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“MATERIAL”—MEANS SUCH MATERIAL AS IS CUSTOMARILY AND GENERALLY USED IN MANUFACTURE OF BEDDING—SECTIONS 1038-25 THROUGH 1038-36 G. C.—MATTRESS —INSPECTION OF BEDDING—PENAL STATUTES.

SYLLABUS:

“Material,” as the same is used in Sections 1038-25 through 1038-36, General Code, means such material as is customarily and generally used in the manufacture of bedding.

Columbus, Ohio, December 3, 1947

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

Dear Sir:

I am in receipt of your request for my opinion, as follows:

“On August 29, 1947, complaint was made to this department of a mattress which had been purchased approximately a month earlier. Complainant stated that on the night of August 27, 1947, her four-year-old daughter who was sleeping on the mattress became ill. Thereupon complainant examined the mattress and discovered a small wire spring protruding therefrom. She then cut the mattress cover and discovered foreign matter and filth as follows: Empty cigarette packages, glass, wires, nuts, bolts, milk bottle caps, unattached springs, black shavings, nails, match boxes, chewing gum wrappers, carbonated beverage caps and wooden spoons.

(Included in the request is a drawing of a law label and of another label which states this mattress contains new material.)

The undersigned has conducted a hearing, which representatives of the manufacturer attended, and is in doubt as to whether he has cause to believe that the manufacturer has violated any provisions of the Inspection of Bedding Act. This doubt arises by reason of the language of the Act and request is made as to:

1. Whether the foreign substances enumerated above constitute ‘material’ as defined in Sec. 1038-25, General Code; and
2. If the foreign substances enumerated above are materials’ within the definition of the Act, whether intent on the part of the manufacturer is necessary to constitute a violation of the act.
3. If such intent is necessary, whether it may be presumed from the facts.”

Sections 1038-25 through 1038-36, General Code, entitled “Inspection of Bedding,” were passed by the 95th General Assembly, these sections to take effect August 19, 1943 (120 O.L. 347).

The first definition to which my attention has been directed by you in your request is that of “material” as found in Section 1038-25, General Code, reading as follows:

“ ‘Material’ means any article, substance or substances or portions thereof used in the manufacture, repair or renovation of bedding.”

The second definition to which my attention has been directed is that of “new material,” which is defined :

“ ‘New material’ means any material which has not been used in the manufacture of another article or used for any other purpose. ‘New material’ also includes by-products of machines at mills using only new raw material.”

Your attention is directed to Section 1038-33, General Code, which reads as follows :

“Whoever manufactures or makes for sale, offers for sale, sells, delivers or has in his possession, for such purpose or purposes, an article of bedding which is not tagged or labeled as provided for in this act, or which does not have the stamp provided for by this act affixed to said tag or label, or which is falsely tagged or labeled, or whoever uses, in the making, manufacture, remaking or renovating of any article of bedding, material which has been used or formed a part of any article of bedding, that has been used by or about any person having an infectious or contagious disease, or whoever dealing in bedding articles has such an article in his possession for the purpose of sale or offers it for sale without the tag or label required by this act, or removes, conceals, alters or defaces the tag or label thereon except as provided in this act, or whoever counterfeits the stamps provided for in section 3 of this act, shall be fined not less than twenty-five (\$25.00) dollars nor more than five hundred (\$500.00) dollars, or be imprisoned in the county jail for not more than six (6) months, or both such fine and imprisonment. Each stamp counterfeited and each article of bedding manufactured, made, remade, renovated, delivered for sale, offered for sale or sold in violation of the provisions of this act shall be a separate offense.”

It is to be noted that Sections 1038-25 through 1038-36 of the General Code were one complete act, being House Bill No. 42 of the 95th General Assembly. It is also to be noted that none of the provisions of said act pertinent to the instant question have been repealed, amended or changed, since its original enactment in 1943. This act is clearly of a penal nature. The definition of a penal statute, as is found in 37 O. Jur., Section 25, p. 317, “Statutes,” is :

“A penal statute is an act which imposes a penalty for transgressing its provisions.”

The fact that the penal provisions are not included in the same section of the General Code as the other provisions does not change the fact that this is a penal act. In *McNary v. State of Ohio*, 128 O.S. 497, the second branch of the syllabus reads:

“It is not necessary that such penalty be included in the particular section of the statute involved, it being sufficient if the penalty is provided in some section of the same act, or it even may be included within the provisions of another act, if the reference to the particular statute is so clear and plain as to leave no room for conjecture.”

This act is penal in nature and it is necessary that the rules which govern the interpretation of penal statutes should apply to Section 1038-25 through Section 1038-36, General Code.

In 37 O. Jur., section 420, page 744, “Statutes,” it is stated:

“It is a well-settled general rule, recognized by the General Code, that a strict construction is to be accorded to penal statutes. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. On the other hand, exemptions from such restrictive provisions are liberally construed.

The General Code distinguishes penal statutes and makes strict construction of such statutes in favor of the accused and against the state absolutely mandatory. In Section 10214, in the Remedial Part of the General Code, we find:

“The provisions of part third and all proceedings under it, shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice. The rule of common law, that statutes in derogation thereof must be strictly construed has no application to such part; *but this section shall not be so construed as to require a liberal construction of provisions affecting personal liberty, relating to amercement, or of a penal nature.*”
(Emphasis added.)

The introductory sentence of Section 1038-25, General Code, provides:

“The words, terms and phrases as used in this *act* shall have the following meaning.”

Your attention is directed to the emphasized word “act.” The act referred to is House Bill 42 of the 95th General Assembly, on which I have com-

mented above. In this provision, made in the introduction to the act, it is necessary that the definition of the terms in the act be strictly construed. It is mandatory that when used in the act, the term "material" has to be used as defined in Section 1038-25 of the General Code. It is to be noted in the sequence of definitions in Section 1038-25, General Code, "new material" follows "material." Also, it is to be noted that in the definition of "new material" it is stated: "'New material' means *any material* * * *." Thus "new material" is a subgrouping of kind of materials. The reference is to be made to the general group of material. The clause which follows in the definition refers to "any material" and not to "new material." It is clear, when analyzing and construing the definition of "new material" strictly, as is required in penal statutes, that the only reference made refers to "material" used in the bedding industry. Thus, the clause which follows "any material" would mean "any bedding material" which has not been used in the manufacture of other articles or used for any other purpose. Beyond a doubt, the filth and trash which was found in the mattress in question could not be considered bedding material.

My opinion is further substantiated by the fact that under Section 1038-32, General Code, when listing the specific materials which are prohibited from being used in mattresses, the items enumerated by you are not included. This section provides:

"No person shall use, in the manufacture or making of any article of bedding for sale or offered for sale in this state, any material that has been used by a person having an infectious or contagious disease or any material which has been a part of a bedding article so used.

No person shall sell or offer for sale any article of bedding that has been used by a person having an infectious or contagious disease."

These items found in a mattress, as set forth by you in your request, clearly do not come within the provisions of this section.

For the construction of this act to allow a penalty to be enforced against this manufacturer, there must be an expression of the requirements so that the manufacturer will be aware of the crime. There is nothing in this entire act which expressly prohibits the use of the named articles in manufacturing bedding material, and there is nothing which, when strictly construed, makes this act anything more than a labeling and

tagging act. The manufacturer has not violated that labeling act, as it was stated he must list the materials or new materials, and by definition in the act these materials or new materials are limited to bedding materials, a strict construction being forced on all penal statutes.

In view of the foregoing, and in specific answer to your first question, you are advised that in my opinion the word "material," as the same is used in the act in question, must be construed to mean such material as is customarily and generally used in the manufacture of bedding, and consequently the articles mentioned in your letter would not constitute "material" within the meaning of said act.

Since the answer to your first question is in the negative, it is not necessary to answer your other two questions.

Respectfully,

HUGH S. JENKINS,
Attorney General.