1012.

PUBLIC HEALTH COUNCIL No. 201, NOT APPLICABLE TO DINING CARS—POLICE POWERS OF STATE IN REGULATING DINING CARS.

SYLLABUS:

1. *Regulation No.* 201 *promulgated by the Public Health Council of the State of Ohio does not apply to dining cars.*

2. *The State of Ohio has ample authority in the exercise of its police power to regulate dining cars within its territorial limits in the absence of Federal regulation along the same line, notwithstanding the fact that such dining cars are being used in interstate transportation. Such a regulation would not contravene the commerce, due process and equal protection of the law clauses of the Federal Constitution.*

COLUMBUS, OHIO, August 13, 1937.

HON. DAVID LADD ROCKWELL, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR: I am in receipt of your communication of recent date as follows:

> "I am transmitting to you, under cover, copy of a letter I have received from William Rasey, Chairman of the Ohio State Legislative Board, Brotherhood of Railroad Trainmen.
>
> Will you or your office be kind enough to furnish me with an opinion in this matter?"

I likewise note your enclosure as follows:

> "My dear Mr. Rockwell:
>
> I wish to call your attention to paragraph 201, page 729, of the Ohio Public Health Manual for 1925, which reads as follows:
>
> 'Sleeping quarters.
>
> No person shall live or sleep in any room used as a restaurant or hotel kitchen. All living and sleeping apartments shall be departed from the kitchen, dining and storage rooms by impervious walls. No food products shall be stored or kept in a stable, barn or other place where animals are quartered.'
>
> On some of our railroads, the railroads require the stewards, dining car conductors and waiters to sleep in the dining

cars, and at night, if you had ever walked through one of these dining cars where they were sleeping, you would appreciate the objections made by some of these employes (white) to the conditions under which they work. There was a decision handed down by the United States Supreme Court in the case of the New York, New Haven and Hartford Railroad Company, N. Y. 165—U. S. Rep. 628, on page 631.

I am wondering what authority you might have over this matter and in what way it would be possible to be of assistance to us in the enforcement of this statute. Any information that you can give me upon this subject will be greatly appreciated.

Yours respectfully,
(Signed) William Rasey,
Chairman & Legislative Representative,
Brotherhood of Railroad Trainmen."

Paragraph 201, page 729 of the Ohio Public Health Manual is a regulation looking toward the public health. There is no question but that the Public Health Council of the State of Ohio had the power under the law to promulgate such a regulation in the exercise of the State's police power. This regulation, under the law, has all the virtues of a criminal statute in as much as it is provided as follows by Section 843-8, General Code:

"Whoever shall fail or refuse to comply with the provisions of this Act shall be deemed guilty of a misdemeanor and shall be subject to a fine of ten dollars for each day that such violation is continued. If such violation continues for more than thirty days, the state fire marshal may revoke the license of such person, firm or corporation upon hearing and notice as hereinafter provided and close the building or premises for use as such hotel or restaurant until all the provisions of this act shall be complied with."

Criminal statutes are strictly construed. You can read nothing out of them nor can you read anything into them. The regulation does not mention "dining car" and there is no rule of construction that will permit its inclusion. If this statement of the law needed any strengthening a resort to the doctrine of "Nosceitur a sociis" would furnish the needed strength. "Noscitur a sociis" translated means—one is known by his companions. The maxim is applied to the familiar rule of construction, namely, that the meaning of a word or expression is to be gathered from the surrounding words—that is, from the context.

The regulations of the Public Health Council are grouped under headings. Regulation No. 201 which you mention in your letter is under the heading "Sanitary Regulation for Restaurants, Hotel Kitchens and Dining Rooms," hence it follows that the regulation was intended for restaurants, hotel kitchens and dining rooms—and not for dining cars.

It is a matter of common knowledge that dining cars were in existence in 1925 when Regulation No. 201 was promulgated and if the Public Health Council had intended to include dining cars within the category, it could have so provided.

I have read with interest the case referred to by Mr. Rasey, namely, *New York, New Haven and Hartford Railroad Co.* vs. *New York,* 165 United States Reports, page 628. The same syllabus rule does not obtain in Federal Courts as in the Supreme Court of Ohio. However, the Federal Courts do condense the law of the case and state it in their reporting system immediately following the style of the case, in what is denominated a headnote, but this headnote does not contain all the law of the case. To get the law of the case the entire opinion must be digested. No statement of law contained in the opinion can be regarded as obiter dictum. I quote the headnote of the above cited case, viz:

> "The statutes of New York regulating the heating of steam passenger cars and directing guards and guard-posts to be placed on railroad bridges and trestles and approaches thereto, (Laws of 1887 C. 616, Laws of 1888, c. 189), were passed in the exercise of the powers resting in the State in the absence of action by Congress, and, when applied to interstate commerce, do not violate the Constitution of the United States."

It was contended in this case that the statutes of New York cited in the headnote were repugnant to Section 8 of Article I of the Constitution of the United States providing that Congress shall have power to regulate commerce among the several states and make all laws necessary and proper to carry such power into execution. It was further claimed that such statutes violated the Fourteenth Amendment to the Federal Constitution in that the railroad company was denied due process and the equal protection of the law. The court, in effect, held that the New York regulations were valid police regulations in the absence of national regulation along that line and that the law did not deny due process and did not withhold equal protection of the laws.

I am of opinion, in the absence of federal regulations, that the State of Ohio could, in the reasonable exercise of its police power, regulate dining cars, in the respect stated by you, just as it regulates restaurants, hotel kitchens and dining rooms. As to the interpretation of opinions of

the Federal Courts, I cite 15 O. J., page 971, Section 380 and *Ohio River & Western Railroad Co.* vs. *Dittey,* 232 U. S. 576.

The question you submit is not what the State of Ohio could do in the matter of the regulation of dining cars in Ohio—but what has it done? Under its administrative practice the Public Health Council has not, in so far as I am advised, undertaken to apply Regulation No. 201 to dining cars, although the regulation has been in effect twelve years. An administrative practice may be established as well by what the administrative board does not do as by what it does. The administrative practice reflects upon administrative interpretations of the law. Along this line I quote from *State, ex rel.* vs. *Brown,* 121 O. S., 75, viz:

> "Administrative interpretation of a given law, while not conclusive, is if long continued, to be reckoned with most seriously and is not to be disregarded or set aside unless judicial construction makes it imperative to do so."

Because the Public Health Council in twelve years has not seen fit to proceed against dining cars under Regulation No. 201, it is a logical conclusion that it did not regard dining cars as coming within the purview of the regulation and this is some argument to the effect that it was not the legislatve intent to include dining cars within the terms of the regulation. This regulation is not only penal but may involve a forfeiture in as much as it provides that if a violation continues for more than thirty days, the state fire marshal may revoke the license of the accused to carry on his business. This involves a forfeiture. Forfeitures are abhorred by the law and all laws providing for forfeitures are strictly construed. Thus it is seen that this regulation must receive a strict construction for two reasons, namely, it is penal and may involve a forfeiture.

I stated heretofore that a penal statute could not be extended beyond its express terms. I regard this statement as superlatively fundamental, however, it may not be out of place to cite some standard authority in support thereof. I regard Sutherland's Statutory Construction as standard and have extracted therefrom the following excerpts:

> "Penal statutes are those by which punishments are imposed for transgressions of the law. They are construed strictly and more or less so according to the severity of the punishment. Where a law imposes a punishment which acts upon the offender alone and not as a reparation to the party injured, when it is entirely within the discretion of the law-giver, it will not be presumed that he intended it should extend further than is

expressed; and humanity would require that it should be so limited by construction.

Criminal statutes are construed strictly against the accused and favorably and equitably for him."

Sutherland's Statutory Construction, Sec. 337:

"It is the legislature and not the court which is to define a crime and ordain its punishment."

Sutherland's Statutory Construction, Sec. 520:

"A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy of the law."

Sutherland's Statutory Construction, Sec. 521:

"Nothing is to be regarded as included within criminal statutes that is not within their letter as well as their spirit; nothing that is not clearly and intelligently described in the very words of the statute, as well as manifestly intended by the legislature can be considered."

Sutherland's Statutory Construction, Sec. 520:

"No act however wrongful, comes under a criminal statute unless clearly within its terms. Although a case may be within the mischief to be remedied by a penal act, the fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language."

"Constructive crimes, crimes built up by courts with the aid of inference, implication and strained interpretation, are repugnant to the spirit and letter of English and American criminal law.

It is assumed that in criminal statutes, the legislature expresses itself clearly and it intends no more than it so expresses."

(Sutherland's Statutory Construction, Sec. 521).

For examples verifying this text see Sections 522, 523, 524 and 525, Sutherland's Statutory Construction. I quote further from the same authority under the doctrine of *expressio unius est exclusio alterius.* Section 491:

"When a statute defining an offense, designates one class of persons as subject of its penalties, all other persons are deemed to be exempted."

So it is with a place of business. When certain places or businesses are enumerated in a criminal statute, all other places and businesses are excluded from its operation.

When Regulation No. 201 included restaurants, and hotel kitchens, it surely excluded dining cars. Restaurants and hotel kitchens occupy definite niches and have distinct meanings. A dining car occupies a different niche and likewise has a distinct meaning. Dining cars were not strangers to the members of the General Assembly or Public Health Council in 1925, as they had been in use for more than a half-century and if the General Assembly and Public Health Council had intended that dining cars should be regulated, they could have said so and not having said so, I must conclude that dining cars are not included within the regulation in question.

From all the authorities I have been able to discover I evolve one safe rule to follow in the construction of criminal statutes, namely, a criminal statute has no spirit and unless an alleged offense comes within its letter, it cannot be brought within its provisions by any rational process of reasoning.

Answering your specific question, I am of opinion that Regulation No. 201 as promulgated by the Public Health Council in 1925, has no application to dining cars.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

1013.

APPROVAL—BONDS OF MAPLE HEIGHTS VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, $4,000.00.

COLUMBUS, OHIO, August 16, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of Maple Heights Village School Dist., Cuyahoga County, Ohio, $4,000.00.