

**Fruit, Inspection of. Fees, Payment of for Inspection of Fruit.  
Inspection of Fruit, at What Point.**

An inspector has the authority to inspect fruit in the hands of retail dealer, and such dealer may be prosecuted for refusing to permit such inspection. The inspector can refuse to deliver a certificate of inspection until the fee is paid, or he may bring suit to recover the fee for the delivery of certificate.

When fruit is not inspected at the point of shipment, it must

be inspected at destination, before delivery, and if consignor and consignee refuse to pay for the inspection the carrier is not liable for refusing to deliver the fruit. The carrier also would have the right to have such fruit inspected and sold to collect its freight or express and the inspection fees paid by it.

Helena, Montana, January 14, 1910.

Mr. M. L. Dean,

Inspector at Large of Montana State Board of Horticulture,  
Missoula, Montana.

Dear Sir:

I am in receipt of your letter of January 4, submitting the following questions for an opinion thereon, to-wit:

"If a retail grocer handling fruits has come into the possession in any manner of uninspected boxes of apples, oranges or other fruits, and upon demand by the inspector to permit inspection of the fruit, he refuses to permit it to be inspected, under what provision of law, if any, can he be prosecuted?"

"If the retail dealer comes into possession of the boxes of uninspected oranges, apples or other fruits in the manner mentioned in the first question, and the inspector does actually inspect the fruit, and the dealer refuses to pay the inspection fees, what can be done?"

We are also in receipt of a letter from Mr. Wallace, Jr., division counsel of the Northern Pacific Railway Company, stating that "an acute situation has arisen at Glendive growing out of the refusal of local merchants at that point to pay inspection charges upon shipments of fruit consigned to them and received at that station without a certificate from any of the several inspectors provided for by the act creating the state board of horticulture."

Mr. Wallace submits certain questions for the consideration of this office, which involve matters of importance to the shipping public, and dealers at large in this state, and as opinions are only given to public officials, we have decided to answer such questions in an opinion to you.

The questions submitted being as follows:

"1. Is an inspection of fruit, by the district inspector covering the point of origin of shipment, a necessary condition precedent to the right of the owner thereof to ship the same for sale within this state?"

"2. If such an inspection is not a necessary condition precedent to shipment, is it necessary to have the same inspected at destination before delivery by a carrier to consignee?"

"3. If the inspection, either before shipment or before delivery, is necessary, against whom is the fee for inspection a proper charge?"

"4. Who is liable for the collection of this fee, if the fee is properly chargeable?"

We shall answer the questions in the order set out above.

1. As was pointed out in an opinion given you on December 29, 1909, there is an error in sections 1925 and 1936, as they appear in the revised codes of 1907. In the fourth line from the end of said section 1925 the words "fruit trees" appear, and the same words appear in said section 1936, whereas the enrolled bills, and the session laws, show only the word "fruit" in such instances, and therefore the word "trees" has no place in these two sections.

Section 1924 provides that,

"it shall be the duty of said inspectors to visit \* \* \* stores, packing houses, warehouses and other places where horticultural products and fruits are kept and handled. \* \* \* Said inspector shall have free access, at all times, to all premises where any trees, plants, fruits, etc., are kept or handled \* \* \* and shall have full power to order destruction and disinfection of any or all trees, plants, fruits," etc.

Under this section the inspector has authority to make inspections of fruit in the possession of a retail merchant. Such authority is necessarily implied for the reason that he could not order the destruction or disinfection of fruit without first inspecting it.

Section 1943 provides that,

"any person or persons, corporation, etc., violating any of the provisions of this act, shall be deemed guilty of a misdemeanor and fined in the sum of not less than twenty-five dollars, nor more than three hundred dollars."

Therefore, if any merchant in possession of uninspected fruit refuses to permit an inspector to enter his premises and inspect such fruit, he violates the provisions of said section 1924 and is guilty of a misdemeanor and may be prosecuted under said Section 1943.

2. If the retail merchant permits the fruit in his possession to be inspected, and then refuses to pay the fee provided therefor by the latter part of section 1925, then the inspector has one of two remedies.

Section 1925 provides that he can refuse to deliver the certificate of inspection until the fee is paid, and if the merchant delivers or turns over any of such fruit without first having attached the inspector's certificate he shall be deemed guilty of a misdemeanor and prosecuted under Section 1936. On the other hand, if the inspector, on making the inspection, delivers a certificate of inspection to the merchant, and then the merchant refuses to pay the inspection fees, the inspector should have the county attorney bring civil suit against the merchant to collect the fee.

As to what point inspections of shipments of fruit should be made is not clearly indicated in the law.

Under Section 1942 it appears that

"all nursery stock, trees, plants, vines and cuttings grown or growing within the state"

should be inspected before shipment, but this section does not include fruit.

It would therefore appear that Section 1925 would only apply to shipments of "trees, plants, vines, scions, or grafts," shipped from points

without the state, and that such shipments should be inspected at the point of delivery. But here it will again be noticed that fruit is not included, except in the last part of the section, which fixes the fee for inspection of fruit.

But we find no provision in the statute stating at what point shipments of fruit should be inspected.

The latter portion of section 1925 provides the fee for the inspection of fruit, and section 1936 makes it a misdemeanor for any person, transportation company or common carrier to deliver or turn over fruit without first having attached the inspector's certificate.

Therefore, it is clear that fruit must be inspected either at point of origin of shipment or at point of destination, before delivery, and that the transportation company or common carrier can not lawfully deliver the fruit to the consignee until it is inspected.

The law is also silent as to whom should pay the inspection charges. If the shipper has the fruit inspected before shipping, then he should pay the inspection fee. In fact he would not be entitled to a certificate until the fee is paid. In fact the just and equitable rule would be for the shipper to pay the inspection fee in all cases, for the spirit of the law is that only clean fruit is to be marketed by him, and it should be his duty to know this before asking the transportation company to transport his fruit. If it is not possible or practical for the shipper to have the fruit inspected at point of shipment, then he should be required to pay for the inspection made at point of destination.

In the absence of a statutory provision, defining where the inspection should be made, and who should pay the fees, I am of opinion that the state board of horticulture has power, under section 1923, to enact valid regulations covering such question, but it appears that the board has not yet done so.

However, under the law as it now stands, I am of the opinion that when a consignor ships fruit which has not been inspected, that the transportation company can not lawfully deliver the same to consignee until inspected, and if upon the arrival of the fruit at destination both the consignor and consignee refuse to have the fruit inspected and to pay the charges, that the transportation company is warranted in refusing to deliver the fruit, for it can not be held liable for refusing to do a criminal act.

If the freight or express charges has been prepaid on the shipment, of course the transportation company could fully protect itself by simply refusing to deliver the fruit until either the consignor or consignee had secured an inspection of the same.

But in cases where the freight or express charges had not been prepaid, then the carrier has an interest in such fruit to the amount of such freight or express charges, and if the consignor and consignee refuses to have the fruit inspected then the transportation company can have the fruit inspected and pay the inspection charges. Such inspection charges could then be added by the transportation company to its bill for freight or express, and the fruit held by it until the consignee or consignor paid the total bill, including the inspection charges.

If the consignee or consignor refused to pay such total bill on demand, then in my opinion the transportation company would have the right to sell such inspected fruit (the same being perishable goods) to collect its freight and express charges and the inspection charges advanced by it.

6 Cyc. 501 to 506.

Also:

Sections 5145, 5149, 5150, 5151, 5242, 5359 and 5360, revised codes.

Very truly yours,

ALBERT J. GALEN,

Attorney General.