

Constitutional Law—Itinerant Vendors—License — Interstate Commerce—Vendors.

Chapter 184, laws of 1925 is unconstitutional (as in derogation of the commerce clause of the constitution of the United States) insofar as it attempts to impose a license upon persons engaged in selling or seeking to sell the goods of a non-resident of the state of Montana prior to the introduction of such goods into this state.

To All County Treasurers:

April 30, 1925.

Many requests have been received by this office for an opinion as to the constitutionality of chapter 184, acts of the nineteenth legislative assembly of 1925, defining itinerant vendors and imposing on them a county license of \$5.00 for each ninety days that they do business in a county.

The material portions of the act are the following: *

"Section 1. Definition of terms. Any person engaged or employed in the business of retailing to consumers by going from consumer to consumer, either on the streets or to their places of residence or employment, and there soliciting, selling, or offering to sell, or exhibiting for sale, by sample, by catalogue, or otherwise, or taking orders for future delivery of any goods, wares or merchandise, or for services to be performed in the future, is within the meaning of this act, an 'itinerant vendor;' a 'consumer' is 'one who uses, and by using, destroys the value of the article purchased.' This act shall in no way effect any person, firm, co-partnership or corporation with a commercial rating and who maintain a permanent place of business in the state of Montana."

"Section 2. Amount of license. For the purpose of defraying the expenses of regulation under this act every itinerant vendor desiring to do business in any county of this state must before commencing such business, pay to the county treasurer of such

county, the sum of five dollars for a license to conduct such business for a period of ninety days from the date of such license is issued."

Section 7 of the act makes it a misdemeanor punishable accordingly for an itinerant vendor to do business without first obtaining the license required by the act.

Section 8 of the act declares that "nothing in this act contained is intended to operate so as to interfere with the power of the United States to regulate commerce between the states as such power is defined by the supreme court of the United States.

The language of section 8 of the act may be ignored. It amounts to nothing more than a legislative declaration that the act is not intended to do away with the commerce clause of the constitution of the United States.

Section 8 of article I of the constitution of the United States provides in part that "congress shall have power * * * to regulate commerce with foreign nations and among the several states." This power is quite obviously beyond the regulation of the legislature of any state and cannot be curtailed by any law of the state of Montana. From a consideration of the rest of the act it appears that by its terms every "itinerant vendor" who sells in any manner by sample, catalogue or otherwise, or who takes orders for the future delivery of any goods which are to be thereafter shipped into this state by any person or firm residing outside of the state, and not maintaining a permanent place of business in this state, must pay a county license of \$5.00 every ninety days.

Is this a regulation of interstate commerce by the state of Montana contrary to the provisions of the commerce clause of the constitution of the United States above quoted? The supreme court of the United States has several times passed upon legislation similar in character and in language to this. Such legislation was construed in the following cases:

Brown vs. Maryland, 12 Wheat. 419;
 Welton vs. Missouri, 91 U. S. 275;
 Robbins vs. Shelby Taxing District, 120 U. S. 489;
 Stockard vs. Morgan, 185 U. S. 27;
 Texas Transport & Terminal Co. vs. New Orleans, 68 L. Ed. 611.

In the case last above cited the court said:

"We find it unnecessary to do more than to refer to the general and well established rule which is that a state or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the state prior to their introduction therein."

In the Stockard case (supra) the court held unconstitutional an act similar to the one under consideration as an invasion of the commerce clause of the constitution of the United States. It quoted with approval the other decisions of the supreme court above cited, particularly the Robbins case. In the Robbins case there was under consideration a

statute of Tennessee enacting that "all drummers and all persons not having a regularly licensed house of business in the taxing district of Shelby county, offering for sale or selling goods, wares or merchandise therein by sample shall be required to pay to the county trustee the sum of \$10.00 per week or \$25.00 per month for such privilege."

The similarity of this Tennessee statute to the Montana law is self-apparent. Robbins was a drummer for a Cincinnati, Ohio, firm and was arrested for taking orders for said firm in the state of Tennessee. The court held that the act imposed a tax upon interstate commerce contrary to the commerce clause of the constitution and was therefore void.

I am unable to perceive any difference whatsoever in principle between chapter 184 of the session laws of 1925 and the legislation which has been so repeatedly condemned by the supreme court of the United States. Clearly, the Montana law exempts persons and firms with a commercial rating and who "maintain a permanent place of business in the state of Montana." If, however, the person or firm does not maintain such permanent place of business in the state, then it comes within the terms of the act.

It is, therefore, my opinion that chapter 184 of the session laws of the nineteenth legislative assembly of 1925 is unconstitutional insofar as it attempts to impose a license upon persons engaged in selling or seeking to sell the goods of a non-resident of the state of Montana prior to the introduction of such goods into this state.

Very truly yours,
L. A. FOOT,
Attorney General.