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1. LIQUOR CONTROL, DEPARTMENT OF — DAMAGE TO MERCHANDISE PURCHASED, USUALLY TERMED “CONCEALED DAMAGE” — UNKNOWN AT TIME OF DELIVERY — DISCOVERY — DEPARTMENT MAY NOT RECOUP LOSS OR DAMAGE FROM ANY PERSON WITHOUT EVIDENCE SHOWING PERSON SOUGHT TO BE CHARGED WAS RESPONSIBLE BY REASON OF BREACH OF CONTRACT OR WRONGFUL ACT.
2. LOSSES SO DISCOVERED—MAY BE ABSORBED BY DEPARTMENT OF LIQUOR CONTROL — PROVISIO, CANNOT BE ESTABLISHED LOSSES OCCASIONED BY FAULT OF SOME PERSON, FIRM OR CORPORATION.

SYLLABUS:

1. Upon the discovery of damage to merchandise purchased, which damage, usually termed "concealed damage", was unknown at the time of delivery, the Department of Liquor Control may not recoup such loss or damage from any person without evidence showing the person sought to be charged was responsible therefor by reason of breach of contract or his wrongful acts.
2. Losses so discovered may be absorbed by the department of Liquor Control when it can not be established that they are occasioned by the fault of some person, firm or corporation.

Columbus, Ohio, Aug. 16, 1944

Hon. Don A. Fisher, Director, Department of Liquor Control
Columbus, Ohio

Dear Sir:

This will acknowledge your recent letter seeking my opinion, which letter is as follows:

"Prior to the present year the Department of Liquor Control purchased its spirituous liquor through what was called the bailment stock plan. Simply stated that plan was this. The distillers doing business with the Department maintained stocks of spirituous liquor in warehouses within the state. When the Department needed various items for sale in its stores a purchase order was issued and it drew on those stocks in the warehouses and delivery was made to the various stores of the Department.

Because of the condition of the market in spirituous liquors, the above plan has been abandoned and the Department now purchases spirituous liquor f. o. b. the plant of the distiller and does its own warehousing through contracts between various warehouses in the state and the Department.

Frequently now shipments are received at the stores of the Department and in spite of the examination of cases made at time of delivery, upon later opening of the cases it is disclosed that there is concealed damage to the bottles in the cases.

It is sometimes found that there is a bottle missing, with no external evidence easily discoverable to show that the case has been tampered with, but extremely close examination discloses that at some time the case has been opened and a bottle taken.

At other times it is discovered when the case is opened that a bottle or more is broken and the contents missing. Again, in this situation there is no external evidence on the case discoverable at the time of receipt of the cases that such condition exists.

Under the above circumstances and related circumstances, it was the practice under the bailment stock plan to charge such losses back against the distiller and they were accepted by the distiller. Under the present plan, however, the distiller disclaims liability and refuses to reimburse the Department for the loss.

The above situations and related ones give rise to the following question upon which I should like your opinion:

May the Department write off losses such as the above when the Department is unable to fix the liability for the loss upon either the distiller, the carrier, the warehouseman, or the trucker; or must such losses be charged to one of the above and an attempt at collection made?"

I note from your letter that purchases of spirituous liquor by the Department of Liquor Control are now usually made f. o. b. the plant of the distiller or some similar plan whereby title to merchandise purchased by the Department passes at some shipping point by delivery to the carrier. This is in contrast to the former plan whereby the distiller and supplier to the Department held title to the merchandise until delivery at the stores of the Department. Under the circumstances attendant upon the present method of purchase the general rule is, in the absence of special conditions, the title to merchandise passes upon delivery by the seller to the carrier. See 35 O. Jur. 791, G. C. Sec. 8399 — Rule 4. The seller's liability then for damage or loss would cease upon delivery to the carrier assuming that the contract of the seller has been fulfilled. While such merchandise is in transit the carrier has certain responsibility to safeguard and deliver the goods. Upon delivery to the warehouseman for the account of the Department the carrier's liability has ended and the warehouseman assumes liability for the safekeeping of the spirituous liquor. The same is true as to the safeguarding of the merchandise while in the hands of the trucker. Thus, when the Department finds in its hands shipments of merchandise which have become damaged somewhere in the process of shipment and delivery to the Department there is present the possibility that any of the above handlers of the merchandise have caused that

damage or loss through negligence of their agents or through failure properly to perform their contracts with the Department. Your letter states that such damage as you inquire about is concealed damage. The name you apply to the damage implies that under the usual circumstances the source of the damage or loss is not discoverable, and as stated above, that any of the handlers of the merchandise may have caused the damage. To charge any person, however, with liability for damage or loss, there must either be wrongful act by the person sought to be charged or a breach of contract by that party. Conversely stated, damage without proof of a wrong or a breach of contract does not give rise to a claim. See 15 Amer. Juris. 389.

Applying the above to the instances given by your letter, it is obvious that neither the seller, shipper, warehouseman, trucker or any other person can be charged with liability for concealed damage unless the Department is able to show that the party sought to be charged is guilty of negligent acts the proximate cause of the concealed damage or a breach of contract resulting in the loss. Therefore, losses for concealed damages in merchandise received by the Department of Liquor Control may not be charged against any person unless it may be shown that such person has caused the loss in the manner above indicated.

Under Section 6064-8 General Code, the Department of Liquor Control has been given authority as follows, to engage in the purchase and sale of spirituous liquors:

“3. To put into operation, manage and control a system of state liquor stores for the sale of spirituous liquor at retail and to holders of permits authorizing the sale of such liquor, to be established throughout the state as hereinafter provided; and thereby and by means of such manufacturing plants, distributing and bottling plants, warehouses and other facilities as it may deem expedient in connection therewith, to establish and maintain a state monopoly of the distribution of such liquor and the sale thereof in packages or containers; and for such purpose to manufacture, buy, import, possess, and sell spirituous liquors in the manner provided in the liquor control act and in the regulations adopted and promulgated by the board pursuant to the liquor control act; to lease or in any manner except by purchase, acquire the use of any land or building required for any of such purposes; to purchase such equipment as may be required to effectuate the purposes of the liquor control act; to borrow money to inaugurate and carry on its business, and to issue, sign, endorse, and accept,

notes, checks, and bills of exchange; but any and all obligations of the department created under authority of this paragraph shall be a charge only upon the moneys received by the department from the sale of spirituous liquor pursuant to the liquor control act and its other business transactions in connection therewith, and shall not be general obligations of the state of Ohio."

And in addition thereto, sub-section 9 of the same section of the General Code, confers authority as follows:

"9. All other powers expressly or by necessary implication conferred upon the department by any provisions of the liquor control act; and all powers necessary and proper for the exercise or discharge of any power, duty or function expressly conferred or imposed upon the department by any provision of the liquor control act."

To me, it is inescapable from the above quoted sections and a consideration of the commercial nature of the business of the Department of Liquor Control that the Department has the authority to write off losses in the nature of the ones to which you direct my attention. If such losses are chargeable to the negligence or breach of contract of no one the writing off of such losses is a necessary incident to the carrying on of the Department's business and is within the authority granted by law to the Department of Liquor Control. In my view the authority to write off such losses is within the grant of authority given to the Department by sub-section 9 of Section 6064-8 necessary for the discharge of the duties imposed by Section 6064-8, subsection 3, General Code.

An opinion upon a question similar to the question here asked is found in Volume II, Opinions of the Attorney General for 1937, page 1563. While that opinion does state that the Department of Liquor Control may "absorb losses resulting from breakage or deterioration", it also contains this statement: "The item which you mention as being received in 'bad order' represents another problem. The Department is responsible for ascertaining that all merchandise is received in 'good condition'." There is no discussion supporting this latter conclusion nor is any reason stated why there is a distinction between loss from breakage and loss occasioned by the receipt of merchandise bearing concealed damage not discoverable by ordinary means—I cannot, therefore sub-

scribe to the statement in that opinion quoted above, that the Department is responsible for ascertaining that all merchandise is received in good condition if the meaning of that statement, which is somewhat obscure, is in conflict with what is herein expressed.

There remains within your question the inferential question of whether employes of the Department receiving on behalf of the Department merchandise in which there is concealed damage must be charged with the loss resulting from such damage. The persons receiving and handling such merchandise on behalf of the Department are employes of the stores division of the Department of Liquor Control. They are not public officers. I know of no rule of law which requires such employes, especially where engaged in a commercial enterprise of buying and selling as in the stores of the Department, to be insurers of the property of the Department, nor do I believe that it would be possible to impose such a rule on such employes. It is my opinion that employes handling merchandise of the Department of Liquor Control which proves to be damaged in a concealed manner are not responsible for the loss resulting from such damage in the absence of negligence on the part of the employes.

From all of the above, you are advised that my opinion is as follows:

1. Upon the discovery of damage to merchandise purchased, which damage, usually termed "concealed damage", was unknown at the time of delivery, the Department of Liquor Control may not recoup such loss or damage from any person without evidence showing the person sought to be charged was responsible therefor by reason of breach of contract or his wrongful act.

2. Losses so discovered may be absorbed by the Department of Liquor Control when it can not be established that they are occasioned by the fault of some person, firm or corporation.

Respectfully,

THOMAS J. HERBERT

Attorney General