1872.

OHIO LIQUOR CONTROL ACT — NOT UNLAWFUL FOR DISTILLER MANUFACTURING LIQUOR IN SISTER STATE TO DELIVER LIQUOR IN OWN TRUCKS TO PUBLIC CARRIER IN OHIO FOR TRANSPORTATION TO LAWFUL AGENCY OF OR IN ANOTHER SISTER STATE—"DELIVERY" LIMITED IN MEANING—USE OR SALE IN OHIO.

SYLLABUS:

*It is not unlawful under the Ohio Liquor Control Act, or otherwise, for a distiller who is lawfully engaged in the manufacturing of liquor in a sister state to deliver liquor in his or its own trucks to a public carrier in Ohio for transportation to a lawful agency of or in another sister state, the word "delivery," as used in the Ohio Liquor Control Act, being limited in its meaning to delivery in Ohio for use or sale therein.*

Columbus, Ohio, February 19, 1940.

Honorable Jacob B. Taylor,
Director, Department of Liquor Control,
Columbus, Ohio.

Dear Sir:

Your request for my opinion, with which you enclose copies of certain letters relating to the question submitted by you, duly received. The facts by which your question is engendered are stated as follows in one of the enclosures.

> "The M. Distilling Corporation sells its product to the West Virginia Liquor Control Commission, which commission places orders for less than truckload lots, operating on a fifteen day basis in that state, and in these less than truckload lots shipment as economically as possible must be made by the distilling Company.
> * * *
> The M. Distilling Corporation desires to ship its product into Ohio to be consolidated at the Cinicinnati Terminal Warehouse with other shipments going into West Virginia. This liquor will be transported from————, Indiana, to Cincinnati in the trucks of the M. Distilling Corporation. The shipping documents and through Bill of Lading will show that the product is for the State of West Virginia and probably will show a stopover at the

Cincinnati Terminal Warehouse for consolidation and reforwarding to the consignee in West Virginia.

In other words, it will be an interstate movement from ————, Indiana, to West Virginia with a stopover at Cincinnati for consolidation with products of other distillers making truckload shipments into West Virginia."

The enclosures also disclose that the product in question is to be transported from Cincinnati to West Virginia by lawfully certified trucking companies.

Your question is, may a distiller who is duly licensed by, and engaged in the business of lawfully manufacturing whiskey in a sister state, legally transport whiskey in its own trucks to a point in Ohio and transfer such whiskey to the truck of a public carrier for delivery to a lawful agency of or in another sister state.

Your request necessitates a consideration of Sections 6064-13, 6064-14, 6064-15, 6064-20 and 6064-55 of the General Code, which will be quoted in part and discussed, not in numerical order, but in such order as best serves to demonstrate the intention of the Legislature in the enactment of the sections in question.

Section 6064-14 of the General Code provides in part as follows:

"No person shall directly or indirectly, himself or by his clerk, agent, or employee, manufacture, manufacture for sale, offer, keep or possess for sale, furnish or sell, or solicit the purchase or sale of any beer or intoxicating liquor in this state, *or transport or import or cause to be transported or imported,* any beer or intoxicating liquor or alcohol *in or into this state for delivery, use or sale* herein, unless such person shall have fully complied with the provisions of the liquor control act or shall be the holder of a permit issued by the department of liquor control and in force at the time. * * * " (Emphasis the writer's.)

It seems to me that, in so far as the instant question is concerned, this section, by its express terms, has to do only with (1) the transportation of liquor *in* the state as distinguished from transportation *across* or *through* the state and (2) the *importation* of liquor *into* the state, and that (3) both the transportation and importation referred to are such movements of liquor in or into the state as are for "delivery, use or sale" therein. In other words, this section, in so far as we are here concerned, should be read as though it were written as follows:

> "No person shall *** transport *** or cause to be transported *** in *** this state (for delivery, use or sale herein), *** or import or cause to be *** imported *** into this state for delivery, use or sale herein, ***," etc.

That is, the words "transport or cause to be transported (for delivery, use or sale herein)" are in apposition to the words "*in* this state," while the words "import or cause to be imported, for delivery, use or sale herein" are in apposition to the words "*into* this state."

I am aware, of course, that while it is well settled that statutes are not to be construed by strict and critical adherence to grammatical rules and that the collocation of words is not conclusive but only an aid in the construction of a statute, yet at the same time, where the grammatical construction and the obvious meaning of the statute concur, that construction will be adhered to. See 37 O. Jur. 561, 565; Black on Interpretation of Laws, 2nd Ed., p. 148, and cases cited. As stated in 25 R. O. L. 965:

> "* * * Relative and qualifying words and phrases should ordinarily be referred to the word or clause with which they are grammatically connected, but this rule is not controlling and has often been disregarded."

In any event, as will be hereinafter seen, the interpretation and construction of Section 6064-14, here given, is consistent with the provisions of the other pertinent sections of the Liquor Control Act.

Moreover, both the transportation of liquor *in* the state and the importation thereof *into* the state, attempted to be regulated by the General Assembly in Section 6064-14, supra, is transportation or importation only for "delivery, use or sale" therein. The words "use (in the state)" and "sale (in the state)" are plain and unambiguous and clearly express the intention of the Legislature; and, when read in connection with the words "use" and "sale," I have little difficulty in determining the meaning of the phrase "for delivery (in the state)." As stated at page 194 of Black on Interpretation of Laws:

> "Associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found and the meaning of the terms which are associated with it."

Applying this rule of construction, it seems clear that when the Legislature used the word "delivery" in connection with the word "use" and the

word "sale," and then limited all three by the word "herein," it intended that delivery should mean a bringing to rest or permanent stoppage in this state and not a temporary transfer from one lawful carrier to another. And especially is this true when it is considered that one of the definitions of the word "delivery," as given in Webster's New International Dictionary is:

> "* * * In modern commercial usage, loosely, the transportation of a purchase to a place designated by the purchaser and transferance of it then to the purchaser, his agent, or one designated by him.
> * * *"

So much for Section 6064-14, supra.

Section 6064-15, General Code, prescribes the various kinds of permits required to be obtained in order lawfully to engage in the traffic or transportation of malt, vinous or spirituous liquor. For example, provision is made for "Permit B-1," required to be obtained by "a wholesale distributor of beer to purchase from the holders of A-1 permits (manufacturers), to import and distribute, or sell beer, ale, lager, stout and other malt liquors, containing not more than seven per centum of alcohol by weight, for home use and to retail permit holders under such regulations as may be promulgated by the department" of liquor control. This section provides in part that:

"The following classes of permits may be issued:

* * *

> Permit H. A permit for a fee of five dollars to a carrier by motor vehicle who also holds a license by the Public Utilities Commission of Ohio to transport beer, intoxicating liquor or alcohol, or any or all of them in this state for delivery or use in this state; * * * provided, further, that manufacturers or wholesale distributors of beer or intoxicating liquor other than spirituous liquor who transport or deliver their own products to or from their premises licensed under the provisions of this act by their own trucks as an incident to the purchase or sale of such beverages shall not be required to obtain the H permit herein specified. Carriers by rail shall receive such H permit upon application therefor.
>
> Nothing in this section shall prevent the department of liquor control from issuing, upon payment of the permit fee, an H permit to any person, partnership, firm or corporation, licensed by any other state to engage in the business of manufacturing and brewing beer and malt liquor, and such manufacturer, upon the issuance of an H permit, may transport, ship and deliver only his or its own products to holders of B-1 permits in Ohio in motor trucks and equipment owned and operated by such manufacturer. * * *"

You will note that the section authorizes the issuance of H permits only to the public carriers specified in the section and to manufacturers of beer and malt liquors, licensed by any other state, who desire to "ship and deliver only his or its own products to holders of *B-1 permits in Ohio,*" i. e., to lawfully authorized Ohio wholesale distributors of beer and malt liquors. Two facts are significant, first, no provision is made for the issuance of an H permit to duly licensed distillers of whiskey and other spirituous liquor of other states, and, second, the H permit authorized to be issued to brewers of other states is for the purpose of permitting such foreign brewers to transport *their own* products *into* Ohio for *delivery* to holders of B-1 permits and for sale and use *in Ohio.*

The second paragraph of Section 6064-20, General Code, seems to me to be clearly indicative of the intention of the Legislature only to regulate the transportation or importation of liquors when intended for delivery, use and sale in the state. This paragraph reads:

> "Nothing in the liquor control act shall be so construed as to prohibit the holder of a class A, class B, class C, or class D permit from making deliveries of beer or intoxicating liquor containing not more than twenty-one per centum of alcohol by volume or to prohibit the holder of a class A or B permit from selling or distributing beer or intoxicating liquor to a person at a place outside of this state, nor to prohibit the holder of any such permit, or a class H permit, from delivering any beer or intoxicating liquor so sold from a point in this state to a point outside of this state."

You will note that in that part of Section 6064-20, above quoted, the Legislature has carefully differentiated between deliveries in Ohio by the permit holders, enumerated in the section, of beer or intoxicating liquor containing *not more than twenty-one* per cent. of alcohol by volume and the distribution or delivery of such liquor by a lesser number of permit holders to a point outside of this state.

The next section requiring examination is a penal section, viz., Section 6064-55, supra, which reads:

> "Whoever, not being the holder of a Class H permit, transports beer, intoxicating liquor or alcohol, or any of them, *in this state,* shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than thirty days nor more than six months, or both. This section shall not apply to the transportation and delivery of beer, alcohol or intoxi-

> cating liquor purchased or to be purchased from the holder of a permit issued by the department of liquor control, in force at the time, and authorizing the sale and delivery of the beer, alcohol or intoxicating liquor so transported, nor of beer, intoxicating liquor or alcohol purchased from the department of liquor control or the tax commission of Ohio, *or purchased by the holder of a class A or class B permit outside this state and transported within this state by them in their own trucks for the purpose of sale under their permits.*"
>
> (Emphasis the writer's)

As stated in the case of Rogers v. State of Ohio, 87 O. S. 308, 312 (1913), it "is elementary, in construing statutes defining crimes and criminal procedure, that they must be strictly construed, reasonably, of course, but still strictly." Indeed, this rule of construction to be applied to statutes of a penal nature is expressly provided for in Section 10214, General Code. See in this connection 37. O. Jur. 744, 749, and cases cited.

Applying this rule of strict construction to Section 6064-55, it seems to me that the offense there defined is restricted to unlawful transportation of liquors "in this state," that is, *intra-state* transportation and that the section has no application to lawful transportation *through* or *across* the state, or, as it might otherwise be expressed, *interstate* commerce from one sister state to another across or through the state of Ohio. Certainly this construction is consistent with the several sections above considered and with the provision in the last phrase of Section 6064-55, to the effect that this section shall not apply to liquor "purchased by the holder of a class A or class B permit outside this state and transported within this state by them in their own trucks for the purpose of sale under their permits," that is, for sale in Ohio. And this was the view taken by the Court of Common Pleas of Hamilton County in the case of Brooks v. State of Ohio, 2 C. O. 356, 22 Abs. 343 (1935), affirmed without opinion by the Hamilton County Court of Appeals on April 22, 1936.

In the Brooks case the defendant was convicted under Section 6064-55 for transporting liquor legally purchased in Ohio to the state of Kentucky, without having an H permit. While a part of the reasoning of the court is in conflict with the opinion of the Supreme Court of the United States in the case of Ziffrin, Inc., Appellant, vs. Reeves, Commissioner of Revenue of the Commonwealth of Kentucky, et al., 60 Sup. Ct. 163, 84 L. Ed. 107 (November 13, 1939), the following statements of Judge Mack are here pertinent. At page 357 the court said:

"Obviously, by the plain provisions of Sections 6064-55, General Code, the permit therein required was for a carrier who transports in the state of Ohio liquor 'for delivery or use in this state,' or desires to *"import"* the same in this state for delivery or use in this state. Clearly this does not intend to, nor does it relate to any one engaged in the interstate commerce business of transporting liquor legitimately sold in Ohio to another in another state and to be transported to such consignee in such other state.

That no other conclusion can be reached is obvious from the concluding paragraph of Section 6064-55, General Code, above set forth, and which excludes from the provisions of a misdemeanor by one not being a holder of a Class H Permit the following:

'The transportation * * * of intoxicating liquor purchased * * * from the holder of a permit authorized by the Department of Liquor Control * * * authorizing the sale and delivery of the * * * intoxicating liquor so transported.' "

From the above discussion it is clearly deducible that the Legislature, in enacting the Liquor Control Act, was concerned only with the importation of liquor into the state of Ohio, or the transportation thereof within the state, when such liquor is to be delivered, or used, or sold therein. And the only section dealing with the transportation of liquor from one sister state to another is Section 6064-13, supra, which provides in part as follows:

"Nothing in the liquor control act shall be construed to prevent the storage of intoxicating liquor in bonded warehouses established in accordance with the acts of congress and the regulation of the government of the United States, located in this state, or the transportation of intoxicating liquor to or from bonded warehouses of the United States wherever located; * * *"

From this it might be argued that, having expressly excepted from the operation of the Liquor Control Act the transportation of liquor to and from one bonded warehouse of the United States to another, wherever located, no other liquor may be transported through Ohio from one state to another. That is to say, the provisions of Section 6064-13, just quoted, are exclusive. However, such an argument entirely overlooks the provisions of Article VI, Clause 2, of the Constitution of the United States that such "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." Pursuant to its constitutional powers the Congress had, prior to the passage of Section

6064-13, enacted laws and made full provision for the removal of liquor from bonded warehouses (See Tit. 26, Sec. 1268, and cognate sections of the Federal Code Annotated), and since such laws are the supreme laws of the land, it seems apparent that the provisions of Section 6064-13 of the General Code, above quoted, are a legislative appreciation of that fact. In other words, the Legislature included the provisions under discussion in the Ohio Liquor Control Act, because of its recognition of the fact that the Congress had preempted the field in so far as the transportation of liquor to and from bonded warehouses of the United States is concerned.

For all of the reasons above given, I am constrained to hold that the Legislature has not, in the Liquor Control Act or otherwise, legislated with reference to the transportation of liquor from one sister state to another through or across the State of Ohio and that the plan desired to be followed by the company mentioned in your request is not unlawful.

That a state may so legislate seems to be clearly indicated in the Ziffrin case, supra. In this case, in passing upon the Twenty-first Amendment, Mr. Justice McReynolds said as follows in delivering the opinion of the Court:

> "* * *
>
> The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. *Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put.* Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.
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> * * *
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> *Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less.*
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> * * *
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> The point suggested in respect of Due Process is not in accord with what has been decided in the cases above referred to.
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> The record shows no violation of Equal Protection. A licensed Common Carrier is under stricter control than an ordinary contract carrier and may be entrusted with privileges forbidden to the latter.
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> Here the state law creates no discrimination against interstate

commerce. It is subjected to the same regulations as those applicable to interstate commerce.

* * *

The power of a state to regulate her internal affairs notwithstanding the consequent effect upon interstate commerce was much discussed in South Carolina State Highway Dept. v. Barnwell Bros. 303 U. S. 177, 189, 82 L. Ed. 734, 741, 58 S. Ct. 510. There it was again affirmed that although regulation by the state might impose some burden on interstate commerce this was permissible when *'an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.'* * * * "

(Emphasis the writer's)

In the above case the facts were that an Indiana corporation authorized to act as a contract carrier under the Federal Motor Carrier Act of 1935, insisted upon the right to receive whiskey from distillers in Kentucky for direct carriage to consignees in Chicago, without complying with the Kentucky Alcoholic Beverage Control Law of 1938. The carrier had been so transporting liquor since 1933, and contended that the Kentucky act was unconstitutional "because repugnant to the Commerce, Due Process and Equal Protection Clauses of the Federal Constitution, in that, under pain of excessive penalties," it undertook to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquor from Kentucky in interstate commerce exclusively. The carrier further contended that although a state may prohibit the manufacture of liquor, if the distillation, sale and transportation thereof were permitted, "the rule of law is that the state may not annex to its consent to manufacture and sell the unconstitutional ban upon carriage of interstate exports of liquors by contract carriers." In deciding against the plaintiff carrier, the Court held as above set forth.

It will be observed that the above case had to do with the export of liquor from the state wherein it was lawfully manufactured, across one or more sister states, to another and different sister state. Our question concerns the transportation of liquor legally distilled in any adjoining state, across our state to a sister state. Nevertheless, I am inclined to the view that the principles laid down in Ziffrin case apply with equal force to the facts presented in your inquiry and that the state of Ohio may prohibit and certainly may regulate the kind of shipments mentioned in your request should it see fit so to do. In this connection I am not unmindful of the

rule-making power of the Board of Liquor Control under Section 6064-3 of the General Code, and it may be that it is within the power of the Board, if in the exercise of its discretion it determines such action necessary and proper, to adopt rules and regulations governing such shipments as engender your question, to the end that the provisions of the Liquor Control Act may be enforced as intended by the Legislature.

For the above reasons, and in specific answer to your question, it is my opinion that it is not unlawful under the Ohio Liquor Control Act, or otherwise, for a distiller who is lawfully engaged in the manufacturing of liquor in a sister state to deliver liquor in his or its own trucks to a public carrier in Ohio for transportation to a lawful agency of or in another sister state, the word "delivery" as used in the Ohio Liquor Control Act being limited in its meaning to delivery in Ohio for use or sale therein.

Respectfully,

THOMAS J. HERBERT,
Attorney General.