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1. MERCANTILE ESTABLISHMENT—BUYING AND SELLING ARTICLES OF MERCHANDISE—WHOLESALE OR RETAIL—SECTIONS 1008-2, 12993, 12996 G. C.
2. DEPARTMENT LOCATED ON SAME PREMISES AS FACTORY—MAINTAINED TO SELL AT RETAIL ARTICLES MANUFACTURED BY FACTORY—A MERCANTILE ESTABLISHMENT.
3. RESTAURANT, BEAUTY PARLOR, OFFICE, REPAIR SHOP, MANUFACTURING OR DRY CLEANING ESTABLISHMENT—NOT A MERCANTILE ESTABLISHMENT—NO EXCEPTION AS TO SEPARATE AND DISTINCT UNIT OR ESTABLISHMENT LOCATED AND OPERATED IN CONNECTION WITH DEPARTMENT STORE.

## SYLLABUS:

1. A "mercantile establishment," within the meaning of Sections 1008-2, 12993 and 12996 of the General Code, is one where the buying and selling of articles of merchandise, either at wholesale or retail, is carried on.

2. A department located on the same premises as a factory and maintained for the purpose of selling at retail the articles manufactured by said factory, is a "mercantile establishment" within the meaning of said sections.

3. A restaurant, beauty parlor, office, repair shop, manufacturing or dry cleaning establishment is not a "mercantile establishment" within the meaning of said sections, whether it exists as a separate and distinct unit or is located and operated in connection with a department store.

Columbus, Ohio, June 28, 1948

Hon. W. J. Rogers, Director, Department of Industrial Relations  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"A request is made for your opinion as to the definition of the term, 'mercantile establishment' as used in Sections 1008-2, 12993 and 12996, General Code of Ohio.

"In addition to the general definitions requested above, it is desired that if the general definition does not answer the following specific questions that they be dealt with individually.

"1. Is a wholesaler included within the definition of the term?

"2. Is a restaurant included within the definition of the term?

"3. Is a retail department of a manufacturer, located upon the manufacturing premises, included within the definition of the term?

"4. Are the restaurant, beauty culture, office, repairing, manufacturing and dry cleaning departments of a retail department store all located within the department store building proper, included within the definition of the term?"

According to the canons of construction, the General Assembly's own construction of its language by means of definitions of the terms employed should be followed in the interpretation of the section to which it relates. However, if definitions are not given, then such words of a statute in common use will be construed in their natural, literal and full meaning. See 37 O. J. 542.

The sections of the General Code to which you call attention do not contain a definition of the term "mercantile establishment." Therefore, in the interpretation of that term, it must be assumed that the Legislature used such words in their ordinary acceptance and significance. The meaning commonly attributed to "mercantile" is defined in 40 C. J. 634 as:

"Commercial; having to do with trade or commerce; having to do with trade or buying and selling of commodities."

A similar definition may also be found in Black's Law Dictionary at page 1178.

"Mercantile establishment" is defined in 20 C. J. 904 as:

"A place where the buying and selling of articles of merchandise as employment is conducted."

In *Grahm v. Hendricks*, 22 La. Ann. 523, it was held:

"The phrase, 'mercantile business' has a definite meaning. It refers to the buying and selling of articles of merchandise as an employment. It implies operations conducted with a view of realizing the profits which come from skillful purchase, barter, speculation and sale."

From the above authorities it would appear that a "mercantile establishment" is one where the buying and selling of articles of merchandise, as an employment, is conducted, and, consequently, since a wholesaler is a species of merchant, engaged in the business of buying and selling merchandise, it would clearly follow that he is included within the definition of such term.

I come now to a consideration of the question of whether a restaurant is a "mercantile establishment." While your letter refers to Sections 12993 and 12996 of the General Code, I assume that since the former of said sections inhibits the employment of minors under certain conditions in the occupations and establishments enumerated therein and that restaurants and mercantile establishments are both enumerated therein, and that the latter of said sections adopts the former by reference, your inquiry concerns only the question of whether a restaurant is a "mercantile establishment" within the meaning of such latter term as it appears in Section 1008-2 of the General Code.

In *City and County of San Francisco v. Larsen*, 131 P. 366 (Cal.), it was held that a restaurant is primarily a public eating place and not a place where business of selling goods, wares or merchandise is carried on.

Similarly, in *Goff Company v. First State Bank of De Queen*, 298 S. W. 884 (Ark.), it was held:

"\* \* \* Clearly, we think a keeper of a restaurant, whose business it is to serve food and drink to the public, is not engaged in the mercantile or merchandising business, nor is he a merchant, within the meaning of the Bulk Sales Law. Even though he may

keep some merchandise which is used or useful in his business, including cigars and cold drinks, still we are of the opinion that this does not change the character of the business, but is only incidental thereto."

In *re Excelsior Cafe Co.*, 175 F. 294 and also In *re Wentworth Lunch Co.*, 159 F. 413, it was stated that a restaurateur is not a "trader," nor so far as his business of cooking and selling food is concerned, is he engaged in "mercantile pursuits."

In view of the above cases, it would appear that a restaurant is not generally regarded as a mercantile establishment.

Reverting again to Section 1008-2 of the General Code, your attention is directed to that portion of said section wherein reference is made to mercantile establishments. In said section, which regulates the hours and days of employment of females in certain occupations, it is provided:

"\* \* \* except further that in mercantile establishments, females over eighteen years of age may be employed ten hours on any one day of the calendar week, and for ten hours on the days preceding the thirtieth day of May, known as Decoration or Memorial day; the fourth of July, known as Independence day; the day designated by proclamation as Thanksgiving day; the twenty-fifth day of December, known as Christmas; and the first day of January, known as New Year's day, and not to exceed eight hours on any other day: except, further, that in any one week during the first six months of the year, and in any two weeks during the last six months of the year, females employed in mercantile establishments may work not to exceed ten hours in any one day and fifty hours in the week so selected: \* \* \* "

From the above it will be noted that the provisions of said section dealing with the employment of females in mercantile establishments appear therein as an exception to the general provisions thereof. It is a familiar rule of statutory construction that exceptions to the general provisions of a statute must be strictly construed. With respect thereto, it is stated in 37 O. J. 781:

"Statutory exceptions to the operation of laws, especially if such laws are entitled to a liberal construction, should receive a strict, but reasonable, interpretation. In the absence of direct language, they should not, it has been declared, be carried further than the spirit of the law requires, or enlarged from considerations of apparent hardship or inconvenience. \* \* \* "

In view of the above, it would appear, and it is accordingly my opinion, that a restaurant is not a "mercantile establishment" within the provisions of Section 1008-2 of the General Code.

A retail department of a manufacturer, located upon the manufacturer's premises, is included within the definition of "mercantile establishment." The word "merchant", according to common understanding, means something different from the word "manufacturer." The former engages in buying and selling merchandise in the usual course of trade; the latter engages in making or producing articles, raw or partly finished, into wares suitable for use or sale. A merchant sells to make a profit and a manufacturer sells to take profit already earned. A manufacturer does not become a merchant by disposing of the goods he has produced at a manufacturer's profit. However, if he keeps within a store a stock of articles manufactured by him for sale in ordinary course of trade, he is a merchant. See *Kansas City v. Ferd Heim Brewing Co.*, 73 S. W. 302 (Kan.).

This brings me to the question numbered four in your letter. Since I have pointed out above that a mercantile establishment is one where buying and selling of articles of merchandise is carried on, it is difficult to perceive how a beauty parlor could be characterized as a "mercantile establishment." The operator of a beauty parlor is required, under the laws of this state, to have certain educational attainments and may only procure a license after having satisfactorily passed an examination following an extended course of beauty culture in an accredited school. In view of this, it is clear that a beauty parlor is engaged in the rendition of a professional service and not the sale of merchandise. Obviously, neither a repair shop, manufacturing establishment nor a dry cleaning establishment is a "mercantile establishment" in view of the above definition thereof, and it is likewise true of an office.

There remains, then, the single question of whether or not such establishments, which are not mercantile establishments when operated as separate and distinct units, become such when located within the premises of a department store.

Since "an establishment" is generally regarded as a fixed place where business is carried on, it might appear that a department store constitutes a single establishment, and that the separate departments therein would, consequently, be a part of a "mercantile establishment." I am unable to bring myself into accord with this view.

If it is argued that a restaurant located in a separate building and not connected with a department store is not a "mercantile establishment," while one housed under the same roof as a department store is a "mercantile establishment," then a classification would be created that has no sound, reasonable basis. Consequently, grave doubt would be cast upon the constitutionality of the statute.

There is a presumption in favor of the constitutionality of all laws. Indeed, our courts have repeatedly stated that a construction which would render a statute unconstitutional should always be avoided, unless the plain language of the statute precluded any other construction. In other words, if a statute is fairly susceptible of two interpretations, one of which will save the statute and the other render it unconstitutional, the former should in all events be adopted.

In view of this, I must conclude that a restaurant, a beauty shop, office, repair shop, manufacturing or dry cleaning department conducted as part of a department store must, for the purpose of the statutes under consideration, be regarded as a separate establishment and, therefore, not included as "mercantile."

In specific answer to your several questions, you are advised that:

1. A "mercantile establishment," within the meaning of Sections 1008-2, 12993 and 12996 of the General Code, is one where the buying and selling of articles of merchandise, either at wholesale or retail, is carried on.
2. A department located on the same premises as a factory and maintained for the purpose of selling at retail the articles manufactured by said factory, is a "mercantile establishment" within the meaning of said sections.
3. A restaurant, beauty parlor, office, repair shop, manufacturing or dry cleaning establishment is not a "mercantile establishment" within the meaning of said sections, whether it exists as a separate and distinct unit or is located and operated in connection with a department store.

Respectfully,

HUGH S. JENKINS,  
Attorney General.