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Municipal Corporations--Power to Prohibit Pool Rooms

Lester C. Hess
West Virginia University College of Law

ishment under an order of attachment. *Minotti* v. *Brune*, 94 W. Va. 181, 118 S. E. 149.

—ARLOS JACKSON HARBERT.

MUNICIPAL CORPORATIONS — POWER TO PROHIBIT POOL ROOMS.—In a recent West Virginia case, a mandamus proceeding, it was found that the city council, after impartial examination and consideration had refused to issue to the relator, a license to operate a certain pool and billiard room. The reasons for this refusal were that relator had previously operated a pool room on the location in question, such operation not being in conformity with the law; and that relator had proved himself incapable of conducting such business in conformity with the law. *Held*, in such case, the court will not disturb the discretionary judgment of the council. *State ex rel. Smith* v. *Town of Ravenswood et al.*, 140 S. E. 680 (W. Va. 1928).

To remedy defects occasioned by the repeal of an earlier pertinent statute, ACTS 1919, ch. 102, § 130, in 1921 the following amendment was made to ch. 47, § 28 of the WEST VIRGINIA CODE:

> "The council of such city, town or village shall have plenary power and authority therein * * * * to license or prohibit the operation of pool and billiard rooms, and maintaining for hire pool and billiard tables, and in event any such business is licensed, to make and enforce reasonable ordinances regulating the same." ACTS 1921, ch. 143.

This amendment expressly confers on the council absolute power to license or prohibit the operation of pool and billiard rooms. WEBSTER'S NEW INTERNATIONAL DICTIONARY "plenary: full, entire, complete, absolute." In two subsequent cases the court, without mentioning this statute apparently does away with its effect. *State ex rel. Hamrick* v. *County Court of Pocahontas County et al.*, 92 W. Va. 222, 114 S. E. 519, and 92 W. Va. 618, 115 S. E. 583, 29 A. L. R. 37. A third case, subsequently decided, while mentioning the statute, arrives at the same conclusion as the preceding two

cases, namely, that if the discretion of the council is unreasonably exercised, mandamus will lie to compel the issuance of the license. *State ex rel. Hardman* v. *Town of Glenville*, 102 W. Va. 94, 134 S. E. 467. In 33 WEST VIRGINIA LAW QUARTERLY 116 it was pointed out that to give full effect to the above amendment would be constitutional; that it would not interfere with operation of fiscal measures; and that although pool rooms have been consistently held in West Virginia not to be nuisances *per se*, the power to prevent nuisances need not be invoked, since the statute confers absolute power respecting this identical subject matter. Pool rooms, it was there pointed out, are sufficiently obnoxious to justify their prohibition under the police power. One court considers them as inherent breeders of vice. *State ex rel. Sayles* v. *Superior Court*, 120 Wash. 183, 206 Pac. 966. There being good pool rooms and bad ones, and the city council obviously being in better position to distinguish the one class from the other, it was consequently submitted that the statute be literally construed and applied, and the city council be given full power to grant or refuse such license.

Such action would be confronted by a minimum of difficulties, and would avoid the apparent overruling of an unambiguous statutory provision. And if it were possible that improper motives should induce a city council to refuse to consider issuing such a license without an exercise of discretion, recourse may be had to the general rule that mandamus will lie to compel performance of a ministerial duty. 18 R. C. L. 292, and cases cited. Obviously, then, the court has only power to compel the council to consider the question, and the exercise of discretion is left wholly with the council. The court states as a general rule that "all that is necessary is that the discretionary decision shall be the outcome of examination and consideration," *State ex rel. Hamrick* v. *County Court of Pocahontas, supra,* and approved in the principal case. This is undoubtedly the weight of authority in the United States, but it is also highly probable that those states wherein it is followed have no such statute as ours with which to contend. Although the principal case does not mention the above provision of the statute, and although the court retains the general rule in its rea-

soning, the case as a whole seems to approach the position advocated in the earlier article. And as "great civic good can be done by giving effect to the statute," it is to be desired that the court will continue its approach to that position, ultimately to apply the statute literally construed. Obviously, the only alternative is the repeal of the provision.

—LESTER C. HESS.

REAL PROPERTY—VENDOR AND PURCHASER.—Plaintiff is the assignee, first in date of assignment, of five out of a total of twelve notes secured by a vendor's lien. By virtue of such priority of time he claims a lien against the security prior to holders of the remaining notes subsequently assigned. Plaintiff's claim was based on the rule of West Virginia and Virginia, that where notes secured by a mortgage or vendor's lien are assigned to different persons, the first note assigned will be the first satisfied out of the security. The court acknowledged the rule, but made an exception to it in the case under consideration because the notes were made payable to several grantors jointly, and before assignment of any of the notes they had divided them among themselves by indorsing them "without recourse." In such a case the court held that the payees or their assignees will be entitled to participate in the distribution of the security in the proportion represented by the amount of their notes irrespective of priority of assignment. *Home National Bank of Sutton* v. *Boyd*, 140 S. E. 482 (W. Va. 1927).

The rights of different assignees of a series of notes secured by a vendor's lien have by the courts of this country been adjudicated in three different ways. First, some courts, and West Virginia among them, have held that the notes should be paid in the order of their assignment. *White* v. *King*, 53 Ala. 162 (1875); *McClintic* v. *Wise*, 25 Gratt. 448, 18 Am. Rep. 694; *Paxton* v. *Rich*, 85 Va. 378, 7 S. E. 532; *Tingle* v. *Fisher*, 20 W. Va. 497 (1882); *Jenkins* v. *Hawkins*, 35 W. Va. 799, 12 S. E. 1090. The decision in the