

865.

APPROVAL—OFFICIAL BOND IN THE SUM OF \$5,000.00  
AS DEPUTY DIRECTOR FOR VAN WERT COUNTY,  
OHIO.

COLUMBUS, OHIO, July 9, 1937.

HON. JOHN J. JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR:—There has been submitted for my approval an official bond in the sum of \$5,000.00 with Edison Ellis, as principal, and the Continental Casualty Company of Chicago, Illinois, as surety, conditioned that the said principal shall faithfully discharge the duties imposed upon him by law as resident district deputy director in Van Wert County, Ohio, said bond being dated June 16, 1937.

After examination of the bond, I find the same to be in proper form and executed in pursuance of law. I have accordingly endorsed my approval on the bond and am returning same herewith.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

866.

DEPARTMENT OF LIQUOR CONTROL—STATE LIQUOR  
MONOPOLY—ACCOUNTABLE FOR ALL FUNDS—NOT  
RESPONSIBLE FOR BREAKAGE AND DETERIORATION  
OF PERSONAL PROPERTY WHERE NO NEGLIGENCE ON  
PART OF EMPLOYEES.

*SYLLABUS:*

1. *The Department of Liquor Control is strictly accountable for all moneys received through the operation of the state liquor monopoly, the only excuse for failure to remit the full amount received being an act of God or a public enemy.*
2. *In the operation of the State Liquor Monopoly, the Department of Liquor Control is not responsible for breakage or deteriora-*

*tion of personal property which occurs without negligence on the part of its employes.*

COLUMBUS, OHIO, July 12, 1937.

HON. J. W. MILLER, *Director, Department of Liquor Control, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent letter in which you inquire as to the right of the Department of Liquor Control to write off various losses which occur in the operation of the state liquor stores. Your correspondence relates that the individual amounts involved are quite small and fall within the following classes:

1. Shortage in cash accounts which occurred while extra personnel was employed by the stores during the Christmas Season.

2. Shortage of bank deposits. The Brinks Express, I am informed, collects the deposits in closed containers and there have been discrepancies between the amounts the store managers claim were in the containers and the amounts the banks credit to their accounts.

3. Shortage in inventory. (A) A member of store personnel after having signed during the rush hours for the receipt of certain merchandise, later by checking same more minutely discovered that all the merchandise on the delivery slip was not in fact received. (B) Disappearance of bottles of liquor occurring while outside help was making repairs of the stores.

4. Merchandise stolen.

5. Breakage of bottles. (A) Occurring during transportation from warehouse to store or from one store to another. (B) Occurring because of faulty bins. (C) Occurring from floor buckling. (D) Occurring in handling.

6. Merchandise received at warehouses or stores in "bad order."

Section 154-3, General Code, provides that the Department of Liquor Control is a department of state government. Therefore all of the statutes and decisions regarding the accountability of public officers, directors of state departments, as well as other officers are applicable.

Peculiarly the statutes of Ohio do not make specific provision for the degree of care for which public officials are responsible in the protection and preservation of moneys and property coming into their possession in their official capacities. It is only by reference to the laws and decisions in connection with the Bureau of Inspection and Supervision of Public Offices Sections 274 to 291, General Code, both inclusive, that the law on the subject is revealed.

Section 274, General Code, provides in part:

“The bureau of inspection and supervision of public offices shall have the power to supervise and inspect reports of all state officers.”

Section 284, General Code, provides that the Bureau shall examine all public offices, save village and school district offices, and justices of the peace annually; such examinations to inquire into the methods, accuracy and legality of the accounts, records, files and reports of the office and whether the laws, ordinances and orders pertaining to the office have been observed.

Section 286, General Code, provides for the reports of the examinations made by the Bureau and contains inter alia, the following:

“If the report sets forth that any public money has been illegally expended, *or that any public money collected has not been accounted for* or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions to the proper court in the name of the political subdivision or taxing district to which such public money is due or such public property belongs, for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination. \* \* \*”

\* \* \* \* \*

No claim for money or property found in any such report to be due to any public treasury or custodian thereof in any such report shall be abated or compromised either before or after the filing of civil actions, by any board or officer or by order of any court unless the attorney general shall first give his written approval thereof.

*The term ‘public money’ as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials shall be liable therefor. \* \* \**” (Italics ours).

The courts have been uniform in holding public officials strictly accountable for public moneys. They have gone so far as to hold that such responsibility is not relieved by showing that a discrepancy occurred

through no fault of the official. This rule is stated in 32 O. J. 257 as follows:

“It is one of the duties of a public officer intrusted with public moneys to keep them safely, and this duty of safe custody must be performed at the peril of the officer. In effect, according to the weight of authority followed in Ohio, a public officer is an insurer of public funds lawfully in his possession and, therefore, liable for losses which occur even without his fault. The liability is absolute, admitting of no excuse except an act of God or the public enemy.”

Basing its decision on this general principle the Supreme Court of Ohio held in *Seward vs. National Security Company*, 120 O. S. 47, that it is no defense of a public officer called upon to account for public moneys, to establish that the money had disappeared through no fault of his. The following language of the court is particularly noteworthy:

“It has been the general policy, not only with government employees and appointees, but with state officers, county officers, township officers, and all other public officials, to hold the public official accountable for the moneys that come into his hands as such official, and his obligation has been held to be as broad as is the obligation of a common carrier of freight received for shipment; that is to say, that when he comes to account for the money received, it must be accounted for and paid over, unless payment by the official is prevented by an act of God or a public enemy; and burglary and larceny and the destruction by fire, or any other such reason, have not been accepted by the courts as a defense against a claim for the lost money. The decisions to this effect are so uniform and so numerous that no useful purpose would be served by restating the law that has been so many times stated so clearly.”

In view of the above authorities, I am of the opinion that the Department of Liquor Control has no authority to charge off losses accruing from various discrepancies in public moneys handled by the Department, and the Bureau of Inspection and Supervision of Public Offices is duty bound to report and make a finding for any discrepancies between the amount of money collected by the Department and the amount actually transferred to the state treasury. This duty is imposed upon the Bureau by Section 286, General Code, wherein the Bureau is required to make a finding where the examination reveals” \* \* \* that

any public money collected has not been accounted for \* \* \*." Claims based upon such discrepancies could not be abated until the report has been made by the Bureau and the abatement or compromise thereof approved by the Attorney General, as required by Section 286, supra.

While none of the above cited cases have dealt with the responsibility of public officers for personal property coming into their possession by reason of their official capacities, the reasoning used by the courts is to a large extent equally applicable. The same public policy which dictates that public officials should be insurers of public moneys which come into their possession as against loss by fire, theft, burglary or insolvency of a depository, could also be applied to personal property, especially as to items readily convertible into money (such as liquor). It should be noted, however, that the provision in Section 286, General Code, as to property is not as stringent as the provision as to public moneys, and the Bureau is only required to make a finding where it discovers that "public property has been converted or misappropriated."

It is not conceivable that public officials would be held accountable for items of personal property which were broken through natural wear and tear. Loss through breakage is akin in some instances to loss through wear and tear. Where hundreds of thousands of bottles are handled by humans it is common knowledge that there is bound to be some breakage, no matter how careful the handlers. Therein lies the similarity between breakage and natural wear and tear.

Although a public official is accountable for public moneys lost through no fault of his, such a public official has the power to protect himself against such losses. There are means for protection against fire. He may insure himself against it, as well as against theft, burglary or robbery. Furthermore he may secure collateral to cover bank deposits. Thus there is good reason for applying a different degree of responsibility for a loss arising from the handling of personal property when we know that some loss in connection therewith is bound to occur no matter what precautions are taken by the public official or his subordinates. However, in addition to the above stated reason for applying a different rule as to the responsibility for personal property, there is inferentially in the Liquor Control Act (Section 6064-8, paragraph 9, General Code) authority so to do, for it is there provided:

"The department (of Liquor Control) shall have and exercise the following powers:

\* \* \* \* \* \* \* \* \*

All other powers expressly or by necessary implication conferred upon the department by any provisions of this 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 this act. \* \* \*” (Parenthesis, the writer’s.)

In my opinion the right to absorb losses for breakage is a power “necessary and proper” to discharge the duty of the Department in operating and maintaining the state liquor monopoly. I say it is “necessary and proper” because a contrary holding would require of men a superhuman degree of care. It is common experience that when an employe is penalized for failing to conform to an unreasonable standard, such an employe will be disgruntled and dissatisfied and revengeful. Employees in such a frame of mind would make it impossible to efficiently operate the state liquor monopoly. I am therefore of the opinion that the Department has the power to write off losses occurring through breakage of bottles under authority of the above cited part of paragraph 9 of Section 6064-8, General Code. This power in my opinion is not absolute but only covers breakage occurring in the natural course of events and would not include breakage brought about by a negligence of the employes. Despite this power on the part of the Department, the Bureau of Inspection and Supervision of Public Offices has the right to check upon such losses in the same manner that it has power to inspect all other activities of the Department, and I suggest that evidence of all breakage, loss for which is to be written off, should be preserved until the Bureau has had an opportunity to examine same.

The item which you mentioned as being received in “bad order” represents another problem. The department is responsible for ascertaining that all merchandise is received in “good condition.” If, on the other hand, the merchandise deteriorates after being in the possession of the Department, this class of loss is similar to breakage. My opinion in regard to such losses is the same as above stated in regard to breakage.

This right of the Department of Liquor Control to absorb losses resulting from breakage or deterioration does not obviate the necessity of the Department to account for all merchandise handled, and in my opinion in that respect the Department has the same responsibility as to the protection of personal property from loss by conversion, misappropriation, or fire as it has as to “public moneys.”

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*