Opinion No. 16-1755

March 13, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Mr. J. S. Vaught, Assistant District Attorney, Silver City, New Mexico.

Issuance of liquor licenses to do business within five miles of any United States sanatarium.

OPINION

*{*326}* I understand from Mr. Murray that you would like to have from me some expression of opinion as to the present condition of the law with regard to the issuance of a retail liquor license to do business within a distance of five miles of any United States Government Sanatorium, which is declared to be unlawful by Section 2889 of the new Codification of the statutes. In the case of Rapp v. Venable, 15 N.M. 509, 518, our supreme court had this statute under consideration, and although not absolutely necessary to the decision of the case, yet, in answer to the contention that the statute was invalid because its effect was to create a monopoly in the saloons previously established, the court said, in effect, that that merely postponed the prohibitory effect of the statute until the expiration of the then existing licenses. This appears to be a rather strained and forced construction as to the meaning of the statute which, as originally enacted, declared that "this section shall not apply to any saloons previously established." It would seem to be a lawful exercise of legislative authority to limit such saloons within the prescribed distance of a sanatorium to those already in existence, and not to attempt to destroy them. However, this may be, the condition of the law at the present time is quite different. The Codification of the statutes is an entirely new enactment and Section 2889 thereof must be read as though it were an entirely new statute, and the last clause of that section is to the effect that "this section shall not apply to any saloons established prior to March 16, 1905." By this provision the legislature clearly evinced an intent to limit such saloons to those which were in existence prior to the date of the adoption of the statute of 1905, and merely to prevent any increase in that number.

The argument that this creates a monopoly and that, therefore, the statute is invalid, is not of great force. In many parts of the country legislatures have limited the number of saloons upon the basis of population or area and in no case has such legislation been held to create a monopoly even though drinking places already established *{*327}* had a right to continue as long as the limited number was not exceeded.

In any event, I cannot believe it proper for an executive officer like a county clerk, who is charged with the duty of issuing liquor licenses, taking upon himself the judicial duty of declaring a statute unconstitutional. Every presumption is in favor of the validity of

statutes and as a general rule, all citizens and officers should follow those statutes until and unless the courts should hold against them.

My conclusion is that the prohibition in Section 2889 cannot be held applicable to retail liquor dealers whose places of business were established prior to March 16, 1905.

I ought to add that an opinion which I gave to Mr. Royall in June last, was written before I had received the new Codification so that I did not know of the change in the language of the section hereinbefore referred to, nor did I know that Section 4123 of the Compiled Laws of 1897 had been omitted from the Codification. The opinion was a perfectly good one upon the law as it then stood, but when the Codification took effect, that destroyed a large part of that former opinion.

F. W. C.