Carnivals—Circuses—Shows—Cities and Towns—Licenses.

A street carnival is not a circus or show of like character.

A city council may not arbitrarily refuse a license to one show and grant to another of the same character when both are clean, moral and legitimate.

L. C. Kelley, Esq., July 26, 1926.
Placer Hotel.
Helena, Montana.

My dear Mr. Kelley:

You have requested my interpretation of sub-section 16 of section 5039 R. C. M. 1921.

This sub-section provides:

> "To license, tax, and regulate auctioneers, peddlers, pawnbrokers, second-hand and junk shops, drivers, porters, saloons, billiard tables, tenpin alleys, shooting galleries, shows, circuses, street parades, theatrical performances, and places of amusements within the city or town; provided, that the power to license tax, and regulate circuses and shows of like character shall extend three miles beyond the limits of the city or town."

You desire to know whether the last clause relating to the three mile limit has application to a street carnival where the principal attractions consist of a merry-go-round, ferris wheel, and other riding devices, though in addition thereto there are exhibitions of skill and training by dogs and ponies, and also a collection of snakes on exhibition and other like attractions.

If this constitutes a "circus or show of like character," it is subject to license, tax and regulation by the city within three miles beyond the limits of the city; otherwise not. This language is indefinite, and no adjudicated cases have been found where exact language has been interpreted.

The case of State vs. Cody (Tex.) 120 S. W. 267 is of some assistance by reason of the similarity of the statute there involved with the language appearing in our statute. In that case it was held that a wild west show was not a "circus or other exhibition." The court in its opinion said:

> "The legislature did not undertake to define the word 'circus,' and the entire nature and character of performance or exhibitions that would bring it within that term. It certainly could not have meant that the mere exhibition of horsemanship or acrobatic performance would create a circus, for exhibitions of that character are frequently given when in no wise connected with a circus. You may find them at fairs and other exhibitions of a like kind, and frequently acrobatic exhibitions are given upon the stage as a part of what we understand to be a theatrical performance. The legislature evidently intended that the word

'circus' should be used in its common and ordinary acceptation, and that it should embrace and apply to the character of exhibition commonly known and understood as a circus, and it is doubtful if it had in mind an exhibition such as the wild west show, the main features of which were intended to portray scenes, incidents, and characters peculiar to that period and to that region."

In pointing out the reasons why the court concluded that the exhibition or performance there considered was not a "circus or other exhibition," the court said:

"It is true the performance was within a canvas inclosure, but was open overhead, this so that it would not interfere with the firing of loaded guns which was a part of the performance, but not found in the circus. It contained no rings that are peculiar to a circus; in fact, most of the performance could not have been given within the ordinary circus rings. Much of the performance was to exhibit the skill of the cowboy, Mexicans, Indians, and soldiers of different nations, interspersed with imitation train and stage hold-ups and attacks upon the latter by Indians, and a battle between the latter and American troops, and an artillery drill and the firing of the pieces, and an exhibition of skill in shooting by an expert marksman, and the firing at glass balls by Buffalo Bill, and pony races between cowboys and Indians and others, and some other features similar to these which are detailed by the witnesses, and which constituted the principal part of the exhibition. There was an athletic exhibition and a few equestrian features, but not enough to detract from the general trend of the performance that shows that the main features were foreign to that of a circus. There was an absence of the lady with the paucity of garments, the gentlemen in spike-tail coat with whip in hand, the clown that tries to be funny and often fails, the trick pig or hog, but both doubtless to be found in the audience, the trained animals, bareback riders, high and lofty tumblers, the trapeze performers, rope walkers, chariot races, and many others, and last, but not least, the genial artist that delights my soul in obligingly taking the photographs of my country cousins as they appear upon the scene."

It is my opinion, therefore, that the clause relating to the three mile limit, found in sub-section 16 of section 5039 R. C. M. 1921, has no application to a street carnival such as you refer to, and that the authority of the city over the same does not extend beyond the limits of the city.

You have also submitted the following question:

"Is there anything in the Montana statutes authorizing cities and towns to pass ordinances charging traveling shows a license, which would allow a city to refuse a license to one show while permitting another show of the same kind to operate, admitting that both shows could prove that they were considered clean, moral and legitimate in other cities throughout the United States?"

The rule seems to be that in the granting or refusing of a license there is a large discretion in the city-governing body. However, it has been generally held that this discretion cannot be arbitrarily exercised. (3 McQuillin Mun. Corp. Sec. 1005).

In Kenney vs. Village of Dorchester, 163 N. W. 762, it was said:

> "The village board having granted plaintiff's competitor permission to install and maintain similar apparatus under like conditions, it ought not to arbitrarily deny the same privilege to plaintiff."

To the same general effect are Laurelle v. Bush (Cal.) 119 Pac. 953, and 3 McQuillin Mun. Corp. Sec. 1005.

It is, therefore, my opinion that a city may not arbitrarily refuse to license one show and permit another of the same kind to operate, assuming that both are clean, moral and legitimate.

You have also asked the following question:

> "Is there anything in the Montana statutes authorizing cities and towns to collect licenses from and have police powers over traveling shows, for three miles beyond their incorporate limits, which could allow a city to refuse a license to a traveling show showing outside the city limits and inside the three mile limit set by law, providing license was applied for and payment offered in a legal manner, at the rate and in the manner prescribed by local ordinances?"

What has been said heretofore, in answer to the other questions submitted applies to this question also.

Very truly yours,

L. A. FOOT,

Attorney General.