

done and performed within the Ohio penitentiary at Columbus or the Ohio state reformatory at Mansfield, Ohio.

In your letter you inquire as to whether or not the Division of Manufacturing and Sales is within its right in furnishing the printed matter upon the envelopes in question and I have assumed that you have confined your inquiry as to whether or not such printing may be done at the penitentiary or the Mansfield reformatory since you refer to Section 2205, *supra*. It may be observed, however, that this last mentioned section refers only to these two institutions and it is assumed that other institutions under your jurisdiction are not equipped to do this printing. If this assumption is erroneous, it is obvious that such Section 2205 would have no application to printing to be done in some other institution and under the reasoning of the foregoing opinion, Section 1847, General Code, hereinabove referred to, would apparently be controlling.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

777.

EFFECTIVE DATE, LAW PROVIDING FOR TAB LEVIES—
SUBSTITUTION OF WORD "MORE" FOR WORD "LESS,"
WHEN—LEVY AND COLLECTION OF TAKES, BY TAX
COMMISSION OF OHIO—SECTION 6212-48, GENERAL
CODE.

SYLLABUS:

1. Section 6212-48, *General Code*, as contained in Amended House Bill No. 501, passed by the 92nd General Assembly April 29, 1937, approved by the Governor May 20, 1937, and filed in the office of the Secretary of State May 24, 1937, is a law providing for tax levies, as that phrase is used in Section 1d of Article II of the Constitution of Ohio, and went into immediate effect when approved by the Governor.

2. In Section 6212-48, *General Code*, as amended by Amended House Bill No. 501, passed by the 92nd General Assembly April 29, 1937, approved by the Governor May 20, 1937, and filed in the office of the Secretary of State May 24, 1937, where provision is made in the first paragraph that, "*** a tax is hereby levied on *** beverages containing more than 3.2 per centum but not less than 7 per centum of alcohol by weight ***", an error is apparent, and the word "more" will be deemed substituted or supplied in place of the word "less" so that this will here-

after read, “* * * a tax is hereby levied on * * * beverages containing more than 3.2 per centum but not more than 7 per centum of alcohol by weight, * * *.”

3. *The Tax Commission of Ohio is authorized and empowered to levy and collect the tax upon the sale or distribution in Ohio of beer, ale, porter, stout, and other malt beverages containing more than 3.2 per centum but not more than 7 per centum of alcohol by weight, whether in barrels or other containers (excepting in sealed bottles or cans) at the rate of \$2.50 per barrel of thirty-one gallons, as is provided by Section 6212-48, General Code, as amended in Amended House Bill No. 501, passed by the 92nd General Assembly, effective May 20, 1937.*

COLUMBUS, OHIO, June 24, 1937.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your letter of recent date, which reads as follows:

“In Section 6212-48, as it now appears in Amended House Bill No. 501 (corresponding to lines 1122-24 in the amended bill as ordered reprinted by the House Judiciary Committee April 27th), a tax of \$2.50 per barrel is levied on ‘the sale and distribution in Ohio, of beer, ale, porter, stout, and other malt beverages containing more than 3.2 per centum but not *less* than 7 per centum of alcohol by weight.’ The word ‘less,’ which we italicized, is apparently an inadvertent substitution for the word *more* in the section as heretofore effective. In Section 6064-1 of the same bill, the definition of malt liquor or malt beverage containing more than 3.2 per centum of alcohol by weight limits this to not more than 7 per centum.

Will you please give the Tax Commission your early decisions:

- (1) Whether this enactment became effective at once with the approval of the Governor or will become effective 90 days thereafter?
- (2) Whether under the Act as it stands, the Commission may continue to collect the tax upon barreled beverages containing more than 3.2 and less than 7 per cent of alcohol by weight?”

Section 6212-48, General Code, was amended in Amended House Bill No. 501, passed by the 92nd General Assembly April 29, 1937,

approved by the Governor May 20, 1937, and filed in the office of the Secretary of State May 24, 1937. Section 6212-48, as amended, reads as follows:

"For the purpose of reimbursing the state for the expense of administering the provisions of the liquor control act and to provide revenues for the support of the state, a tax is hereby levied on the sale or distribution in Ohio of beer, ale, porter, stout and other malt beverages containing more than 3.2 per centum but not *less* than 7 per centum of alcohol by weight, whether in barrels or other containers (excepting in sealed bottles or cans) at the rate of \$2.50 per barrel of 31 gallons to be paid by the purchase of stamps in the manner hereinafter provided. A stamp shall be affixed to each barrel or other container of such beer, ale, porter, stout or other malt beverages of an aggregate denomination not less than the amount of the tax upon the contents thereof. The stamp or stamps, so affixed, shall be prima facie evidence of the payment of the tax imposed by the section. Excepting as may be otherwise provided in the rules and regulations prescribed by the tax Commission of Ohio under authority of this section and the sections of the General Code herein mentioned, each manufacturer of beer, ale, porter, stout or other malt beverages in this state shall, within twenty-four hours of the time of its manufacture and prior to the delivery thereof in barrels or other containers to any person whomsoever, affix such stamps to each such barrel or other container, and cancel the stamp or stamps so affixed by writing across the face thereof, the name of such manufacturer and the date of cancellation. Excepting as may be otherwise provided in such rules and regulations, and unless such stamps have been previously affixed, such stamps shall be so affixed by the original consignee within this state on each barrel or other container of beer, ale, porter, stout or other malt beverage made outside of this state, and cancelled by writing across the face thereof the name of such consignee and the date of cancellation, within twenty-four hours after such beer, ale, porter stout or other malt beverage comes into the possession of such consignee, and prior to the delivery thereof to any other person in this state.

The stamps herein required shall be designed, procured, sold and purchased in the manner provided in Sections 6212-49e, 6212-49f, and 6212-49g of the General Code, relating to the tax imposed upon the sale of bottled beverages. The tax

commission of Ohio, the treasurer of state the auditor of state, and the county treasurer shall have and exercise with respect to the administration of the tax imposed by this section, all the powers and duties vested in or imposed upon such commission and other officers named herein, by the provisions of said sections, so far as consistent with this section, and by those of section 6212-49p of the General Code; and manufacturers and consignees of beer, ale, porter, stout or other malt beverages in barrels or other containers (excepting in sealed bottles or cans) and railroad companies, express companies and other public carriers transporting shipments of such beer, ale, porter, stout or other malt beverages, shall be subject with respect to the tax hereby imposed to the same duties and entitled to the same privileges as are required or permitted by any of said named sections of the General Code. The treasurer of state shall pay for redeemed stamps issued pursuant to this section and shall make refunds pursuant to said named sections from an appropriation to him for the purpose of defraying the expenses of administering the tax imposed by this section.

The revenue derived from the tax on the sale and distribution of beer, ale, porter, stout and other malt beverages pursuant to this section and section 6064-41a of the General Code shall be for the use of the general revenue fund of the state.

Provided, however, that the treasurer of state may from the revenue so derived create a special fund to be known as the malt beverage tax rotary fund in the amount of three thousand dollars and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund a sum sufficient to make the total of such fund at the time of each said credit amount to three thousand dollars. Said malt beverage tax rotary fund when established may be drawn upon by the treasurer of state for any redemption of stamps or for any refunds authorized to be made by him in Sections 6212-49f and 6212-49h of the General Code for malt beverages containing more than 3.2 per centum and not more than 7 per centum of alcohol by weight."

Section 1d, Article II, of the Constitution of Ohio, provides:

"Laws providing for tax levies, * * * shall go into immediate effect. * * * The laws mentioned in this section shall not be subject to the referendum."

Section 16 of Article II, of the Constitution of Ohio provides:

“ * * * Every bill passed by the general assembly shall, before it becomes law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the secretary of state. * * * ”

You inquire: “Whether this enactment (Section 6212-48, General Code, as amended) became effective at once with the approval of the Governor or will become effective 90 days thereafter?” A review of Section 6212-48, *supra*, shows that this is a tax levying section, as it contains the statement:

“For the purpose of reimbursing the state for the expenses of administering the provisions of the liquor control act, and to provide revenues for the support of the state, *a tax is hereby levied * * **” (Italics the writer’s.)

Again, in the second paragraph of Section 6212-48, *supra*, it is stated:

“* * The tax commission of Ohio, the treasurer of state, the auditor of state, and the county treasurer shall have and exercise with respect to the administration of *the tax imposed by this section, * **” (Italics the writer’s.)

The third paragraph of this same section provides:

“The revenue derived *from the tax* on the sale and distribution of beer, ale, porter, stout and other malt beverages pursuant to this section * * shall be for the use of the general revenue fund of the state.” (Italics the writer’s.)

These extracts from Section 6212-48, *supra*, show that it clearly comes under the phrase, “laws providing for tax levies”, as that term is used in Section 1d, of Article II, *supra*, and that it is one of the laws which shall go into immediate effect when signed by the Governor, as is provided by Section 16 of Article II of the Constitution of Ohio.

In Opinions of the Attorney General for 1935, Vol. I, page 705, my immediate predecessor held:

“Sections 6064-1 * * and 6212-84, General Code * * approved by the Governor June 5, 1935, are laws providing

for tax levies as the phrase is used in Section 1d of Article II of the Constitution, and went into effect when approved by the Governor."

Section 6212-48, as contained in this enactment, was substantially the same as it exists under this new amendment.

It is therefore my opinion, in answer to your first question, that Section 6212-48, General Code, as contained in Amended House Bill No. 501, passed by the 92nd General Assembly, April 29, 1937, approved by the Governor May 20, 1937, and filed in the office of the Secretary of State on May 24, 1937, is a law providing for tax levies, as that phrase is used in Section 1d of Article II of the Constitution of Ohio, and went into immediate effect when approved by the Governor.

Coming now to a discussion of your second question, as to whether or not "the Commission may continue to collect the tax upon barreled malt beverages containing more than 3.2 and less than 7 per cent of alcohol by weight," under the authority of Section 6212-48, General Code, as amended by Amended House Bill No. 501, it will necessarily require an interpretation of the phrase, "and other malt beverages containing more than 3.2 per centum but *not less than* 7 per centum of alcohol by weight," as this phrase is used in Section 6212-48 as amended.

Section 6212-48 as enacted in Amended Substitute Senate Bill No. 2, passed by the 91st General Assembly May 23, 1935, approved by the Governor June 5, 1935, and filed in the office of the Secretary of State June 6, 1935, contained the phrase "* * a tax is hereby levied on the sale or distribution in Ohio of beer, ale, porter, stout and other malt beverages containing more than 3.2 percentum *but not more than* 7 percentum of alcohol by weight * * at the rate of \$2.50 per barrel * *."

When Section 6212-48, was again amended by House Bill No. 583, passed by the 91st General Assembly December 19, 1935, approved by the Governor December 23, 1935, and filed in the office of the Secretary of State December 24, 1935, it contained the phrase "* * other malt beverages containing more than 3.2 percentum but *not more than* 7 percentum of alcohol by weight. * *"

Consequently, there was no change in this phrase, as contained in Section 6212-48, until Amended House Bill No. 501 was passed by the 92nd General Assembly, when it was changed to read "but *not less than* 7 percentum of alcohol by weight."

It seems to me that it is clearly apparent that an error was made when Section 6212-48 was enacted by the General Assembly in Amended House Bill No. 501, in so far as the word "less" was used in place of the word "more" as heretofore stated. This is an error which the scrivener or printer could easily have made, and it is impossible to

reconcile the wording of the statute as it now stands, except to change the word "less" to "more."

It is a well know rule of statutory construction that mistakes will not be permitted to defeat the object of legislation. Lewis, in Sutherland on Statutory Construction, at Section 410, says :

"Legislative enactments are not any more than any other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the legislature can be collected from the whole statute; * * where one word has been erroneously used for another * * and the context affords the means of correction, the proper word will be deemed substituted or supplied."

36 Cyc., page 1126, says :

"Mere verbal inaccuracies or clerical errors in statutes in the use of words * * will be corrected by the court whenever necessary to carry out the intention of the legislature as gathered from the entire act."

In the case of *State, ex rel. vs. Archibald, Sheriff*, 52 O.S., page 1, (9), the court said :

"That courts have power to correct errors and mistakes in statutes, cannot be doubted; but such errors and mistakes must be manifest beyond doubt, either on the face of the act, or when read in connection with other statutes in *pari materia*.

When it thus appears beyond doubt that a statute, when read literally as printed, is impossible of execution, or will defeat the plain object of its enactment, or is senseless, or leads to absurd results or consequences, a court is authorized to regard such defects as the result of error or mistake, and to put such construction upon the statute as will correct the error or mistake, by carrying out the clear purpose and manifest intention of the legislature."

In the case of *Stanton vs. Realty Company*, 117 O. S., 345, (349), the court said :

"It is a general rule of interpretation of statutes that the intention of the legislature must be determined from the language employed, and, where the meaning is clear, the courts

have no right to insert words not used, or omit words used, in order to arrive at a supposed legislative intent, or where it is possible to carry the provisions of the statute into effect according to its letter.

In this particular instance it is quite clear from the history of the legislation that there was an erroneous use of the word 'of' when 'or' was the word which was clearly intended. It is impossible to execute the statute according to its strict letter, because the use of the word 'of' renders it obscure and meaningless. *It is a well settled rule that courts will not permit a statute to be defeated on account of a mistake or error, where the intention of the legislature can be collected from the whole statute, or where one word has been erroneously used for another, and where the context affords means of correction. The strict letter of a statute must yield to the obvious intent. * ** The word 'of' was by interpretation changed to 'or.'" (Italics the writer's.)

Opinions of the Attorney General for 1918, Vol. I, page 186, holds as follows:

"Where one word has been wrongfully used for another and the context affords the means of construction, the proper word will be deemed substituted or supplied."

In the case of *Ex parte Hedley*, 31 Calif., 108, the last branch of the syllabus reads:

"Where there is an evident mistake in the use of a word in a section of a statute, and it is apparent what was the word intended, it will be read as though the intended word was inserted."

In the case of *Hancy vs. State*, 34 Ark., 263, the second branch of the syllabus reads:

"Where it is obvious that the legislature did not intend to use a particular word written in a statute, and it is further apparent what word they did intend, *the courts will correct the mistake by substituting the word intended for the one used.*" (Italics the writer's.)

Section 6212-48, General Code, always provided, since first enacted, for the levying of a tax on the sale or distribution of beer, ale, porter,

stout and other malt beverages containing more than 3.2 percentum *but not more than 7* percentum of alcohol by weight, whether in barrels or other containers (excepting in sealed bottles or cans), at the rate of \$2.50 per barrel of thirty-one gallons. There is no particular reason for the change in the context of this taxing statute now except what was occasioned by an apparent mistake of the scrivener or printer.

A review of Amended House Bill No. 501 further shows what the legislature intended Section 6212-48 to cover. A definition of the term "malt liquor" is set forth in Section 606+1 of the Act, and reads as follows:

"'Malt liquor' or malt beverage includes all brewed or fermented malt products containing more than 3.2 percentum of alcohol by weight, and *not more than 7* percentum of alcohol by weight." (Italics the writer's.)

The term "malt beverages" is specifically referred to as one of the subjects on which the tax levied in Section 6212-48, as amended, is applicable. Again, it should be noted that the last paragraph of Section 6212-48, as amended, makes a further reference to the term "malt beverages", and describes them as "containing more than 3.2 percentum and *not more than 7* percentum of alcohol by weight."

A further reference to Section 6212-48a of the Liquor Control Act (effective December 23, 1935), of which Act Section 6212-48 has always been a part, shows the following:

"Whoever has in his possession a barrel or other container (excepting a sealed bottle or can) of bear, ale, porter, stout or other malt beverage containing more than 3.2 percentum but *not more than 7* percentum of alcohol by weight, not bearing the stamps required to be affixed * * shall be fined * *."

A further reference to Section 6212-48g of the Liquor Control Act (effective September 5, 1935) shows that it provides:

"Whenever the commission or any of its deputies * * shall discover any beer, ale, porter, stout or other malt beverage containing more than 3.2 percentum but not more than 7 percentum of ale by weight subject to tax *as provided by Section 6212-48 of the General Code*, and on which the tax has not been paid * * it is * * empowered * * to seize * *." (Italics the writers.)

It seems to me that this review of the legislative enactment of Section 6212-48 and other related sections, clearly establishes the fact that the use of the word "less" was an error or mistake, and that it was the intention of the legislature to use the word "more;" as can be easily ascertained from a reading of the context of previous enactments of this same section, as well as associated sections in the act. Accordingly, the word "more" will be deemed substituted or supplied in place of the word "less" so that the phrase will read, "more than 3.2 percentum but not *more* than 7 percentum of alcohol by weight", as contained in the first paragraph of Section 6212-48, General Code, as amended.

Therefore, in specific answer to your second question it is my opinion that, the Commission may continue to collect the tax upon the sale or distribution in Ohio, of beer, ale, porter, stout and other malt beverages containing more than 3.2 percentum but not more than 7 percentum of alcohol by weight, whether in barrels or other containers (except in sealed bottles or cans) at the rate of \$2.50 per barrel of thirty-one gallons, as provided in Section 6212-48 of the General Code, as amended, and the word "more" will be deemed substituted or supplied for the word "less" as contained therein.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

778.

BOARD OF EDUCATION—EXCHANGE TEACHERS—BOARD
HAS NO AUTHORITY.

SYLLABUS:

A board of education of a school district is without authority to assign a teacher to another school district inside or outside of the state, in exchange for the services of a teacher to be assigned and sent into said school district by the board of education from another school district and compensation to be paid by the board of education to the teacher with whom the contract for teaching exists.

COLUMBUS, OHIO, June 24, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.
GENTLEMEN:

This will acknowledge receipt of your recent communication which reads as follows: