

**License, Retail Liquor, When to Issue. County Treasurer,
Duties Of. Mandamus, Proceedings On.**

Law relating to mandamus proceedings and appeal and of the duty of the county treasurer to issue liquor license considered and discussed. See opinion.

June 24, 1911.

Mr. John Hurley,
County Attorney,
Glasgow, Montana.

Dear Sir:

Your letter June 21st, relative to mandamus proceeding now pending, received.

The limited time will not permit me to make very extensive research, or to write at length, as this letter to reach you in time, must be mailed today. I can here only state the propositions which as I understand them from your statement of fact, are:

1. No tender of the money was made by the parties seeking the license. If this contention is sustained, of course the petitioner must fail in his mandamus proceedings, for no officer has the right to issue a license without first receiving the money.

2. If the town of Plentywood has a population of less than 100, the writ must also be refused unless the party seeking the license, had previously obtained an order of the county commissioners. (Sec. 2760 Revised Codes.)

3. It is very probable that under the holding of the supreme court in state v. Hogan, 22 Mont. 384; 56 Pac. 818, that the court will take into consideration both the alternative writ issued and the petition filed.

4. In the matter of new trial, it is my judgment that Section 7222, is inoperative and is in conflict with Sections 7232 and 7233, and that the provisions of Section 5793 et seq. should be followed. The supreme court in the somewhat recent case of Power Bros. v. Turner, 37 Mont. 521, page 543, held that a notice of intention to move for a new trial filed prior to the entry of judgment, is premature and of no avail. See also State v. District Court, 38 Mont. 119, at page 123.

5. It is also probable that under the provisions of Section 7109, Revised Codes, the mere filing of the intention to move for a new trial, will not have the effect of itself staying the proceedings, though of course, that question may be argued and presented to the court, but it is very probable that you will have to make application to the court for a stay of proceedings under the provisions of Section 6798.

With reference to the expediency of taking an appeal you know our court has repeatedly decided that where the question turns on a matter of fact with reference to which there is a substantial conflict in the evidence, that it will not disturb the findings of the lower court, hence, if the determination of this act is based on a question of fact with reference to which there is a material conflict in the evidence, an appeal would be unavailing, but this you can consider later after you have tried the case.

This is written you in haste. If there is anything further we can do that will assist you, kindly let us know.

I return you herewith, the papers you enclosed, as you may need them.

Yours very truly,

ALBERT J. GALEN,

Attorney General.