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IN FAVOR OF THE LAWLESS.

We publish to-day the full text of Judge Hunter's decision in the case of the billiard saloon keepers who were arrested for keeping their saloon open after 10 o'clock p. m., contrary to the City ordinance.

It will be seen that the Court acknowledges an error in a former decision, arising from a lack of knowledge concerning an amendment to the City Charter curing the objection on which that decision was based. But the Judge has hunted up another technicality on which he can rule against the City and in favor of those who violate its regulations.

The Charter gives power to the City Council to license, tax, regulate and suppress billiard tables, etc., but does not specify the keepers or owners of those tables. So the Court rules that it is the *tables* that must be licensed, regulated, etc., and not the *persons*. Anything to play into the hands of those who are trying to lead away the youth of our people into the ways of the wicked, and encourage those habits which are working so much evil throughout the world.

We have not space to comment at any length on this subject to-day, but we ask all candid persons who desire the welfare of society, and value good, common sense, to weigh the pitiful special pleading by which the Judge's conclusion is reached, and then say if the conclusion is justified.

HOW "WISE" MEN BLUNDER.

Richard Grant White had an article in the *Atlantic Monthly*, of a recent date, in which he treated on English customs and peculiarities, and among the singular trades he described was that of "executioner." It appears that the gifted writer had seen or heard of a business card, on which was inscribed, "W. Marley, executioner. Executions attended to with promptness and dispatch." The gentleman, not understanding the local signification of the term "executioner," and confounding the name "Marley" with that of Marwood, the public hangman, jumped at the conclusion that the Jack Ketch of London, was advertising his business of putting condemned people out of the way in the most expeditious manner. The callousness of this supposed public functionary, in thus proclaiming his dreadful trade, and the condition of society where such things could be tolerated, were treated of by Mr. White in copious and indignant English and at considerable length.

Now the term "executioner" in England is applied to an officer who levies executions for debt and on judgments of courts for other purposes; an executioner of a legal process, not the functionary who inflicts the death penalty. Mr. White is therefore made the laughing stock of the critics, who are indulging in much fun at his expense. And it is certainly remarkable that so close a student of the English language should have made such an egregious blunder.

But Mr. White has made no greater mistake, and displayed no profounder ignorance than most writers on "Mormonism" and Utah affairs exhibit. Their disquisitions and fulminations and demands for legislation or extermination, are founded upon just as gross misconceptions of the facts as Mr. White's essay on this supposed "peculiarity of English customs." They start out with a misconception of the "Mormons," our faith, practices, intentions and condition, and proceed like Mr. White to make themselves ridiculous over a subject they do not understand. There are some who wilfully, intentionally and with malice aforethought, misrepresent and bear false testimony against us, taking advantage of popular notions and popular prejudice concerning us, and thus help to mislead the other class and confirm them in their misconceptions. The miserable wretches lie under the inspiration of Satan, and take malignant pleasure in their fiendish work. While the others display their ignorance, these exhibit their venom and mendacity, and are in fact deceivers who will one day reap the full recompense of their villainy.

The lesson to all writers for the public is, be sure to obtain correct information and well established facts before you proceed to enlarge and moralize, or denounce and condemn. For it is certainly a great evil to aid in bringing injury upon the innocent, and the time will come when every one must give an account for the use of the powers and talents given by the great Creator, who will also be the Judge, for the benefit and not the destruction of our fellow-creatures. Be sure you are right before you go ahead.

PUT NOT YOUR TRUST IN EXPERTS.

Whitaker's ears have not made much of a stir in the land during the progress of the second trial. At the first investigation they raised a breeze which wafted to every nook and corner of the country the tale of the outrage and the story of the dispute. But this trial has proceeded without any public interest, although it has been conducted with vigor and has developed as many contradictory features as at the first.

There is one thing that this second trial has demonstrated, and that is the fallibility of the writing experts. Several professors have given testimony concerning the identity of the handwriting of the "note of warning" and specimens admitted to be Whittaker's, tending to show that he was the slitter of his own ears. Their evidence has been direct and positive, and make things look very dark for the colored cadet.

But the defense have introduced testimony which goes to prove that these experts may be entirely mistaken. One witness, after illustrating the blunders frequently made by those professional gentlemen, swore that in a Boston forgery case five specimens of writing by five different hands were submitted to one of the professors of chirography who has figured prominently in the investigation of Cadet Whittaker. After making the usual examination and comparisons, the professor confidently reported that four of the specimens were in the handwriting of the alleged forger and one was not. It was thereupon shown that the accused had not written any of the four which the expert found he did write, but had written the one which the expert said he did not write.

Put not your trust in experts, will have to be numbered among the adages of the times.

THE BILLIARDS CASE.

DECISION OF JUDGE HUNTER.

In the matter of the application of Joseph Russell and Robert Burns, for writ of Habeas Corpus.

Sutherland and McBride
for Applicant,
Miner
for Respondent.

The first duty of a court when called upon to consider the force and validity of the ordinances of a municipal corporation is to look into the powers conferred upon such corporation by its charter. Municipal corporations have no powers save those which are delegated to them under the law of their creation, such as are necessary to the exercise of their corporate existence.

The supreme legislative power of this Territory is vested in the Governor and a Legislative Assembly, subject to the right of Congress of the United States to disapprove of any of its enactments.

The Territorial Legislature, under the powers conferred upon it by the Organic Act, and section 1851 of the Revised Statutes of the United States, subject to the reserved right of disapproval by the Congress of the United States, has the right to grant charters to municipal corporations.

By an act passed January 20, 1860, entitled An Act incorporating Salt Lake City, and by sections 21 and 22 thereof, the City Council of Salt Lake City is empowered, within the jurisdiction of the city, by ordinance and enforcement thereof, to license, tax, regulate suppress *or* prohibit billiard tables, etc.

And by an act entitled An Act Amending the Charters of incorporated Cities, approved February 15, 1872, and by sections eight and nine thereof, it is enacted that "The City Council of the respective cities are hereby empowered, by ordinance, to license, tax, regulate *and* suppress billiard tables," etc., and by section 10 thereof, repeals so much of the city charters of the several cities as conflict with the foregoing sections. It is evident that the effect of this enactment and the repealing section is to repeal section 22 of the act of January 22, 1860.

All power, therefore, which is conferred on the City Council of Salt Lake City, to license, tax, regulate and suppress billiard tables etc., is derived from this amendment.

It will be observed that the form of expressing the powers thus conferred, is different in the two enactments. That used in section 22 of the Act of January 22, 1860, has the additional word "prohibit," and is connected by the disjunctive conjunction "*or*;" that used in section 9 leaves out the word "prohibit," and is connected by the conjunctive conjunction "*and*." In giving construction to enactments, consideration must be had as to the grammatical purport of the language used. When the former case, in which these same parties were before the Court, on a writ of habeas corpus, for a violation of an ordinance of this city, was heard, the existence of the amendment to the City Charter of February 15, 1872, escaped the attention of counsel on both sides and the Court. The whole line of argument then presented, being with reference to the provisions of the charter of January 22, 1860, and what was then said by the Court had reference only to the case as it was presented to the Court. The conclusions of the Court, based upon the case as then made, was to the effect that the City Council did not have the power, under its charter of January 22, 1860, to license *and* tax billiard tables, and that the effect of the ordinance then presented to the Court was to do both of these things. It is the general principle, that where two or more powers are granted to a municipal corporation, which are inconsistent with each other, that the attempt on the part of the corporation to exercise one excludes the right to exercised the other. It is in the nature of an option, and when the option is exercised, and as long as the ordinance remains in existence which sets forth the option, just so long will the corporation be estopped from assuming the other power. Consequently, relying upon the counsel who argued the case for the presentation of all the chartered privileges of the city, and having only presented the charter of January 22, 1860. The Court was forced to the conclusion it reached on that hearing. In the case just referred to, the charter in expressing the powers to be conferred upon the city, used the disjunctive conjunction "*or*," there could be no other conclusion reached by the Court, than the one it did, and in such case it could make no difference whether the powers conferred were inconsistent or not. As in the construction of a criminal statute which confers upon a Court the power to imprison *or* fine a convict, the word "*or*" controls the authority of the Court. The Court cannot both fine and imprison. It has the right of choice as between the two punishments, and having chosen one, it cannot inflict the other. Nor can it inflict both. The contrary is the rule where the conjunctive conjunction "*and*" is used. In such case both grades of punishment may be inflicted, and must be under the state of the law as it is now before the Court. With the aid of the amendment of February 15, 1872, this construction will not do. And, in determining the effect of that amendment, resort must be had to the general principle before referred to, namely, if the two or more powers are granted, are they such as being so consistent with each other they can stand together, or are they so inconsistent one with the other that they cannot be exercised at the same time. By this amendment the city is empowered by ordinance "*to license, tax, regulate and suppress billiard tables.*" Under this grant of power the City Council of Salt Lake City has enacted the following ordinances:

Section 1—*Be it ordained by the City Council of Salt Lake City*, That no person shall keep any of the tables hereinafter mentioned in any hotel, saloon or other public place, for use, without first obtaining a license therefor according to the provisions of this ordinance.

Sec. 2.—For the purpose of revenue, there shall be levied and collected in advance, of the keeper thereof, for every license to keep, as aforesaid, billiard, bagatelle, parabolatic, pigeon-hole, pool or other kind of tables on which games are played, for one such table for three months fifteen dollars, and for each additional table, for three months, ten dollars.

Sec. 3.—Licenses under this Ordinance shall be obtained, issued and recorded in the same manner as provided in Chapter Eight of the Revised Ordinances of Salt Lake City.

Sec. 4.—Any person refusing or neglecting to comply with the provisions of this Ordinance shall be liable to a fine not exceeding Ninety-nine Dollars, and to imprisonment not exceeding One Hundred Days, or both for every such offense.

Sec. 5.—That Article Seven of Chapter Eight, of the Revised Ordinances of Salt Lake City, "Relating to Billiards and Pin Alleys," also "An Ordinance in relation to Billiards and Other Tables, and to Pin Alleys," passed May 20th, 1859, be, and the same are hereby repealed.

Passed September 16th, 1879.

Section 1.—*Be it ordained by the City Council of Salt Lake City*, That it shall not be lawful for any owner or person in charge of any billiard, or other kind of tables, or ball or pin alleys, or runways on which games are played at any public place in said city to permit games of any kind to be played thereon on the first day of the week, commonly called Sunday, or after the hour of ten o'clock p.m., or before the hour of six a.m., on any day of the week.

Section 2.—Any person violating the provisions of this Ordinance shall be liable to a fine in any sum not exceeding twenty-five dollars.

Passed March 22d, 1881.

The applicants Joseph Russell and Robert Burns were arrested on the 6th day of April, 1881, on a warrant issued from Justice Pyper's court, charged with "keeping open their saloon and permitting billiards to be played on the tables of said saloon after the hour of ten o'clock p.m., on the 5th day of April, 1881." Application having been made to the judge of the Third Judicial Court for a writ of habeas corpus, in the manner provided by law, the writ was issued, directed to Andrew Burt marshal of Salt Lake City, commanding him to bring the bodies of the said Russell and Burns. To this writ the said Burt made return, producing the bodies of the said Russell and Burns, and stated that he held them by virtue of the warrant aforesaid, issued upon an affidavit made in said Justice Pyper's court, charging them with a violation of the ordinance entitled an ordinance in relation to billiard tables, passed by the City Council of Salt Lake City, March 22, 1881.

It is claimed on the part of counsel for the applicants, that the ordinance under which the arrests were made is a mere supplemental ordinance to the one of September 16th, 1879, and that that ordinance being null and void, the supplemental ordinance has no force or validity; that the ordinance of September 16th, 1879, attempts to do two things, and which the City Council has no power under the city charter to do, namely, to levy a tax and grant a license upon the same business; that the amount specified in said ordinance as and for license to keep a billiard table is in its nature a tax, and as a tax cannot be collected under the form of a license, that the city council has no authority to exercise jointly the power to levy a tax and compel a party to take a license to keep billiard tables; that the charter of the city does not confer upon the city power to license, tax, regulate and suppress the use of billiard tables, but only, if it confers any right, empowers it to license, tax, regulate and suppress billiard tables as property; and that if it does this, the act of incorporation is void in that particular for want of uniformity. That the city council having, under section 70 of the act of incorporation, "the exclusive authority and power to impose fines, forfeitures and penalties," such power cannot be delegated to another, and as section 2 of the March 22d, 1881, ordinance does not fix a definite amount of fine, but leaves the amount to be determined by the court before whom any offender may be tried, it is void. That the charter requiring that all ordinances passed by the City Council shall, within one month after they shall have been passed, be published in some newspaper printed in said city, and the ordinances under consideration not having been so published at the time of the alleged offence, no authority exists whereby and under which the city could proceed against these alleged violators of the ordinance. That the requirement for publication is equivalent to a provision that ordinances shall not go into effect until a month after their passage.

As has been said, the power exists in the City Council of Salt Lake City under and by virtue of sections 8 and 9 of the Act of February 15, 1872, to licence and to tax, and to regulate and to suppress billiard tables. Clearly four things can be done. Can they all be done at one and the same time? and are they all four so consistent, one with the other, that they can be exercised at the same time? If they cannot all be exercised at one and the same time, because of inconsistencies, which of them can stand together? To license, is to grant a permission to do some lawful act.

To tax is to impose a burden on property or individuals in the shape of a sum of money, at the will of the sovereign power, for the purpose of deriving revenues to support and sustain the government or any particular feature of it.

To regulate, implies that duties may be imposed and restrictions provided and enforced.

To suppress implies that a certain thing may be prohibited, forbidden, stopped.

It occurs to the mind that three of these powers may be conjointly enjoyed, namely: To license, to tax and to regulate. And at the same time it follows that under the head of one you cannot do the other; as for instance, under the power to license taxes cannot be imposed, nor under the power to tax can a license be imposed, nor under the head to regulate can either a license fee be exacted or a tax imposed, but under the general power to do all these, a tax may be imposed, a license fee exacted and duties may be imposed and restrictions provided and enforced. To do all three of these acts does not require the exercise of the same power, and the same objects are not attained by the acts authorized.

Neither of the three named things can be exercised over any subject which has been suppressed by legislative enactment. It then becomes a prohibited and forbidden thing, the subject only of the punitive powers of the government. It is concluded, therefore, that the power does exist in the City Council of Salt Lake City under its charter to do the three mentioned things, they being consistent at the same time.

Has the City Council exercised these powers properly and legally by the enactment of the ordinances of September 16, 1879, and March 22, 1881.

By the first section of the ordinance of September 16, 1879, it is provided that:

No person shall keep any of the tables hereinafter mentioned, in any, hotel, saloon, or other public place, for use, without first obtaining a license therefor, according to the provisions of this ordinance.

Section 3 provides:

"Licenses under this ordinance shall be obtained, issued and recorded in the same manner as provided in Chapter Eight of the Revised Ordinances of Salt Lake City.

Chapter Eight provides that all applications shall be made in writing to the Mayor, amount paid in advance, that licenses shall be issued by the Mayor and signed by him or the presiding officers of the City Council and attested by the City Recorder, under the seal of the city.

This is an attempt to provide by ordinance that no person shall keep a billiard table in the places mentioned, without having provided a license therefor. And if it stood alone, although nothing in the part last quoted is said as to what amount of money shall be paid therefor, would impose upon a person who shall keep a billiard table in the places mentioned the obligation of obtaining a license.

By section 2 of the same ordinance, it is provided:

"For the purpose of revenue there shall be levied and collected in advance of the keeper thereof, for every license to keep as aforesaid, billiard, etc., for one such table for three months $15, and for each additional table for three months $10."

The form of this section indicates that the purpose to be attained by it is revenue, and revenue is taxes. It is an effort, under the power to license, to impose a tax. A commingling of the two powers granted by the charter which is not warranted, and the attempt is fatal to the effort. The very words of the Section under consideration expresses the object to be for the purpose of revenue; and as we have seen the power to license cannot be used to impose a tax, this section must be null and void. Divested of this section the ordinance of September 16, 1879, may yet be a valid one. Leaving it out it can be read harmoniously, and it can stand as a whole.

If the ordinance of September 16, 1879, stand the other tests which may be put to it, and it should be conceded that the ordinance of March 22, 1881, is supplemental to it, no good reason has presented itself to the mind of the Court, why it should not be a valid ordinance. It is simply an attempt to regulate by the imposition of restrictions the hours and times when the tables may be used; and is the mere exercise of a power which may be conferred on the city by the charter, which in the opinion of the Court may be exercised at the same time with a license. It is for the infraction of this ordinance the applicants were arrested.

It has been insisted that as the exclusive authority and power is conferred by the city charter on the City Council to impose fines, forfeitures and penalties for breach of any ordinance, the failure on the part of the Council in both said ordinances to fix a definite sum as a fine or penalty for the breach of them, and the leaving the exact amount to be determined by the Court before whom the offender may be tried, is fatal to the ordinance, such act having the effect of delegating to another a delegated power. It is thought the exclusive authority is exercised by the Council when it fixed a maximum sum beyond which the Court could not go. In these, as in all other cases, criminal and quasi criminal, there are grades of offense, or more properly speaking the circumstances of one case may be more aggravating than another, and the Court trying it should have some discretion as to amount, and yet be so guarded as not to be permitted to go beyond a certain sum.

The ordinance of Sept. 16th, 1879, seeks to impose upon persons who shall keep a billiard table the duty of obtaining a license therefor. And that of March 22, 1881, seeks to make it unlawful for any owner or person in charge of any billiard table at any public place to permit games to be played thereon at certain times. The question is made that these two ordinances do not come within the scope of the powers granted by the charter, in this to-wit:

1st. That by the ordinance of Sept. 16, 1879, the attempt is to require a *person* who shall keep a billiard table in the places mentioned to provide a license there.

2nd. That by the ordinance of March 22, 1881, the attempt is made to regulate the owner or person in charge of a billiard table, and to make it unlawful for such person to permit games to be played on such table after certain hours and on Sunday.

The power conferred by the statute is the only power vested in the City, and as stated in the outstart, municipal corporations have no powers except those granted to it by its charter. And to it we must look, and are to determine what they are from a fair, logical construction of the language, and the import of the words used.

Authority is undoubtedly given to the City Council to license, to tax, to regulate and to suppress billiard tables. Do these two ordinances do either or any of these things. Nothing is said in the charter about the owner or keeper of a billiard table, nor as to the use of a billiard table. The power is not given to license, to tax, to regulate, or suppress, the owner or keeper of a billiard table, it is only the simple naked power to license, &c., a billiard table. No power is given to license, etc., the owner or keeper, or to regulate the owner or person in charge, and an ordinance to do either of these things applies only to the persons and not to the property. It might just as well be contended that under Section 43 of the charter, where the City Council is empowered by exactly the same language, to license, tax, regulate or suppress hawkers and peddlers, that an ordinance prohibiting the employment of such hawkers or peddlers by any one, was within the powers granted by the section, or that a person who employed such hawker and peddler, would have to take out a license before he make the employment. The language of the charter is directed to the thing, the billiard table, it is the subject of the legislation, and not the owner or keeper. The language of the ordinances is directed to the owner or person, and keeper, and not to the table, and I fail to find any power to impose a license and tax, or a power to regulate such owner, etc. By reference to the statutes of other States and of the United States, it will be observed that the almost universal rule adopted, where the object is to license or regulate billiard tables, is to impose the obligation of taking out a license, or the duty of observing restrictions upon the person or persons owning and in charge of the tables. In the City Charter as granted by the Legislature, that usual form of legislation has not been followed. It saw fit to impose the license etc., upon the table, and we must take the law as we find it. It is true, and may be said, that the table being an inanimate thing, cannot be licensed or regulated, and the only way to get at the intention of the Legislature, is to impose the obligation of obtaining the license, etc., upon the owner or keeper of it. But was it the intention of the Legislature to require the owner and keeper to take out the license. We might, by the interpolation of the words *the use of* into the statute, give it that meaning, and so might the Legislature. Courts are not permitted to supply omissions in legislation. When passing upon statutes they are to take them as they find them, giving full import and supplying no more force to the language used than the subject warrants. While under this section nine it is not possible to license and regulate, it is possible to tax and suppress, and to this extent the powers granted to it can be used, and to that extent only does it confer authority upon the City Council.

It is not necessary to pass upon the effect of section 71 of the City Charter.

The applicants will be discharged.

DIED.

At West Porterville, Morgan County, Utah, April 8th, 1881, ANNA, daughter of Andrew and Caroline Mortenson, of Brain Fever, aged two years and 15 days.

We sympathize with the bereaved parents as it was the only daughter of eight children.

At Wanship, Summit County, March 25th, 1881, MARTIN CARVER, son of Martin F and Rosanna Nixon Forbes, of inflammation of the lungs. Aged six years, two months and four days.

At Johnson, Kane County, Utah, March 28th, 1881, MARY, wife of Benjamin] Laws, after many years sickness. She was born at Brandon, Suffolk, England, March 24th 1832. Funeral services were held at the residence of the deceased and was well attended by the members of this ward and Kanab. She was a kind wife and a loving mother and faithful member of the Church. She leaves a husband and two sons.

Millennial Star please copy.

At the residence of Brother L. L. Woods in the Clover Valley Branch of the Hebron Ward, Lincoln County, Nevada, JANE, wife of Benjamin F. Bird.

Deceased was born in Newbern, North Carolina, age 86 years, was a member of the Church for 40 years, suffered untold pain for the last seven years with a cancer on the right arm which had to be amputated, and another came on her temple which took her left eye and affected the brain and caused death. She was a faithful Saint and died in the full belief of a glorious resurrection.

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