AGRICULTURAL PRODUCTS- License required for sales under Sections 7289 and 13312 R. S. Mo. 1929.

13312-7289 RSMo 1929

March 8, 1933.

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Mr. C. P. Anderson
Commissioner
State Marketing Bureau
Jefferson City, Missouri

Dear Mr. Anderson:

In your inquiry of March 1st, directed to the undersigned, you state the following:

> "We would like to have your opinion as to whether or not the growers of apples in the State of Missouri can sell their products in any town or City in the State of Missouri without having a license regardless of the fact that the town or city may have an ordinance prohibiting same."

From the opinion rendered in the case of St. Louis v. Meyer 185 Mo. l. c. 591, a case dealing with the same subject matter to which your inquiry is directed, we find this language,

> "The mandate of organic law of this state is that the charter and amendments of municipal corporations shall always be in harmony with and subject to the constitution and laws of this state."

Chapter 96, Article I, R. S. Mo. 1929, entitled "Peddlers", requires a license for such occupation and fixes a penalty for failure to secure the same prior to engaging in such occupation. Agricultural and horticultural products are, however, specifically exempted from its provisions. Section 13312 of said article and chapter provides,

> "Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs and cheese, by going about from place to place to sell the same, is declared to be a peddler."

Section 7289, R. S. Mo. 1929, restricts the jurisdiction of municipalities of this State in the passage of ordinances, requiring that such ordinances conform with the state law upon the same subject.

Construing the constitutional provision aforesaid, and what are now Sections 7289 and 13312, supra, in the above cited case, the court held that by reason of the constitutional and statutory restrictions upon municipalities they were without authority to pass an ordinance imposing a license tax upon anyone who would come within the exceptions of this general statutory provision.

In 1911, Session Act, p. 423, the Legislature passed an act pertaining to itinerant vendors and Section 1 thereof defines the words "itinerant vendor" for the purpose of said act as follows:

> "The words "itinerant vendor", for the purposes of this act, shall mean and include all persons, both principal and agents, who engage in, or conduct, in this state, either in one locality or in traveling from place to place, a temporary or transient business of selling goods, wares and merchandise with the intention of continuing in such business in any one place for a period of not more than one hundred and twenty days, and who, for the purpose of carrying on such business, hire, lease or occupy, either in whole or in part, a room, building, or other structure, for the exhibition and sale of such goods, wares and merchandise. The provisions of this act shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, nor to bona fide sales of goods, wares and merchandise by sample for future delivery, nor to hawkers on the streets or peddlers from vehicles, nor to any sale of goods, wares or merchandise on the grounds of any agricultural

society during the continuance of any annual fair held by such society."

Any person, firm or corporation which comes within the definition as set out in said section is required in the remaining sections of said act to take out a state license, and municipal corporations are granted the right of passing ordinances imposing upon said person a license tax. For engaging as an itinerant vendor without first having obtained a license in compliance with said provision, a penalty is provided in said act.

Sections 10103 to 10110, R. S. Mo. 1929, inclusive, are the same sections as contained in the 1911 Session Act and as hereinabove referred to.

The 1911 Act as carried into the 1929 Statute received judicial interpretation and was differentiated from the laws pertaining to peddlers hereinabove set forth, by the Kansas City Court of Appeals in the case of State v. Long 203 Mo. Ap. 427. In that case the defendant for a period of several weeks was engaged in selling apples, potatoes and cabbage from box cars on the sidetrack of a railroad in the city of Kirksville, Missouri. The facts recite that defendant procured these agricultural products from various places; that they were shipped to him at this place; that he advertised the sale in newspapers and purchasers would come to the car, buy what they wanted and take it home with them. Defendant claimed that he came within the exception of what is now Section 13312, R. S. Mo., which we have heretofore set out and underlined. The court in discussing the defense interposed says at pages 428 and 429,

> "This view rests upon the fact that section 10282, Revised Statutes 1909, in defining a peddler as one who shall deal in the selling of goods, wares and merchandise 'by going about from place to place to sell the same,' exempts 'agricultural and horticultural products.' There is no question but that apples, potatoes and cabbage, even though agricultural products, are goods, wares and merchandise. Section 10282 by expressly excepting agricultural products from the things covered by the phrase 'goods, wares and merchandise' clearly recognizes that such products are goods, wares and merchandise otherwise there would be no

no need to exclude them. But the 1911 Act has no reference to peddlers nor does it contain any such exemption as the peddler statute. The 1911 Act was passed long after the Peddler Act and if such products were to be exempted from the latter Act as in the former it would seem that the Legislature would have said so. At any rate we are not authorized to write into the statute an exemption the Legislature did not see fit to insert. The two statutes deal with two entirely different matters. The peddler statute exempts one from the necessity of taking out a license where he sells agricultural products by going from place to place to sell them; but the other and later statute requires a license for the sale of goods, wares and merchandise, without any exception, where the vendor does so at a place of business which is intended to be so temporary and transient as not to exist longer than 120 days. Defendant was doing this and he did not have a license for that purpose. He was not a peddler within the meaning of the other statute. If one brings agricultural products to town and sells them from house to house no license is required, but under the 1911 Act no one can temporarily conduct a business which in fact is the same as that of a regular retail grocer or other merchant who pays an occupation tax. No doubt it was because the temporary merchant paid no such tax, owing to the transient character of his business, that the statute was passed. If so, it was intended to abolish the unjust discrimination whereby one man could carry on a public business and by reason of its temporary character escape all tax, while another, in the same business permanently, would have to pay. But whatever was the intention of the law, it is written as above stated and when this is ascertained we have nothing to do with the intention or effect of the law but only with its application."

It seems that the only statutory provision against municipalities placing a license upon the sale of farm products, either sold by the person raising the same or not, was by reason of the provisions of the law as herein first set out. The act of 1911 according to the holding in State v. Long, repealed this exception insofar as it conflicted with the new enactment.

The provisions of the new enactment, Section 10103, R. S. Mo. 1929, excepts hawkers on the street and peddlers from its operation.

Except, insofar, as Section 13312, R. S. Mo. 1929, is in conflict with the latter statute passed in 1911, as aforesaid, said section is still in force.

If the apple growers, therefore, travel from place to place, as the "peddler" statute provides he may, or sell from sample for future delivery, or from vehicles as provided in said Section 13312, it is our opinion that a tax could not be imposed, but should the manner of sale come within the definition of "itinerant vendor", then, in our opinion, a license tax could be imposed, notwithstanding the fact it is an agricultural product produced upon the seller's own farm.

Yours very truly,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CCA:EG