

**Special Road Tax, Liability Under—Residence, How Determined
—Foreman, Not Liable for Forfeiture—Service, on
Foreman Insufficient.**

Residence is a question of fact to be determined from the evidence.

A mere foreman is not liable for forfeiture, under Section 26 of Article 3 of the road law of 1903.

Service on foreman of special construction crew insufficient to bind railroad company.

Helena, Montana, May 3, 1905.

Hon. J. A. Matthews, County Attorney, Townsend, Montana.

Dear Sir:—Your letter of April 28 received, in which you state, in substance, that a foreman of a special construction crew on the Northern Pacific Railway, within Broadwater county, was requested by the road supervisor to furnish a list of the persons subject to the special road tax, and that said foreman had neglected to furnish the list.

The propositions submitted by you will be quoted and considered in their order.

"1. Are the men composing such transient crew 'residing within the county' and within the road district, as required by the provisions of Section 11, Article III, and Section 19, Article III, of road law."

Section 2, Article III, of the road law of 1903, provides that every man over the age of 21 years and under the age of 50 years, residing in the county, shall be subject to a special road tax of two dollars. Under this law before any one is liable for this road tax he must be a resident of the county where it is sought to be collected. Whether he does reside within the county must be determined from the facts of each particular case, under the rules provided by statute for determining residence, and cannot be determined as a question of law in the absence of these facts. No further answer can, therefore, be given to this query than to say that it can be determined only from the evidence in the particular case.

"2. If crew are 'residing within the county' could action be brought against the foreman as a 'person having in his employment any other person liable for the special road tax?'"

Section 26, of Article III, of the road law of 1903, provides in substance, that any person having in his employment any other person liable for the special road tax must, upon demand of the road supervisor, furnish a list of all persons so employed, etc. This, you will notice by the law, is made the duty of the employer. The following section of this act, Section 27, is a little clearer on this point and provides that if any person does not pay the road tax and is in the employment of another person, the road supervisor must deliver to the employer a written notice, etc. The question, then, is who is the employer of the men, the foreman or the railroad company? The foreman, like the men who act under his direction, is an employe and may himself be liable for a road tax. He is in no sense an employer and is, therefore, not personally liable for the forfeiture named in said Section 26.

"3. If foreman is not the proper party defendant, would proof of service of notice on such foreman, be sufficient to bind the N. P. Ry. Co. in an action to recover penalty from said company?"

In the matter of service the law in question does not seem to designate any particular person on whom the service of this request must be made, nor have we any other statute upon this subject except that relating to the service of summons. That provides, in Section 636, C. C. P., that in an action against a corporation service may be made upon the president, secretary, treasurer or other officer of the corporation, or on an agent designated by such corporation as the person upon whom service shall be made; that if none of these persons above mentioned can be found in the county, then the service may be made upon any of the other parties mentioned in that section. If none of the parties mentioned in the first part of subdivision 3 of Section 636, above referred to, can be found in the county it might be possible that a court would hold that service upon a foreman was sufficient, though the statute in its enumera-

tion given in Section 636 of the persons on whom service may be made does not mention foremen.

In the particular case to which you refer it is hardly probable that the service upon the foreman was a sufficient service to bind the company. To obviate any doubt on this matter such notices or requests, mentioned in said Section 26 of Article 3 of the road law of 1903, should be served upon the foreman and also upon one of the persons designated in Section 636, in the same manner that a summons would be served.

Respectfully submitted,

ALBERT J. GALEN,
Attorney General.