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Constitutional Law--Licenses

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to be attached to the testimony of each" was held to be proper.[18] "The remark as to which of the witnesses was entitled to the most credit, preceded and followed as it was by the explicit declaration that the jury were the sole judges alike of the correctness and credibility of the witnesses, calls for no interference."[19] "It is error to charge the jury that they are bound to believe a witness unless he is impeached."[20]

Now, we have in the United States two distinct lines of decisions, one upholding an instruction that tells a jury that it may arbitrarily disbelieve testimony, the other holding such instruction to be erroneous. Decisions of either kind have been handed down in West Virginia at different times. The question then arises as to which decision is the sounder. From the cardinal principle of the common law that the jury are the sole judges of the evidence it would seem to follow that it is entirely within their province to accept or refuse within their own minds such testimony as they see fit. Otherwise they are not the sole judges of the evidence. If this be true, then the West Virginia Court should not reverse a case because the jury has been instructed that they are the sole judges of the evidence and that they may believe or refuse to believe any witness, as it has done in the recent decisions cited.

—*R. G. K.*

CONSTITUTIONAL LAW—LICENSES.—The petitioner averred that section 35a of Chapter 32 Code 1913 as amended and re-enacted by sections 35a and 35b of Chapter 109, Acts 1921, insofar as they undertake to give the discretion to grant or refuse licenses are in contravention of the equal protection of the law clause of the United States Constition. The section, the constitutionality of which is in question, provides that the county court may at its discretion grant or refuse the application of any person for a license to keep a pool table for public resort. *Held,* that the statute does not infringe the equal protection of the law clause of the Federal Constitution. *State, ex rel. Hamrick* v. *Pocahontas County Court, et al.,* 114 S. E. 519, (W. Va. 1922).

Section 35b of Chapter 109, Acts 1921 transfers all powers, including the discretionary power of section 35a, to the council of

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[18] 22 2nd Dec. Dig. 337.
[19] Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341 (1854); 14 R. C. L. 733.
[20] State *v.* Smallwood, 75 N. C. 104 (1876).

municipal corporations. The conducting of billiard and pool rooms for hire or public use is a constant menace to the public peace and morals and they may be subjected to control and regulation or, indeed, entirely prohibited. *City of Tarkio* v. *Cooke,* 120 Mo. 1, 25 S. W. 202; *Clearwater* v. *Bowman,* 72 Kans. 92, 82 Pac. 526; *Tanner* v. *Albion,* 5 Hill (N. Y.) 121; *Hall* v. *State,* 98 Ky. 648, 343 S. W. 22; *Corinth* v. *Crittenden,* 94 Miss. 41, 47 So. 525; *Booth* v. *Illinois* 184 U. S. 425. This attitude of the courts toward such public resorts is not only generally adopted in the United States at the present time but it was very early maintained in England as evidenced by the fact that Lord Hale in 1672 upheld a municipal by-law forbidding the keeping of such resorts due to the demoralizing tendencies which accompanied them. *Rex* v. *Hall,* 2 Keb. 846. While the existence of a pool room is not a nuisance *per se,* it may become such and the municipal authorities are not bound to wait until the evil becomes flagrant before exercising their power of regulation. Such regulation, when exercised, is aimed not at the business, as such, but at the evils accompanying the business. Under the police power, the maintenance of such a resort may be entirely prohibited. *Murphey* v. *California,* 225 U. S. 623. Where the only legislative authority conferred upon the municipality with reference to pool rooms is to license such places by ordinance, the power to license is to be construed as a power to regulate through the license ordinance and the city council may thereby impose such reasonable terms and conditions as may be necessary to make the license issued in pursuance thereof efficacious as a police power. *State* v. *Pamperin,* 42 Minn. 320, 44 N. W. 251. The proposition that the confering of discretionary power upon municipal councils to grant or withhold permission to carry on a business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment, is undoubtedly correct. *New York State* v. *Vann de Carr,* 199 U. S. 552, 50 L. Ed. 305. However the opposite of this doctrine is supported by a number of respectable authorities including West Virginia. *Lynch et. al.* v. *Town of Northview et. al.,* 73, W. Va. 609, 81 S. E. 833; *Houvouras* v. *City of Huntington,* 90 W. Va. 245, 110 S. E. 692; *Commonwealth* v. *Matetsky,* 203 Mass. 241, 89 N. E. 245. But to prevent this broad and important power from being abused by a discriminating or predjudicial application, it is held a duty of the licensing authorities to determine from an honest judgment based upon personal investigation whether an applicant is a proper person to be licensed.

Darby v. *Pierce,* 17 Idaho 697, 107 Pac. 484; *Perry* v. *Salt Lake City,* 7 Utah 143, 25 Pac. 739. An ordinance may be valid on its face, but which if improperly applied, may become unconstitutional. *Yick Wo* v. *Hopkins,* 118 U. S. 356. Where a municipal corporation has authority to regulate pool rooms under the police power, the plaintiff can not be heard to complain of the loss of his property because he will be considered as having knowingly engaged in an occupation without the protection of the Federal Constitution and which lawfully could be regulated out of existence. *Murphey* v. *California, supra.* Social interests demand and authority sanctions the decision in the principal case.

—H. C. H.

CONTRACTS, SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—WRITING NECESSARY TO TAKE CASE OUT OF OPERATION OF STATUTE.—A agrees in writing to accept certain real estate in compromise of a suit at law. B orally agrees to convey. Subsequently thereto A attempts to withdraw and announces intention of continuing his action at law. B tenders deed and brings his bill asking for specific performance and that A's suit be enjoined. *Held,* injunction and specific performance granted. *Ruckman* v. *Hay,* 114 S. E. 514 (W. Va. 1922).

A could not have sued B upon his oral promise to convey, because such suit is expressly excluded by the terms of the STATUTE OF FRAUDS, which in effect provides that no action shall be brought upon any contract for the sale of land unless some note or memorandum thereof be in writing and signed by the party to be charged. See W. VA. CODE, c. 98. The principal case is in accord with the weight of authority, which treats this as a voidable contract allowing the party not signing to enforce the contract against the party signing, thereby extending the privileges and immunities of a class legally incompetent to a party who is legally competent enabling such party to reap the advantages of a profitable bargain and escape the consequences of an unfavorable one. *Penniman* v. *Hartshorn,* 13 Mass. 91; *McCrea* v. *Purmont,* 16 Wend. 460; *Mountain Park Land Co.* v. *Snidow* 77 W. Va. 54, 86 S. E. 915. The courts so holding apparently treat this as a voidable contract because the statute does not in terms preclude recovery by the party not signing against party who has signed. *Don-*