brand or manufacturer's name affixed to the unit rather than any names which might appear on the ten-gallon containers. As a result, the customer may receive ice cream of a make or quality other than that which he believed he was buying. Under the circumstances misrepresentation undoubtedly is involved.

Chapter 355 of the Laws of 1933 (R.S. 56:3–14 to 34), also, is pertinent. Section 15 provides that:

> "Any person . . . engaged in manufacturing . . . ice cream [or similar products] . . . or selling [ice cream] in . . . refrigerators . . . upon which his . . . name . . . or other marks [is] branded . . . may register his . . . name . . ."

and is thereafter

> ". . . deemed the proprietor of such name . . . and of every container upon which such name . . . may be branded." R.S. 56:3–15.

Where there has been a proper registration of the brand name in compliance with sections 16 through 19:

> "No person . . . other than the owner or proprietor, of [the] name . . . shall fill or cause to be filled with [ice cream] . . . or shall . . . use . . . any [refrigerator] . . . nor shall . . . remove or conceal any such name . . . without the written consent of the owner." R.S. 56:3–20.

Absent written permission to store other ice cream, a violation would exist. Persons violating Section 20 are subject to prosecution under Section 21 which provides for fines of $5.00 per unit or imprisonment for a period of not less than 10 days nor more than one year or both. On subsequent violations, the penalty is a fine of $10.00 or imprisonment for not less than 20 days nor more than one year or both.

Very truly yours,

DAVID D. FURMAN
Attorney General

JUNE 29, 1961

HONORABLE HAROLD J. ASHBY
Chairman, State Parole Board
State Office Building
Trenton, New Jersey

FORMAL OPINION 1961—No. 11

DEAR MR. ASHBY:

You have requested our opinion as to whether *R.S.* 19:4–1 disenfranchises a person convicted of "carnal abuse" as distinguished from a conviction had for "rape."

A preliminary determination must be made that *R.S.* 19:4–1 operates to deprive persons convicted of certain enumerated offenses of the right of suffrage and to this extent works a forfeiture upon such persons. In *Marter* v. *Repp*, 80 *N.J.L.* 530, 532 (Supreme Ct. 1910); *aff.* 82 *N.J.L.* 531 (E. & A. 1911), it was said that

"A penal statute is one which enforces a forfeiture or penalty for transgressing its provisions by doing a thing prohibited."

The court then observed that such a forfeiture statute falls within the category of a "penal statute" and the decisions in this jurisdiction to the effect that penal statutes are to be construed strictly against the state are legion. It was said in *State* v. *Vanderhave*, 47 *N.J. Super.* 483, 492 (App. Div. 1957); *aff.* 27 *N.J.* 313 (1958) that

"Penal statutes are to be construed strictly against the state, for statutes creating and defining crimes cannot be extended by intendment. The condemned act must be plainly and unmistakably within the statute. * * * Accordingly, any doubt as to the meaning of the statute is to be resolved in favor of the strict construction thereof."

In *Marter* v. *Repp, supra,* the court carefully made the observation "that 'penal' is a much broader term than 'criminal,' and includes many statutory enforcements of police regulations, the violation of which are in no sense crimes." Thus, we must conclude that *R.S.* 19:4–1, in that it provides for a forfeiture of the right of suffrage in certain cases, falls within the definition of a "penal" statute as defined in *Marter* v. *Repp, supra,* and is subject to the rule of strict construction. Accordingly, unless it clearly appears that the Legislature intended the forfeiture of suffrage by a person convicted of "carnal abuse," we must find that the forfeiture will not apply.

An examination of the pertinent portions of the statutes involved is essential to a determination of the issues raised.

The applicable part of *R.S.* 19:4–1 is as follows:

"No person shall have the right of suffrage—

(1) Who is an idiot or is insane; or

(2) Who has been or shall be convicted of any of the following designated crimes, that is to say—blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beast, robbery, conspiracy, forgery, perjury or subornation of perjury, unless pardoned or restored by law to the right of suffrage; or . . ."

The crime of "rape" or "carnal abuse" and the punishment for conviction thereof in various phases is described in *N.J.S.* 2A:138–1, which provides:

"Any person who has carnal knowledge of a woman forcibly against her will, or while she is under the influence of any narcotic drug, or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child under the age of 12 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 30 years, or both; or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child of the age of 12 years or over, but under the age of 16 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000 or by imprisonment for not more than 15 years, or both."

State v. *Lefante,* 12 *N.J.* 505, 513 (1953), observes that there are three separate crimes encompassed in *N.J.S.* 2A:138–1 and, to use the language of our Supreme Court, they are as follows:

"(1) Rape,

(2) Carnal abuse of a woman-child under the age of 12 years, and

(3) Carnal abuse of a woman-child over the age of 12 years and under the age of 16."

The distinction between "carnal abuse" and "carnal knowledge" was made early in this jurisdiction in *State* v. *Hummer*, 73 *N.J.L.* 714 (E. & A. 1906) and *State* v. *Huggins*, 84 *N.J.L.* 254 (E. & A. 1912) and affirmed in *State* v. *MacLean*, 135 *N.J.L.* 491 (Supreme Ct. 1947) where it was held that

> "Carnal abuse is an act of assault or debauchery of the female sexual organs by the genital organs of the male which falls short of knowledge with its accompanying penetration."

Of similar effect was *State* v. *Auld*, 135 *N.J.L.* 293 (E. & A. 1946); and *State* v. *Riley*, 49 *N.J. Super.* 570, 584 (App. Div. 1958) where the court said:

> "The law is clear that what is required to constitute rape or forcible carnal knowledge is actual sexual penetration. Application of Faas, 42 N.J. Super. 31, 35 (App. Div. 1956)."

In *State* v. *Orlando*, 119 *N.J.L.* 175, 183 (Supreme Ct. 1937), Justice Trenchard said:

> "Considered in its entirety the instruction of this topic was that to convict the defendant of rape the jury must find that he had sexual intercourse with the prosecutrix forcibly and against her will; that to complete the crime of rape there must be penetration by the sexual organ of the male in the sexual organ of the female, and that the slightest penetration is sufficient. That was right."

Summarizing the general situation described above, our Supreme Court said in *State* v. *Lefante, supra*:

> "In normal usage rape, or forcible carnal knowledge, is entirely distinct from carnal abuse, the first involving actual sexual penetration, and the second being, as stated in *State* v. *Huggins*, 84 N.J.L. 254, 259 (E. & A. 1913), 'an act of debauchery of the female sexual organs by those of the male which does not amount to penetration.'"

It is evident that a conviction for "rape," referred to in *N.J.S.* 2A:138–1 as "carnal knowledge" is for an entirely different offense than "carnal abuse." Referring again to *R.S.* 19:4–1, the legislative enactment which disenfranchises certain convicted persons, it is significant that only the crime of "rape" is included and no reference is made to the application of the law to a person convicted of "carnal abuse."

Accordingly, we determine that a person convicted of "carnal abuse" has not been convicted of "rape," is not within the purview of the disenfranchising statute and is not obliged to forfeit the right of suffrage.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: EUGENE T. URBANIAK
Deputy Attorney General