2288.

AUTOMATIC FOOD VENDING MACHINES—INSTALLATION IN FACTORIES WHERE EMPLOYES ARE ONLY CUSTOMERS—NOT A RESTAURANT UNDER SECTION 843-2, GENERAL CODE.

SYLLABUS:

A person, firm or corporation, which has installed, in a number of factories, automatic food vending machines, which, for a consideration, serve lunches, but which machines furnish such lunches solely to the employes of such factories and are not kept, used, maintained, advertised or held out to the public generally as such, is not conducting a restaurant, as that term is defined by Section 843-2, *General Code, and therefore not subject to the provisions of Sections* 843-3, *et seq., of the General Code.*

COLUMBUS, OHIO, June 28, 1928.

HON. LOUIS F. MILLER, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter dated June 18, 1928, which reads:

> "Our representative in Toledo reports that his attention has been directed to the fact that 'The Selective Food Service Co., Inc.' has placed automatic food vending machines in a number of factories in Toledo. He tells me that the company has installed as many as ten machines in some factories and that the management expects to install them in each factory in Ohio which will permit such installation. The general manager of the Selective Food Service Co., Inc., has explained to our representative that 'it is only a between meal lunch.' We refer you to the attached card with cut of machine. You will notice, in the center of the machine, a button which will slide to any compartment after the money has been inserted. The machines located to date, in Toledo, have contained sandwiches, pies and candy.
>
> We would like to have an opinion, at your earliest convenience, as to whether the Selective Food Service Co., Inc., and other companies or individuals operating in the same way, are subject to a license under what is known as the Restaurant Law of Ohio, providing the factories in which they place their machines are within the corporate limits of a village or town and, if so, whether the company or individual will have to secure a license for each factory or location in which the machines are placed."

Sections 843 to 843-18, inclusive, of the General Code, create in the State Fire Marshal's Office, a division known as the "Hotel Division," to be administered as prescribed in such sections.

The term "restaurant" is defined by Section 843-2, General Code, as follows:

> "Every building or other structure kept, used, maintained, advertised or held out to the public to be a place where meals or lunches are served for consideration without sleeping accommodations, shall, for the purpose of this act, be defined to be a restaurant."

Section 843-3, General Code, provides in part as follows:

> "On or before May first, nineteen hundred and twenty, and the first day of January in each year thereafter, every person, firm or corporation now

engaged in the business of conducting a hotel or restaurant, or both, in all cities and villages of this state and who shall hereafter engage in conducting such business, in such cities and villages, shall procure a license for each hotel or restaurant so conducted or proposed to be conducted; provided, that one license shall be sufficient for each combined hotel and restaurant where both are conducted in the same building and under the same management. No hotel or restaurant shall be maintained and conducted in any city or village in this state after the taking effect of this act without a license therefor. * * * "

As provided by Section 843-4, General Code,

"The fee for the period of May first, nineteen hundred and twenty to January first, nineteen hundred and twenty one and the annual fee thereafter for a license to conduct a hotel or restaurant in any city or village in this state shall be as follows:

* * * for all restaurants in any city or village where no hotel license is granted, and where said restaurant is separate from the management of a hotel and has a seating capacity of less than twenty-five persons, three dollars; and when such restaurant has a seating capacity of twenty-five or more persons, five dollars. Each fee must be paid to the state fire marshal before such license is used and such fee shall be paid into the state treasury and placed to the credit of the special fund for maintenance of the office of the state fire marshal. * * * "

By Section 843-8, General Code, penalties for failure to comply with the provisions of Sections 843 to 843-18 are provided in the following language:

"Whoever shall fail or refuse to comply with the provisions of this act (G. C. Sections 843 to 843-18) 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 any such violation continue 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 (G. C. Sections 843 to 843-18) shall be complied with."

Since, unless the automatic food vending machine referred to in your letter, or the building or structure in which such machine is placed be a restaurant, as that term is defined by Section 843-2, supra, a license would not have to be procured therefor, the question herein presented is: whether or not, upon the facts presented, it can be said that, as a matter of law, the automatic food vending machine or the building or structure in which the same is placed is a restaurant.

Before passing upon the specific question you present, your attention is directed to two former opinions of this office which construe these sections of the General Code. I refer to an opinion which appears in Vol. I, Opinions, Attorney General, 1920, at page 551, the first three paragraphs of the syllabus of which read as follows:

"1. Covered movable lunch wagons on wheels, and county fair lunch stands fashioned and constructed somewhat after a shed, come within the meaning of the words 'every building or other structure,' as used in Section 843-2 G. C.

2. Section 843-2, G. C., defining a restaurant, neither refers to nor makes the furnishing of chairs, stools or benches an element or part of the definition, whether the restaurant be commonly called a saloon, soft drink parlor, general store, or other name.

3. A manufacturing company operating an eating place commonly called a factory or employes' restaurant, in which meals or lunches are supplied and furnished solely to its employees, and which is never held out as a place where meals or lunches will be served to others, is not conducting a restaurant, as the word is defined in Section 843-2, G. C. And the mere fact that occasionally, but not as a matter of practice, a traveling salesman or other person having business at the factory may, as a personal accommodation, be permitted to secure a meal or lunch in such factory or employes' restaurant, would not of itself constitute a holding out to the public, within the meaning of the statute."

The other opinion referred to is Opinion No. 853, dated August 11, 1927, and addressed to you, the syllabus of which reads:

"1. In so far as the 'Ohio Hotel and Restaurant Law' (Sections 843 to 843-18, General Code,) is concerned, a restaurant is defined by Section 843-2 as a 'building or other structure kept, used, maintained, advertised or held out to the public to be a place where meals or lunches are served for consideration, without sleeping accommodations.

2. Where the proprietor of a grocery store sells articles of food, such as cheese, ham, veal loaf, buns, etc., to his customers but does not serve his patrons with prepared lunches, he is not engaged in the business of conducting a restaurant within the meaning of Section 843-3 and related sections of the General Code, even though he has knowledge that his customers intend immediately to prepare and actually do prepare a lunch from such articles."

By the terms of Section 843-2, supra, a restaurant is defined as:

1. A building or other structure,
2. kept, used, maintained, advertised or held out,
3. *to the public,*
4. to be a place where meals or lunches are served,
5. for consideration,
6. without sleeping accommodations.

In Opinion No. 583, supra, addressed to you, the following language appears:

"In so far as criminal prosecutions are concerned, the sections of the code under consideration must be strictly construed, and if the acts complained of do not come clearly within the prohibition of the statutes, their scope cannot be extended to include acts other than those which are clearly described and provided for. If there be a fair doubt as to whether the acts charged are embraced in the prohibition, that doubt is to be resolved in favor of the defendant. And as stated in 36 Cyc. 1187, 'In order to enforce a penalty against a person, he must be brought clearly within both the spirit and the letter of the statute.'

In Potter's Dwarris on Statutes and Constitutions, the author says at pages 245 and 247:

'Penal statutes receive a strict interpretation. The general words of a penal statute shall be restrained, for the benefit of him against whom the penalty is inflicted.

* * *

A penal law then, shall not be extended by equity; that is, things which do not come within the words, shall not be brought within it, by construction. The law of England does not allow of constructive offences, or of arbitrary punishments. No man incurs a penalty unless the act which subjects him to it, is clearly both within the spirit and the letter of the statute imposing such penalty."

The question presents itself as to whether or not the machines about which you inquire and the factories in which they are placed, are 'kept, used, maintained, advertised or held out to the public.' After quoting several definitions the following language appears in the 1920 Opinion, supra.

"After considering the various definitions referred to in the foregoing authorities (and also others not specifically mentioned), in connection with the act now under consideration, I have reached the conclusion, and therefore advise you that a manufacturing company operating an eating place commonly referred to as a factory or employes' restaurant, in which meals or lunches are supplied and furnished solely to its employes, and which is never held out as a place where meals and lunches will be served to others, is not conducting a restaurant within the statutory definitions; and also, that the mere fact that occasionally, but not as a matter of practice, a traveling salesman or other person having business at the factory may, as a personal accommodation, be permitted to secure a meal or lunch in the employes' restaurant, would not of itself constitute a holding out to the public, within the meaning of the statute."

I concur in the conclusions reached by my predecessor and it is my opinion that a like conclusion must be reached in regard to the question which you present. In other words, although the machines in question or the buildings where they are located might be said to be kept, used, maintained, advertised or held out to be a place where lunches are served for consideration, without sleeping accommodations, they are not kept, used, maintained, advertised, or held out *to the public* as such.

Specifically answering the question presented by you, I am of the opinion that, upon the facts that you set forth, the automatic food vending machines of which you inquire are not subject to the provisions of Sections 843, et seq., General Code, and do not constitute a restaurant as that term is defined by Section 843-2, General Code. Cases may occur where the facts are such as clearly to bring the owner or proprietor of such machines within the provisions of these sections. All that is herein decided is that upon the facts stated in your letter, no license is required.

Respectfully,
EDWARD C. TURNER,
Attorney General.