

1705.

WEIGHTS AND MEASURES—WHERE PERSON SELLS APPLES AT “35 CENTS PER PECK MEASURE”—REQUIRED TO GIVE MEASURE OF APPLES HAVING PECK DIMENSIONS PRESCRIBED BY SECTION 6415 G. C. AND HEAPED IN MANNER REQUIRED BY SECTION 6416 G. C.

*Under existing statutes, a person who sells apples at “35 cents per peck measure” cannot be required, in the absence of agreement between the parties, to give 12 pounds of apples, but he can be required in such case to give a measure of apples having the peck dimensions prescribed by section 6415 G. C. and heaped in the manner required by section 6416 G. C.*

COLUMBUS, OHIO, December 11, 1920.

HON. THOMAS C. GAULT, *Chief, Bureau of Dairy and Foods, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of a letter written to this department by Mr. John M. Mote, state inspector of weights and measures, and reading as follows:

“There are some concerns in Ohio selling apples, potatoes, etc., at a certain price per peck measure. Some of these parties display signs in their stores reading, ‘Apples 35 cents per peck measure.’

The measures are usually filled level full and the peck measure so filled usually contains nine to ten pounds of apples instead of twelve pounds, the legal weight of one peck. Section 6416 reads, ‘Articles usually sold by heaped measure shall be heaped in a conical form as high as such articles permit.’

We would appreciate a ruling by your department on the question of whether a party selling any of the commodities listed in 6418, Ohio Laws, could be compelled to give twelve pounds of apples or fifteen pounds of potatoes by weight for a peck when using the phrase of so much per peck measure.”

Section 8 of Article I of the constitution of the United States gives congress power to

“\* \* \* fix the standard of weights and measures.”

However, as said in *Williams et al. vs. Sandles et al.*, 93 O. S. 92 (1st syllabus),

“The authority to prescribe a standard of weights and measures not being vested by the constitution of the United States exclusively in congress, it is within the power of the legislatures of the several states to enact laws fixing and regulating standards of weights in all respects in which congress has not legislated upon the subject.”

There appears to be no federal statute affecting the question put by your letter, and we are therefore ready to consider the same in the light of the statutes of Ohio. The following statutes have a bearing in this connection:

“Section 6414 G. C. The unit or standard measure of capacity for substances other than liquids, from which all other measures of such sub-

stances shall be derived and ascertained, shall be the standard half-bushel measure furnished this state by the government of the United States, the interior diameter of which is thirteen inches and thirty-nine fortieths of an inch, and the depth is seven inches and one-twenty-fourth of an inch."

"Section 6415 G. C. (103 O. L., 139). The peck, half-peck, quarter-peck, quart and pint measures for measuring commodities other than liquids, shall be of the interior dimensions and capacities as follows, to-wit: the peck measure shall be eleven inches in interior diameter, five and five-eighths inches in interior depth, and shall contain five hundred thirty-seven and six-tenths cubic inches \* \* \*."

"Section 6416 G. C. Articles usually sold by heaped measure shall be heaped in a conical form as high as such articles permit."

"Section 6417 G. C. Measures for measuring dry commodities not usually heaped shall be struck with a straight stick, with the edges rounded. Commodities other than liquids, when sold by the gallon or less, shall be sold by the dry measure."

"Section 6418 G. C. (103 O. L. 559). A bushel, in avoirdupois weight, of every article herein mentioned shall be, viz.: of \* \* \* Irish potatoes, sixty pounds; \* \* \* of apples, forty-eight pounds; \* \* \*. Unless otherwise agreed to, all of the above mentioned articles shall *when dealt in by the bushel*, be bought and sold upon such actual bulk weight, and no test for moisture shall be used to change the standards herein provided. The prosecuting attorney of each county shall enforce the provisions of this act. Any person, firm, company, corporation, agent or employe violating any of the provisions of this section shall be fined not more than one hundred dollars, or imprisoned in the county jail (if a company or corporation its president) not more than six months, or both."

Section 6418-1 G. C., as amended in 103 O. L., 136, providing that "all articles hereinafter mentioned (potatoes and apples being among those mentioned), when sold, shall be sold by avoirdupois weight or numerical count, unless by agreement *in writing* of all contracting parties," was held unconstitutional in the case of *in re Steube*, 91 O. S. 135, the court considering the requirement as to an agreement *in writing* to be an unreasonable exercise of the police power.

Section 6418-1 G. C. (102 O. L. 421), regarded as now in force, the amendment thereof having been declared unconstitutional (See Opinions of Attorney-General for 1915, Vol. I, p. 588), requires merely that the articles therein mentioned (among them, apples and potatoes) shall be sold by avoirdupois weight or numerical count, "unless by agreement of all contracting parties." Under this statute an "agreement" might, of course, be *oral* as well as written, and *implied* as well as express.

As a result of the decision of the court in the *Steube* case, the statement is often made that under existing law, articles such as apples and potatoes may be sold either by measure or by weight. Such a statement, while not precisely erroneous, is at least incomplete.

The incompleteness of the statement just referred to is evidenced by considering section 6418 G. C., above quoted. Said section fixes standard weights for certain articles. By virtue thereof the standard weight of a bushel of Irish potatoes is sixty pounds; that of apples, forty-eight pounds. But said section contains the further provision that

"Unless otherwise agreed to, all of the above mentioned articles shall when dealt in by the bushel, be bought and sold upon such actual bulk weight \* \* \*"

So that as to potatoes and apples sold by the bushel, we have (unless the parties agree otherwise) a requirement not only of *measure*, but also of *weight*.

There is, however, no weight requirement fixed by law as to potatoes and apples sold by the peck. Section 6418 G. C. extends only to articles dealt in by the bushel, and it does not follow that because said section requires a bushel of apples to contain forty-eight pounds, it also requires a peck—one quarter of a bushel—to contain one quarter of forty-eight pounds, to-wit twelve pounds.

There is, though, a legal requirement as to a peck of potatoes or a peck of apples. That requirement is, however, one of *measure* and not of *weight*. Section 6415 G. C. says that a peck measure shall be eleven inches in interior diameter, five and five-eighths inches in interior depth, and shall contain five hundred thirty-seven and six-tenths cubic inches. Would such a measure, full of potatoes or apples, be a legal peck of the same?

Such a question cannot be answered without some attention being first paid to the word "full."

Sections 6416 and 6417 G. C. were evidently passed for the very purpose of indicating what should be regarded as a "full" measure. Articles usually sold by "heaped measure" must, by virtue of section 6416 G. C., be heaped in a conical form as high as such articles permit; whereas articles not usually sold by "heaped measure" shall, pursuant to section 6417 G. C., be struck with a straight stick, with the edges rounded.

In *Epinger vs. Cincinnati*, 16 O. N. P. (n. s.) 257, it was said, obiter, that section 6416 G. C. was of "doubtful constitutionality." For the purposes of this discussion, its constitutionality will be assumed.

It will also be assumed that potatoes and apples are articles "usually sold by heaped measure."

By virtue of section 6416 G. C. we must conclude that a measure of the dimensions required by section 6415 G. C. is not, as applied to potatoes and apples, "full" of potatoes or apples, so as to make it a legal peck thereof, unless and until such potatoes or apples therein are

"heaped in a conical form as high as such articles permit."

In *Gates vs. Cleveland*, 11 O. N. P. (n. s.) 545, the 4th printed syllabus reads:

"Turnips are articles usually sold by heaped measure as defined by section 6416 G. C., and a box or crate not containing when stroked a heaped bushel of turnips is not a lawful measure for turnips, notwithstanding it contains more cubic inches than is required for dry measure \* \* \*"

The judgment in this case was reversed on other grounds by the circuit court of Cuyahoga county (18 O. C. C., n. s., 349).

A vessel, then, having dimensions for a peck as prescribed by section 6415 G. C., but filled only *level full* of potatoes or apples, is not a legal peck *measure* of potatoes or apples at all, but is merely a container of potatoes or apples. Or the distinction may also be brought out by saying that it is not a peck measure of potatoes, but a peck measure *containing* potatoes.

In your letter you speak of signs displayed in stores reading "Apples 35 cents per peck measure." It is my opinion that such signs are in law a representation that the vendor will sell and the vendee receive that quantity of apples which a

measure dimensioned as per section 6415 G. C. would hold when said apples were, pursuant to section 6416 G. C., "heaped in a conical form as high as such articles permit." In such case the giving by the vendor of a mere "level full" measure would constitute a false or short measure, and would be a violation of section 13106 G. C., which says:

"Whoever, in buying or selling any property, or directing or permitting an employe so to do, makes or gives a false or short weight or measure \* \* \* shall be fined not more than fifty dollars."

The precise question submitted by you, whether a party selling apples or potatoes at so much "per peck measure" may be compelled to give twelve pounds of apples or fifteen pounds of potatoes, must be answered in the negative. This for the reason already suggested, namely, that there is no legal requirement as to the *weight* of a *peck* of potatoes or apples, but only a requirement as to *measure*. In other words, one who sells apples at "35 cents per peck measure" cannot be required, in the absence of agreement between the parties, to give twelve pounds of apples, but he can be required in such case to give a peck measure of apples heaped in the manner required by section 6416 G. C.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*

1706.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN CRAWFORD, MUSKINGUM AND WILLIAMS COUNTIES, OHIO.

COLUMBUS, OHIO, December 13, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

1707.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN SENECA COUNTY, OHIO.

COLUMBUS, OHIO, December 13, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*