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OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

COPY

Department of Agriculture
Austin, Texas

Gentlemen: Attention: Mr. W. S. Bussey

Opinion No. O-2496
Re: Under the facts set forth should a complaint be filed under Article 1037 of the Penal Code for selling less than the quantity represented of a commodity, i. e., wood? And related requests.

Your recent request for an opinion of this Department on the above stated question and the related requests as herein set out have been received.

Your letter reads in part as follows:

"This Department recently received a complaint from a citizen who had purchased one cord of wood from a dealer, said dealer delivering to the residence of the purchaser a quantity of wood which he represented as being one cord and collected for one cord of wood at the price which had been quoted.

"Owing to the fact that the pile of wood seemed rather small to be a full cord, the purchaser measured same, finding that less than three-fourths of a cord had been delivered, which measurement was later confirmed by a representative of this Department.

"In the light of the above explanation, should a complaint be filed under Article 1037 for selling less than the quantity represented of a commodity, towit: wood; and if so, will you please prepare for

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this Department the proper form complaint to be filed?

"If the complaint should be filed under some other statute, please advise and also furnish us with the proper form complaint under that statute."

Article 1037, Vernon's Annotated Penal Code, reads as follows:

"False weights and measures. - Any person who, by himself or by his servant or agent of another person, shall offer or expose for sale, sell,use, or retain in his possession any false weights or measures, or weighing or measuring devices, in the buying or selling of any commodity or thing or in calculating or measuring service or in the determination of weight or measure when a charge is made for such determination, or who shall dispose of any condemned scales, weights, measures or weighing or measuring devices contrary to law; or who shall sell or offer or expose for sale less than the quantity he represents of any commodity, thing or service, or shall take or attempt to take more than the quantity he represents of any commodity, thing or service, when, as the buyer or weigher of any commodity, he furnishes the weight, measure, or weighing or measuring device by means of which the amount of any commodity, thing, or service is determined; or who shall sell sell or offer for sale, or use or have in his possession for the purpose of selling or using, any device or instrument to be used to or calculated to falsify and weight or measure; shall be guilty of a misdemeanor, and shall be punished by a fine or not less than $20 or more than $100, upon the first conviction in any court of competent jurisdiction; and upon a second or subsequent conviction in any court of competent jurisdiction he shall be punished by a fine of not less than $50 or more than $200."

Article 1037(a), Vernon's Annotated Penal Code, provides that:

"Definitions. - The word 'person' as used in this Act shall be construed to import the plural

and singular, as the case demands, and shall include corporations, companies, societies, and associations. The words 'weights, measures or (and) weighing and measuring devices' as used in this Act, shall be construed to include all weights, scales, beams, measures of every kind, instruments and mechanical devices for weighing and measuring and any appliances and accessories connected with any or all such instruments. The word 'sell' or 'sale' as used in this Act, shall be construed to include barter and exchange. The term 'false weight or measure, or weighing and measuring devices,' shall be construed to mean any weight or measure which does not conform to the United States Standards of weight or measure or any weighing or measuring device which does not give correct results or isnmanipulated to give incorrect results in terms of United States Standards of weight or measure."

Article 1042, Vernon's Annotated Penal Code, reads as follows:

"Failure to regard unit of measure. - Whoever in buying any commodity or article of property, merchandise or produce, the standard weight of which per bushel or barrel, or divisible merchantable quantities of a bushel or barrel, or by the cord or ton or cubic yard, has been fixed by the laws of this State, shall take any greater number of pounds thereof to the bushel, barrel or cubic yard, or divisible merchantable quantity of bushel, barrel, cubic yard or lineal yard, or in selling any of the same, shall give any less number of pounds thereof to the bushel, barrel, cubic or lineal yard, or divisible merchantable quantity of bushel, barrel, cubic or lineal yard than is allowed by the laws of this State, with intent to gain an advantage thereby, shall be fined not less than twenty nor more than two hundred dollars."

Article 1037, supra, makes it an offense for any person, who, by himself or his employee or agent, or as the employer or agent of another, shall use in the buying or selling of any commodity or retain in his possession a false

weight or measure, or weighing or measuring instrument. This statute further makes it an offense for any person to use or have in his possession for the purpose of selling or using any device or instrument to be used, or calculated to, falsify any weight or measure. Clearly under the facts set out, there is no violation of Article 1037. There are no facts under the above mentioned situation showing that false weights or measures were used in the buying or selling of any commodity, neither were false weights or measures used or had in the possession of the party in question for the purpose of selling or using any device or instrument to be used to, or calculated to, falsify any weight or measure. Article 5734, Vernon's Annotated Civil Statutes, provides in part that:

> "Whenever any commodity is sold by the cord, it shall mean 128 cubic feet, or the contents of a space 8 feet long, 4 feet wide, and 4 feet high . . ."

We quote from Texas Jurisprudence, Volume 44, page 516, as follows:

> "Construing the statute, it has been held that a cord is a measure of wood containing 128 cubic feet, or, otherwise expressed, it is a pile of wood 8 feet long, 4 feet wide, and 4 feet high. However, the law does not require that, in order to ascertain that a quantity of wood sold is a cord, or any multiple thereof, it shall be placed in a pile of such dimensions; any other measurement or pile that contains a full cord satisfies the statute." Sacks v. State, 204 S. W. 430.

Under the above stated facts, we are of the opinion that the complaint could not be filed under Article 1037, supra, but should be filed under Article 1042, Vernon's Annotated Penal Code.

With reference to a form complaint, we would respectfully refer you to Form No. 462, page 280, of Wilson's Texas Criminal Forms Annotated, which form we believe is the proper form for a complaint under the above stated facts, and Article 1042, supra.

Trusting that we have satisfactorily answered your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Ardell Williams

Ardell Williams
Assistant

APPROVED JUL 11, 1940

Gerald Sullivan

FIRST ASSISTANT
ATTORNEY GENERAL

AW:BBB

APPROVED
OPINION
COMMITTEE
BY Burns
CHAIRMAN