

General Code, to evidence deferred installments of the purchase price of road machinery or equipment.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*

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1088.

NURSERYMAN—WHEN CONTRACT ENTERED INTO WITH PERSON TO FURNISH SEED, SMALL PLANTS, ETC.—CULTIVATION—GROWING PLANTS—SUCH “CONTRACT GROWER” A NURSERYMAN—SUBJECT TO INSPECTION FEES—WHAT CONSTITUTES “PLACE OF BUSINESS”—SECTIONS 1137, 1122 (5), 1122 (4), 1122 (6), G. C.

*SYLLABUS:*

*Where a nurseryman enters into a contract with a person, whereby such person is furnished seed, small plants, etc., by the nurseryman, cultivates the growing plants, and when such plants have arrived at maturity sells the finished products to the nurseryman at a price dependent upon the grade and number of plants delivered, such “contract grower” is a nurseryman within the purview of Sections 1122(5) and 1122(6) of the General Code, and is therefore subject to the inspection fees provided in Section 1137, General Code; but said “contract grower” does not operate a “place of business,” as that term is defined in Section 1122(10), General Code, and therefore is not required to pay the fee for the operation of a place of business, as provided in Section 1137, General Code.*

COLUMBUS, OHIO, August 23, 1939.

HON. JOHN T. BROWN, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR: Your recent request reads as follows:

“Frequently, nurserymen in Ohio, who hold valid nursery certificates issued by the Ohio Department of Agriculture, enter into contracts with certain persons, who are commonly known as ‘contract growers’, to produce nursery stock for them. The usual contract arrangement between the aforementioned parties referred to is as follows:

The nurseryman supplies the planting stock such as seed, cuttings, small plants, scions or buds, as the case may be, for a certain predetermined price. The ‘contract grower’ plants the

planting stock on his own or leased ground. He then cultivates, buds and trims the growing stock. Finally, he digs, grades and delivers the mature nursery plants to the nurseryman in consideration for a certain sum based on the grade of the plants produced. The 'contract grower' furnishes all the labor necessary to produce the mature plant crop. Sometimes the nurseryman deducts the price of the planting stock, etc., previously supplied to the 'contract grower', from the total sum owed to said 'contract grower', for growing the stock to maturity at the time delivery of the finished product is made.

In consideration of the definition of the term 'nursery' and 'nurseryman' respectively, as set forth in Section 1122, paragraphs (5) and (6) respectively, and in view of the necessity for the annual inspection of nursery stock as indicated in Section 1126 and Section 1135, paragraph (2), as well as the statement of fees collectible by the Director of Agriculture for inspection and certification of nursery stock from persons who produce or sell such stock as specified in Section 1138, General Code of Ohio, effective August 29, 1939, is the 'contract grower' mentioned above to be considered as a producer on the same basis as a nurseryman and is his growing block of stock to be regarded as a separate nursery in as far as inspection and certification and assessment of fees is concerned, or is the growing block of contract stock to be regarded as a separate part of the nursery operated by the nurseryman mentioned above who holds a valid nursery certificate?"

You ask whether the "contract grower" in the situation presented in your letter is to be regarded as a nurseryman within the purview of Sections 1122 to 1140-6a, General Code, and subject to the requirements and provisions of the act.

The so-called nursery laws were passed for the protection of agriculture and horticulture and to prevent the introduction and dissemination of insects and diseases injurious to plants or plant products. To this end, the Legislature provided for the licensing of nurserymen and the regular inspection of nurseries.

The Ninety-third General Assembly, in House Bill No. 444, amended various provisions of the nursery laws. House Bill No. 444 becomes effective August 30, 1939, and will be considered and cited in this opinion for the reason that you are concerned with the future administration of the nursery laws of the state.

Section 1122(5), General Code, defines a nursery as follows:

"The term 'nursery' for the purpose of this act, shall be construed to mean any grounds or premises on or in which nurs-

ery stock is propagated and/or grown for sale, or any grounds or premises on or in which nursery stock is being fumigated, treated, packed or stored.”

Section 1122(6), General Code, defines a nurseryman as follows:

“The term ‘nurseryman’ shall mean a person who owns, leases, manages, or is in charge of a nursery.”

It appears from an examination of the above definitions that the “contract grower” described in your letter would be in charge of a nursery and therefore a nurseryman under the provisions of said act. The grower in question owns, manages or is in charge of premises on which nursery stock is propagated and/or grown for sale. True, said grower may have certain arrangements with a definite nurseryman as to the disposal of the stock. However, said grower is in charge of his own nursery and he, in effect, sells his stock to the specified nurseryman. He is not paid for his labor but is paid for the stock he delivers, based on the grade and number of plants delivered.

Since such grower is in charge of a nursery and is therefore a nurseryman, he is subject to the licensing and inspection laws relating to nurseries. Section 1126, General Code, provides:

“The director of agriculture through the inspector or deputies shall at least once each year inspect all nurseries and other places in which nursery stock is stored or kept for sale. For this purpose such inspector or deputies shall have free access, within reasonable hours, to any field, orchard, garden, packing ground, building, cellar, freight or express office, warehouse, car, vessel, motor vehicle or other place, which it may be necessary or desirable for him to enter in carrying out the provisions of this act. It shall be unlawful to deny such access to the inspector or deputies or to hinder, thwart, or defeat such inspection by misrepresentation or concealment of facts or conditions or otherwise.”

Under this section such contract grower would be subject to the annual inspection specified therein. Such a grower would also be subject to the provisions of Section 1133, which provides:

“Nurserymen, dealers, and collectors selling or delivering nursery stock in this state except as herein otherwise provided, shall make application in writing before May 15 of each year to the director of agriculture for inspection of their nursery stock growing in this state, or failing to give such notice, such

nurserymen, dealers, or collectors shall be liable for the additional expense of the inspector for the inspection of the nursery stock."

The conclusion reached as to the application of this section is based on the fact that such grower is a nurseryman "selling or delivering nursery stock in this state."

Section 1135(2), General Code, also aids in ascertaining the purpose and intent of the Legislature in enacting the nursery act. This section provides:

"It shall be unlawful for any person to sell or offer for sale or to remove or ship from a nursery or other premises any nursery stock unless such stock has been officially inspected and a certificate or permit signed by the inspector has been granted by the director of agriculture."

The legislature apparently deemed it necessary that nursery stock be inspected in its growing state, inasmuch as it would be impracticable, and often impossible, to inspect nursery stock after it was cut and removed from the premises on which it was grown. Of course, it might be argued that the stock grown by the contract grower is a part of the nursery operated by the nurseryman who purchases said stock after it is grown. However, heretofore in this opinion it has been determined that said grower is not paid wages for his labor in growing this stock. Rather, it is seen that said grower is in charge of his own premises and sells his product, the price being dependent, not on his labor, but on the product he delivers.

Section 1137, General Code, provides:

"For the purpose of defraying the cost of inspection and the administration of this act, every person as defined in section 1122 of the General Code, except as hereinafter provided who produces, sells, offers or exposes for sale or traffics in nursery stock within the state of Ohio shall pay an annual fee of ten (\$10.00) dollars to the director of agriculture for each separate place of business operated, and the director of agriculture thereupon shall issue to such person a license and/or certificate to do business in the state of Ohio; provided, further, that such person has complied with the requirements of section 1135 of the General Code. A certified copy of such license and/or certificate shall, at all times, be conspicuously posted in each place of business of such person. In addition thereto each nurseryman shall pay an annual inspection fee to the director of agriculture of ten (\$10.00) dollars and a sum equivalent to twenty-five (25c) cents per acre or fraction thereof for each acre or fraction thereof growing nursery stock, and each dealer

and collector, upon the payment of the fee herein provided shall secure annually from the director of agriculture a certificate by furnishing a sworn affidavit that he will buy and sell only nursery stock which has been duly inspected and certified by an official state or federal inspector, and a certified copy of such certificate shall, at all times, be conspicuously posted in each place of business operated by such dealer or collector.”

The question immediately arises as to whether the contract grower is subject to all fees set out in Section 1137, *supra*. It seems obvious that such grower, since he is a nurseryman, is subject to the inspection fees. However, a more serious question arises as to the annual fee of \$10.00 for each place of business operated. Is such grower the operator of a place of business?

Section 1122(10), General Code, defines a place of business as follows:

“The term ‘place of business’ shall be construed to mean each separate nursery, store, stand, sales ground, lot, truck, railway car or other vehicle at or from which nursery stock is being sold or offered for sale where one or more sales persons are in attendance.”

It appears that the contract grower in the instant situation does not operate a “place of business” as that term is defined in Section 1122(10), *supra*. The mere fact that he is a contract grower precludes any other conclusion. It seems clear that, under said definition, a “place of business” is a place where nursery stock is offered for sale to the general public. The fact that the definition specifies the attendance of one or more sales persons necessitates such a conclusion.

Therefore, in view of the above, and in specific answer to your inquiry, I am of the opinion that where a nurseryman enters into a contract with a person, whereby such person is furnished seed, small plants, etc., by the nurseryman, cultivates the growing plants, and when such plants have arrived at maturity sells the finished products to the nurseryman at a price dependent upon the grade and number of plants delivered, such “contract grower” is a nurseryman within the purview of Sections 1122(5) and 1122(6) of the General Code, and is therefore subject to the inspection fees provided in Section 1137, General Code, but said “contract grower” does not operate a “place of business”, as that term is defined in Section 1122(10), General Code, and therefore is not required to pay the fee for the operation of a place of business, as provided in Section 1137, General Code.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General*