Licenses, Liquor. County Commissioners, Powers of to Revoke License. County Treasurer, Power of to Issue License. Certiorari, To Revoke License. Town, Village or Camp, Population of, How Computed.

Action of County Treasurer in issuing retail liquor dealers license cannot be reviewed by certiorari. The power to revoke such license rests, primarily, with the county commissioners.

The determination of the population of a town, village or camp is a question of fact. (See opinion for rules.)

Chapter 39, Laws of 1905, has no application to licenses where a saw mill is merely incident to or an aid to a town or village.

Helena, Montana, March 31st, 1906.

John A. Matthews, Esq., County Attorney, Townsend, Montana.

Dear Sir:—I am in receipt of your favor of the 24th inst., requesting official opinion from my office concerning several questions which have arisen in your county with reference to the application of Chapter 71, laws of 1905.

The facts as you present them are, substantially, as follows:

A party being desirous of commencing business as a retail liquor dealer at the town or camp of Mason in your county, applied to the county treasurer for a license, stating that such town or camp contained a population of one hundred or more people, and that, for that reason, he was not required, as a condition precedent to securing such license, to present a petition to the board of county commissioners and secure from them an order directing the issuance of such license by the treasurer in accordance with the provisions of Chapter 71, laws of 1905. At first, the treasurer refused to issue the license, stating that he did not know that the town or camp in question has a population of more than one hundred, and that, subsequently, the applicant appealed to two members of the board of county commissioners at their respective places of business and not when the board were regularly convened in session, and that said members of the board having heard a statement of facts by the applicant, requested, or ordered the treasurer to issue the license applied for. Thereafter, objection to the issuance of said license having been called to the attention of the board of county commissioners, a hearing was by them ordered for the purpose of determining the population of said town or camp, which hearing was duly and regularly had, and evidence introduced pro

and con; at the conclusion of said hearing the board took no action whatsoever respecting said license, and the license theretofore issued by the treasurer was permitted to stand unrevoked. Thereafter, certiorari proceedings were instituted by and on behalf of Allan C. Mason as relator, against the county treasurer, attempt being made in this manner to secure a revocation of such license issued by the treasurer. This proceeding was taken up and heard before the Hon. W. R. C. Stewart, Judge of the District Court, at chambers in the City of Bozeman, Gallatin County, and, in connection therewith an agreed statement of facts was furnished and presented for the consideration of the judge, which statement contained in substance, the testimony given before the board of county commissioners with reference to the boundaries of the town or camp of Mason and the number of inhabitants thereof. At the conclusion of such hearing, the said judge ordered the writ to issue and directed the treasurer to annul and cancel such license.

Upon this statement of facts, the following questions arise and are presented for consideration and determination by this office.

What effect, if any, did the certiorari proceedings have upon the license issued by the Treasurer.

If the license was improperly issued by the Treasurer, what is the proper method of procedure to secure its revocation?

How should the population of a town, city or camp, etc., under said law be determined, and who should be enumerated as residents?

Would the fact that a saloon is run in a camp established and supported solely by mines within a distance of a mile of a saw mill run in connection with such mines, bring the business within the inhibition of Chapter 39, Laws of 1905?

In answer to question No. 1, we submit the following:

It is undoubtedly within the power and authority of the county treasurer to issue licenses. Sec. 4043 Pol. Code.

It appears that this license was issued by the treasurer after making inquiry as to the number of inhabitants at the town or camp of Mason, and prior to any action having been taken by the board of commissioners, for the board cannot act as such except when in session. Williams vs. Commissioners, 28 Mont. 360.

It appears that, subsequent to the issuance of the license, the board did, when in session, hear testimony with reference to this matter, but made no finding. This license so issued by the county treasurer stands and is final until revoked by some competent authority.

The proceedings instituted by and on behalf of Allan C. Mason, by which it was sought in the certiorari proceeding to annul this license, and the judgment of the court made and entered with respect thereto, are without authority of law and are null and void, for the reasons, among others, that

(a) A writ of review (certiorari) can be granted only when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction. The functions of the county treasurer are ministerial, clerical, administrative—not judicial. The fact that there are or are not one hundred or more people residing in the certain town or village, or

whether there is any town or village, is acted upon by the treasurer as a fact and not acted on by virtue of any judicial determination by the treasurer, for the treasurer is not vested with judicial powers.

(b) Neither question of fact nor errors of law can be called in question by certiorari proceeding; questions of jurisdiction alone can be considered. The treasurer has the authority, under the statute, to issue licenses. If he errs in the exercise of this authority, either in law or in fact, such error cannot be corrected by writ of review. When a writ of review is granted, the inferior tribunal, board, or officer, is required to certify up the record for review, but the only record made by the treasurer in issuing a license in his book entries with reference to the license and the moneys received therefor. The stub of the license is kept by the county clerk, hence, the only record before the judge for review in the proceeding directed against the treasuer were those book entries. The statement of facts was not any part of the record and could not be consndered. State vs. Dist. Ct., 26 Mont. 365. State vs. Dist. Ct., 31 Mont. 260.

If the determination by the treasurer that there were, at that time, one hundred or more people residing at this camp is a question of fact, it could not be reviewed in a certiorari proceeding, and if, as the honorable judge intimates, it was a question of law, such error could not be reviewed in such a proceeding. The only question that could could be reviewed in such a proceeding, if such a proceeding would lie against the county treasurer, would be the autnority of the treasurer to issue the license, and that authority is given him by positive statutory provisions. It therefore follows that the question as to the number of people residing at this town, camp or village has never yet been determined, either by judge, court, or commissioners.

(c) The party to whom the license was issued was not made a party to this proceeding, and his license could not be taken away from him or revoked without giving him a day in court. See the following authorities:

State vs. Dist Ct. 27 Mont. 174;
State vs. Dist Ct., 24 Mont. 539;
State vs. Dist. Ct., 27 Mont. 280. Sec. 1940 et seq. Code Civ. Pro.

In answer to your second question, we give you as our opinion that, where a license is issued by the county treasurer for the conduct of a retail liquor dealer's business in a town or camp having a population of less than one hundred, his action can be reviewed by the board of county commissioners, and upon such review by the board of county commissioners, if it is found from the evidence that such camp or town has a population of less than one hundred, it is within the power and province of the board to order the revocation of such license and to insist upon a full compliance with the provisions of Chapter 71, Laws of 1905. At such hearing before the board, only evidence should be heard respecting the population of the town or camp at the time of the issuance of the license by the county treasurer.

In answer to your third question, we are of opinion that a town or camp, under said law, consists of a collection or habitations or places of

abode, inhabited, whether temporary or permanent, as distinguished from isolated places of residence, whether adjacent to said town, etc., or elsewhere. The town must be determined by the collectiveness of such habitations and the contiguous character thereof, and the enumeration is to be made of the people actually residing in such collective places of abode, and whether a given habitation should be enumerated in computing the population of a town, etc., is purely a question of fact.

In State v. Minnetonka (Minn.) 25 L. R. A., 755, it was said by the court with reference to the incorporation of a village, that only lands should be included which lay so near the center or nucleus of population as to be somewhat suburban in character and to have some community of interest in the village government.

And, in People v. McCune (Utah) 35 L. R. A., 396, the court said:

"Where it appeared from the evidence that a settlement consisted of fourteen families, each family containing five persons; that these resided along a stream, the distance from one extreme end of the settlement to the other being about two and one-half miles, some residing within forty rods of each other and others being distant about one mile or more; that their cheif occupation was farming; that the settlement contained a school district, a district school and a postoffice; that the nearest settlement to the north was distant about 15 miles, to the west about 12, and to the south about 6 miles; it was not error in the court to instruct a jury that, as a matter of law such a settlement was a village within the meaning of the statute."

Separate and distinct clusters of habitations apart and distant from each other or from the community of dwellings comprising the alleged town, camp or village, and having no community of interest with the camp or village and nothing in common in the maintenance of the village government cannot, as a matter of law, be considered as a part of said village, camp or town.

These general rules are about all the statements that can emanate from this office with respect to how this question should be decided, for it is, primarily, a question of fact.

The rules for determining residence are laid down in Sec. 72 of the Pol. Code, and we merely make reference to this section.

In answer to question four, with reference to the application of Chapter 39, Laws of 1905 amending Section 717 of the Penal Code prohibiting a saloon being operated within five miles of the line of any railroad grade, logging camp, saw mill, etc., it has heretofore been held by this office in opinion rendered to W. T. McKeown, Esq., County Attorney, on October 20th, 1905, that the provisions of said amended section did not apply to the sale of liquors within any town or city. And that this law applies only to camps of a temporary, rather than a permanent character.

This law has no application to instances where a saw mill is merely incident to or in aid to the town or village.

We sincerely hope that we have fully covered your questions in a

manner that may be easily understood by all concerned and be of benefit to yourself and other county officers.

Yours respectfully,

ALBERT J. GALEN,

Attorney General.