va.) 47 S. E. 267; *Rosenberg v. State*, 192 Ind. 485. The inferences must be

drawn from premises established by proof. *Young v. State*, 194 Ind. 221, 141 N. E. 309.

The state's evidence of knowledge consisted of actual possession as shown by testimony of the arresting officer. The issue presented was whether the presumption of knowledge was overcome by appellant. In face of that the finding of the court must be taken to mean that the testimony of appellant and Fennoff was discredited. The question of credibility of witnesses is not open on appeal, and no new trial will be granted generally, when case turns on the credibility of witnesses, even though evidence was contradictory and might have authorized an opposite finding of fact if testimony of appellant's witnesses had been believed. 16 Corp. Juris. 481; *State v. Sullivan*, (W. Va.) 47 S. E. 267; *Goldman v. U. S.*, 245 U. S. 474; *Payne v. State*, 194 Ind. 438. The reason for the rule is that the trial court and jury have an opportunity to observe the witness while the court of appeal does not. In this case, therefore, the presumption of knowledge, in light of the finding, must be taken as unrebutted, as it depended on the credibility of appellant and his witness and was decided adversely to appellant and is not reviewable. That being so, there was evidence sufficient to sustain the verdict.

Appellant requested oral argument, which was denied. Petition for oral argument is governed by Rule 26, Rules of Supreme and Appellate Courts of Indiana, which in substance provides that if petition is made within time for filing briefs, the court will set it down for oral argument. The line of Indiana decisions on that point hold that where appellant's case is thoroughly briefed, his position clearly stated, with the questions relating thereto, the petition for oral argument will be denied where nothing can be gained thereby. *Young v. State*, 194 Ind. 221, 141 N. E. 309; *Parrett v. State*, 159 N. E. 755; *Allgaier v. State*, 164 N. E. 315; *Gale v. State*, 168 N. E. 241; *Seeger v. State*, 168 N. E. 577; Ewbank, Indiana Criminal Law, p. 627.

H. N. F.