

MUNICIPALITIES: Hannibal cannot license non-resident towel service business.

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Gentlemen:

This will acknowledge receipt of your letter of December 30, 1939, and the attached memorandum submitting the following for our opinion:

"Is the City of Hannibal, under its special charter, authorized to enact, by its City Council, and enforce an ordinance requiring the payment of a license tax by a party who is a non-resident of said city, and who is engaged in carrying on and conducting a business or rendering a service within the city limits of said city of the following character:

He is engaged in renting the use of towels and other articles used in hotels and by private families. He owns these articles and launders them at a place outside of said city and comes within the city limits of said city to deliver and distribute them to his customers at a nominal rental. After such articles have been soiled, he comes around and gathers them up, takes them to his laundry and launders them again, delivering them to his customers in said city, this course being pursued at regular intervals."

Section 6, Laws 1873, p 241 of the special charter of Hannibal is as follows:

"MAY LICENSE, TAX AND REGULATE AUCTIONEERS, MERCHANTS, VEHICLES, ETC. Sec. 6. To license, tax and regulate auctioneers, merchants, retailers, grocers, confectioners, hotels, boarding houses, liquor sellers, circuses, shows and exhibitions for pay, ball and ten pin alleys, hacks, drays, wagons and other vehicles, used within the city for pay, fish-mongers, butchers, pistol galleries, wood and coal yards, livery and feed stables, billiard tables, shuffle-boards, bagatelle tables, restaurants or ordinaries, gift enterprises, hucksters, banking associations and corporations, intelligence offices, public buildings, public halls, public grounds, beer houses, patent right dealers, street railroad cars and companies, hackney carriages, omnibusses, and all other vehicles and all other business trades whatever, and fix the rates for carriage of persons, and of wagonage, drayage and cartage of property."

Section 7287 R. S. Mo. 1929 provides:

"No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

This section appears in Chapter 38, Article 12, R. S. Mo. 1929, being specially applicable to cities under special charters. Further in *Siemens v. Shreeve* 296 S. W. (Mo. Sup) 1.c. 418, the court said, "We think this statute (Sec. 7287 supra) applies to all municipal corporations whether under general or special charter."

Thus, if the city of Hannibal has the power to impose a license tax upon the activity described in your memorandum it must be found in Section 6, supra, of the Hannibal charter. No provision of Article 13, Chapter 38, R. S. Mo. 1929, that bears on this question, is applicable to Hannibal, a city of 22,761 population according to the 1930 U. S. census.

Before taking up the immediate problem we desire to eliminate one feature, that is, that the license tax desired to be imposed cannot be upon the motor vehicle used in making delivery of the towels and other articles, unless in conformity with the rules announced in *City of Sikeston v. Marsh* 110 S. W. (2nd) 1135 (Mo. App); *City of West Plains v. Noland* 112 S. W. (2nd) 79 (Mo. App), or one of the class of vehicles named in the charter provisions.

The vehicles named in section 6 are: "hacks, drays, wagons and other vehicles, used within the city for pay," and, "street railroad cars * * *, hackney carriages, omnibusses, and all other vehicles." Under the rule of ejusdem generis the phrase "other vehicles" above underlined must be confined in its application to the same class of vehicles specifically named. The vehicles above named are all of the type that is used to transport persons or property for hire. (The section specifically provides that a portion of the vehicles named must be used for pay). The vehicle in question here is not used, as we understand it, to transport persons or property for hire and therefore is not within the class of vehicles the city of Hannibal is authorized to tax under its charter.

By other provisions of Section 6, supra, the City of Hannibal is authorized to "license, tax and regulate * * merchants, retailers * * * and all other business trades whatever * * ." Unless the city has authority under the above quoted provisions of section 6, it does not have the authority to license the activity in question. It is obvious that no other provisions of Section 6 could possibly include this activity.

In *City of Ozark v. Hammond* 49 S. W. (2nd) 129 (Mo. Sup), the city imposed a license tax on a baking company that sold bread in the city that it manufactured elsewhere. The license was imposed on the theory that the baking company was a merchant. The statute authorized the city to license "merchants of all kinds". The court held the ordinance void because the baking company was not a merchant, defining that word to mean, l.c. 131, "A merchant is one who is engaged in the purchase and sale of goods; a trafficker; a trader." It is clear under this definition that the activity in question here is not that of a merchant. He buys and sells no goods but only sells the use of something owned by himself.

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A "retailer" is defined in Great Atlantic & Pacific Tea Company v. Cream of Wheat Co. 227 Fed. 46 as one who "sells to the consumer." In Words & Phrases 3rd Series p. 820, there appears the following: "the word 'retail' meaning to sell in small parcels, and not in gross, to sell in broken parts, and in small lots or parcels, rather than in bulk, and the word 'retailer' meaning one who retails or sells goods in small quantities or parcels. Byron v. City of Sparks 137 p. 522, 523, 36 Nev. 573."

Thus, it appears a retailer has been defined to be one who sells some tangible item of property. In the present activity nothing is sold; no title passes; the towels are only rented and therefore the activity is not that of selling at retail as a retailer.

We now come to the weight to be given to the phrase "and all other business trades whatever," in deciding the question. In Siemens v. Shreeve 296 S. W. 415 (Mo. Sup) the court determined that an architect could not be compelled to pay a license tax under a charter provision that did not name that avocation but that did name "all occupations, professions, trades, pursuits * * * of whatever name or character." The court in the opinion reviews cases wherein licensing under general language had been approved but holds that since the enactment of Section 7287 R. S. Mo. 1929 the license tax imposed upon an architect under such a general classification of avocations could not stand.

CONCLUSION

Therefore, it is our opinion that the city of Hannibal has no authority to license a person, a non-resident of the city, that rents towels and other articles to persons in the city.

Respectfully submitted,

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APPROVED:

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