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MILK SERVICE—GLASS FILLED TO A MARK—ONE PINT, ONE-HALF PINT OR ONE GILL—USED TO SERVE MILK, CREAM, OTHER DAIRY PRODUCTS—FILLED FROM BULK MILK DISPENSER—CONTAINER REQUIRED BY SECTION 1327.29 RC.

SYLLABUS:

A glass, filled to a mark designating one pint, one-half pint or one gill, used to serve milk, cream and other fluid dairy products, and filled from a bulk milk dispenser, is such a container as is required by the provisions of Section 1327.29, Revised Code.

Columbus, Ohio, April 6, 1955

Hon. Don W. Montgomery, Prosecuting Attorney
Mercer County, Celina, Ohio

Dear Sir:

I have your request for my opinion which reads in part as follows:

“May milk, cream and other fluid dairy products be sold at restaurants, hotels, confectioneries, drug stores or any place where they are served by the glass, in a glass, filled to a mark designating one pint, one-half pint or one gill which glass with such designating mark has been filled from a bulk milk dispenser?”

As you point out, the answer to this question depends on whether or not a glass so marked and so used complies with the provisions of Section 1327.29, Revised Code. That section provides:

“Bottles and other containers used for the sale and distribution of milk, cream, and other fluid dairy products at retail, shall be of the capacity of one gallon, one-half gallon, one quart, one pint, one-half pint, and one gill, and shall be filled full to the base of the lip, the cap seat, or the stopper, or to some other such designating mark.

“Sections 1327.29 to 1327.31, inclusive, of the Revised Code do not apply to retail sales of cream furnished as a part of a meal in cafeterias, restaurants, or dining rooms, nor to retail sales of manufactured fluid milk products sold in hermetically sealed cans.”

Violation of this section constitutes a criminal offense punishable by fine. Section 1327.99 (F), Revised Code.

Some mention of past events outlined in your request and bearing on the development of the immediate problem will be helpful. First, pursuant to Section 901.10, Revised Code, the Department of Agriculture some years ago promulgated its Regulation 53 in an effort to clarify the administration of Section 1327.29, Revised Code. That regulation provides:

“At all restaurants, hotels, confectioneries, drug stores or any place where milk or other fluid dairy products are sold and served by the glass, they shall be sold from individual bottles and each and every bottle shall conform to the preceding rules.

“Such products shall have been properly bottled and capped at the dairy or milk plant. The cap shall remain on the container until the product is served to the consumer.”

Thus it is clear that the administrators interpret the statute so as to permit *only* the use of an individual bottle as the container from which milk may be sold by the glass. Second, on June 10, 1952, I addressed to the Director of Agriculture my Informal Opinion No. 141. That informal opinion was in response to a question by the Director as to whether or not he could by regulation permit the sale of milk from bulk dispensers at retail. That informal opinion held that “the use of a bulk dispenser of milk in restaurants or other public eating places is not authorized by Section 6412-1, General Code.” The statute considered in that opinion is the same as that involved here.

Third, during the latter part of 1954, a prosecution for violation of Section 1327.29, Revised Code, was begun in the Common Pleas Court for Preble County. The information by which that proceeding was initiated alleged that the defendant, in his restaurant, was serving glasses of milk filled from a bulk milk dispenser. These glasses were properly marked to show one-half pint and one gill. A jury was waived and the case submitted to the Court on an agreed statement of facts. The Court found the defendant not guilty and in its entry found:

“* * * that the Defendant did not violate Section 1327.29 of the Revised Code of Ohio as charged by the facts of said affidavit in that the glass used by the Defendant in the sale of milk to said Robert Max is a container within the meaning of the statute and the mark on said glass to which the same was filled is a designating mark within the meaning of the statute; * * *”

Although, of course, a decision by one common pleas court does not of itself establish the proper interpretation of a statute for the entire state, nevertheless the specific precedent which has been established together with the reasons given for it demand a serious reconsideration of the problem. It is worth noting that the informal opinion previously referred to was limited to a proposed situation where milk would be served from a bulk dispenser into an *unmarked* glass. Obviously, as will subsequently appear, such a procedure could not in any event comply with the statute.

The problem is simply this—is a glass which is used to serve milk from a bulk dispenser, and which is properly marked for the quantities set forth in Section 1327.29, Revised Code, a “container” within the

meaning of such section so that if properly filled it will comply with that section? The answer depends upon the intent of the legislature.

What is the purpose of the statute? 41 Ohio Jurisprudence, Weights and Measures, 173, states :

“The general object or purpose of acts for the regulation or standardization of weights and measures is to prevent fraud and to provide a method by which the purchasers of commodities may protect themselves from short weights and measures and be enabled to obtain the quantity of property bought and paid for.”

The section which we are considering is part of a chapter of the Revised Code dealing solely with various weights and measures. Sections 1327.01 to 1327.99, Revised Code, establish a system for weights and measures, apply that system to certain commodities ranging from coal to fruit, and provide penalties for violation of such standards. In short, every provision of these statutes is aimed at insuring that the public will have a standard of weight and measure and that sales of certain commodities will be in accordance with that standard. This purpose is tremendously important when its converse is considered. It is *not* the purpose of the statute to prescribe the way in which sales are made or the type of vessel or receptacle used if *those matters are unrelated to accurate weight and measure*. Thus in the instant case, it is difficult to believe that the legislature by the phrase “bottle or other container” intended that no receptacle other than a bottle could be used in the retail sale of milk even though the other receptacle should be so marked as to completely protect the public with respect to the standard for weights and measures. It is much more consistent with the whole scope and purpose of this and related statutes to take the language at its ordinary meaning and so to conclude that the legislature intended only to say that no matter what container was used to serve milk, it must be marked so that the public could know exactly how much milk was being received.

The validity of this interpretation is more apparent when we consider that the statute in question is criminal in nature. The Supreme Court of Ohio has expressed one of the well known rules for construction of criminal statutes as follows in *Clymer v. Zane*, 128 Ohio St., 359:

“Penal statutes and statutes which impose restrictions upon the conduct of business must be strictly construed and their scope cannot be extended beyond the usual meaning of their terms.”

It seems to me to be a far reaching extension of usual meaning which would permit the conviction of an individual giving honest weight and measure under a weight and measure statute for the reason that he did not use a certain type container. As the Common Pleas Court for Preble County pointed out in its decision of *State v. Wagner*, No. 4154:

“There is no evidence showing that the defendant failed to give full measurement. The record merely shows he didn’t serve the milk in such a container as the inspector desired.”

No doubt some technical argument applying the doctrine of *ejusdem generis* could be made to restrict the words “and other containers” to bottles alone. In view of the purpose already explained and in view of the fact that a criminal statute must be so worded as to give fair warning to the ordinary citizen of the acts which are forbidden, I do not believe the legislature intended such a vaguely expressed restriction. Again to quote from the reasoning in *State v. Wagner*, *supra*:

“The meaning of the legislature should be plain as all citizens are presumed to know the law and thus it should be possible for the average citizen to place upon the words used the ordinary every day meaning and construction and not be dependent upon the interpretation of some department or bureau of the government. What is a container in every day language? A container is defined as ‘anything that contains’. Thus a glass would be a container.

“The statute provides such container shall be filled to ‘* * * or to some other such designating mark’. A designating mark is a line that indicates a certain position or boundary. The glass in this case had a designating mark and no complaint is made that it was not filled to such mark. Thus, with a common everyday interpretation of the words of the statute there has been no violation of this section of the code. If the legislature had a different intention let them say so in definite terms and not leave it open for bureaucratic or judicial interpretation.”

It is quite likely that the legislature at the time of enactment of the statute was familiar only with the bottle process for handling milk, and therefore used the only word with which the legislators were familiar, but realizing that any marked container would meet the desired requirements, included the broader phrase to cover just such an instance as this.

I have examined the history of several legislative attempts to amend the present statute, but find those efforts to be without much value in

ascertaining the intent of the General Assembly in originally enacting the section. In both instances, the proposed bills died in committee. It is more important that the 100th General Assembly enacted Chapter 3732, Revised Code, providing for regulation by the Department of Health of all restaurant operations. This regulation specifically embraces the power to reasonably determine the type of equipment and utensils used in the serving of food. Thus, control of the *type* of container would seem to be treated by the health laws with a general purpose of protecting the public from unsanitary practices, and control over the *marking* of the container is treated by the weights and measures laws with a general purpose of protecting the public from fraudulent practices.

Accordingly, in specific answer to your question, it is my opinion that a glass, filled to a mark designating one pint, one-half pint or one gill, used to serve milk, cream and other fluid dairy products, and filled from a bulk milk dispenser, is such a container as is required by the provisions of Section 1327.29, Revised Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General