COUNTY COURT: County court in third class county has discretion
LICENSE: to refuse to issue license to keepers of billiard tables.

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Honorable Morran D. Harris
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St. Clair County
Osceola, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

> "Application was made to the County Court for license to operate a pool hall. A hearing was had, after notice had been published in a newspaper published in the County Seat. At the hearing, no evidence was submitted to the effect that (1) the applicant was an unfit person to operate such a business, or (2) that such business would be run too near to a school or church. The facts are that the applicant is a person of the highest character and reputation, and that the business would not be run within 300 feet of any school or church. The facts are, however, that the license was refused without cause. The reason given for refusing it was that a majority of those at the hearing were opposed to pool halls.
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> "It is my understanding, in the light of Missouri cases, esp. 263 SW 807 and 227 SW 2d 80, that County Courts have no authority to arbitrarily refuse to issue licenses for pool halls or billiard halls, that said Courts may use their discretion (i.e., refuse license for cause, such as unfitness of applicant, or improper location of business), but that dislike for pool halls in general is not good cause in itself for refusing such licenses. Is that the correct interpretation of the laws of Missouri?

> "Applicant has obtained city license from the city of Osceola, and has applied for State and Federal license. He has said that he plans to operate a pool hall and at the same time place in the bank here to the credit of the County Court an amount equal to the maximum amount which the County Court could legally charge him for licenses, taking into account the number of pool tables he will operate. That would be operating without a county license. If my interpretation of the laws of Missouri is correct, as set out above, is there anything that I, as Prosecuting Attorney, can do about it, so long as the County Court gives no cause for refusing said license?"

Section 318.010, RSMo 1949, Chapter 318, relates to the power vested in the county court to license the keepers of billiard tables and reads:

> "The county court shall have power to license the keepers of billiard tables, pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming, upon which balls and cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their counties as many blank licenses for the keepers of such tables, herein mentioned, as the respective courts shall direct, which shall be signed by the clerk and attested by the seal of the court."

Section 318.020, RSMo 1949, requires the collector to deliver to any person licensed a license and further provides for the amount to be charged for said license depending upon the number and kind of tables, and reads:

> "The collector shall deliver to any person who shall have been licensed, a license to keep any such table mentioned in section 318.010 in their respective counties, for a term of twelve months, upon the payment by the applicant of the sum of twenty dollars for each billiard table, and ten dollars for each other table described in said section, and the collector shall countersign such license before delivering

> the same to the applicant; provided, that if the applicant be the keeper of more than one of such tables, the number may be named in one license, and in such case the clerk shall not be entitled to more than one fee as provided in section 318.050."

Section 318.080, RSMo 1949, fixes a penalty for keeping tables mentioned in Section 318.010, supra, without first obtaining a license to keep them. Said section reads:

> "Every person who shall keep or permit to be kept or used any one or more of the tables mentioned in section 318.010, without having a license therefor, shall forfeit and pay not less than fifty nor more than four hundred dollars, to be recovered by indictment or information."

Section 38 of Volume 53, Corpus Juris Secondum, pages 632 and 633, lays down the general principle of law relative to authority of licensing officials and reads in part:

> "As a general rule the power vested in the board or officer to grant licenses on compliance by applicant with the prescribed conditions carries with it, either expressly or impliedly, the power to exercise a reasonable discretion in granting or refusing licenses, but under statutes mandatory in terms no discretion is vested in the licensing board or officer, and every person who possesses the statutory qualifications and who complies with the statutory requirements is entitled to a license, and under some statutes the board has no discretion except to determine whether applicant is a proper person to conduct the business. Whether the words of a licensing statute are mandatory or discretionary in providing for the issuance of a license is a matter of legislative intention to be determined by a consideration of the purposes sought to be accomplished by the statute."

From reading the foregoing statute, Section 318.010, supra, one would be inclined at first blush to conclude that the county court has no discretion in the matter upon the

tendering to said court the amount charged for a license, since there are no requirements as to holding a hearing or qualifications of the applicant or any requirement that said license must not issue when the tables are located within a certain proximity of schools and churches and other similar provisions and conditions for issuing such a license. Such was more or less the holding of both the Kansas City and Springfield Courts of Appeals. (State ex rel. Bayless v. County Court, 193 Mo. App. 373, 185 S.W. 1149; and State ex rel. Oetker v. Johnson, 211 S.W. 682.)

However, in State ex rel. Hawkins v. Harris, 239 S.W. 564, the Springfield Court of Appeals held contrary thereto and held that as that court read Section 9644 (same as Section 318.010, supra) the county court has the right to refuse a license without giving any reason whatsoever. In so holding, the court said, l.c. 565:

> "We have come to the conclusion that both of these decisions were erroneous, and our reasons for such conclusion will be hereinafter stated. The application of the law, as declared in those cases, would not require that we order the county court to issue the license in this case. The reason for this last statement is that in those cases it was shown that the county court did not find any evidence which would justify it to refuse the license on account of unsuitable man or place, while there is evidence in this case bearing on the suitability of the place, and the county court, passing upon that evidence, has found that it was unsuitable and objectionable. The right to try that question is vested solely in the county courts, and even should a county court base its conclusions upon evidence such as this court could not reach the same conclusion, still there is no power under the law or right given to this court to usurp that function which by statute is delegated to the county court. This phase of the law has been clearly set forth by the Kansas City Court of Appeals in the case of State ex rel. v. Thornhill, 174 Mo. App. 469, 160 S.W. 558, wherein the Supreme Court and appellate court cases are learnedly discussed, and wherein it is expressly held that:

"'It is only when the county court refuses to hear the application, or when it has found in relator's favor every fact necessary to the granting of the license, and yet refuses to issue the license, that mandamus will lie.'

"That case and the cases cited therein clearly support the rule, and further hold that if the county court does undertake to hear evidence on the question, where the statute gives them the right to act, and makes an adverse finding, mandamus will not lie merely because the evidence would not support the finding, or that the court has made erroneous deductions from the evidence before it, and it is held in that case, and cases cited, that the only remedy which would ever be available to one who had been adversely ruled against by the county court would be a bill in equity charging fraud. Under authority of the Thornhill Case, the county court in the case at bar having heard evidence and found the facts under that evidence, this court cannot, by mandamus, correct that finding and require that court to issue the license; otherwise, the appellate court would be assuming the authority which has been solely delegated to the county court.

"But there are other reasons, which to our minds are greater than these, that would prevent this court from ordering the county court to grant the license, and that is because, as we read the statute (section 9644), the county court has the right under that law to refuse a license without giving any reason whatever. The statute itself merely provides that 'the county court shall have power to license the keepers of billiard tables.' There is no intimation in the statute that this power shall be exercised in a mandatory way. We say this because there is no provision made, in the statute with reference to the granting of pool and billiard licenses, for a hearing before the county court; there is no provision made for remonstrance to be filed; there is nothing in the statute which appears to us directing that the county court shall do anything in connection with an application filed before it."

The foregoing case was thereafter certified by the Springfield Court of Appeals to the Supreme Court of Missouri for final determination for the reason that there was a direct conflict with that decision and one of the Kansas City Court of Appeal decisions. The Supreme Court decision, reported in 304 Mo. 309, 263 S.W. 807, affirmed the decision of the Springfield Court of Appeals and in so holding, the Supreme Court said, l.c. 808:

> "The majority opinion of the Court of Appeals, while holding that the petition of relator was deniable upon the ground that respondents had taken evidence, and made a finding thereon, and had not abused its discretionary power in the instant case, a conclusion in which we concur, went farther, and sustained the action of respondents upon the ground that county courts have 'the exclusive right, acting under section 9644, R. S. 1919, to grant or refuse billiard or pool room licenses, without basing their conclusion on anything other than that they may determine that such an institution in a community is a nuisance.' That holding being in conflict with the decisions of the Kansas City Court of Appeals in State ex rel. v. County Court of Clinton County, 193 Mo. App. 373, 185 S.W. 1149, and State ex rel. v. Johnson, 211 S.W. 682, the cause is certified to this court.
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> "The occupation of keeper of billiard and pool tables is one which has never been permitted to be exercised except a license therefor be granted by the county court. The power to grant the license has always been vested in the county court, and without the laying down of any conditions under which, or in accordance with which, the power shall be exercised, other than the provision fixing the amount to be paid upon each table, and the provision forbidding county courts and city authorities from levying a greater amount on any table than is allowed for state purposes.
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"It is clear that the primary license to keep pool or billiard tables is the license to be obtained from the county court. * * * The power given to the county court is not of a regulatory character. * * * * * * * * There is nothing in the terms mandatory upon the county court in the language of section 9644. There is nothing prescribing the qualifications of the applicant nor the character of the place where the tables are to be kept. No provision is made for a petition by him setting forth anything, nor for petitioners whom he must secure as a prequisite, nor for a remonstrance from any one opposed to the granting of license, nor any provision for the taking of evidence by the county court. In construing the language used in section 9644, a comparison of that section with the statute formerly in force, providing for license to keepers of dramshops with the ruling of this court upon the latter, is pertinent. Under the statute of 1865, G. S. 1865, c. 98, there were certain requirements made as to the application, and the statements therein to be made and shown. After which there was a provision as follows: 'And if the court shall be of the opinion that the applicant is a person of good moral character, the court may grant a license for six months.' The question of the force to be given to this language came up in the mandamus proceeding in State ex rel. Kyger v. Justices of Holt County, 39 Mo. 521. In that case the contention of the relator was that, since he filled the requirements, and had complied with all of the conditions prescribed by the statute, the county court had no discretionary power in the premises, and the license must be granted as a matter of right. It was held that, since the business was one which the Legislature had not prohibited, but allowed to be exercised by certain persons, having qualifications specified by the law, it then became a 'municipal privilege.' It was said (loc. cit. 524):

"'The business, then, which the retailer seeks to engage in is not a matter of personal right, nor one that the interests of

> the public at large demands that he should be permitted to carry on.'
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> "It was held that the county court was fully vested with discretionary powers, and might exercise the same, 'subject to the limitations and restrictions absolutely imposed by statute.' This ruling upon the force and meaning of the words, 'the court may grant a license,' was followed thereafter. * * * '"

State ex rel. Hawkins v. Harris, supra, seems to be the last word of the Supreme Court in this state construing such statutes, and, therefore, is the law of Missouri.

You refer to the case of City of Meadville v. Caselman, 227 S.W. (2d) 77, as a possible authority for holding that the county court has no discretion in the matter. In that case the Kansas City Court of Appeals discussed at length many Missouri decisions. The city had duly passed an ordinance prohibiting the using, keeping or maintaining pool tables for pay or profit in said city. At the time there was a general statute, Section 7196, RSMo 1939, which provided that the mayor and board of aldermen shall have power and authority to regulate and to license and levy and collect a license tax on billiard and pool tables and other gaming tables and to license, tax, regulate or suppress the operation of billiard tables, pool and other gaming tables. There was also a statute, Section 7442, RSMo 1939, which provided that ordinances must conform with the state law. The above ordinance was in direct violation of its foregoing statutes. After discussing laws pertinent to licensing pool halls in various cities of Missouri, it concluded that villages and certain cities were given the power to prohibit the operation of pool halls under other specific statutes, but no such authority had been conferred upon cities of the fourth class under the statutes in full force and effect at that time, which we have referred to hereinabove.

CONCLUSION

It is the opinion of this department that the county court in this instance had discretion under State ex rel.

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Hawkins v. Harris, supra, to refuse to grant said license notwithstanding the good reputation of the applicant and the premises on which said tables would be located, not being in close proximity to any school or church.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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