

of a county refuse to issue a dance-hall license to an applicant outside of an incorporated city or town?

"What rules and regulations may be imposed? For instance, could a board of county commissioners exclude an applicant from operating a dance hall if the place was within, say two hundred feet, or any distance from a highway?

"Can a board of county commissioners alter, that is increase or diminish the qualifications of an applicant other than as provided for by statute, Chapter 253, Revised Codes of Montana, 1935?"

Section 2815.1 provides:

"As used in this act, the term 'public dance' shall be construed to mean any dance to which the public generally may gain admission with or without the payment of an admission fee, whether said admission fee is paid in the form of club dues, membership fees, or in any other manner. The term 'dance hall' shall be construed to mean any room, hall, pavilion, building or other structure kept for the purposes of conducting therein public dances or dancing."

Section 2815.2 has reference to the license for a public dance hall and prohibits the granting of a dance hall license to an applicant with bad moral character; Section 2815.3 specifies the license fee; Section 2815.4 prohibits immoral or suggestive dancing, and requires the dance hall to be well lighted; Sections 2815.6 to 2815.9, inclusive, refer generally to the display of the license, to the powers of the board of county commissioners in revoking the same, and the enforcement and penalties for violation of the same; Sections 2815.5, 11566.3 and 11566.4 provide as follows:

"2815.5. The board of county commissioners shall have authority to make all proper and necessary administrative rules and regulations for the purpose of carrying into effect the provisions of this act with respect to the conduct of public dances, and may in its discretion refuse to grant licenses for dance halls to be located at such places or to be conducted at such times as will in their judgment interfere with the comfort and happi-

Opinion No. 232.

**County Commissioners — Licenses —
Dance Halls—Beer Parlors—
Cities and Towns.**

HELD: 1. County Commissioners may make administrative rules and regulations for carrying out the provisions of Sections 2815.1, 2815.2, 2815.3, 2815.4 and 2815.5, R. C. M. 1935, but may not legislate as to qualifications or eligibility requirements for operation of dance halls outside incorporated cities and towns.

2. Bona fide patrons of premises where beer is sold are permitted to dance therein without such premises having a license as a Public Dance Hall.

3. Section 11566.3 being a later enactment than Section 2815.1, supercedes it in such respects as the two sections may be in conflict.

January 24, 1938.

Mr. John K. Claxton
County Attorney
Butte, Montana

Dear Mr. Claxton:

You have submitted to this office, for my opinion, the following inquiry:

"Under what, if any, conditions may a board of county commissioners

ness of the community in which such proposed dance hall is to be located.

"All peace officers of the state of Montana shall have free access to public dances and dance halls for the purpose of inspection and to enforce compliance with the provisions of this act."

11566.3. The term 'entertainment' as used in this act shall include every species and kind of entertainment, including vaudeville shows, motion picture shows, variety shows and all forms of dancing; provided, however, that it shall not include the usual and social forms of dancing participated in solely by bona fide patrons."

"11566.4. Hereafter it shall be unlawful for any person, firm, company, corporation or association of individuals to conduct or provide or permit to be conducted or provided, any entertainment of any sort or kind at, in or about any beer hall or any room, premises, place or establishment at which beer is sold or licensed to be sold, either under the provisions of the Montana beer act or any other law of Montana, now or hereafter in effect, regulating and licensing the sale of beer."

It is elementary that the board of county commissioners has only such powers, expressed or implied, as are necessary and incidental to the performance of its duties.

Strange v. Esva, 67 Mont. 301;

Sullivan v. Big Horn County, 66 Mont. 45.

The board of county commissioners is solely an administrative body, and lacks both legislative and judicial powers. The board of county commissioners may refuse to grant a dance hall license, outside of an incorporated city or town, upon the following grounds:

1. The applicant is not of good moral character.

2. The board may, in its discretion, refuse to grant licenses for dance halls to be located at such places, or to be conducted at such times, as will in its judgment, interfere with the comfort and happiness of the community in which such proposed dance hall is to be located.

Chapter 253, R. C. M. 1935 (part of the above statutes are included therein), has expressly enumerated the qualifications of the applicant for a dance hall license, and, having done so, such qualifications are exclusive. The county commissioners cannot impose additional, lesser or different qualifications. It, the board, cannot provide by resolution, or otherwise, that the dance hall must be located at a designated number of feet from a public highway, or from a liquor or beer establishment, or other place of business. Chapter 253, supra, makes no such qualifications or restrictions, and the board cannot do what the legislature did not authorize it to do. The legislature, under authority of Chapter 253, authorized the board of county commissioners of each county to make all proper and necessary administrative rules and regulations for the purpose of carrying into effect the provisions of Chapter 253, with respect to the conduct of public dances. These rules and regulations authorized are purely administrative rules, and contemplate the establishment of the proper forms for making the application above, the procedure in hearing the same, and similar and related matters, and such rules and regulations do not contemplate nor authorize the establishment or creation of qualifications of the applicant. The legislature, as noted above, having already established the qualifications necessary in order to enable the applicant to receive his license, the board therefore is without power to increase, diminish or alter the same. To prohibit dance halls from operating outside of incorporated cities or towns only at a designated distance from a highway, beer hall, or other place of business, is without the jurisdiction and the powers of the board of county commissioners, subject to that exception as is hereinafter noted.

Before the board can legally deny an applicant a dance hall license, facts must actually exist showing that the operation of such dance will interfere with the comfort and happiness of the community in which such proposed dance hall is to be located, or that the applicant is a person of bad character, or both. The judgment of the board, as provided for in Section 2815.5, must be exercised in accordance with the existing facts; otherwise, its acts are arbitrary and unlawful. It will be noted that Chapter 253, supra, was

enacted in the year 1929, whereas Sections 11566.3 and 11566.4 were enacted in the year 1935, and under the familiar rule of statutory construction the last two sections, being enacted later in time, if any conflict does exist, would prevail. Section 2815.1 defines "public dance" and "dance hall," and generally public dancing thus defined is that character of dancing as is provided for and authorized in Section 11566.4. Such dancing refers to commercial dancing, and "dance hall" has reference to the place where said commercial dance is being conducted. Such dancing is prohibited at such place where beer is sold, or licensed to be sold. A granting of a dance hall license by the board of county commissioners could not legalize the same. To do so would be to diminish the requirements of the statute, and would constitute legislation, which the board is without power to do.

Section 11566.3 permits the usual and social forms of dancing, participated in solely by bona fide patrons, upon the premises where beer is sold or licensed to be sold. That form of dancing which is permitted in places where beer is licensed to be sold is not directly charged for, and is incidental to the main business of the sale of beer. Section 11566.3, in permitting the usual and social forms of dancing, to be participated in solely by bona fide patrons of the beer establishment, differentiates in the definition of "public dancing" as defined in Section 2815.1, or else is a finer and closer definition of said term "public dancing;" nevertheless, Section 11566.3, being enacted in the year 1935, and Section 2815.1, being enacted in the year 1929, if any conflict exists, Section 11566.3 would supersede Section 2815.1.

Therefore, it follows that the social form of dancing participated in solely by bona fide patrons of the beer establishment, is not construed as public dancing, and under Chapter 253, supra, the board of county commissioners would have neither the power to prohibit the same, nor the power to license the same, and no license would be required to operate that form of dancing participated in by bona fide patrons of the beer establishment.