Liquor, Sale of on Railroad Grade.

It is unlawful to sell intoxicating liquors at a town or camp on the line of a railroad grade in course of construction at a point where liquor had not been sold under a license six months previously, even though the population exceeds one hundred, and this is true even if the grade is completed for more than five miles distant from the camp or town, so long as the men doing the work continue to remain at said town or camp.

Helena, Montana, August 5, 1909.

Hon, Henry R. Melton,
County Attorney,
Dillon, Montana.

Dear Sir:

I am in receipt of your letter of August 3, requesting an opinion upon the following proposition:

Within the last six months a railroad has begun the construction of a railroad from the town of Armstead. At the beginning of the construction of said grade said town of Armstead did not have a sufficient permanent population to make it a town within the definition given by section 8555, revised codes. The railroad grade has now been completed to a point several miles out from Armstead. Upon these facts you ask the question as to whether intoxicating liquors can be legally sold in Armstead, when the track is laid more than five miles from the town, or is it necessary to wait until the entire grade is completed, regardless of the five mile limit.

Section 8555 prohibits the sale of liquors within five miles of any railroad grade under course of construction, or on any railroad grade on which track is being laid. Under a literal construction of this statute, it would appear that liquor could not be sold until the entire grade is completed and the rails laid thereon. However, such a construction, where a road is several hundred miles or more in length, would seem unreasonable. The object of this law is to prevent the establishment of saloons at the various points where the railroad company establish camps for its men who are constructing grades and laying track, and it is intended to prohibit saloons within five miles of any such camps. Therefore, in our opinion, it would be unlawful to sell liquor in the town of Armstead while the men constructing the grade or laying the rails are working within five miles of said town, and for such length of time thereafter as the men, while working on said grade, continue to operate from the town of Armstead. In other words, whenever the railroad company has completed its grade and laid the rails to a point sufficiently distant from Armstead that they have moved their grading camps and men to a new point, which is five miles or more from Armstead, then liquor could be sold in Armstead without violating the provisions of section 8555 by a person who had not been previously engaged in selling liquors at a fixed place of business six months prior to the beginning of the work on such grade.

You further state that the county treasurer has granted licenses to two parties ot sell intoxicating liquors in Armstead, who were not engaged in such business at that point at the time of beginning work upon the railroad grade. If the town of Armstead was not a town within the definition given in section 8555 at the time such grading started, the issuance of licenses by the county treasurer to such persons is no protection whatever to them from prosecution under said section 8555, for the county treasurer by the mere issuance of a license cannot repeal the mandotory provisions of said law. Therefore, the procedure for you to follow is to prosecute these parties for selling liquor within five miles of a railroad grade under course of construction.

You also state that a saloon keeper had been in business for many years at a point within five miles of the railroad grade above mentioned, and which grade has now been constructed within that limit, and that his license, upon a hearing, was revoked by the board of county commissioners in June last; also, that his place of business is at a cross-road, and there are no permanent residences within a half mile thereof; that since the revocation of his license by the county commissioners the contractors on said railroad grade have established grading camps at a point close to his saloon, containing probably more than 100 persons; that upon persons to the number of 100 coming into said camp, the county treasurer, upon demand of this saloon keeper, issued him a new license. In our opinion this man has no protection under said license from a prosecution under said section 8555. His old license was duly revoked by the county commissioners at a time when there was less than 100 population at the place where he was running his saloon. If he thereafter sought to engage in the saloon business at that point, he was exactly in the same position as a person who had never engaged in such business at such point. Therefore, before he would be entitled to a license from the county treasurer he would have to show that there was a town established at such point containing a permanent population of not less than 30 persons, of at least six months' residence, within the definition of the word "town" as given in said section 8555, and under said section he could not count any of the railway employes who moved in there at the time of the establishment of the grading camp near his place. On the other hand, such railway employes temporaritly remaining at a grading camp cannot be counted for the purpose of showing that the place has more than 100 population, within the meaning of that term as given in section 2760, revised codes.

The supreme court of New York, in the case of In re Silkman, 84 N. Y. Supp., page 1030, in construing the following phrase of their state constittuion, to-wit: "Having a population exceeding one hundred and twenty thousand," said:

> "We think not, and we are clearly of opinion that the words 'having a population,' when used in the constitution of this state, which is to be considered as a whole, complete in itself, force to be given to every provision contained in it, and each clause explained and qualified by every other, are to be understood as limited to the resident citizen population of the county."

The United States Supreme Court, in Dred Scott v. Sanford, 19 How. 403, said.

> "The phrase 'people of the United States' and 'citizens' are synonymous terms, and meaning the same thing."

In our opinion, the above decision of the New York court conclusively shows that the word "population," as used in said section 2760, means citizens, and the word "citizens" is held by Judge Cooley, in his work on constitutional limitations (6th Ed.), p. 754, to mean substantially the same thing as inhabitants and residents.

Section 32, revised codes, lays down the rule for determining residence in this state, and says:

> "It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose."

Clearly, under the above quotation from section 32, a laborer on a railroad grade, who only intends to remain at a particular point during the time he is engaged in work there, is not a resident of such locality, and if not he could not be counted as part of the population of the town or camp in which he is temporarily employed.

Yours very truly,

ALBERT J. GALEN,
Attorney General.