

Opinion No. 163.**Licenses—Cities and Towns—Ordinances—Produce Wholesaler—Huckster.**

HELD: 1. A city may not, by ordinance, impose a license on Produce Wholesalers, who have been licensed under Section 2443.1 to 2443.16 incl., R. C. M. 1935.

2. A city may not, by ordinance, enlarge the definition of "Huckster" as defined in Section 2229.9, R. C. M. 1935, so as to include "Produce Wholesaler," as defined in Section 2443.1, R. C. M. 1935, for the purpose of licensing.

September 21, 1937.

Mr. J. T. Sparling
Commissioner Agriculture, Labor
and Industry
The Capitol

Dear Sir:

You have submitted, for our opinion, the following facts and question:

"The Department of Agriculture has issued Wholesale Dealers licenses to applicants under the provisions of Chapter 229 of the 1935 R. C. M. Under the authority of Ordinance 1233, the City of Helena refuses to permit said licensees to sell to retailers unless they procure licenses as provided for in said ordinance. May the City of Helena do this?"

Section 5039.1 of the R. C. M. 1935, provides as follows:

"Levy and collection of taxes. The city or town council has power: To levy and collect taxes for general and special purposes on all property within the town or city subject to taxation under the laws of the state." Section 5039.2 provides:

"Licenses-requirement. The 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."

It will be seen from the above statutes that the City of Helena is empowered to license any industry

licensed by the State of Montana, unless restricted by law.

Section 2429.9 reads:

"'Huckster' defined. Any person engaged or employed in the business of buying and selling farm products who disposes of such products by selling them at retail to consumers by going from house to house, is within the meaning of this act, a huckster."

Section 2429.10 reads:

"Amount of license. Every huckster 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 fifteen dollars (\$15.00) for a license to conduct such business for a period of six months from the date such license is issued."

Subdivision (b), of Section I, of Ordinance No. 1233, defines the word "huckster" as:

"Means any person engaged or employed in going from place to place, and/or house to house, and/or at temporary premises, who carries for sale, offers for sale, or exposes for sale, either at wholesale or retail, farm, orchard, vineyard or garden products which have not been produced or grown by such person; but in any prosecution under this ordinance, or suit or proceeding to collect the license fee in this ordinance provided, it shall not be necessary for the city to plead or prove that such products were not produced or grown by such person, such matter being hereby declared to be a matter of defense."

If the state is not empowered to license a person, or enlarge upon the class of persons who may be licensed, and who come within the class of persons licensed under Section 2429.9, it follows that the City of Helena could have no greater power, and could not enlarge upon the class of persons defined as "hucksters" under said section, and to that extent Paragraph (b) of Section I of said ordinance is a nullity.

The City of Helena has the authority to impose a license upon a person who

sells farm products at retail to consumers by going from house to house, but cannot impose a license upon persons who sell to retailers under the huckster statute.

It is to be noted that the license fee for hucksters, under Section 2429.10, is the sum of \$15.00 for each six months, while under subdivision (a) of Section 2 of said ordinance, the license fee is \$35.00 for the first week, or fraction thereof, and \$5.00 for each succeeding week, or fraction thereof.

Under subdivision 3, Section 5039 of the 1921 Laws, the license that a city could impose could not exceed the license imposed by the state. This restriction was removed by subdivision 3, Chapter 115 of the Twenty-fifth Session Laws. The license fee of the city is designated as a police regulation, and the amount of the license must be in proportion to the actual and incidental cost expended in such regulation. The court said in the case of *State v. Police Court*, 68 Mont. 435, at page 433:

"As these costs must be prescribed in advance, they must of necessity be based upon estimates, which is the right and duty of the municipal authorities to make. The courts cannot, therefore, on a mere difference of opinion as to the amount necessary to meet these costs, say that they are excessive. They must be shown to be so by evidence, or else they must be so exorbitant and arbitrary as to leave no room for two opinions on the matter—so exorbitant and arbitrary as to show that they could not have been based on any possible estimate of the probable cost. So likewise in this instance, the presumption is that the fee is reasonable until the contrary appears, and in the absence of anything in this record to indicate that the fee exacted from persons engaged in the business of operating motor vehicles for hire exceeds the reasonable cost of proper supervision of the business, the ordinance is not open to the charge that it is unreasonable."

Sufficient facts have not been stated for us to pass upon the question as to the validity of the ordinance, by virtue of the amount of the license imposed, in reference to that part of the ordinance relating to hucksters' licenses. However, there was no reason why you

should submit such facts and there is no reason why we should pass upon that phase of the huckster ordinance of the City of Helena, for the reason that said ordinance does not have application to your licensee under said Chapter 229, R. C. M. 1935, relating to the sale of goods through retailers.

Section 2443.1 provides that:

"Produce wholesaler, meaning of term. For the purpose of this act any person who shall buy to sell at wholesale, or contract to buy to sell at wholesale, or who shall handle at wholesale for the purpose of resale, or who shall handle at wholesale on account of, or as agent for another, any produce as herein defined, shall be deemed a dealer at wholesale. Provided, that a trucker operating for hire under an M. R. C. License and not buying or selling any produce as herein defined, shall not come under the provisions of this act. Provided further, that the provisions of this act shall not apply to dealers at retail."

It may be noted that the above section expressly excludes the provisions of Chapter 229 from applying to dealers at retail.

Section 2429.16 reads:

"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."

Neither does the ordinance have application to a person operating under your Wholesale License Act as an itinerant vendor, because an itinerant

vendor is a person engaged in the business of retailing to consumers by going from consumer to consumer, and your licensee sells only to retailers, and no other division of said ordinance provides for such license. The City of Helena would have the authority to impose, by ordinance, a license fee upon any person who buys or sells at wholesale, or contracts to buy or sell at wholesale, or who would handle at wholesale on account of, or as agent of another, all in accordance with Chapter 229, supra, but inasmuch as the ordinance above referred to imposes no such license upon such person, the City of Helena cannot now, under its present (No. 1233) ordinance, impose such a license, and if it did impose such license, the license fee provided would have to be reasonable and not so prohibitive as to render Chapter 229 void, nor so excessive as to render inoperative the license fee authorized to be imposed by your department.

Under the present ordinance the city can impose a license upon hucksters selling from house to house, except their own grown products, and the retail merchants are now protected from such competition; but under Ordinance No. 1233, the retail merchant can buy direct from a person trucking such products here, without that person paying a city license if he has paid the state license and filed the requisite bond; and if the city desires to impose a license fee upon wholesalers who sell to retail merchants, a new ordinance will have to be adopted. The wisdom of such an ordinance being addressed to the council and the people of Helena.

Therefore, it is my opinion that under the present ordinance the City of Helena is without authority to license the licensee you have licensed under Chapter 229, and is without authority to arrest or impose penalties for a purported violation of said ordinance by said licensee.