

INSPECTION OF FACTORIES, WAREHOUSES, ETC.: State Commissioner
of Labor has no authority under Section 13218,
R. S. Mo. 1929, to inspect a nursery.

February 6, 1940

Mr. Earl Shackelford
Commissioner of Labor
Jefferson City, Missouri

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Dear Sir:

We are in receipt of your request for an opinion,
under date of January 25, 1940, which reads as follows:

"A question has arisen concerning the authority of this department to make inspections of nurseries who sell potted plants, bulbs, shrubbery, etc., grown on their premises. The inspection of these establishments have been made under the provisions of Section 13218 of the Revised Statutes of Missouri, 1929, by classifying them as mercantile establishments because of the fact that they do a wholesale and retail business with the products grown by them.

Will you please give us an opinion in this matter, advising whether or not we have such authority to make such inspections under the provisions of the section above mentioned."

We assume from your statement that you have in mind nurseries in the true sense of the word, and whatever selling is done by them is from nurseries proper, and do not have in mind persons who sell nursery products but do not produce any of the productions which they sell. Therefore, this opinion is restricted to nurseries in the true sense of the word. That is, the growing and producing of bulbs, shrubs, potted plants and all manner of greenhouse products.

Section 13218, R. S. Mo. 1929, Chapter 95, Article 59, which Article 59 has to do with the inspection of factories, warehouses, etc., reads as follows:

"The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating to said establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors, may administer oaths and take affidavits in matters concerning the enforcement of the various establishments; Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

In the case of City of Ozark v. Hammond, 49 S. W. (2d) 131, the court defined the word "merchant" as follows:

"A merchant is one who is engaged in the purchase and sale of goods; a trafficker, a trader."

In Words and Phrases, 5th Edition, Volume 3, the term "mercantile establishment" has been defined as follows:

"A mercantile establishment is a place where the buying and selling of articles of merchandise is conducted. Veazey Truck Company v. Braza, 37 Pac. (2d) 294, 169 Okla. 418."

Section 13218, supra, has to do with the powers and duties of commissioners and deputies. If nurseries are to be inspected, the right must come under the provisions in the aforesaid section.

Section 10075, R. S. Mo. 1929, defines who is declared to be a merchant, and this section reads as follows:

"Every person, corporation or co-partnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose is declared to be a merchant."

In the case of Kansas City v. Lorber, 64 Mo. App. 608, the court, in discussing the word "merchant", defined it as follows:

"The term 'merchant' has been defined to be strictly a buyer, but by extension, one who buys to sell, or buys and sells; one who deals in the purchase of goods; a dealer in merchandise; a trader. Kinney's Law Dict. & Glos. 459. One who buys to sell again and who does both, not occasionally, but habitually, as a business; one who buys and sells an article. Anderson's Law Dict. 671. One who is engaged in the business of buying commercial commodities and selling them again for the sake of profit. Century Dict. 3713."

In the case of Ward Baking Company v. City of Ste. Genevieve, 119 S. W. (2d) 292, the Supreme Court had this to say:

"A merchant is one who is engaged in the purchase and sale of goods; a trafficker; a trader. * * * * * A manufacturer is one engaged in making materials, raw or partly finished, into wares suitable for use. * * * * * 'The marked distinction between a manufacturer and a merchant is that the merchant, or dealer, sells to earn a profit, and the manufacturer sells to take profit already earned. He must buy the materials out of which to make his finished product, and he must sell the product of his factory after it is finished. But such dealings are not his occupation. The one supplies him with the materials with which to pursue it, while the other merely enables him to take the profit earned."

Upon the analogy of these cases and the reasoning of the courts, which we think is sound and applies to the instant question asked by your department, we must

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conclude that in the operation of a nursery business, it is elementary that the seeds or plants are placed in the ground, and, after due time, they grow and multiply into salable products; and one who is engaged in such business must be thought of as one who produces bulbs, plants, trees and other productions which are grown by agricultural means. After these productions are raised, they have enhanced themselves in value, and the situation confronting the owner of the nursery is to realize a profit from his products. He is in the same position as a manufacturer who converts raw materials into a finished product and, having succeeded in doing this, sells his products.

We conclude, therefore, that the situations are very closely related although they are very foreign to each other. In the light of the reasoning of the Ward Baking Company case, supra, one is driven to the conclusion that in the operation of the nursery, which for the purpose of this opinion is taken to be the primary business, when the productions are produced from the land, and once in a salable state, the owner merely takes profit which he has earned because of his efforts in the operation of the nursery, whereas, a merchant is one who operates his business with a view of realizing profits which come from skillful purchase, barter, speculation and sale.

The term "mercantile establishment" is further defined to be a place where the buying and selling of an article of merchandise as an employment is conducted. See 21 C. J. 904.

Therefore, in conclusion, it is the opinion of this department that nurseries, as defined in your question, do not come within the meaning of Section 13218, R. S. Mo. 1929.

Respectfully submitted,

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APPROVED:

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