

at any one time, and by prohibiting the exportation of such stock, regardless from where it came or was obtained. As a means to accomplish that end the statute does not confine itself in terms or by implication to minnows taken in this state. However, it is to be understood that the state can not prevent the passage through the state of Ohio in interstate commerce of minnows lawfully taken in another state and destined for shipment through Ohio but to a point outside of Ohio.

In view of what has been said, I am of the opinion that minnows in this state can not be shipped out of Ohio by a person or dealer, either alive or preserved in jars, regardless of the source from which they came.

Your fifth question is answered by the provisions contained in section 1438-1, General Code, wherein it is provided, among other things, that the conservation council may make and establish such rules and regulations not inconsistent with law governing its organization and procedure and administration of the division of conservation, as it may deem necessary or expedient, as well as having the authority and control in all matters pertaining to the protection, preservation and propagation of fish, subject to certain restrictions. Inasmuch as your department is far more qualified than this office in the matter regulating the importation of minnows, it becomes unnecessary for me, in view of the provisions of section 1438-1, General Code, to advise you as to how to prevent the illegal importation or excessive importation of minnows from without the state of Ohio.

It is therefore my opinion that:

1. Minnows lawfully taken and exported from another state or foreign country can not be sold in Ohio without a minnow dealer's license, as provided by section 1414-1, General Code.

2. A dealer in minnows for bait can not possess more than 4000 minnows, either alive or otherwise, at one time, and can not sell more than 100 minnows to one person in one day.

3. Minnows, either alive or otherwise, can not be exported from the state of Ohio, regardless of the source from whence they are secured.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

3552.

NURSERY STOCK—DEALERS NOT REQUIRED TO HAVE CERTIFICATE FOR EACH PLACE OF BUSINESS—EACH SOLICITOR MUST HAVE AGENT'S CERTIFICATE—SECTION 1138, GENERAL CODE, CONSTRUED.

*SYLLABUS:*

1. *Dealers in nursery stock are not required, by virtue of the provisions contained in section 1137, General Code, to take out a dealers' certificate for each store or place wherein they offer to sell or sell nursery stock. However, persons engaged in soliciting orders for or selling nursery stock in stores controlled by a dealer are required to take out agents' certificates costing one dollar.*

2. *Persons selling nursery stock on consignment are required, by virtue of section 1138, General Code, to procure agents' certificates, providing the consign-*

*ment of sale creates the relationship of principal and agent and not that of creditor and debtor.*

COLUMBUS, OHIO, September 9, 1931.

HON. I. S. GUTHERY, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a letter of recent date from W. W. Ellenwood, Chief, Division of Plant Industry, which reads in part as follows:

“For our guidance for the present wish you would write me telling whether or not one license fee does suffice for all the stores or places of business for each nursery dealer or whether he should have a license for each separate place of business. Also, as to whether those selling nursery stock on consignment are required to have the dealers’ or agents’ license, and which license they are required to have. One cost \$5.00 and the other \$1.00 as you will note.”

The following sections of the General Code are pertinent to your inquiry.

Section 1137. “Each dealer within the meaning of this act, located either within or without the state, engaged in selling nursery stock in the state or soliciting orders for nursery stock within this state, shall secure annually a dealer’s certificate by furnishing a sworn affidavit that he will buy and sell only stock which has been duly inspected and certified by an official state or federal inspector; and that he will maintain with the secretary of agriculture a list of all sources from which he secures his stock. Such affidavit shall be accompanied by a fee of five dollars (\$5.00).”

Section 1138. “All agents within the meaning of this act selling nursery stock or soliciting orders for nursery stock within the state for any nursery-man or dealer located within the state or outside the state shall file annually with the secretary of agriculture a sworn statement that he will sell only stock that has been duly inspected by an official state or federal inspector, accompanying such statement with a fee of one dollar, and shall secure and carry an agent’s certificate and a copy of the certificate shall be issued only by the secretary of agriculture to agents authorized by their principal or upon request of their principal. Names and addresses of such agents shall not be divulged by the inspector nor the secretary of agriculture.”

It is apparent upon a reading of these two sections that it was not the intention of the legislature to require a dealer to procure a dealer’s certificate for each separate place of business wherein nursery stock is offered for sale or sold. Section 1137 does not contain a provision similar to that contained in section 5805-13, which reads in part as follows:

“For the purpose of defraying the cost of inspection and analyses of agricultural seeds under the provisions of this act it is hereby further provided that before any person, firm, company or corporation shall sell, offer for sale, expose for sale, or solicit for sale in this state any of the agricultural seeds, \* \* \*, he or they shall pay each year a license fee to the director of agriculture of five dollars, for each separate place of business in which seeds are offered for sale,” etc.

Inasmuch as the legislature has failed to enact a provision similar to that contained in section 5805-13, it conclusively indicates that the legislature only intended to license the dealer and not the places in which nursery stock is offered for sale or sold.

However, the employe or employes of a dealer who operates one or more places of business may be required to take out an agent's certificate if such employe or employes come within the meaning of the word "agents" contained in section 1138 and defined by the legislature in section 1122, subsection 8. Section 1122, subsection 8, reads as follows:

"The term 'agent' shall be construed as applying to any person soliciting orders for, or selling nursery stock, under the partial or full control of a nurseryman, or of a dealer or other agent. This term shall also apply to any person engaged with a nurseryman, dealer, or agent in handling nursery stock on a co-operative basis."

Thus an employe engaged by a dealer to solicit orders or sell nursery stock comes within the definition of agent as defined by the legislature and is subject to the provisions of section 1138.

It is generally held by the courts that consignments for sale of merchandise create the relation of principal and agent between consignor and consignee and the title to the property so consigned remains in the consignor. See 24 R. C. L. 426, also 23 R. C. L., pages 1214 to 1221.

Whether or not a particular transaction is a contract to sell or a sale or a consignment for sale depends on several factors. However, it is generally held that if the relationship created by the transaction is merely that of principal and agent, it is a consignment for sale, but if the transaction creates a relationship of debtor and creditor, it is considered a sale. Present day business practice is such that attempts are made to include provisions in contracts or agreements rendering it possible to interpret such contracts as either consignments for sale or sales, depending on the interest which the consignor might desire to protect. The provisions in such contracts, in many instances, are inconsistent, including, as they do, clauses of both agency and sale, and in many instances these contracts are called, by the contracting parties, consignments for the sale of goods. The courts have held that the name by which the parties choose to designate a transaction will not in itself create a consignment or sale of goods, since the designation does not determine the character of the transaction. In other words, the courts, in order to determine the character of the transaction, examine the contract itself and determine the intention of the parties from the various provisions of the contract taken as an entirety and not from the name given or from some isolated provision contained therein.

I am assuming, for the purpose of this opinion, that when you refer to a consignment for the sale of nursery stock, you are referring to a transaction which creates the relationship of principal and agent. That being so, the consignee will be subject to the provisions of section 1138 and will be required to take out an agent's certificate costing one dollar.

It is therefore my opinion that:

1. Dealers in nursery stock are not required, by virtue of the provisions contained in section 1137, General Code, to take out a dealer's certificate for each store or place wherein they offer to sell or sell nursery stock. However, persons engaged in soliciting orders for or selling nursery stock in stores controlled by a dealer are required to take out agents' certificates costing one dollar.

2. Persons selling nursery stock on consignment are required, by virtue of section 1138, General Code, to procure agents' certificates, providing the consignment of sale creates the relationship of principal and agent and not that of creditor and debtor.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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3553.

APPROVAL, BONDS OF LIBERTY TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO—\$4,000.00.

COLUMBUS, OHIO, September 10, 1931.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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3554.

APPROVAL, BONDS OF VILLAGE OF WEST LAFAYETTE, COSHOCTON COUNTY, OHIO—\$10,000.00.

COLUMBUS, OHIO, September 10, 1931.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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3555.

APPROVAL, BONDS OF VILLAGE OF UPPER ARLINGTON, FRANKLIN COUNTY, OHIO—\$5,234.43.

COLUMBUS, OHIO, September 10, 1931.

*Industrial Commission of Ohio, Columbus, Ohio.*

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3556.

APPROVAL, BONDS OF LORAIN CITY SCHOOL DISTRICT, LORAIN COUNTY, OHIO—\$10,000.00.

COLUMBUS, OHIO, September 10, 1931.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*