

License, for Sale of Intoxicating Liquors in Incorporated Towns. Liquors, License for Sale Of in Unincorporated Towns. Board of County Commissioners, Authority in Issuing Liquor License.

Prior to the taking effect of Chap. 92, Session Laws of 1911, an application for a liquor license for a town containing a population of less than 100 should have been made under the provisions of Section 2760 of the Revised Codes. A license issued by the county treasurer to conduct a saloon in a town containing less than 100 is void unless authorized by the board of county commissioners.

Subsequent to the taking effect of Chap. 92; Session Laws of 1911, applications for liquor license outside incorporated cities or towns must be made to the board of county commissioners, and the board is invested with a sound discretion as to whether or not they will grant such license.

Sept. 12th, 1911.

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

Dear Sir:

I am in receipt of your letter of August 24th, requesting my official opinion upon the following questions, to-wit:

1. "At Hinsdale, in this county, it has been the custom of the treasurer to issue liquor licenses without a petition, he having assumed that the town had a population of over one hundred and shortly before July first a liquor license for a third saloon was issued at that place and shortly afterwards, county commissioner James T. Farris, who resides at Hinsdale, caused an actual enumeration of the inhabitants of Hinsdale to be made and upon such enumeration it was found that the actual population is something less than 80 inhabitants. We are at a loss as to how to proceed to cancel the license and if you have ever had this question for consideration I would be glad to have your opinion upon the matter."

2. "Chapter 92, Section 3 of the Session Laws of 1911, provides that when application is made to the board for the issuance of a liquor license a petition must be signed by at least twenty freeholders residing within the particular village, camp or township where the license is desired to be issued and that if a protest is filed by twenty residents freeholders residing within such particular village, camp or township, the board shall then set a date for hearing. We have several points in this county which are practically villages but in each there are not twenty resident freeholders. In such a case can a petition for or remonstrance against be signed by resident freeholders residing without the village or camp but who reside in the same township."

3. In case no remonstrance is filed against the application for a liquor license has the board the authority to refuse the license if in their judgment they deem it for the best interests of the county to do so."

In answer to your first question, it appears that the particular license was issued prior to the taking effect of Chapter 92, Session Laws of 1911, and as the town of Hinsdale contained at that time a population of less than one hundred, the application for the license should have been made under the provisions of Section 2760, Revised Codes, and if authorized by the county commissioners, the treasurer should have issued the license. However, the applicant for the license, as well as the treasurer, appear to have been mistaken or misinformed as to the population of Hinsdale, and, therefore, the application was made direct to the treasurer, and the license was issued by him without any authority from the board of county commissioners.

If the town of Hinsdale contained at that time less than one hundred inhabitants, the county treasurer had no authority to issue the license, and a license improperly issued is no protection to the holder thereof.

State v. Laborde, 119 La. 410.

Mayson v. City of Atlanta, 77 Ga. 662.

State v. Shaw, 32 Me. 570.

This being the case, the holder of the license, as a matter of law, is selling liquor without a license.

A license issued under a mistake of facts necessary to authorize

its issuance may be revoked; and the officer issuing it is not estopped by his conduct in issuing it to revoke or cancel it:

Woolen & Thornton on Intoxicating Liquors, Sec. 441, and cases cited.

You are therefore advised that a license improperly issued is no protection to the holder, and the treasurer may notify the holder of the license that the same was improperly issued and revoke the same.

However, in this matter, as it appears that both the treasurer and the person to whom the license was issued acted in good faith, and nearly three months have expired since the license was issued, I would advise that the person holding the license be permitted to conduct his saloon until the date the license expires, and that he be notified at that time that it will be necessary for him to make an application for the reissuance of a license to him under the provisions of Sec. 3, Chap. 92, Session Laws of 1911. You will further notice that under the provisions of this section the number of licenses which may be issued in any place not within the corporate limits of any city or town is not limited and as Hinsdale is not an incorporated city or town, the number of licenses which may be issued for that place would depend upon the action taken by the board of county commissioners under the provisions of Sec. 3, Chap. 92, SUPRA.

In answer to your second question you are advised that the petition must be signed by at least twenty freeholders residing within the particular village, camp or township in which such person seeking the license intends to engage in business. If there are not twenty people within the village or camp, of course, those residing within the township might also sign the petition or the remonstrance to the petition.

In answer to your third question I will say that it is my opinion that the board of county commissioners has a discretion in the matter of issuing a liquor license whether a protest against the issuance of such license, signed by at least twenty freeholders residing within the particular village, camp or township is filed or not. When the application is made for the issuance of a license it is the duty of the county clerk to give five days' notice of the hearing of such petition, and whether a protest is filed or not, the board may determine whether or not a license shall be issued. From their decision an appeal may be taken to the district court in the same manner as appeals from justice courts.

I wish to again call your attention to the circular letter which was sent out by this office under date of March 15th, 1911, directing county attorneys to present with their requests for opinion the result of their own research upon the question involved.

Yours very truly,

ALBERT J. GALEN,
Attorney General.