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CASE NOTE

INTOXICATING LIQUORS—Liquor License Transfer—Liens on Liquor Licenses. Johnson v. Smith, 455 P.2d 244 (Wyo. 1969).

Plaintiff and his wife were owners of the capital stock of the Gladstone Hotel, Inc. in Casper, Wyoming. As original mortgagors on chattel and real estate mortgages on the hotel in which Massachusetts Mutual Life Insurance Company was the mortgagee, plaintiff and his wife transferred their interest in the hotel to the Center Street Investment Company in 1961, which in turn, executed a second real estate mortgage in favor of the plaintiffs and agreed to assume the original indebtedness. Center Street conveyed its interest in the Gladstone Hotel Inc. to the defendant. A liquor license had been annually issued to the corporation since 1956. When the original mortgagee, Massachusetts Mutual, commenced foreclosure on its interest, plaintiffs initiated similar proceedings against the defendant. Prior to the first foreclosure sale, plaintiffs paid the first mortgagee the total indebtedness and brought suit for summary judgment and a decree of foreclosure on the second real estate mortgage, contending that the liquor license was included in the real and chattel mortgages. The District Court found in favor of the plaintiffs holding that under the terms of the real and chattel mortgages the liquor license was included as an article appurtenant to the hotel property. Upon appeal the Wyoming Supreme Court affirmed the Natrona County District Court, holding that real and chattel mortgages, intending to include all of a liquor establishment's property, necessarily imply the inclusion of the liquor license.¹ In essence, a liquor license in Wyoming was construed to be a valuable piece of property upon which a mortgage might attach.

Because of the sparsity of decisions regarding liquor license liens, the law is far from settled. Most controversies regarding the issue are decided on the collateral area of transfer, in which statutes are usually relevant. These vary from the restrictive approach on which such licenses are inalienable,² to the more permissive statutes which allow quite liberal

1. Johnson v. Smith, 455 P.2d 244 (Wyo. 1969).

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2. An example of such a statute is NEB. REV. STAT. § 53-149 (1968). "A license shall be purely a personal privilege. . .and shall not constitute property, . . . nor shall it be alienable or transferable. . .or subject to being encumbered or hypothecated."

transferability.³ In interpreting the former, courts have frequently held that a liquor permit is a personal privilege which cannot be assigned to another.⁴ Being a personal privilege, such a liquor permit is outside the grasp of the licensee's creditors who might wish to attach it or levy execution upon it.⁵ Such a declaration which construes a liquor permit as a personal privilege and not subject to transfer, usually has as its motive the belief that licenses of this nature should be free from any outside influence which might subject the license to exterior pressure.⁶ The latter type of enactment, the statute allowing more liberal transferability, denotes the current trend in this area. Under these statutes licenses are generally considered to have property characteristics which may under some circumstances pass to an assignee or trustee of the licensee.⁷ Nevertheless the permits still remain under the control and scrutiny of the state or local licensing authorities, the transfer only being valid in the case of a person or persons who are not denied the right to take as original license holders.⁸ There is no common law property right in a liquor license since the scope of limitations is primarily determined by the legislature, and the rights of the licensee are such, and only such, as the legislature statutorily permits.⁹ Consequently when a statute permits a license to be transferred or sold, even under restricted conditions, the personal privilege interpretation is subordinated to the property concept and the license takes on certain characteristics of property, intangible though it may be.¹⁰ Most jurisdictions have come to realize that a liquor license is an economic asset, because of its obvious pecuniary value, especially in states or localities in which the quantity of permits is limited by statute or ordinance. To deny that a license has any property characteristics when such a license is transferable would be contradictory, even when the state in the exercise of its police power may regulate

3. See CAL. BUS & P. CODE, § 24070. "Each license is separate and distinct and is transferable upon approval of the department from the licensee to another person and from one premises to another premises."

4. Annot., 131 A.L.R. 1340 (1941).

5. *Paramount Finance Co. v. S & C Tavern, Inc.*, 245 F. Supp. 766 (N.D. Ohio 1965).

6. *Walsh v. Bradley*, 121 N.J.Eq. 359, 190 A. 88 (1937).

7. 4A, COLLIER, BANKRUPTCY, § 70, at 306 (14th ed. 1967).

8. 48 C.J.S. *Intoxicating Liquors* § 138 (1947).

9. *State v. Superior Court of Marion County*, 233 Ind. 596, 122 N.E.2d 9 (1954).

10. *Deggender v. Seattle Brewing & Malting Co.*, 41 Wash. 385, 83 P. 898 (1906).

the manner of transfer and assignment.¹¹ Such statutes would give greater emphasis to the intent of the parties involved in a transfer in that the transferee of a liquor establishment, who also simultaneously becomes the transferee of the adjoining liquor license, if he so qualifies under the statute, receives that which is more commensurate with what he has bargained for, as opposed to a transferee who purchases the physical premises only to find that even though he is eligible for a liquor permit, he cannot possibly receive one.

A considerable number of legislatures have enacted statutes which allow liquor license transfer subject to extensive limitations, which include required approval from the licensing authorities. Wyoming has such a provision.¹² This compromise between the two extremes at initial observation seems to create superficial confusion. However, upon analysis of the section, the clash may be partially, if not totally, resolved. As between the rights of the licensee and the state liquor authorities, the liquor permit is but a personal privilege subject to the police power of the State and is not a property right in the statutory sense; but as between the licensee and third persons, such as an assignee or trustee, the license is a property right with definite economic value.¹³ Such a provision incorporates the advantages of both viewpoints. The state regulatory agency may retain sufficient control over the liquor license while at the same time permit the furtherance of the intent of the licensee and subsequent qualified third parties involved in a later transfer.

Interpretation of Wyoming's liquor license transfer statute¹⁴ has indicated influence from both schools of construction. In *Scranton v. Whitlock*,¹⁵ the state Supreme Court held that a license to sell liquor was a mere personal privilege. *Bogus v. American National Bank of Cheyenne*, a Tenth Cir-

11. *Pacific Firestone Escrow Co. v. Food Giant Markets, Inc.*, 202 Cal. App.2d 155 20 Cal. Rptr. 570 (1962).

12. WYO. STAT. § 12-13 (1957): "A license shall be a personal privilege, good for one year unless sooner revoked, provided. . .that the owner of such license . . .may. . .assign and transfer such license. . .subject to the conditions and approval herein stated. . . . Except as above provided, no license shall be transferred or sold. . .nor shall it be subject to attachment, garnishment or execution."

13. WYO. STAT. § 12-13 (1957).

14. *Hooper v. Duncan*, 95 Ariz. 305, 389 P.2d 706 (1964).

15. *Scranton v. Whitlock*, 389 P.2d 1015 (Wyo. 1964); also see *Whitesides v. Council of City of Cheyenne*, 78 Wyo. 80, 319 P.2d 520 (1957).

cuit case based upon similar facts to the *Johnson* case, but concerned with the language of the Uniform Commercial Code, said:

Although by the terms of the liquor control statute a license is a personal privilege which is not subject to attachment, garnishment or execution, it nevertheless has, under the liquor control law, an element of transferability, as under certain conditions it may be sold. As this case shows, it has a unique value. These characteristics stamp a liquor license as an item of property, even though it is statutorily said to be a personal privilege as well.¹⁶

Armed with the liberal interpretation of this decision, the Supreme Court justified its holding in the *Johnson* case by relying heavily upon the *Bogus* opinion. In *Johnson* the Court looked at the original chattel mortgage which provided that the Smiths

transfer. . .all of the property, goods, and chattels listed on Schedule A hereto annexed and entitled "List of fixtures, furnishings, and equipment" . . . together with any and all renewals or replacements of or additions to any such property, goods, and chattels. . .¹⁷

From this was inferred that the license to sell liquor, defined as an article of property under the *Bogus* decision, was impliedly included within the framework of the chattel mortgage. In the chattel and real estate mortgages the parties involved had seemingly created an all inclusive document upon which they intended that the entirety of the mortgagor's property should be subject to a lien upon the occurrence of default in payment. As a result the license was also treated as a valuable economic unit under consideration as security when the comprehensive mortgages were created. The *Johnson* case is not the first in which the Wyoming court has held that property of economic value may be impliedly included in comprehensive real and chattel mortgages. Tobacco, liquor and other alcoholic beverages have been treated along with other bar fixtures as included within a mortgage lien.¹⁸ The theory be-

16. 401 F.2d 458, 460-61 (10th Cir. 1968).

17. *Johnson v. Smith*, *supra* note 1, at 249.

18. *Hill v. Salmon*, 69 Wyo. 1, 236 P.2d 518 (1951).

hind such rationalization is based upon the concept that, if the parties so intended, the unity of the establishment should be maintained under the transfer, if reasonably possible.¹⁹ The District Court had expressed the desirability of maintaining such unity when it stated that "the preservation of the liquor license in the premises was necessary to prevent invasion and destruction of the security interest holder's rights in the security. . . ."²⁰

Turning to the statute,²¹ the Court once again liberally construed the enactment when it said that although attachment, garnishment, and execution are not permitted, "there is no direct prohibition against its being subject to a lien."²²

A definite legal distinction is evident between a lien and an attachment, garnishment, or execution. The former is somewhat analogous to a mortgage, especially in lien states such as Wyoming.²³ A mortgage lien implies a voluntary transfer of an interest in the form of a contract between the parties involved whereby a lien is created or real estate is pledged for the payment of a debt. An attachment, garnishment, or execution, on the other hand, imply an involuntary transfer of the property. For instance, an attachment is a proceeding to take property into legal custody to satisfy a creditor's demand.²⁴ Although not exactly synonymous, garnishment and execution likewise imply a form of transfer of an involuntary nature. In recognizing this distinction, the Court was able to construe the liquor license as an extension of the property concept already previously established.²⁵

The Court disregarded appellant's contention that at the time of the creation of the mortgages, the parties thereto had not intended to include the liquor license within the subject matter of the document. Viewing the factual situation as a whole, one is inclined to believe that the majority decision's premise is not sustained by the circumstances available. Because of statutory regulations restricting the quantities of

19. *Scranton v. Whitlock*, *supra* note 15.

20. *Johnson v. Smith*, *supra* note 1, at 247.

21. WYO. STAT. § 12-13 (1957).

22. *Johnson v. Smith*, *supra* note 1, at 250.

23. *Robinson Mercantile Co. v. Davis*, 26 Wyo. 484, 187 P. 931 (1920).

24. *Kohler v. Cole*, 79 N.D. 226, 55 N.W.2d 589 (1952).

25. *Bogus v. American National Bank of Cheyenne*, *supra* note 15.

such permits available in an area,²⁶ commercial demand produces a highly inflated economic market value on liquor licenses. One is led to the conclusion that had the parties intended to include the liquor permit in the mortgages, surely they would have done so. The exclusion of the most valuable asset in the premises seems to be *prima facie* evidence of the absence of intent to include the permit. Because of its intangibility, and because of the absence of inclusion or exclusion of licenses in prior mortgages, the parties probably formed no intent at all regarding the attachment of a lien on the liquor permit. For the Court to include the liquor license is to subordinate the original intent of the parties to a secondary position in favor of achieving the desired judicial result.

Under the statutes the holder of a liquor license may transfer the license to different premises upon approval of the licensing authorities.²⁷ Prior to foreclosure proceedings, the holder may have reasonably believed that he could transfer or assign the liquor permit without restriction from the mortgagees, especially when the law is so unsettled regarding whether an assignee would have taken the liquor license subject to a lien. The inclusion of the liquor permit within the mortgages seemingly took place in an *ex post facto* manner at the time of the judicial proceedings, not at the time of the creation of the mortgage document.

Although the Court might have disregarded the original intent of the parties in the *Johnson* case, nevertheless when viewed in a long range perspective, this is not as equitable as it may seem. As a result of this opinion mortgagors of liquor establishments in Wyoming will be permitted to mortgage both the tangible real and personal property relating to the premises as well as the intangible "property" of the liquor license. This will enable them to acquire a greater capital supply because of the value of the mortgaged asset, if they qualify under the statute to become licensees themselves. Mortgagees are now faced with the situation that if they wish to retain the liquor establishment for their own use, they must not only successfully bid at the foreclosure sale in order to acquire both the premises and the license but must also receive ap-

26. WYO. STAT. § 12-6 (1957).

27. WYO. STAT. § 12-13 (1957).

proval from the licensing authorities. The same is true if purchase is made by a third party. Failure to bid successfully may possibly frustrate the mortgagee's intent to take possession himself if he so desired, although he would still obviously benefit from the sale as a mortgagee. This dilemma is one properly to be resolved by the parties, not by judicial declaration.

An issue of definite judicial concern has arisen as a consequence of the *Johnson* case. The question now arises as to whether holders of liquor licenses may now mortgage the license independent of the physical premises. The Court failed to consider this question, so the resolution of this issue awaits possible future litigation. To hold in the affirmative would be to extend the *Bogus* case one step further and to fully develop the property concept of liquor licenses. The writer could find no decisions which have held that liquor licenses may be independently mortgaged; therefore any examination of the effects of such a decision are merely speculative. However, it seems that no serious detrimental effects would be forthcoming; conversely an even greater freedom of negotiation could be given to individuals involved in mortgages on liquor establishments.

In regard to the litigants themselves in the *Johnson* case, the immediate results reached by the Wyoming Supreme Court are questionable. Perhaps the Court should have chosen a subsequent case involving a different factual situation to reach the result that it did. Nevertheless, the Court's construction seems to be more in pace with the general policy behind such statutes. A liquor code is to be liberally construed in the interests of public welfare and not so as to benefit an individual or to aid the licensee for his private gain.²⁸ As a result of the *Johnson* case, as it was a furtherance of the *Bogus* opinion, holders of liquor licenses will now be permitted to mortgage their licenses in conjunction with the other property and mortgagees will receive a greater security interest upon the premises as an entity. A liquor interest may now be viewed in a more proper perspective as a truly valuable

28. *In re Weiss' Liquor License*, 187 Pa. Super. 89, 142 A.2d 385 (1958).

asset with definite property characteristics which may be subject to a lien.

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