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LIQUORS, SPIRITUOUS—MAY BE PROCURED BY DEPARTMENT OF LIQUOR CONTROL FOR PERSONS WHO SEEK TO ACQUIRE SUCH LIQUOR FROM A LEGAL SOURCE OUTSIDE THIS STATE—LIQUOR FOR PERSONS WHO ACQUIRED IT FROM LEGAL SOURCE OUTSIDE OF STATE AND SEEK TO HAVE IT BROUGHT INTO STATE — SECTIONS 6064-8a, 6064-12 G. C.

SYLLABUS:

Under the provisions of Sections 6064-12 and 6064-8a, General Code, and proper regulations adopted thereunder, spirituous liquors may be procured by the Department of Liquor Control for persons who seek to acquire such liquor from a legal source outside this state not available to the Department of Liquor Control, or, for persons who have acquired such liquor from a legal source outside this state and seek to have it brought into this state.

Columbus, Ohio, May 21, 1943.

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

Dear Sir:

I have your request for my opinion which is as follows:

“Numerous individuals other than permit holders, who have acquired or seek to acquire intoxicating liquor from legal sources outside of the State of Ohio, have sought permission from the Department of Liquor Control to bring such liquor into Ohio for their own use.

May I have your opinion as to whether or not such persons as mentioned above may, under the Liquor Control Act, bring intoxicating liquor into this state for their own use in this state.”

A review of the provisions of the Liquor Control Act, Section 6064-1, et seq., General Code, reveals that by it the Legislature has created a comprehensive system whereby the control of the sale and distribution of all intoxicating beverages is lodged in the state itself, acting through the Department of Liquor Control. For the purposes of this opinion it is sufficient to note that the sale of spirituous liquor by container or bottle is confided exclusively to the Department of Liquor Control and that the sale of spirituous liquor by the drink, beer, wine and malt beverages, is

allowed under a system of permits established by the Liquor Control Act, which permits are issued by the Department of Liquor Control.

The Department of Liquor Control is authorized by the provisions of law above mentioned to sell such spirituous liquors by means of state stores or agencies. Spirituous liquors are defined (Section 6064-1, General Code) as "all intoxicating liquors containing more than twenty-one per centum of alcohol by volume." As a means of implementing and safeguarding the monopoly in liquor control created by the Liquor Control Act, certain provisions thereof impose penalties against the possession or transportation of intoxicating liquors which are not obtained through the Department of Liquor Control itself or from a licensee under the Liquor Control Act pursuant to the provisions thereof. Section 6064-55, General Code, reads as follows:

"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 intoxicating 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."

Section 6064-64, General Code, forbids the possession of intoxicating liquor which is not acquired in accordance with the Liquor Control Act. Following is the text of that section:

"Whoever, not being the holder of a permit issued by the department of liquor control, in force at the time, and authorizing the same, has in his possession any intoxicating liquor in one or more bottles, containers or other receptacles of whatsoever kind or character, not having thereon the seal prescribed by the board of liquor control, pursuant to the liquor control act shall, unless such intoxicating liquor shall have been lawfully acquired by him pursuant to the liquor control act, be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars nor more than two hundred dollars, or be imprisoned not less than ten days nor more than thirty days, or both.

The possession of such intoxicating liquor, in such bottle, container or other receptacle, shall be considered as prima facie evidence that the same was not lawfully acquired by the defendant pursuant to the liquor control act."

From the above two sections of law it appears that the Legislature has made it clear that intoxicating liquor may not be transported or possessed unless it be acquired in conformity to the Liquor Control Act.

It is a matter of common knowledge that in some states not subject to the tremendous buying power created by the concentration of war industry as in Ohio intoxicating liquors may be purchased at the present time in greater quantities than in this state. This situation naturally gives rise to the question as to whether or not Ohio residents who are able to purchase liquor legally in such states or to arrange for the purchase of liquor there, for their own consumption and not for sale, may legally have such liquor brought into this state under the present provisions of the Ohio Liquor Control Act.

Since the original enactment of that act it has contained a provision to facilitate the acquisition of spirituous liquor by the individual purchaser when such liquor is not "in stock" in the state store where the purchaser seeks to buy. That provision is contained in Section 6064-12, General Code, so much of which as is pertinent being as follows:

" * * * If any persons shall desire to purchase any variety or brand of spirituous liquor which is not in stock at the state liquor store where the same is ordered, the department shall immediately procure the same, by order or otherwise, upon the making of a reasonable deposit by the purchaser in such proportion of the approximate cost of the order as shall be prescribed by the rules or regulations of the board. The customer shall be immediately notified upon the arrival of the spirituous liquor so ordered at the store at which it was ordered. Unless he pays for the same and accepts delivery thereof within five days after the giving of such notice, the department may place such spirituous liquor in stock for general sale, and the deposit of the customer shall be forfeited."

The General Assembly of this state took notice of the shortage of spirituous liquors when it recently enacted Substitute House Bill No. 211 which was signed by the Governor and became effective April 8, 1943 and is now identified as Section 6064-8a, General Code. So much of that section as need be considered here is as follows:

"When the supply of spirituous liquor in this state is insufficient to meet the demands of ordinary trade, due to causes beyond

the control, scope and power of the director of liquor control, the director may establish rules and regulations which will insure the equitable distribution of such supplies of spirituous liquor as are available, any other provision of the laws of this state governing the sale of spirituous liquor to the contrary notwithstanding. The director may institute and terminate the aforementioned rules and regulations, as conditions may demand and also make changes and alterations therein in accordance with specific needs."

Considering first the provisions of Section 6064-12, *supra*, and having in mind the question you ask, two provisions of that section stand out. It is contemplated by that section, first, that the liquor desired to be purchased be not in stock at the store where ordered and, second, that the Department shall immediately procure the same "by order or otherwise."

I have been unable to find any judicial construction of the term "in stock" and so I believe that in conformity with the usual rule of interpretation the words should be given their ordinary, commonly accepted meaning. I consider that term in the ordinary sense, therefore, to refer to liquor on the shelves and immediately available for unlimited sale.

While, of course, I am aware that Section 6064-12, General Code, was enacted by the Legislature at a time when a scarcity of liquor was not contemplated, I nevertheless feel that the broad form of and the terms employed in Section 6064-12 not only justify, but invite a conclusion allowing a person who has legally acquired liquor outside the state to have such liquor brought into this state without being forced into the position, as recently intimated in the public press, of being a bootlegger.

If we now consider Section 6064-8a which, as the text above shows, allows the Director of Liquor Control to establish such rules and regulations as will insure the equitable distribution of such supplies of spirituous liquor as are available "any other provisions of law * * * to the contrary notwithstanding", I believe the way is made clear to allow persons legally acquiring spirituous liquor outside this state to have such liquor brought into this state. Such practice, through proper rules which may be adopted under the authority of Section 6064-8a, would have the effect of carrying out the intent stated in that section to insure the equitable distribution of the spirituous liquor available as it would partially free the liquor available to the Department from a proportionate amount of the demand against it. Also, in determining a system of equitable distribution and establishing rules under Section 6064-8a, General Code, a record of any liquor so brought into this state could be easily kept and taken into consideration with respect to the rationing of the individual for whom it is procured.

If, under the circumstances here considered, a person wishes to purchase liquor outside the state from a source of which he has knowledge, or wishes to bring liquor into this state which he has legally acquired outside the state, the words "the department shall immediately procure the same by order *or otherwise*" would authorize and justify the Department, under such rules as may be adopted pursuant to Section 6064-8a, in establishing whatever procedures as may be necessary to procure such liquor. These could take the form of issuing consents, the issuing of shipping directions or orders, or any other means necessary to procure the liquor.

Support for the conclusion reached herein is found in the case of *Frankenstein v. Board of Liquor Control*, decided by the Court of Appeals of Franklin County on July 6, 1937, 27 O. L. Abs. 335, affirmed in 134 O. S. 251.

In said case the plaintiff challenged the validity of certain sections of the Liquor Control Act under the authority of which the Department of Liquor Control threatened to prosecute him for failure to pay a mark-up, handling and gallonage charge assessed by it on spirituous liquor legally purchased by him in Kentucky and imported into this state for his own use. The authority of the Department of Liquor Control to permit the importation into this state of liquor procured outside thereof by an individual for his own use was not questioned by the court. In the opinion written by Geiger, J., the court recognized, without any comment or criticism, that a person desiring to bring into Ohio spirituous liquor legally purchased outside of this state might do so if he presented the invoice for the liquor purchased, to the Department of Liquor Control, and paid the so-called mark-up and gallonage tax as required by the Department.

It is thus seen that a former practice of the Department, which prescribed the manner in which liquor for personal use could be purchased outside the state and imported thereinto, and which was established, if anything, under less authority of law than that which now exists therefor, was before the court for consideration and the power of the Department with respect thereto was not questioned.

Such action by the Department of Liquor Control would keep in effect all the safeguards and prohibitions imposed by the Liquor Control Act and a person procuring liquor in such manner would violate neither Section 6064-55 nor Section 6064-64, *supra*, which relate to the transportation and possession of intoxicating liquors.

In accordance with the above, you are advised and it is my opinion that under the provisions of Section 6064-12 and 6064-8a, General Code, and proper regulations adopted thereunder, spirituous liquors may be procured by the Department of Liquor Control for persons who seek to acquire such liquor from a legal source outside this state not available to the Department of Liquor Control, or, for persons who have acquired such liquor from a legal source outside this state and seek to have it brought into this state.

Respectfully,

THOMAS J. HERBERT,
Attorney General.