

3114.

MILK—STANDARDIZED MILK DEFINED—REQUIREMENTS AS TO
FATS DISCUSSED—CONTAINERS MUST BE LABELED.*SYLLABUS:*

1. Section 12719 of the General Code defines "standardized milk" as being milk of which the original fat content has been changed, either by skimming or by the addition of skimmed milk, cream or milk rich in fat, where said milk, as so changed, contains not less than three and one-half per cent of milk fats and twelve per cent solids.

2. The only offenses provided in Section 12719 of the General Code are for selling or offering for sale, etc., milk from which the cream, or part thereof, has been removed when the same contains less than three and one-half per cent of milk fats and less than twelve per cent total solids; or when the container of such milk is not properly labeled as required by said section.

COLUMBUS, OHIO, January 8, 1929.

HON. CHARLES V. TRUAX, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a communication from Honorable W. D. Leech, Chief of Division of Foods and Dairies, which reads:

"I should like to submit to you the following questions with regard to the second paragraph of Section 12719. In the words of the section 'standardized milk is milk of which the original fat content has been changed by partial skimming or by the addition of skimmed milk, cream, or milk rich in fat.' We should like to have an interpretation of these words, 'milk rich in fat.'

In arriving at a uniform fat content for milk, two methods are followed:

One is through the addition of cream or skimmed milk:

Two is through the use of Jersey or Guernsey or Holstein milk mixed in proper proportions.

The latter as you know is mixing milk of 4½% to 5% fat content with milk of say 3% fat content. Clearly, of course, when skimmed milk or cream is added the milk is standardized and the label should carry a statement of the same.

In the second case is the milk containing 4½ to 5% fat, milk rich in fat, in the meaning of the Section, and should this be labeled standardized?

Certain distributors of milk who are mixing the milk of several herds without the addition of skimmed milk or cream, are claiming that under this Section it is not necessary for them to carry a statement on the label, of the fat content. Is their opinion correct?

Does the penalty clause in the first paragraph of Section 12719 apply to the second paragraph in which there is no reference to violation and penalty for violation?"

It is believed essential to consider the other related sections.

Section 12716, General Code, which relates to the definition of adulterated milk, provides:

"In all prosecutions under this chapter, if milk is shown upon analysis to contain more than eighty-eight per cent of watery fluid, or to contain less than twelve per cent of solids or three per cent of fats, it shall be deemed to be adulterated."

Section 12716-1, General Code, contains the definition of cream.

Section 12716-2, General Code, provides a penalty for selling, etc., cream that does not conform to the requirements set forth in the act.

Section 12717, General Code, provides a penalty for selling, exchanging or delivering, or having in his custody or possession with intent to sell, etc., adulterated milk, or milk to which water or any foreign substance has been added.

Section 12718, General Code, provides a penalty for a subsequent offense for one violating the provisions of Section 12717, *supra*.

Section 12719, General Code, to which you refer, provides:

"Whoever sells, exchanges, delivers or has in his custody or possession with intent to sell or exchange or exposes or offers for sale as pure milk, any milk from which the cream or part thereof has been removed, shall be fined not less than fifty dollars nor more than two hundred dollars. For a second offense he shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned in the jail or workhouse not less than thirty days nor more than sixty days, and, for a subsequent offense, shall be fined fifty dollars and imprisoned in the jail or workhouse not less than sixty days nor more than ninety days.

The provisions of this chapter shall not be construed to prohibit the sale, exchange or delivery or having in custody or possession with intent to sell, exchange or deliver, standardized milk, which is milk of which the original fat content has been changed by partial skimming or by the addition of skimmed milk, cream or milk rich in fat, and which contains not less than three and one-half per cent of milk fats and twelve per cent total solids, if the can or vessel containing such milk be labeled standardized milk and the percentage of butter fat contained in such milk or in unstandardized milk sold at retail be plainly stated on the label permitting a two-tenths of one per cent tolerance on one or more bottles, cans or vessels, but an average of twenty-five bottles, vessels or cans shall contain the required stipulated percentage of fat."

In examining the history of the section last quoted, it will be noted that the last paragraph to which you refer was added to said section in an amendment by the 84th General Assembly (109 v. 550). Prior to said amendment, the section provided a penalty in substance, for one who sells, etc., any milk from which the cream, or part thereof, had been removed. The first paragraph of the section as it now stands is in exactly the same form and substance as the original section. The amended section, in express language, except from the operation of the first paragraph thereof one who takes cream from milk so long as said milk does not contain less than three and one-half per cent of milk fats and twelve per cent total solids, if the can or vessel containing such milk is labeled "standardized milk", and the other requirements therein set forth are complied with.

In considering the other phases of the question which you present, it will be noted that the last paragraph of Section 12719, *supra*, undertakes to define what constitutes standardized milk. The paragraph in question is rather vague and difficult to construe. However, it appears to be clear that it is the intent of the

Legislature in such enactment to provide, in substance, that any milk which has been changed by skimming or has been changed by the addition of any milk substances, and which after said change contains not less than three and one-half per cent of milk fats and twelve per cent total solids, is to be regarded as standardized milk. However, it is believed unnecessary for the purposes of your inquiry further to consider the complicated provisions of said section. Your question deals primarily with the penalties provided for the violation thereof.

While the paragraph of Section 12719, *supra*, to which you refer, relates to the provisions of "this chapter", it is clear that it can have no application excepting to the section of which it is a part, or in any event only to the subdivision relating to milk. Other sections of the same subdivision of the chapter which relates to the subject of "milk" provide penalties for the other violations enumerated therein. It is a rule of judicial construction in Ohio that criminal statutes are strictly construed in favor of the accused. It is also a well known rule in Ohio that there are no common law crimes, and unless the statutes, in clear and unambiguous language, make the doing of a certain act an offense there is no such offense.

The section under consideration herein expressly provides a penalty, as hereinbefore pointed out, for the selling, exchanging, delivering or having in custody or possession with the intent to sell, exchange, etc., as pure milk, any milk from which the cream or part thereof has been removed. This section standing alone would authorize the prosecution of one for removing any percentage of cream, even though after said percentage is removed the percentage of cream left in the milk content would be in excess of the amount required by statute. However, the exception in the paragraph heretofore considered expressly provides that one shall not be held to be guilty of the violation of the section if, under such circumstances, he complies with the provisions relative to the standardization of such milk.

In view of the definition of what shall constitute standardized milk, it is believed that the mixing of milks from different herds is included within said definition. However, there are no penalties provided excepting in the case where one removes cream from the milk and fails to comply with the provisions in reference to standardization. The objects and purposes to be accomplished by the act must be taken into consideration in arriving at the intention of the Legislature. In defining what constitutes adulterated milk, the Legislature has clearly indicated its intent that milk shall contain not more than eighty-eight per cent of water fluid and not less than twelve per cent of solids and three per cent of fats. If milk is to be changed from its original content, it is the intent of the Legislature that under such circumstances it shall contain not less than three and one-half per cent of milk fats and twelve per cent total solids. However, as hereinbefore indicated, while there are sections authorizing the prosecution of those who sell milk of any character which does not contain three per cent fats and twelve per cent solids, as set forth in Section 12716, General Code, there are no provisions authorizing the prosecution of those failing to comply with the requirements relative to standardization, excepting in those instances wherein cream has been removed without complying with the provisions with reference to standardization. Although Section 12719 apparently requires the labeling of milk which is a mixture from different breeds as standardized, yet no specific penalty is provided for violation so long as the standards are maintained.

In view of what has been said, I have reached the following conclusions :

1. Section 12719 of the General Code defines "standardized milk" as being milk of which the original fat content has been changed, either by skimming or by the addition of skimmed milk, cream or milk rich in fat, where said milk, as so

changed, contains not less than three and one-half per cent of milk fats and twelve per cent solids.

2. The only offenses provided in Section 12719 of the General Code are for selling or offering for sale, etc., milk from which the cream, or part thereof, has been removed when the same contains less than three and one-half per cent of milk fats and less than twelve per cent total solids: or when the container of such milk is not properly labeled as required by said section.

In view of these conclusions in specific answer to your first inquiry, you are advised that Section 12719, supra, undertakes to require a distributor, who mixes milk when some of same which becomes a part of the mixture contains more fat content than that to which it is added, to label the same "standardized milk" and further designate on the label the fat content of the milk which is the result of said mixture. However, there is no penalty provided for one who does not comply with said requirement.

In answer to your second inquiry, you are advised that the penalty provisions of the first paragraph of Section 12719, supra, do not apply to the second paragraph of said section. In other words, one failing to comply with the provisions of the second paragraph of said section may not be prosecuted under said section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3115.

JURISDICTION—JUSTICE OF PEACE, PROBATE AND COMMON PLEAS COURT—MISDEMEANORS AND FELONIES—INDICTMENT NECESSARY—EXCEPTION—EFFECT OF TUMEY CASE DISCUSSED.

SYLLABUS:

1. *Courts of Common Pleas do not have jurisdiction in misdemeanor cases unless indictments are first procured by a grand jury, excepting in those instances wherein the Legislature has specifically given jurisdiction to said courts to try criminal cases upon affidavits.*

2. *In cases of felony a Justice has jurisdiction only as an examining magistrate, and such jurisdiction is not affected by the Tumey decision.*

3. *A Justice of the Peace, or Mayor is without jurisdiction to render final judgment in misdemeanors even though such final jurisdiction is attempted to be conferred by statute, except in those instances wherein the costs may be, and properly are secured as provided in Section 13499 of the General Code, or in cases wherein the statutes provide for the payment of the magistrate's costs irrespective of the outcome of the case, as in prosecutions under Section 1442 of the General Code which relates to violations of the Fish and Game Laws. However, if the defendant desires to take advantage of the question of jurisdiction in such a case, such objections must be made at the time of, or before trial.*

4. *In other cases of misdemeanors, such as traffic law violation, a Justice is without jurisdiction to render a final judgment unless as provided in Section 13511, General Code, the defendant waives in writing the right of trial by jury and submits to be tried by said Justice. A Mayor of course has final jurisdiction in such cases within the limitations of the Tumey decision.*