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RESTAURANT—PASSENGER BOAT ON GREAT LAKES—
MOORED IN OHIO PORT—MEALS SERVED TO PUBLIC IN
DINING QUARTERS ABOARD SHIP—NOT A RESTAURANT—
SECTION 843-2 G. C.

SYLLABUS:

A passenger boat, which travels on the Great Lakes, while moored temporarily in a port in Ohio, serving meals to the public in the dining quarters aboard the ship, is not a "restaurant" within the meaning of Section 843-2, of the General Code of Ohio.

Columbus, Ohio, August 26, 1946

Hon. Harry J. Callan, State Fire Marshal
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I have a question which I believe requires your opinion in relation to Section 843-2 of the Ohio General Code which defines a restaurant as

'Sec. 843-2. 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.'

In a recent letter from one of my assistants in the Cleveland district I am advised that a number of passenger boats traveling on the Great Lakes dock in Cleveland, Ohio, and while moored in these docks serve meals to the public in the restaurant aboard the ship.

Under the circumstances just described, should these passenger ships be classified as restaurants within the meaning of Section 843-2?"

To consider first the language of the statute involved, it appears on the face of it that if the ships involved can be held to be "structures" within the meaning of Section 843-2, General Code, and do not offer sleeping accommodations to the public, they are "restaurants" within the

meaning of said section. If such ships while in port, do offer sleeping accommodations to the public, it would appear that if such ships are "structures", they come within the definition of a "hotel" within the meaning of Section 843-1 of the General Code.

That a passenger vessel is a "structure", I have little doubt. A "vessel" is so defined, in the case of *Chaffee vs. Ludeling*, 27 La. Annual Reports, 607, 611, wherein it is said that a vessel is:

"A ship, brig, sloop or other craft used in navigation
* * * any structure which is made to float upon the water,
for purposes of commerce or war, whether impelled by wind,
steam, or oars."

See also, to the same effect, *R. R. Ricou & Sons Co. v. Fairbanks-Morse & Co.* (C. C. A.), 11 Fed. (2nd) 103, 104.

Likewise, in *Gruener v. Texas Co.*, 117 N. Y. S., 741, 742, 133 App. Div., 413, it is held:

"A seagoing vessel in dry-dock undergoing repairs, while being painted, is a 'structure', within Labor Law 18, regulating the scaffolding to be erected for the use of persons employed in painting a house, building or structure."

See also, *Herman v. P. H. Fitzgibbons Boiler Company*, 120 N. Y. S., 1074, 1075, 136 App. Div., 286.

However, in examining the scope of Section 843-2 General Code, there is another factor which must be taken into consideration; that is, the relationship between the state and the Federal Government with respect to Great Lakes shipping. Inasmuch as you have stated that the vessels involved, are engaged in "traveling on the Great Lakes", I assume that such vessels are engaged in interstate commerce. Although it is settled that the title to navigable waters and the soil thereunder within the territorial limits of a state of the United States is in such state, it is equally settled that such title is subject to the paramount right of the Federal Government to regulate navigation on such navigable waters. See *State of Ohio v. Cleveland & Pittsburgh Ry. Co.*, 94 O. S., 61; *Shively v. Bowlby*, 152 U. S., 1, 38 L. Ed., 331; *Illinois Central Ry. Co. v. Illinois*, 146 U. S., 387, 36 L. Ed., 1018. In the case of *State v. Cleveland & Pittsburgh Ry. Co.*, supra, the Court announced in the first branch of the syllabus:

“1. Under the constitutional grant of authority to regulate interstate and foreign commerce, the United States government has paramount control of navigable waters and power to establish therein harbor lines and regulations.”

In accordance with this doctrine it has been the practice of the Federal Government to regulate the maintenance, with respect to safety and sanitation, of vessels engaged in commerce on the Great Lakes. Under authority of Section 391 of Title 46, U. S. Code, United States Coast Guard Inspectors are required to ascertain whether steam vessels have suitable accommodations for passengers and the crew. Section 78.28, 79.21a and 79.29b, of the Rules and Regulations for the Great Lakes, with respect to navigation, were promulgated under authority of this statute. Section 78.28, relative to sanitation, reads as follows:

“It shall be the duty of the master and chief engineer of any vessel under the jurisdiction of the Coast Guard, to see that such vessel and the passenger’s and crew’s quarters are kept in a sanitary condition. Failure on the part of the master (or chief engineer so far as it applies to the engineers’ department) of any vessel to observe and carry into effect this section shall be sufficient cause for the suspension of his license on a charge of inattention to his duties.”

Section 79.21a deals with the matter of passenger accommodations for ferry boats, with respect to sanitation thereon, and Section 79.21b deals with accommodations for crews of lake vessels. Section 435, of Title 46, U. S. Code, provides for quarterly inspection of passenger vessels, to insure that all conditions of the vessel’s certificate are being maintained. The laws and regulations referred to are enforced by United States Coast Guard inspectors.

Under authority of Section 92 of Title 42, U. S. Code, the United States Public Health Service has issued regulations under Title 42, Code of Federal Regulations, Sections 12.21 through 12.29, relative to vessels and other conveyances used in interstate commerce. Section 12.29, Title 42, Code of Federal Regulations, reads as follows:

“All dining cars, or dining rooms of vessels, shall be maintained at all times while in operation in interstate traffic in accordance with the following requirements, in addition to the other regulations in Secs. 12.1-12.42. The words ‘dining car, or dining

room of vessel' as used in this section shall be held to include all cars or rooms of vessels in which food is prepared or served.

(a) Dining cars or dining rooms of vessels shall be screened against the entrance of flies or other insects, and it shall be the duty of the employees to destroy flies or other insects that may gain entrance.

(b) A proper lavatory with soap and clean towels shall be provided in all dining cars or dining rooms of vessels for the use of employees and shall be kept in a clean and sanitary condition at all times.

(c) Dining-car or dining-room employees shall thoroughly cleanse their hands by washing with soap and water after using a toilet or urinal and immediately before beginning service.

(d) All cooking table and kitchen utensils, drinking glasses, and crockery used in the preparation or serving of food or drink in dining cars or dining rooms of vessels shall be thoroughly washed in boiling water and suitable cleansing material after each time they are used.

(e) No spoiled or tainted food, whether cooked or uncooked, shall be served in any dining car or dining room of vessel, and no milk or milk products shall be served unless the milk is Grade A pasteurized as defined in the United States Public Health Service sanitary milk code or Grade A boiled, except that certified milk as defined in the standards adopted by the American Association of Medical Milk Commissions may be served in addition if the carrier elects.

(f) Refrigerators, food boxes, or other receptacles for the storing of fresh food in dining and buffet cars, or on vessels, shall be emptied and thoroughly washed with soap and hot water at least once in each 7 days that they are in use.

(g) Garbage cans in sufficient number and with suitable tight-fitting covers shall be provided in dining cars, or on vessels, to care for all refuse food and other wastes, and such wastes shall not be thrown from the car, vessel, vehicle, or conveyance along the right of way within the limits of cities, towns, or villages, or within drainage areas furnishing domestic water supplies.

(h) No person shall serve as a cook, waiter, or in any other capacity in the preparation or serving of food in a dining car, or on a vessel, who is known or suspected to have any communicable disease. All persons employed for such service shall undergo a physical examination by a competent physician before being assigned to service, and before returning to work after any disabling illness, and at such other times during their service as

may be necessary to determine their freedom from such diseases, and shall be immediately relieved from service if found to be so afflicted.

(i) The person in charge of the dining car, or dining room of vessel, shall be responsible for compliance with all regulations pertaining thereto, and he shall make an inspection of the car or room each day for the purpose of maintaining a rigorous cleanliness in all portions thereof. (Sec. 29, amdt. 1, Feb. 15, 1929.)”

An examination of the foregoing Federal authorities indicates that not only has the Federal Government primary responsibility with respect to the proper maintenance of vessels for navigation on the Great Lakes, but that in fact, the Federal Government has covered the field with respect to the regulations thereof.

In such a situation, where the Federal Government has primary responsibility for control of a field of activity and has by legislation and administrative regulation covered that field, the separate states have no power to regulate the activity so controlled by the Federal Government. See *State, ex rel. v. Hildebrant*, 94 O. S., 154; *State ex rel. Public Utilities Commission v. N. Y. C. R. Co.*, 115 O. S., 477; *Postal Telegraph Cable Company v. Jones*, 7 O. App., 90. In the case of *Postal Telegraph Cable Company v. Jones*, *supra*, the Court in holding that the Interstate Commerce Commission Act as amended June 18, 1910 (36 U. S. Statutes at Large, 544, 545) applied to an action for damages for the non-delivery of a telegram, said at page 93:

“We have no doubt that congress by enacting this statute has asserted complete control over the transmission and delivery of interstate messages, and congress having so occupied this field brought the interstate business of such companies within the jurisdiction of the federal courts and left no room for the control of that business by the separate states. The entire field of the business of interstate messages is brought fully within the control of the federal law and is to be determined thereby as much so as is the liability of a railroad when one of its employes is injured, where the company and the employe are both engaged in interstate commerce in transacting the business in which the employe is injured. In determining therefore, whether the limitation of liability contained on the form of night lettergram used by the company is valid we must look to the holdings of the federal courts on that subject.”

It is therefore my opinion, in response to your inquiry, that a passenger boat which travels on the Great Lakes, while moored temporarily in a port in Ohio, serving meals to the public in the dining quarters aboard the ship, is not a "restaurant" within the meaning of Section 843-2, of the General Code of Ohio.

Respectfully,

HUGH S. JENKINS,
Attorney General.