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NOTES

CONFISCATION OF AUTOMOBILES FOR THE ILLEGAL TRANSPORTATION OF INTOXICATING LIQUORS

There are two federal statutes under which automobiles may be confiscated. One is the revenue statute[1] which provides that all vehicles for the removal, deposit and concealment of goods upon which there is a revenue tax with intent to defraud the government of such tax shall be confiscated. Under this statute the proceeding is *in rem* and the interest of the innocent owner and lienholder forfeited,[2] with the one exception where the property has been put to this use by a trespasser or thief.[3] The other federal statute is

[1] U. S. Rev. Stat., sec. 3450, Compiled Stat., sec. 6352.
[2] *Goldsmith-Grant Co. v. U. S.*, 254 U. S. 505 (1921); *Dobbins Distillery v. U. S.*, 96 U. S. 395 (1877); *U. S. v. One Ford Automobile* (N. E. D. Tenn. 1924), 1 F. (2d) 654.
[3] *U. S. v. One Ford Coupe* (S. D. Idaho 1927), 21 F. (2d) 639; *U. S. v. One Buick Roadster* (D. Mont. 1922), 280 F. 517.

the prohibition statute[4] which provides for the confiscation of all vehicles used in the illegal transportation of intoxicating liquors. Under the latter statute, only the wrongdoers interest is confiscated, and the interest of the innocent owner and lienor is protected.[5]

The purpose of the revenue statute was to raise revenue for the government. It is difficult to understand why this statute is enforceable in regard to liquor since the enactment of the prohibition statute which was specially designed to enforce prohibition. There is an irreconcilable conflict in the decisions of the federal courts on this point. Some hold that the revenue statute is enforced so long as it does not conflict with the prohibition statute.[6] Others hold that the statutes do not conflict, and the government has the election to proceed under either for the confiscation of automobiles seized with liquor.[7] Still others hold that the revenue statute does not apply, and that all cases involving the transportation of liquor come under the prohibition act.[8] This appears to be the correct view for several reasons—

1. It seems unreasonable that the court should extend the meaning of the statute so as to impose a tax on goods which are forbidden

[4] National Prohibition Act, tit. 2, sec. 26 (Comp. Stat., sec. 10138½mm).

[5] *U. S. v. One Cadillac Town Car* (C. A. D. C. 1927), 18 F. (2d) 1005; *U. S. v. Sylvester* (D. Conn. 1921), 273 F. 253.

[6] Willis-Campbell Act (Comp. Stat., sec. 10138 4/5 c); *Payne v. U. S.* (C. C. A. 5th. 1922), 279 F. 112, held that the revenue act not repealed but is suspended only where the facts of a particular case bring the matter under the Prohibition Act. Accord, *U. S. v. One Haynes Automobile* (C. C. A. 5th. 1921), 274 F. 926; *McDowell v. U. S.* (C. C. A. 9th. 1923) 286 F. 521.

[7] *U. S. v. One Ford Coupe,* 272 U. S. 321 (1926), held that revenue statute was not repealed by the Prohibition Act. The two statutes cover different grounds and the government has the election to proceed under either. *Port Gardner Investment Co. v. U. S.,* 272 U. S. 564 (1926), held that an arrest and conviction under one statute is a bar to proceedings under the other. *U. S. v. One Essex* (N. D. Ga. 1920), 266 F. 138; *The Jugoslavia* (E. D. La. 1927), 21 F. (2d) 99, where a boat loaded with liquor was found concealed in willows on bank of Mississippi River, held no election for the Government but proceedings must be under the Revenue Statute; *U. S. v. Commercial Credit Co.* (C. C. A. 4th, 1927), 20 F. (2d) 519; *U. S. v. One Ford* (D. Neb. 1927) 21 F. (2d) 628.

[8] *One Ford Touring Car v. U. S.* (C. C. A. 8th. 1922), 284 F. 823, held that the Revenue Statute was not applicable to the removal or concealment of liquor manufactured since the enactment of the Prohibition Act; *U S. v. One Bay State Roadster* (D. Conn. 1924), 2 F. (2d.) 616; *U. S. v. One Chevrolet Automobile* (M. D. Ala. 1927), 21 F. (2d.) 477, held that the Revenue Statute solely intended as a revenue enforcement measure and cannot be used relative to confiscation of vehicles used in unlawful transportation of liquor; *U. S. v. One Dodge Sedan* (D. C. Utah, 1927), 21 F. (2d.) 971; *U. S. v. One Buick Sedan* (S. D. Calif. 1924), 1 F. (2d.) 997, held that Revenue Statute not applicable to mere illegal transportation of liquor.

by the constitution of the United States.[9] There is no way possible to pay this tax, and if there were, payment would subject the payer to indictment for illegal possession.[10]

2. To prove an intent to defraud the government of this tax in the case of a person who has been transporting would be difficult. Clearly the sole intent is to evade the prohibition law. Proof of such intent to defraud the government is necessary for confiscation under the revenue statute.[11]

The state statutes may be divided into two classes, those which provide for the forfeiture of only the wrongdoer's interest in the automobile, protecting the interest of the innocent owner;[12] and those which confiscate the car as a public nuisance and inimicable to public welfare, depriving the innocent owner of his property rights.[13]

The North Carolina statute[14] provides for the confiscation of the right, title, and interest of the defendant in the property used for the illegal transportation of intoxicating liquors. This is a proceeding in personam and the arrest and conviction of a wrongdoer is required before the car can be confiscated.[15] The innocent owner as well as lienor and mortgagee can reclaim the automobile.[16] It is not necessary for the mortgagee that his mortgage be recorded for the state does not occupy the position of a creditor. As between mortgagors and mortgagees, the latter has the legal title even though the mortgage has not been recorded.[17]

W. A. DEVIN, JR.

IMPLIED WARRANTIES IN SALES OF GOODS

In a recent case it was held that in the sale of law books under a trade name, "Encyclopedia of Evidence," there was an implied

[9] U. S. Const., Amend 18; *Lewis v. U. S.* (C. C. A. 6th. 1922), 280 F. 5, held taxes on liquor no longer payable and hence there can be no intent to defraud in not paying them; *One Ford v. U. S.* (C. C. A. 8th. 1922), 284 F. 823; *U. S. v. One Chevrolet* (E. D. Mo. 1925), 9 F. (2d.) 85, held there is no tax, as distinguished from a penalty, on manufacture of illicit liquor.

[10] *U. S. v. Milstone* (Ct. App. D. C. 1925), 6 F. (2d.) 481, held no tax can be paid on moonshine liquor, for issuance of stamps forbidden.

[11] *U. S. v. Two Mack Trucks* (E. D. Pa. 1927), 20 F. (2d.) 188.

[12] Colorado, Fla., Idaho, Me., Miss., Mont., N. C., Nebr., Okla., S. C., Utah, W. Va.

[13] *Van Oaten v. Kansas,* 272 U. S. 465 (1926); *FitzWilliam v. Commonwealth,* 154 N. E. 570 (Mass. 1927).

[14] C. S., sec. 3403.

[15] *Skinner v. Thomas,* 171 N. C. 98, 87 S. E. 976 (1916).

[16] *State v. Johnson,* 181 N. C. 638, 101 S. E. 433 (1921).

[17] *South Ga. Motor Co. v. Jackson,* 184 N. C. 328, 114 S. E. 478 (1922).

warranty that they were specifically as described and of good workmanship according to the description. As to their fitness for the purpose intended, it was held that there was no implied warranty that they were suitable for the purpose of practicing law, though the seller knew that such was the buyer's purpose when he purchased the books.[1]

The important element is the buyer's reliance upon the seller's judgment.[2] If he buys a "known, described, and definite" article, the contract is filled by delivery of the described article,[3] though it was intended for a special purpose.[4] Where he orders by specifications,[5] by special name,[6] by definite description,[7] or a special thing of his own selection,[8] the buyer relies on his own judgment; hence, no warranty of fitness for a particular purpose is implied, though the seller knew of the particular purpose.[9]

Recent cases say that when the article is "well known and defined in current trade,"[10] "selected by the buyer,"[11] "specific and designated,"[12] or "known and described,"[13] the sale of the article even

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[1] *L. D. Powell v. Cowart,* 139 S. E. 585 (Ga. 1927); Supported on both points by *F. & L. Mfg. Co. v. Kitteredge & Co.,* 242 Ill. 88, 89 N. E. 723 (1909). Implied warranties rest logically on one of two bases:

(1) A buyer without opportunity to examine should be protected [unless opportunity for inspection, *caveat emptor* does not apply—*Hood v. Bloch Bros.,* 29 W. Va. 244] against those things which an examination would reveal [*W. R. Colchord Machine Co. v. Loy-Wilson Foundry and Machine Co.,* 131 Mo. App. 540, 110 S. W. 630 (1908)], but not when he relies upon his own judgment; [*Hunter v. Waterloo Gasoline Engine Co.,* 237 S. W. 819 (1922)];

(2) A buyer naturally relying on the representation or superior knowledge or skill of a seller should be protected to the extent of this natural reliance [*International Harvester Co. v. Porter,* 160 Ky. 509, 169 S. W. 993 (1914)].

Implied warranties are exceptions to the general rule, *caveat emptor.*

[2] *Farrell v. Manhatten Market Co.,* 198 Mass. 271, 84 N. E. 481 (1908); *Hunter v. Waterloo Engine Co.,* 237 S. W. 819 (1922).

[3] *Ideal Heating Co. v. Kramer,* 127 Iowa, 137, 102 N. W. 840 (1905).

[4] 1 Parsons, *Contracts,* 587.

[5] *Gill & Co. v. Nat. Gaslight Co.,* 172 Mich. 295, 137 N. W. 690 (1912); *Motor Works v. Vollars,* 83 Was. 680, 145 p. 997 (1915).

[6] *City of Savannah v. U. S. Fuel Corp.,* 116 S. E. 28 (Ga. 1922).

[7] *Century Electric Co. v. Detroit Copper Co.,* 264 F. 49 (1920); *Bowker Fertilizer Co. v. Wallingford,* 111 Atl. 329 (Me. 1920). Also, this case is to the effect that mere knowledge of the particular purpose by the seller is not enough to bind him to a warranty of fitness.

[8] *Port Carbon Iron Co. v. Groves,* 68 Pa. (18 P. F. Smith) 149 (1871); *McDonald v. Acme Lumber Co.,* 216 Mich. 601, 185 N. W. 665 (1922).

[9] *Davis Calyx Drill Co. v. Mallory,* 137 F. 332, 69 C. C. A. 662 (1905). Additional citations: See 17 Dec. Dig. Sales, section 273 (5).

[10] *U. S. Cast Iron Pipe & Foundry Co. v. Ellis,* 201 P. 900 (Wash. 1921); *Ill. Zinc Co. v. Semple,* 123 Kan. 368, 255 p. 78 (1927).

[11] *Hunter v. Gasoline Engine Co., supra,* n. 2.

[12] *Am. Soda Fountain Co. v. Palace Drug Store,* 245 S. W. 1032 (Tex. 1922).

[13] *Clark Lumber Co. v. Kelly,* 117 Kan. 285, 231 p. 71 (1925).

with knowledge of the use intended carries no implied warranty, since the express qualification of quality and characteristics shows the buyer's reliance upon his own judgment. The point has not been passed upon in North Carolina.[14]

Under the Uniform Sales Act,[15] too, the buyer's justifiable reliance on the seller's skill and judgment is alone important.[16] This is a question of fact in each case, and proof of inspection is, at least, evidence against an implied warranty.[17] When goods are sold under a trade name, there is no implied warranty that they are suitable for the purpose intended,[18] for then a specific article is bought, and whether under a trade name or not,[19] this warranty does not arise.

Where the *particular* purpose is *coextensive* with the *general* purpose of an article, there is an implied warranty of fitness for the purpose,[20] by reason of the fact that a lack of fitness for its general

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[14] *Swift & Co. v. Etheredge,* 190 N. C. 162, 129 S. E. 453 (1926). Where the seller knows the purpose intended, if the very article contracted for is received, the buyer can not complain of its worthlessness,—even if use alone will reveal the inferior quality. *Threshing Mach. Co. v. McClamroch,* 152 N. C. 405, 67 S. E. 991 (1910). Where fertilizer was sold under name and analysis (printed on the sack as required by statute), there was an implied warranty that it was merchantable and fit for use as the name represented it to be. *Swift & Co. v. Aydlett,* 192 N. C. 330, 153 S. E. 141 (1926).

[15] The Uniform Sales Act, which has been adopted by practically all of the leading commercial states, copies the English Sales of Goods Act, which in turn merely codified the English common law. Since the common law held that where "a known, described or definite article" was purchased, there was no implied warranty of fitness for a particular purpose, the presumption is that sect. 15 (4) (below) does not change the law on this point simply by using "patent or trade name" instead. Sales Act, Section 15: There is no implied warranty or condition as to quality or fitness for any particular purpose, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose.

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(4) In case of a contract to sell or a sale of a specified article under its patent or trade name, there is no implied warranty as to its fitness for any particular purpose.

Both of these subsections are found in the English Sales of Goods Act, Section 14.

[16] *Brought v. Redewell Music Co.,* 17 Ariz. 393, 153 P. 285 (1915).

[17] Williston, *Sales,* Vol. 1, Section 325.

[18] *Montgomery Foundry & Fittings Co. v. Hall Planetary Thread Milling Mach. Co.,* 282 Pa. 212, 127 Atl. 633 (1925).

[19] *Sampson v. Frank F. Pels Co.,* 192 N. Y. S. 538 (1922), interpreting Personal Property Laws (Sales of Goods Act) Section 96, subd. 1.

[20] Flour must make bread, *Kaull v. Blacker,* 107 Kan. 578, 193 P. 182 (1920). An automobile must be capable of use as a vehicle, *Harvey v. Buick Motor Co.,* 177 S. W. 774 (Mo. App. 1915). A potato digger must dig potatoes, *Hallock v. Cutter,* 71 Ill. App. 471.

purpose would make it unmerchantable and unsalable. However, there are a number of cases holding that fitness for a particular purpose may be impliedly warranted, where the particular purpose is *narrower* than the general purpose;[21] these cases, also, turn upon the justifiable reliance upon the seller. Yet, if the purchase is by trade name, even though the particular purpose is known to the seller, generally there is no implied warranty as to the *particular* purpose.[22]

With regard to the warranty of description and good workmanship the case also represents the apparent weight of authority, even under the Sales Act.[23] Goods must be of the specified kind and quality,[24] must answer the specific description and be of merchantable quality.[25] The article must conform to the description in kind,[26] as made by the seller,[27] under an implied warranty to this effect.[28] The case is even stronger, if there is no inspection.[29] In North Carolina goods sold by name carry an implied warranty that they are merchantable, and salable, under that name, whether the defect is hidden or discoverable.[30]

D. S. GARDNER.

INHERITANCE TAXATION—TRANSFERS IN CONTEMPLATION OF DEATH AND TRANSFERS WHOSE POSSESSION AND ENJOYMENT DO NOT TAKE EFFECT UNTIL AFTER DEATH

In order to prevent evasions of the inheritance tax laws the federal government and many of the states have passed laws taxing transfers of property *inter vivos*.[1] The general theory behind these

[21] *Glass Co. v. Pot Co.*, 97 Md. 429, 55 Atl. 447 (1903); *Heating Co. v. Kramer*, 127 Iowa 137, 102 N. W. 840 (1905).

[22] *Storage Co. v. Woods & Zent*, 99 Mich. 269, 58 N. W. 320 (1894); *Ehrsam v. Brown*, 76 Kan. 206, 91 P. 179 (1907); *Grand Ave. Hotel Co. v. Wharton*, 79 Fed. 43, 24 C. C. A. 441 (1897); *Quemahoning Coal Co. v. Sanitary etc. Co.*, 88 N. J. L. 174, 95 Atl. 986 (1915); *Boston Consol. Gas Co. v. Folsom*, 237 Mass. 565, 130 N. E. 197 (1921). *Contra: Blackmore v. Fairbanks*, 79 Iowa 282, 44 N. W. 548 (1890); *Kansas City Bolt Co. v. Rodd*, 220 Fed. 750, 136 C. C. A. 356 (1915).

[23] Sales Act, sec. 15, subd. 2: where goods are bought from the description of the seller there is an implied warranty of merchantable quality.

[24] *Norman Lumber Co. v. Keystone Mfg. Co.*, 100 W. Va. 515, 131 S. E. 12 (1926).

[25] *El Paso & S. W. E. Co. v. Eichel & Weichel*, 130 S. W. 922 (Tex. 1910).

[26] *Baer & Co. v. Cooperage & Box Mfg. Co.*, 159 Ala. 491, 49 So. 92 (1909).

[27] *J. H. Stone Corp. v. Princeton Ice & Storage Co.*, 212 Ky. 404, 279 S. W. 226 (1926).

[28] *Rauth v. Southwest Warehouse Co.*, 158 Cal. 54, 109 P. 839 (1910).

[29] *Wilson v. Wiggin*, 73 W. Va. 560, 81 S. E. 842 (1914).

[30] *Lexington Gro. Co. v. Vernay*, 167 N. C. 427, 83 S. E. 567 (1914).

[1] 37 Cyc. 1567; 1926 Revenue Act.

statutes is that the transfers which they tax are either in contemplation of death,[2] or are made so that the possession and enjoyment of the property do not pass until after death,[3] and so are testamentary in their nature.[4]

1. *Transfers in contemplation of death.*[5] In determining what transfers are in contemplation of death it is necessary to consider the following: the motive behind the transfer, the age of the transferor, his mental and physical condition and the proportion of the estate transferred.[6]

Whether a transfer is in contemplation of death is generally considered to be a question of fact to be determined by all the circumstances of the individual case.[7] The federal courts seem to follow the same rule as the state courts, pointing out that the expectation of death need not be an expectation of immediate death, nor on the other hand is it that expectation of death which every man has that death will ensue in the future.[8] Apparently the expectation of death meant by the statute is about the same as the motive which leads a man to draw his will disposing of his property after his death.[9]

2. *Transfers the possession and enjoyment of which do not pass until after death.* The inheritance tax laws have lead to the invention of a great many subtle devices attempting to evade them. On the whole the courts seem to have taken a rather rational view of such devices and do not hesitate to go back of the form of the transfer

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[2] 40 A. L. R. 864.
[3] 7 A. L. R. 1028; 21 A. L. R. 1335; 41 A. L. R. 998; 43 A. L. R. 1229.
[4] *Re Reynolds* 169 Cal. 600, 147 Pac. 268 (1915); *Re Minor,* 180 Pac. 813 (Calif., 1919); *Cole v. Nickle,* 177 Pac. 409 (Nev., 1919).
[5] *People v. Dank,* 289 Ill. 542, 546, 124 N. E. 625 (1919).
[6] *Rea v. Heiner,* 6 Fed. (2nd.) 321 (1927) Transfer made by woman 76 years old in good health, for purpose of bringing daughter home, not made in contemplation of death; *Tipps v. Bass,* 21 Fed. (2nd.) 460 (1927) Transfer of estate by woman of 68, in good health, to escape management of the estate, not in contemplation of death; *Smart et al v. U. S.* 21 Fed. (2nd.) 188 (1927). Transfer of real estate, by woman of 84, to shift burden of making extensive repairs, not in contemplation of death; *In re Pauson,* 86 Cal. 358, 199 Pac. 331 (1924). Transfer of large estate by man of 78 to a corporation whose stock was given to his sons, held to be a transfer in contemplation of death; *Schwab v. Doyle,* 269 Fed. 321 (1920). Transfer of large portion of estate by woman of 77, who suffered from serious physical disorders, held to be in contemplation of death; *State v. Stevens,* 188 N. W. 484 (Wis. 1921). The amount of the gift compared to the size of the estate is a material factor in determining the nature of the transfer; *Gaither v. Miles,* 268 Fed. 692 (1920). Gift of insurance policy amounting to 4% of the estate not large enough to put burden of showing transfer was not in contemplation of death on the plaintiff.
[7] 49 A. L. R. 864.
[8] *Tipps v. Bass, Rea v. Heiner, Smart v. U. S.,* all note 6 *supra.*
[9] 7 A. L. R. 1229.

to get at its substance. Courts can and will go outside of the instrument itself to get at the motive of the grantor and it has been held in many jurisdictions that a transfer is taxable even though the motive of contemplation of death does not appear on the face of the instrument itself.[10]

Power of revocation. There are two views on the effect of a power of revocation on the taxability of the transfer. Some courts hold that the mere reservation of a power of revocation by the grantor will not stamp the transfer as being one the possession and use of which is to take effect after death.[11] Others hold that the gift cannot be absolute and revocable at the same time, and so a revocable gift is taxable.[12] The first view seems to be the most logical, for it is true that a power of revocation is not tantamount to a property right, and if the grantor dies without having exercised the power nothing remains to be done to complete the transfer. But it is submitted that the second view is the better from a practical standpoint. For example, the man who puts his large estate in trust for his heirs but reserves a power of revocation really retains control of the property. His wishes will be obeyed so long as he has the power to revoke the gift. The second rule gets behind the form of the transfer and taxes the property on the death of the grantor.

[10] *Kelly v. Woolsey,* 177 Cal. 325, 170 Pac. 837 (1918). In determining whether property is subject to tax, the inquiry is not confined to the terms of the written instrument; parol evidence of real agreement is admissible; *People v. Shutts,* 305 Ill. 539, 137 N. E. 418 (1922). Conveyance in escrow subject to inheritance tax; *Farkas v. Smith,* 147 Ga. 503, 94 S. E. 1016 (1918). Devise to a trustee who was to distribute the estate was within the meaning of the statute; *Harber v. Welchell,* 156 Ga. 601, 119 S. E. 695 (1923); *State & City Bank & Trust Co. v. Doughton,* 188 N. C. 762, 125 S. E. 621 (1924).

[11] *People v. Northern Trust Co.,* 289 Ill. 475, 124 N. E. 662 (1919). "No deed is testamentary in character, or is to be held to take effect after death, by reason alone of the clause of revocation"; *State Street Trust Co. v. Stevens,* 209 Mass. 373, 95 N. E. 851 (1911). "Test of whether transfer exempt from inheritance tax does not depend on whether power to revoke was reserved"; *In re Miller's Estate,* 236 N. Y. 290, 140 N. E. 701 (1923). Reservation of power to revoke by grantor of trust deeds held not to make transfer taxable.

[12] *State and City Bank & Trust Co.,* note 10 *supra.* Power to revoke, alter, or otherwise modify or terminate; the right to control action of trustees and vote stock, prevents the gift from being absolute and is taxable; *In re Danna Co.,* 164 App. Div. 45, 149 N. Y. Sup. 451 (1914). "Where donor transferred one half interest in stock to donee, reserving income and power to revoke, the transfer was taxable"; *Farmer's Loan & Trust Co. v. Bowers,* 15 Fed. (2nd.) 706 (1926). "Trusts under instrument retaining in founder complete power of disposition, not taking effect till his death, subject to tax"; *In re Fulham,* 96 Vt. 308, 119 Atl. 433 (1923). "Property transferred in trust, but subject to recall during life of donor, held liable to transfer tax"; *Dubois's Appeal,* 121 Pa. 268, 15 Atl. 641 (1888). A conveyance enabling donor to incur liabilities to full value of estate, "is made and intended to take effect after death of grantor."