

Opinion No. 45-4636

January 11, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Richard F. Rowley Acting District Attorney Clovis, New Mexico

{*4} We have your letter of January 3, 1945, wherein you request an opinion of this office as to whether or not a man is drinking in public if he is seated in his own automobile, or as a guest in someone else's automobile, with the door closed, and the car parked in a lighted area near a public dance hall, but not on the street or highway, and whether or not such drinking would be considered to be done in a public place if the car was actually parked on a public street or highway.

From a review of the authorities, I find it impossible to do more than give a general discussion of the applicable rules concerning the determination of what constitutes a public place. And then, of course, these rules must be applied to each particular situation to determine whether or not the particular place is public.

In the cases of *Lee v. State*, 33 So. 894, 895; *Fanklin v. State*, 8 So. 678, 679; *Henderson v. State*, 59 Ala. 89, 91; and *White v. State*, 39 Tex. Cr. Rep. 269; 45 S. W. 702, it was held that a place so near and so open that persons traveling the highways can see card and dice playing thereat is abstractly and per se a public place.

It was held in *Brannon v. State*, 39 So. 983, that on a prosecution for playing at a game of cards at a public place it was erroneous to charge that if the place was within 75 yards from a certain public road, and could be seen therefrom, it was a public place; the question being whether the parties who were playing could be seen from the highway.

It was also held in *Morris v. District of Columbia*, 31 Atl. 2d 652, that a public vehicle, such as a taxicab, plying its business on a public street, is a public place.

It would appear, from the above cases, that if the automobile was parked in a lighted area near a public dance hall wherein the general public could have observed the drinking, that the persons were drinking in a public place. It would further appear, from the above cases, that drinking in an automobile on a public highway would be drinking in a public place.

By HARRY L. BIGBEE,

Asst. Atty. General