License—Cities and Towns—Police Regulation — Revenue—Taxes.

A city may, by ordinance, impose a license upon the business or occupation of selling apples by an individual or association, although none is required under the state law.

Such license must be regulatory and not for the purpose of raising revenue.

Whether the amount of the license is such as may be justified as a police regulation and as not to become a revenue measure is a question of fact and not of law.

Chester C. Davis, Esq.,
Commissioner of Agriculture,
Helena, Montana.

My dear Mr. Davis:

You have requested an opinion of this office on the question of whether or not an organization of apple growers having a place of business at Hamilton, Montana, is subject to a license imposed by the city of Choteau while engaged in selling its own product in such city of Choteau.

As I understand it, this association is merely organized for the purpose of marketing fruit and produce raised by the members of the association. The license issued in this case by the city of Choteau accompanies your letter and is issued to the Equity Shippers & Growers Association, Glen Thompson, employee. It, therefore, appears that there is no question that the association was itself engaged in disposing of its products.

Under the provisions of Subdivision 3 of Section 5039, R. C. M. 1921, a city or town council has power:

> "To license all industries, pursuits, professions, and occupations, and to impose penalties for failure to comply with

such license requirements; but the amount to be paid for such license must not exceed the sum required by the state law when the state law requires a license therefor."

The license required to carry on the business or occupation of itinerant merchant under the state laws is provided for by Section 2421, R. C. M. 1921, which provides:

"Every person, company, or corporation, who, at temporary quarters, sells or offers or exhibits for sale any goods, wares, or merchandise, and every person who travels about from place to place and transports by any mode of conveyance and sells, offers, or exhibits for sale any goods, wares, or merchandise, and every person who personally solicits * * * is an itinerant vendor within the meaning of this Act; provided, however, that this section shall not apply to * * * the representative of any person, company or corporation, doing business at a fixed place of business and taking orders for the future delivery of any goods, wares, or merchandise, kept at or in connection with and handled through such fixed place of business, nor shall it apply to the sale of * * * any fruits, vegetables, meats, or other farm produce, when sold by the grower or producer thereof."

This section was construed by our Supreme Court in the case of State v. Tuffs, 54 Mont., page 20. The facts of this case were that the defendant was taking orders in Ravalli county for the Grand Union Tea Company, a corporation engaged in the mercantile business with its fixed place of business at Helena, Montana. Orders were taken and sent in to be filled, and shipment was made to the parties in care of the defendant. A draft was attached to the bill of lading and the defendant was required to pay for the goods upon delivery. The Court, in discussing the matter, said:

"The acts of the defendant bring him within the inhibition of the statute unless he belongs to the class mentioned in the proviso, and the only question presented for solution is: Was the defendant the representative of a corporation doing business at a fixed place of business, and taking orders for the future delivery of goods kept by such corporation in connection with and handled through its fixed place of business? If he was such representative, the statute does not apply to him."

As the facts presented by you do not present any question as to whether the party charged with the license was, in fact, the party disposing of the goods, the discussion of the Court upon the question of the agency of the defendant in the Tuffs case, supra, is not important. The conclusion of the Court in that case was that the defendant was not an itinerant vendor within the meaning of the statute.

The Court further said:

> "The statute under which the prosecution is conducted is penal in character, and its provisions are not to be extended by implication. In order to subject this appellant to the penalty of the statute, it must appear clearly that his acts were within the letter as well as the spirit of the Act."

Under the facts, as stated in your letter, no question of agency is involved. It would follow, therefore, that the Equity Growers & Shippers Association, or any similar organization engaged in growing and selling their produce, is not subject to an "itinerant vendor's" license tax insofar as the state law is concerned.

The question then to be determined is whether a city may impose a license when none is required by the state laws. Under Subdivision 3 of Section 5039, R. C. M. 1921, above referred to, it would appear that a city may impose a license on a business or occupation even though none is required by the state laws.

It is a general rule of law that a city may enact an ordinance pursuant to its authority from the Legislature, even though contravening the state law, and that such ordinance has the same effect as a general law within the municipal boundaries. This rule is stated in 28 Cyc. 366, as follows:

> "But a by-law enacted by a municipal corporation in pursuance of special charter authority has the same force and effect as a law within the **municipal boundaries,** as though it had been enacted by the general assembly, and such a by-law has been repeatedly sustained by the courts, **although contravening general laws,** on the ground that it is equivalent to a special statute repugnant to a general one, and therefore operates as an implied repeal of the general law **within the municipal territory."**

To the same effect is City v. Wilson, 257 Ill. 580.

Of course, if the state law requires the payment of a license, then by the express provisions of Section 5039 the city could not impose a license, the amount of which would exceed the amount required by the state law. To do so would bring the ordinance in conflict with the state law and render it void. (State v. Police Court, 65 Mont. 94.)

However, the Supreme Court of this state in the case of Johnson v. City of Great Falls, 38 Mont. 369, held that the city may not, under Subdivision 3 of Section 5039, impose a license as a revenue measure, but may do so only in aid of police regulations.

It is my opinion, therefore, that the city may, by ordinance, impose a license upon the business or occupation of selling apples from an individual or association, although none is required under the state law, providing the ordinance imposing the same is a regulatory and

not a revenue measure. Whether the amount of the license is such as may be justified as a police regulation and not a revenue measure, is a question of fact and not of law.

You have not submitted a copy of the city ordinance, and hence whether it is sufficiently broad to require a license from the Equity Growers & Shippers Association, under the facts stated in your inquiry, I express no opinion.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.