

7-1-1978

Montana Liquor Licenses: Should They Be Leaseable?

Virginia Bryan Sumner

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Virginia Bryan Sumner, *Montana Liquor Licenses: Should They Be Leaseable?*, 39 Mont. L. Rev. (1978).
Available at: <https://scholarship.law.umt.edu/mlr/vol39/iss2/10>

This Note is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

MONTANA LIQUOR LICENSES: SHOULD THEY BE LEASEABLE?

Virginia Bryan Sumner

The transfer of liquor licenses provides a continuous source of litigation for the Montana courts. Liquor licenses are a limited commodity in a state where liquor consumption is high. Only persons licensed by the state can sell retail liquor in Montana.¹ Licenses are also required in the liquor wholesale business and in wine and beer sales.² Thus, the license privilege is a valuable one.

Before 1947, liquor licenses were freely granted by the state. In 1947, the Montana legislature passed a "quota law" which established limitations on the number of licenses which the Liquor Control Board could issue in the various Montana cities and towns.³ To be granted a license today, one must obtain and renew an existing license or show that the issuance of a new license is "justified by public convenience and necessity."⁴

It is a legitimate and common practice today for owners of businesses operated under liquor licenses to lease those businesses, yet the law does not allow the license itself to be leased. Consequently, there has been much litigation over license ownership because the owner is required to transfer the license to the lessee to allow the lessee to operate the business in compliance with Montana law.⁵ This note will focus on the transfer of licenses between owners and lessees. It will explore problems inherent in the current Montana law and will suggest solutions in the form of legislative changes and possible procedures to follow under the current law.

I. LIQUOR LICENSE RULES

It is important in any discussion of liquor licenses to keep the following rules and statutory provisions in mind as they relate to license transfers. Since the enactment of the "quota law," the license has gained considerable market value.⁶ Licenses are consid-

1. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 4-4-407.

2. R.C.M. 1947, §§ 4-4-103, 104.

3. R.C.M. 1947, §§ 4-4-201, 202; see *Sullivan v. Marsh*, 124 Mont. 415, 421, 225 P.2d 868, 871 (1950).

4. R.C.M. 1947, § 4-4-205.

5. R.C.M. 1947, § 4-4-207. The rationale for this requirement is well-stated in *Light v. Zeiter*:

The state not only has the right but demands to know the identity of all persons to whom it grants the privilege of engaging in the liquor business. The law requires that all persons come out in the open and reveal to the state their exact interest, concern, and participation when trafficking in liquor. 124 Mont. 67, 79, 291 P.2d 295, 301 (1950).

6. The Montana supreme court described the liquor license as a "treasure . . . eagerly

ered a privilege and that privilege extends only to the person named on the license,⁷ hence the requirement that a business lessee's name be on the license. If a contract for the sale of a business which relies on liquor revenues makes no mention of the transfer of the license, the license does not pass to the purchaser as an asset of the business.⁸ Licenses must be renewed annually.⁹ They apply only to the premises for which they are originally issued and cannot be transferred to another person or another location without the approval of the liquor division of the Department of Revenue.¹⁰

The application procedure to obtain a license is set forth in the Administrative Rules of Montana.¹¹ Generally, the applicant must pay a fee and present evidence that he is of "good moral character and a law-abiding citizen."¹² Applicants may be required to have their fingerprints taken for use in a subsequent investigation by the Department of Revenue.¹³ When an application is received by the Department of Revenue for a new "all-beverages" license or the transfer of an existing license, the Department must publish a notice of the application and set a time for a protest hearing.¹⁴

In addition to the procedural requirements, an applicant, including a person seeking a transfer to his name,¹⁵ must meet certain statutory standards. A person can have only one "all-beverages" license during a year¹⁶ and he cannot have an ownership interest in any other establishment licensed under the Alcoholic Beverages Code.¹⁷ The applicant must be a Montana resident qualified to vote in state elections¹⁸ and he must show that the business will be operated in full compliance with the law.¹⁹

II. CURRENT MONTANA LAW AND ITS RATIONALE

A.R.M. § 42-2.12(6)—S12013(2) states that "A license . . . is

sought" in *Sullivan v. Marsh*, 124 Mont. at 421, 225 P.2d at 872 (1950).

7. R.C.M. 1947, §§ 4-4-108, 4-4-206(2). See generally *Light v. Zeiter*, 124 Mont. 67, 291 P.2d 295 (1950).

8. *Light v. Zeiter*, 124 Mont. at 81, 219 P.2d at 300 (1950).

9. R.C.M. 1947, § 4-4-404.

10. R.C.M. 1947, § 4-4-206(4). For a license to be transferred to a new ownership outside the original quota area, certain criteria must be met.

11. Administrative Rules of Montana § 42-2.12(6) - S1298 [hereinafter cited as A.R.M.].

12. R.C.M. 1947, §§ 4-4-101 (beer licenses), 4-4-301 (all beverages licenses).

13. R.C.M. 1947, § 4-4-304.

14. R.C.M. 1947, § 4-4-302.

15. R.C.M. 1947, § 4-4-108.

16. R.C.M. 1947, § 4-4-207.

17. The ownership limitation extends to a person's immediate family. R.C.M. 1947, § 4-4-108(1).

18. R.C.M. 1947, § 4-4-108(2).

19. R.C.M. 1947, § 4-4-108(3).

a privilege *personal* to the licensee and in *no case shall said license be leased* by the licensee to any other person . . ." (emphasis added). The license is defined in Montana case law as a "matter of *privilege* rather than right, *personal to the licensee*, and is neither a right of property, nor a contract or a contract right, in the legal or constitutional sense of those terms."²⁰

On the other hand, the Montana supreme court has acknowledged the liquor license as valuable personal property "which is *saleable* and subject to attachment"²¹ (emphasis added). Montana law allows a license holder to transfer his license to a bona fide purchaser of the business conducted under the license.²² Realistically, any sale of this kind will include a substantial sum in consideration for the privilege of the license.²³ Thus, under Montana law, a license holder can "sell" his license with his business by receiving consideration above the actual value of the business, yet he cannot lease the license under the Department of Revenue regulations.²⁴

Conceivably, the state seeks to discourage personal gain on the part of the license holder. Yet, that position is inconsistent with the fact that a license privilege can be "sold." The theory that the license is a personal privilege conflicts with the practicality of the market situation. The license has become more than a mere privilege granted by the state. It has acquired certain property characteristics. Drawing the line as to which property characteristics the license can have and which it cannot have creates the problem.

III. PRACTICAL PROBLEMS

In practice, the problem is how to adequately protect the license holder's interest throughout a lease or during subsequent leases of the business operated under the license. Adequate protection of the owner avoids the situation where the lessee fails to return the license at the end of the leasehold and denies the lessee an opportunity to quiet title in his own name. Montana law offers little, if any, guidance on the matter. A.R.M. § 42-2.12(6)— § 12023 allows a license to be "subject to a mortgage, security interest . . . and other valid lien" which is endorsed upon the license and approved by the Department of Revenue.²⁵

20. *Light v. Zeiter*, 124 Mont. at 81, 219 P.2d at 302 (1950); *Sullivan v. Marsh*, 124 Mont. at 426, 225 P.2d at 874 (1950).

21. *Stallinger v. Goss*, 121 Mont. 437, 193 P.2d 810 (1948).

22. R.C.M. 1947, § 4-4-206(4).

23. The Montana court has recognized this situation in *Beard v. McCormick*, 147 Mont. 361, 411 P.2d 964 (1966). In that case, the court acknowledged the market value of the license and returned it to the original owner on the grounds that he had received insufficient consideration for the relinquishment of the valuable privilege.

24. A.R.M. § 42-2.12(6) - S12013(2).

25. A mortgage or a security interest, when used, is not much more than a legal fiction.

The following situation typifies the difficulties created by the current law. A business proprietor does not want to sell his business but seeks relief from his day to day worries. He enters into a lease agreement with another party. The license must be assigned to the lessee to allow him to operate the business which receives liquor revenues. The owner is willing to temporarily assign the license to the lessee, but he does not want to relinquish his original interest in the license. Under current law, the parties must: (1) execute a lease for the business itself; and (2) arrange for the license to be put in the name of the lessee.

Since the owner cannot lease the license, he must protect his interest by using the "mortgage, security interest, or other valid lien" approach suggested by the Department of Revenue. Montana case law illustrates that ignoring these methods of transfer often results in litigation over the license. One of the best illustrations of a failure to adequately protect the lessor's interest in the license is *Beard v. McCormick*.²⁶ In *Beard*, the owner leased his bar for five years at fifty dollars a month. The license was assigned to the lessee. The lessee paid all the renewal fees on the license. Later she sought to have the license transferred to another business and the transfer was approved by the Liquor Control Board. The district court held that "since no exceptions were noted in the assignment of the license it was an outright transfer of all rights of L. M. Beard to the defendant. . . ." ²⁷ The Montana supreme court reversed, ruling that the lease and the assignment were dependent on one another on the grounds that the original owner could not have intended to relinquish his valuable license privilege for as little as \$3000 in the form of rent. The lessee was bound to return the license.²⁸

When successive leases are involved, additional problems arise. In *State ex rel. Victor's Inc. v. District Court*,²⁹ the city of Great Falls originally held the liquor license in question. The city of Great Falls leased premises for a restaurant at the airport and the liquor license was transferred to the lessee. The lessee entered into a subsequent lease agreement with a second lessee and received consideration for the rights to the premises and the license privilege. The city of Great Falls did not enforce the provision in the original lease requiring that the lessee reconvey the license to the city at the end of the agreement. Rather, the city consented to each subsequent

When an owner places an interest of this type on the license, it is intended to insure the return of the license at the end of the leasehold; the owner has no intention of selling his license for the amount specified in the encumbrance.

26. 147 Mont. 361, 411 P.2d 964 (1966).

27. *Id.* at 363, 411 P.2d at 965.

28. *Id.* at 366, 411 P.2d at 966.

29. 169 Mont. 110, 545 P.2d 1098 (1976).

assignment of the lease and the license. Each lessee paid the fees associated with the license. Victor's was the lessee when the city demanded that the license be returned without payment. Yet, Victor's had paid the prior lessee a substantial sum of money for the rights to the lease and the license privilege. The supreme court resolved the situation under its equitable powers and required that the city of Great Falls pay Victor's the fair market value for the return of the license.³⁰

Victor's is distinguishable from *Beard*. *Beard* did not involve subsequent leases and the lessee in *Beard* did not pay money for the license privilege. *Victor's* points out that equity can be invoked in liquor license disputes. *Beard* was decided on a point of law.

The most recent Montana case on this subject, *Gartner v. Martin*,³¹ illustrates the ineffectiveness of the mortgage approach suggested by the administrative rules in protecting the owner's interest. Martin originally owned the license. At the time of the litigation the license was in Gartner's name. Gartner was the lessee of Martin's business. Martin originally assigned the license to Meyer, a third party, and Meyer gave Martin a \$16,000 chattel mortgage to protect Martin's interest. The chattel mortgage was filed with the Department of Revenue according to its regulations.³²

After the assignment to Meyer, a series of assignments occurred in which each assignee acknowledged Martin's interest. Gartner acquired the license in 1971 and consented to Martin as mortgagee. When Gartner sought to quiet title in his own name, the Montana supreme court affirmed Martin as the rightful owner and cited *Beard* for the proposition that because he had never been paid a reasonable purchase price for the license, Martin was the rightful owner.³³

There are several cases in Montana involving liquor license transfers,³⁴ however the three discussed are indicative of the problems encountered. Because the lease and the assignment must be separate transactions, lessees are often confused as to their rights under the lease and their temporary interest in the license. Many times, the statutory and administrative guidelines to denote an interest in the license are not followed. Finally, the "mortgage and other encumbrances" alternative suggested by the Administrative

30. *Id.* at 112-120, 545 P.2d at 1099-1103.

31. ___ Mont. ___, 566 P.2d 66 (1977).

32. A.R.M. § 42-2.12(6) - S12023.

33. ___ Mont. at ___, 566 P.2d at 67, 68.

34. *Stallinger v. Goss*, 121 Mont. 437, 193 P.2d 810 (1948); *Jester v. Paige*, 123 Mont. 301, 213 P.2d 441 (1949); *Light v. Zeiter*, 124 Mont. 67, 219 P.2d 295 (1950); *Sullivan v. Marsh*, 124 Mont. 415, 225 P.2d 868 (1950); *Sears v. Barker*, 126 Mont. 101, 244 P.2d 516 (1952); *Gaskill v. Severovic*, 149 Mont. 340, 426 P.2d 582 (1967).

Rules does not assure the reconveyance of the license to the owner at the end of the leasehold, as was seen in *Gartner v. Martin*.

IV. SOLUTIONS AND RECOMMENDATIONS

A. Drafting Solutions

Under current Montana law and regulations governing license transfers, there are a number of steps an attorney or draftsman of a lease instrument can take to protect the owner's interest in the "all-beverages" or beer license. First, the "mortgage, security interest, and other valid lien" approach under A.R.M. § 42-2.12(6)—S12023 should be followed closely. A written request to the Department of Revenue to have the owner's name placed on the assigned license must be accompanied by a financing statement or a copy of the mortgage or other agreement. The request is to be made on forms supplied by the Department and should be signed by both parties. These materials must be accompanied by a ten dollar fee.

Upon the receipt of the materials by the Department of Revenue, the name of the interest holder appears on the license. The license may not be transferred unless the person so endorsed on the license subscribes to and acknowledges the assignment. When the encumbrance is removed, the name of the interest holder will be removed at the written request of the parties and for a ten dollar fee.³⁵ No fee is required if the license is restored to the name of the interest holder.³⁶

As *Gartner v. Martin* indicates, it is a good idea to have a document evidencing the interest in the license prepared with the lease of the premises.³⁷ This approach has special merit as the original owner's name appears on the license records with the Department of Revenue, and it becomes more difficult for an assignee to attempt to quiet title to the license.

Additional steps to be taken include stating in the lease agreement that:

1. the license must be returned to the owner at the expiration of the lease agreement;

35. The requirement for written consent of both parties to remove the assignee's name from the license creates a problem when the assignee fails to cooperate at the end of the period. A.R.M. § 42-2.12(6) - S12023. The true owner is forced to take the matter to court to re-establish his claim to the license. To overcome this problem, many current agreements have the owner appointed "attorney in fact" for purpose of the transfer and assignment at the end of the agreement. Although this practice is questionable, it is one way to avoid the predicament.

36. A.R.M. § 42-2.12(6) - S12023.

37. In *Gartner*, there was no note evidencing the \$16,000 chattel mortgage filed with the Department of Revenue. A document attached to the lease of the premises would have provided visible notice of Martin's interest to all lessees.

2. the lease and the license are not to be assigned without the owner's written consent.
3. all fees incidental to the license are to be paid by the lessee;
4. the purpose of the assignment of the license is to allow the lessee to operate the business for the period of the lease in full compliance with Montana law;
5. no consideration is being given for the license privilege;
6. the lessee agrees that the lessor's name will appear on the license as a secured party in interest for the period of the lease under A.R.M. § 42-2.12(6)—S12023; and
7. the lessee understands that the security interest placed on the license is designed to indicate the lessor's ownership interest in the license.

Provisions covering these particular areas will avoid the difficulties encountered in the cases discussed. There should be no problem enforcing a contract of this type based on the court's language in *Beard* that the lease and the assignment are to be dependent upon one another.³⁸

B. Practical Solutions

The original owner of the license has a duty to see that the provisions of the lease are enforced. It is critically important that all agreements with subsequent tenants are drawn directly between the owner and the new tenant. This practice will reinforce the parties' understanding of their rights under the lease and the temporary nature of the lessee's interest in the license.

The Department of Revenue's published form for the assignment of licenses should not be used as a "short cut" for the transfer of the license between assignees. If a new lessee is to take over the business, the chain of title should reflect the re-assignment of the license to the owner and the subsequent transfer to the new tenant. If the record shows a direct assignment from the lessee to the new lessee, and the original owner's name does not appear as part of the transaction, the assignee may attempt to establish title through the prior assignee.

C. Legislative and Administrative Recommendations

It is highly unlikely that the current trend to lease businesses operated under liquor licenses will change. Montana regulations need to recognize this practice and allow the license to be leased as part of the business transaction.

For policy reasons, the Department of Revenue should continue

38. *Beard v. McCormick*, 147 Mont. at 365, 411 P.2d at 966 (1966).

to approve the transfer or assignment of the licenses.³⁹ A person who leases a liquor license should be subject to the same criteria as a person seeking the transfer or issuance of a new license.⁴⁰ The Department can require that the names of the lessor and the lessee, as interested parties, appear on the license.⁴¹ A procedure similar to that outlined in A.R.M. § 42-2.12(6)—S12023 could be employed to have the names placed on the license. Once the lessor's name appears on the license, it should be noted in the administrative regulations that the license cannot be assigned without the lessor's permission.⁴²

R.C.M. 1947, § 4-4-206(4)(b) is the appropriate place to recognize the leasing of licenses in these circumstances. Under the current statute, a license can be transferred to a qualified purchaser or be subject to the "mortgage, security interest, or other valid lien" endorsed on the license. An additional exception could be added which would allow the license to be leased to the party that is leasing the business operating under the license. The language of this narrowly drawn exception could be added to the corresponding regulation, A.R.M. § 42-2.12—S12023(2) as follows: "in no case shall said license be leased by the licensee to any other person, *except that the license may be leased to a person who is leasing the business operated under the liquor license.*"

A statute allowing either the lessor or the lessee (or the owner and the assignee) to operate the business under the license would overcome the problem created by the regulation which requires the written consent of both parties to have the assignee's name removed from the license.⁴³ Additionally, it would alleviate the dilemma where the owner cannot use the license because of the subsequent litigation over the ownership. A statute of this type would allow the lessor to operate the business under the license at the end of the leasehold, even though the assignee's name still appears on the license, because the owner would have possession of the premises and the license is limited to use on those premises.

These additional provisions will provide the draftsman involved in a business transaction concerning a liquor license with a choice of approaches to take in the assignment of the liquor license. He will be better able to tailor the agreement to the needs of the

39. These procedures can be implemented under the following statutes: R.C.M. 1947, § 4-4-206, 4-4-303, 4-4-304, 4-4-402.

40. R.C.M. 1947, §§ 4-4-108, 4-4-207.

41. R.C.M. 1947, § 4-4-206(1). The law currently allows joint owners to have both of their names appear on the license. These suggestions merely extend that provision to lessors and lessees.

42. This provision could be added to A.R.M. § 42-2.12(6) - S12023.

43. A.R.M. § 42-2.12(6) - S12023.

parties. The lease alternative will assure the owner that his rights in the license are adequately protected. Because the lease is a more commonly used agreement, the ramifications of the transaction concerning the license will be more readily understood by the parties. Finally, because the lease for the premises and license can be executed in a single document, much of the confusion generated by the separate transactions is alleviated.

V. CONCLUSION

Current business practices demand that changes be made in Montana's approach to the transfer of liquor licenses between owners and lessees. The regulation prohibiting the leasing of licenses contradicts the approach taken by Montana case law and the Department of Revenue in these transactions. Montana case law recognizes the owner's right to "lease" his license by holding in *Beard* that the lease of the premises and the assignment are dependent upon one another. In *Beard* and *Gartner*, the owners leased the premises and assigned the license to the lessee; copies of these agreements were filed with the Department of Revenue. Thus, the Department of Revenue was aware that the licenses were, in effect, being leased. Montana's law in this area must be updated to reflect current procedures and effectively regulate this common business practice.

