

Licenses, Peddling Agricultural Implements, etc. Constitutionality of Statute. Peddlers' License. Statute, Construction Of.

Chapter 51, Laws 1903, is unconstitutional. The provisions of Section 4066, Political Code, as amended by Chapter 84, Laws 1905, apply to one who peddles goods for another on a salary.

The phrase "manufactured by himself" does not apply to articles manufactured by a corporation, nor, generally, to articles made by hired employees.

Helena, Montana, July 8, 1908.

Hon. Thomas Nelson Marlowe,
County Attorney,
Missoula, Montana.

Dear Sir:—

I am in receipt of your favor of the 18th ult. submitting for the consideration of this office the questions:

1. Is Chapter 51, Session Laws 1903, relating to license for peddling agricultural implements, etc., constitutional?
2. Do the provisions of Section 4066, Political Code, as amended by Chapter 84, Laws 1905, relating to traveling merchants, hawkers, and peddlers, apply to a party who ships buggies, wagons, etc., into the county from another state and travels through the county selling them to whomsoever he may?

Said Chapter 51, Laws 1903, has never been passed upon by the supreme court of the state of Montana, but similar statutes have many times been held to be unconstitutional for the reason that they contain unjust discrimination between goods manufactured within the state and those manufactured in other states.

Bacon vs. Lock, (Wash.) 83 Pac. 721.

Ames vs. People (Col.), 51 Pac. 725, and cases cited.

This chapter is open to the further objection that it is a revenue measure which originated in the senate instead of the house of representatives as required by Section 32, Article V, State Constitution.

It is very probable that we will not be able to sustain the constitutionality of this chapter, and I would therefore recommend that no expense be incurred in an endeavor to enforce obedience to its provisions.

The question arising with reference to said Section 4066, Political

Code, is more complex. Of course, if a party ships into the state from another state buggies or wagons not "manufactured by himself," or deals in such like articles manufactured by others in this state by peddling them about the country and delivering them to the purchaser at the time of sale, he is subject to the license named in the section as a peddler, and this irrespective of whether he is the owner of the goods or whether he is acting on a salary as an agent of some one else.

People vs. Sawyer, 54 N. W. 333.

In re Abel (Idaho), 77 Pac. 621.

Commonwealth vs. Goodwin (Pa.), 119 Atl. 550; 19 Am. Stats. 645.

Kansas City vs. Overton (Kan.), 75 Pac. 549.

"A person selling goods from door to door as the agent of a manufacturer, at a salary, with no personal interest in the goods or their proceeds, is a peddler."

Commonwealth vs. Gaid (Pa.), 7 L. R. A. 666.

Wrought Iron Range Co. vs. Johnson, 6 L. R. A. 273.

State vs. Richards, 3 L. R. A. 705.

If, however, a party sells from temporary quarters he would be liable, if the statute is applicable, under the provision "vends goods, wares and merchandise at temporary quarters." The statute in question, however, (Section 4036, Political Code, as amended), contains the statement that its provisions do not apply to "agricultural products" raised by himself or articles manufactured by himself." If, however, a party should claim that he is the manufacturer of these articles, or that he is selling as a direct agent of the party who actually makes the articles, the question of both fact and law would then be raised; (a) as to whether the articles were made "by himself," or (b) whether the phrase "manufactured by himself" is to be given a restricted meaning, or apply only to "himself" personally, or whether it should be construed to mean all goods which the party causes to be manufactured by others. If this latter construction is given to the phrase then the statute is practically without meaning, for it stands to reason that the articles mentioned are either made by "himself" or caused to be made by others. If the manufacturer then can by simply entering on his books the statement that all parties who sell these articles are his agents, render himself and his so-called agents immune from the operation of the statute, said statute becomes worthless in all its provisions. We have not been able to find any case giving specific construction to the phrase "manufactured by himself," but in tracing the history of the law we find that it originated in 1810 by Statute 50, George III, Chapter 41, Section 23, which was an act relating to the licensing of hawkers, etc., and contained the provision, "The real worker or maker of any goods or his or their children, apprentices, or known agents or servants, usually residing with such real workers," are exempt from the operation of the statute. This law was afterwards amended by Statute 52, George III, Chapter 108, by striking out the words "usually residing with." This statute was before the English

court for construction in King vs. Mainwairing, 10 Barnewall & Cresswell 66; 21 Eng. Com. Law Reps. 38, in which the court held that the exemption named in the statute had application only to a party, and the members of his family and those who reside with him as members of his family. In other words the court gave to the statute the restricted meaning that the exemption was rather personal in its character and did not extend to the general manufacturer of goods by corporations or by hired employees. Construing this case in connection with the known provisions that all exemptions must be strictly construed,

2nd Lewis Sutherland Stat. Const. p. 1002, Sec. 25 Cyc. 621, and we reach the conclusion that the phrase "manufactured by himself" should be given the restricted meaning placed upon it by the English court. It is further a well recognized principle of statutory construction that the burden is upon the defendant to bring himself clearly within the exemption.

25 Cyc. 621.

If therefore, in your judgment the facts of the particular case warrant action, I recommend that such action as you may deem advisable be instituted.

Yours very truly,

ALBERT J. GALEN,

Attorney General.