3128.

MILK—DEALER AND DISTRIBUTOR—CHARGE GUARANTEEING RETURN OF BOTTLE NOT VIOLATIVE OF SECTION 13169-2, GENERAL CODE.

SYLLABUS:

The practice of a milk distributor or a milk dealer requiring a deposit by a customer to insure the return of a milk bottle in which milk has been delivered to said customer does not constitute a violation of Section 13169-2 of the General Code.

COLUMBUS, OHIO, January 12, 1929.

HON. CHARLES V. TRUAX, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a communication from the Honorable W. D. Leech, Chief of the Division of Foods and Dairies, which reads as follows:

> "Will you please furnish this division with an opinion on the enclosed subject and greatly oblige?"

The subject referred to in said communication is set forth in a letter directed to Mr. Leech, which reads:

> "Under Section 13169-2 it is declared to be unlawful for any person, etc., ------ to fill or refill, etc., ------ with soda water, etc., ------ any ---------- other container so marked or designated, as aforesaid by any name, etc., ------ of which a description shall have been filed and published as provided, -------- or unless the same shall have been purchased from the person, firm or corporation, whose name, etc., ---------.
>
> In your opinion when a milk distributor has properly registered his bottles and in the transaction of wholesale milk business, either makes a charge or requires a deposit, or credits return bottles against bottles received and charges for the shortage from the store, would a sale be constituted by this act, particularly provided that the charge made for the bottles may be 3 or 5 cents charge, to place a value upon them and is not commensurate with the initial cost which may be then 6 to 8 cents per bottle.
>
> Another case which has arisen involves providing these bottles to the retailer charging him 5 cents only on bottles which he may be short, which is not the full value of the bottle, but where the retail dealer charges a deposit from his customer, which may again be 5 cents and not the full value of the bottle, and also issues to the customer a claim check or ticket for identification in the return of the bottle and the claim for the 5 cents deposit.
>
> Do either of these cases constitute a sale within the meaning of Section 13169-2?"

Section 13169-2, General Code, referred to in said communication, provides:

> "It is hereby declared unlawful for any person, firm or corporation to fill or refill, or cause to be filled or refilled, with soda water, mineral or aerated waters, ginger ale, porter, ale, beer, cider, small beer, milk cream, lager beer, weiss beer, white beer, or other beverages, or with medicines, medical preparations, perfumery, oils, compounds, or mixtures any bottle, siphon, siphon top, tin, fountain tank, keg, or other container so marked or designated as

aforesaid by any name, mark or device of which a description shall have been filed and published, as provided in Sections 13169 and 13169-1 of this act; or to fill with bottles with intent to sell their contents any bottle case so marked or designated; or to deface, erase, obliterate, cover up, or otherwise remove or conceal any such name, mark or device thereon, or to sell, buy, give, take or otherwise dispose of or traffic in such bottles, siphon, siphon top, tin, fountain tank, keg, bottle case, or other container without the consent of, or unless the same shall have been purchased from the person, firm or corporation whose name, mark or device shall be in or upon the bottle, siphon, siphon tops, tin, fountain tank, keg, bottle case or other container so filled, refilled, trafficked in, used, or handled, as aforesaid. The provisions of this section shall not apply to any person, firm or corporation, as to filling or refilling with his or its product any bottle, siphon, tin, fountain tank, keg, bottle case, or other container, owned by and having the name, mark or designation of such person, firm or corporation pursuant to the provisions of this act, when such person, firm or corporation shall have complied with the rules and regulations of the dairy and food division of the agricultural commission of Ohio, relative to the cleansing of such bottles, siphons, siphon tops, tins, fountain tanks, kegs, bottle cases or other containers."

The first section of the General Code mentioned in the section above quoted provides for the registration by any person, firm or corporation engaged in the manufacturing, bottling or selling of soda waters, milk and many other beverages, and engaged in the delivery thereof, by filing in the office of the Secretary of State and also in the office of the Clerk of Courts of the county in which his or its principal place of business is situated, a description of such name, mark or device, and causing such description to be printed once in each week for three weeks successively in a newspaper published in such county. When such provisions are complied with he or it shall thereupon be deemed the proprietor of such name, mark or device, etc.

The next section in substance provides for the assignment of such rights acquired by such registration, and further provides that the assignee shall have all the rights, immunities and obligations of the original manufacturer, which provisions need not be specifically considered herein.

In analyzing the provisions of the statutes hereinbefore set forth and referred to, in connection with the inquiry submitted, it is evident that the sole question to be considered is whether or not the practices set forth in the communication constitute a sale of the milk bottles in either of the cases described, in violation of said sections. In analyzing Section 13169-2, supra, it will be observed that it is not unlawful to make a sale of such bottle or other containers mentioned, unless said sale is made without the consent of the owner of the registration mark or device.

In any event, it is not believed that the method of delivery of the bottles or containers which is being considered constitutes a sale within the meaning of the section or any other rule of law upon the question of sale. It is believed that there is no different rule applicable in the transactions under consideration between the distributor and the retailer than there is between the retailer and the ordinary purchaser. In other words, the disposition of one case will serve as an answer to the other. The ordinary transaction in connection with one who purchases a bottle of milk from a grocery store is so well known as to require no elaboration. It is not believed that the purchaser under such custom as is herein being considered understands that he purchases the bottle when a bottle of milk is delivered. The general understanding is that the purchaser obtains the title to the contents of the bottle and that the said container belongs to the manufacturer or owner of the mark or device. However, in order to insure the return of said bottle a custom has grown up between purchasers

from retailers as well as purchasers from wholesalers whereby a deposit of some character is required by the owner to insure the return of said bottles. In other words, as a matter of law it is nothing more than a contract of bailment. By implication the purchaser agrees to return the bottle to the owner. In order to secure the performance of the contract on the part of the bailee, the owner demands a deposit as security therefor. The title to the bottles does not pass under such an agreement, either when the milk is delivered to the purchaser or when the bottles are returned. Even if such a proceeding could be construed by any process of reasoning to constitute sales in each instance, it would necessarily follow in the cases which you mention that the sales were made with the consent of the original owner of the bottle in whose name the mark or device is registered, and it would not constitute a violation of the section of the code under consideration.

In this connection it should be pointed out that Section 13169-2, supra, excepts from the inhibitions therein stated any person, firm or corporation filling or refilling with his or its product any such bottle or container owned by and having the name, mark or designation when such firm shall have complied with the rules and regulations of the division of dairy and food of the agricultural department of Ohio relative to the cleansing of such bottles and other containers.

It will further be noted that Section 12730, General Code, provides as follows:

> "Whoever fills or refills with milk, cream or other milk product a glass jar or bottle, with intent to sell such milk, cream or other milk product, unless such glass jar or bottle is first thoroughly cleansed or sterilized, shall be fined not more than one hundred dollars."

From the section last mentioned in connection with the other sections hereinbefore referred to, it appears clear that it was the intent of the law to permit the distributor of dairy products to have the bottles or containers marked and registered and to refill the same if he complied with the laws with reference to sanitation.

The facts submitted suggest that, on occasion, the bottles are not all in fact returned and accordingly the deposit is retained by the retailer or owner as the case may be. This would not, however, in my opinion, constitute such transactions sales, but would represent merely the retention of the agreed amount of liquidated damages for breach of the contract to return the bottles.

Based upon the foregoing, you are specifically advised that it is my opinion that neither case presented in the communication being considered constitutes a violation of Section 13169-2 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3129.

CORRUPT PRACTICES ACT—ORGANIZATIONS OF TWO OR MORE PERSONS AIDING CANDIDATES OR PROPOSITIONS BEFORE ELECTIONS MUST FILE FINANCIAL REPORTS—EXCEPTION—PROPER PARTIES TO FILE PETITIONS FOR NONCOMPLIANCE.

SYLLABUS:

1. *Under the provisions of Section* 5175-1, *General Code, a committee or organization of two or more persons co-operating to aid in or promote the success or defeat of a candidate or candidates, or proposition submitted to a vote at any election required under the law, is required to make a report of its receipts and expenditures unless it be*