

SCHOOLS: Section 163.370, RSMo 1949, is not violated by "merchant"  
in installing and operating coin-operated soft drink and  
MERCHANTS: candy vending machine in public schools.



December 2, 1953

Honorable Charles J. Hoover  
Prosecuting Attorney  
Grundy County  
Trenton, Missouri

Dear Sir:

Reference is made to your request for an official opinion  
of this department, reading as follows:

"Would your office kindly give me an  
official opinion relative to Section  
163.370, R.S. Missouri, 1949. Specif-  
ically, it is desired to know if soft  
drink and candy bar coin operated vending  
machines may be placed in the school  
buildings, and be permitted to operate  
during the normal school hours."

Section 163.370, RSMo 1949, referred to in your letter,  
reads as follows:

"No agent, solicitor, peddler or other  
such person shall solicit, offer for  
sale or sell any subscription, policy,  
service, article or thing whatsoever to  
any teacher or pupil in any public school  
of this state while such teacher or pupil  
is upon the premises of such public school  
during the hours such public school is in  
session and for one-half hour before such  
school convenes and for one-half hour after  
such school has dismissed. Any such person  
violating any provision of this section  
shall upon conviction, be deemed guilty of  
a misdemeanor."

In this opinion we have accorded this statute the presumption  
of validity which attends all legislative enactments. It is noted

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that the statute is penal in nature inasmuch as it defines and fixes a penalty for a criminal offense, and therefore in accordance with the usual rules of statutory construction is to be construed strictly.

The statute is directed against one who conducts his business as an "agent, solicitor or peddler." The inclusion of the phrase "or other such person" does not in our opinion broaden the class of persons against whom the statute is directed. Under the rule of ejusdem generis, the inclusion of the phrase does but embrace only other persons whose activities are similar in nature to that of the specifically enumerated group. We quote the rule from *Zinn v. City of Steelville*, 173 S.W.(2d) 398, where it appears in the following language:

"\* \* \*Where general words in a statute follow specific words, designating special things, the general words will be considered as applicable only to things of the same general character as those which are specified. \* \* \*"

With this rule in mind, then, we of necessity must examine the nature of the businesses conducted by agents, solicitors and peddlers in an effort to ascertain what other persons are included within the statute by virtue of the use of the phrase "or other such person." These terms have acquired well-defined meanings in mercantile circles. There is, however, one common distinguishing characteristic about each of the occupations, and that is that while all are frequently merchants in the sense that they sell merchandise, yet none of those enumerated have established places of business. Your attention is directed to Section 150.470, RSMo 1949, wherein is found a definition of the term "peddler." This statute reads as follows:

"Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs and cheese, by going about from place to place to sell the same, is declared to be a peddler."

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Similarly, we think that the terms "agent" and "solicitor" as customarily used in mercantile circles are indicative of a type of selling which does not include the actual delivery of merchandise or other articles sold at the time the sale is made. In each instance, including peddlers, the person engaged as an agent, solicitor or peddler is more in the nature of an order taker, with the exception of certain types of peddlers who do make actual deliveries at the time of sale. However, in none of the occupations is the element present of an established place of business at which point sales and deliveries of merchandise are made. From these factors we are led to the belief that the statute is designed to prohibit the activity described therein of persons who are not engaged in a merchandising occupation which includes the establishment of a place of business.

You will note that thereby persons who are engaged in the occupation of "merchants" are excluded from the operation of the statute. We direct your attention to the definition of "merchant" as found in Section 150.010, RSMo 1949, which reads as follows:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. \* \* \*"

Had the Legislature seen fit to designate "merchants" as being within the statute in specific terms, a completely different situation would present itself. However, that was not done and the omission may not be supplied in a penal statute by the use of such a phrase as "or other such persons," for the reasons which we have discussed supra. We therefore believe that such "merchants" are not included.

#### CONCLUSION

In the premises, we are of the opinion that Section 163.370, RSMo 1949, does not prohibit the installation and operation of a coin-operated soft drink and vending machine in a public school by a regularly established "merchant" as an adjunct to his business. It is, of course, a requisite that the consent of the proper governing board of the school district be obtained.

The foregoing opinion, which I hereby approve, was prepared by by assistant, Mr. Will F. Berry, Jr.

Yours very truly,

WFB:ml:mw

JOHN M. DALTON  
Attorney General