

pears that the laws relating to the status of surety companies and the workmen's compensation have been complied with. Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5466.

USE TAX—SALE OF AUTOMOBILE IN FOREIGN STATE TO AVOID SUCH TAX—WHERE MADE TO THIRD PERSON WHO TRANSFERS TO RESIDENT OF OHIO TAX APPLIES.

SYLLABUS:

Where "A", an automobile dealer in Indiana, sells or agrees to sell in that state an automobile to "B", a resident of Ohio, and "A" thereafter, for the purpose of enabling "B" to evade the payment of the Use Tax provided for by section 5546-26, General Code, executes a bill of sale of the automobile to "C", a resident of the state of Indiana not engaged in the business of selling automobiles, under an agreement or understanding with "C" that he shall execute a bill of sale of the automobile to "B", which is accordingly done, and where "B" then brings the automobile from Indiana into Ohio and presents a sworn statement of ownership to the clerk of courts of the county in which he resides, held:

1. *The use of the automobile in Ohio by "B" is subject to the tax provided for in section 5546-26 of the General Code.*

2. *If said tax is not paid by the seller and "B" does not file with the Tax Commission the return provided for in section 5546-29, General Code, "B" would be subject to the assessment and penalty provided for in section 5546-37, General Code.*

3. *While "C" would not be a bona fide owner of the automobile, "B" could not be prosecuted for filing a sworn statement of ownership naming "C" as the bona fide owner.*

4. *If "B" fails to file with the Tax Commission, the return provided for in section 5546-29, General Code, criminal proceedings could be instituted against him under the provisions of section 5546-43, General Code.*

COLUMBUS, OHIO, May 5, 1936.

Tax Commission of Ohio, Columbus, Ohio.

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

"It has come to the attention of the Tax Commission that there has arisen in some border counties a practice of evading the use tax which is levied by Section 5546-26 of the General Code. Exemption No. 3 of that section exempts from the application of the tax property purchased from a seller who is not engaged in the business of selling tangible personal property.

The manner of evading the use tax is best described by example:

A, an automobile dealer in Indiana, sends representatives into the State of Ohio to solicit business. B, who is a resident of Ohio, after being interviewed by A's representative, goes to A's place of business and selects a car and A prepares evidence of title to the car and makes C, who is not a party to the transaction but who is a resident of Indiana, appear as grantee. In such cases there is an agreement between A and C and the latter immediately transfers evidence of title to B, the Ohio resident. B then brings the automobile into Ohio and presents a sworn statement of ownership to the clerk of courts of the county in which he resides. He then refuses to pay the Ohio use tax contending that he purchased the car from C who was not engaged in the business of selling automobiles and that the transaction is, therefore, not subject to the use tax.

In view of the fact that this is a growing practice, we should like to have your immediate informal opinion on the following questions:

1. Is the use of the automobile in Ohio by B subject to the use tax?
2. Is B subject to the penalty provided in Section 5546-36 of the General Code for failing to have filed a return showing the use tax due?
3. Is C, the Indiana resident, a bona fide owner of the automobile? If not, may B be prosecuted for filing a false sworn statement of ownership, or a sworn statement of ownership containing a false statement?

In some cases C may be a fictitious person and in other cases

C may be a bona fide resident of Indiana but he may not know of the transaction between A and B although his name will be used without his knowledge or consent.

Under these circumstances, may B be prosecuted for filing a false sworn statement of ownership and for failure to pay the use tax?"

Section 5546-26 of the General Code, under which the so-called Use Tax is levied, reads in part as follows :

"For the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of reimbursing the state for the expense of administering this act, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property purchased during the period beginning on the first day of January, 1936, and ending on the 31st day of March, 1937, for storage, use, or other consumption in this state, with the exceptions hereinafter mentioned and described, as follows :

* * * * * * * * *

Each consumer, storing, using, or otherwise consuming in this state tangible personal property purchased for such purpose or purposes, shall be liable for the tax imposed by this act, and such liability shall not be extinguished until the tax has been paid to this state; provided, however, that a prepaid tax receipt or receipts, given to the consumer in accordance with the provisions of section 4, or the tax having been prepaid in accordance with the provisions of section 7 of this act, shall relieve the consumer from further liability for the tax to which such receipt or receipts may refer.

The tax hereby levied does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances :

* * * * * * * * *

3. Property purchased from a seller who is not engaged in the business of selling tangible personal property."

Under the exception noted in the above section, the use of an automobile purchased by "B" from "C" would not be subject to the tax if "C" were the bona fide holder and the actual seller thereof.

However, from the facts stated, it is at once apparent that the scheme of operation described in your communication obviously was designed for the sole purpose of circumventing the law. It is clearly a deception deliberately practiced with a view to avoid the payment of the tax levied on the automobile sold to "B". In other words, the entire transaction is tainted with fraud. With reference to the operation and effect of fraud upon the validity of a transaction, it is stated in Ohio Jurisprudence, Volume 19, page 330:

"The genius of the law opposes itself to all fraud, and the most solemn judicial proceedings, when tinctured with it, are vitiated. Fraud taints every transaction into which it enters, and vitiates contracts which but for it would not have been entered into. There is no exception to this rule."

The above text is supported by the following cases:

Piatt v. St. Clair, 6 O. 227;
Westfall v. Dungan, 14 O. S. 276;
First Nat. Bank v. F. C. Trebein Co., 59 O. S. 316;
Spencer v. King, 3 O. N. P. 270, 5 O. D. N. P. 113.

In view of the above, it would therefore appear that the purported sale from "A" to "B" being conceived in fraud, is invalid and therefore should be entirely disregarded. So treated, "C" instead of being "B" 's grantor, becomes the agent of "A", who must be regarded as the actual seller. Specific provision is made in the statute clearly authorizing the Tax Commission to so regard the entire transaction by the terms of section 5546-25, which reads in part as follows:

"As used in this act:

'Seller' means the person from whom a purchase is made and includes every person engaged in this state or elsewhere in the business of selling tangible personal property for storage, use, or other consumption in this state; and when, in the opinion of the commission, it is necessary for the efficient administration of this act to regard any salesman, representative, peddler, or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom he operates, or from whom he obtains tangible personal property, sold by him for storage, use or other consumption in this state, irrespective of whether or not he is making such sales on his own behalf, or on behalf of such dealer, distributor, supervisor, or employer, the commission may

so regard him and may regard such dealer, distributor, supervisor, or employer as the 'seller' for the purpose of this act."

Therefore, in view of the facts stated and the clear language of the above statute, I have no hesitancy in concluding that "A" may be regarded by the Tax Commission as the seller and consequently the use of the automobile in Ohio by "B" would be subject to the Use Tax.

I come now to your second question.

Section 5546-29 of the General Code, reads as follows:

"Every person storing, using, or consuming tangible personal property, the storage use, or consumption of which is subject to the tax imposed, by this act, when such tax was not paid to a seller, shall, on or before the 15th day of the month next succeeding each quarterly period, the first of such quarterly periods being the period commencing with the first day of January, 1936, and ending on the 31st day of March, 1936, and on or before the 15th day of the month following each subsequent quarterly period of three months, file with the commission a return for the preceding quarterly period in such form as may be prescribed by the commission, showing the price of each such purchase of tangible personal property by such person during such preceding quarterly period, the storage, use, or consumption of which is subject to said tax, and such other information as the commission may deem necessary for the proper administration of this act. At the time of filing each such return, each such person shall file with the treasurer of state an executed duplicate thereof and shall pay to the treasurer of state the amount of tax imposed by this act with respect to the purchases covered by the return. The commission, if it deems it necessary in order to insure payment to the state of the amount of such tax, may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax, or his duly authorized agent, but need not be verified by oath.

The payment to the state of the tax, interest and penalty assessed by the commission under this section shall relieve the seller, who sold the property with regard to the storage, use, or other consumption on which the tax was paid to the state under this section, from the payment to the state of the amount of the tax which he is required by this act to collect from the purchaser."

Section 5546-36 of the General Code, reads as follows:

“If any person required by this act to make a return to the commission neglects or refuses to make such return at the time required by or under authority of this act, the commission shall have power to make an assessment against such person, based upon any information within its possession, or that shall come into its possession. The commission shall give to such person written notice of such assessment. Such notice may be served upon such person personally, or by registered mail.”

Section 5546-37, General Code, provides in part as follows:

“Any amount assessed by the commission under the provisions of either of the two next preceding sections, together with a penalty of fifteen per centum thereof, shall be due and payable from the person against whom the assessment has been made to the treasurer of state fifteen days after the service upon such person of notice of such assessment, and when paid shall be considered as revenue arising from the tax imposed by this act.”

Having concluded that the use of the automobile purchased by “B” would be taxable, it would therefore appear that under the provisions of section 5546-29, supra, “B” is required, if the tax is not paid by the seller, to file with the Tax Commission the return provided for therein. Upon his failure to make such return, the Tax Commission would be authorized to make the assessment provided for in section 5546-36, supra, and the amount so assessed, plus a penalty of fifteen per centum would then be due and payable from “B”.

Pertinent to your third question are sections 6310-12 and 6310-13, which read as follows:

“Section 6310-12.

It shall be unlawful for any corporation, partnership, association or person, whether the manufacturer, importer, or agent of either, or the owner, holder, or person in possession of a ‘motor vehicle’ or ‘used motor vehicle,’ conveying, transferring, delivering, giving away, selling, passing title to or attempting to pass title to such ‘motor vehicle’ or ‘used motor vehicle,’ to misrepresent, in the ‘bill of sale’ or sworn statement as required by this act, the name or names, and place or places of residence or business of the corporation, partnership, association or person executing and delivering such ‘bill of sale’ or ‘sworn state-

ment' or to forge, change or counterfeit any part thereof or to misrepresent therein the number or numbers placed upon such 'motor vehicle' or 'used motor vehicle' by the manufacturer or otherwise misrepresent the description of the same, or to misrepresent or falsify the name or address of the corporation, partnership, association or person, purchasing, obtaining or receiving such 'motor vehicle', or 'used motor vehicle.'"

"Section 6310-13.

No person residing in this state shall drive, use or operate, a 'motor vehicle' or 'used motor vehicle' upon the public highways thereof, without having a 'bill of sale' for the motor vehicle as defined in this act, or without having first filed, with the clerk of courts, of the county in which his residence is established, a sworn statement containing the name, residence of each and every bona fide owner or owners of the 'used motor vehicle' the name of the manufacturer or make, the manufacturer's number, the engine or motor number, as well as any other numbers thereon, the horse-power of such 'used motor vehicle', and a general description of the body thereof, and obtain from said clerk, a certified copy of such statement."

Section 6310-14, General Code, which provides the penalty for violation of the above sections, reads as follows:

"Whoever violates any provision of this act, except provisions of section 6310-12 of the General Code, shall upon conviction be subject to a fine of not less than twenty-five dollars nor more than five thousand dollars; and whoever violates any provision of section 6310-12 of the General Code shall upon conviction be fined not less than fifty dollars nor more than five thousand dollars or imprisoned not more than five years or both."

In considering whether or not a crime has been committed by "B", in filing a sworn statement of ownership, wherein "C" is represented as a bona fide owner, reference must be made to the above sections. It is well settled in Ohio that an act or omission in order to constitute a crime must be definitely made so by statute. No act, no matter how atrocious, can be punished criminally except in pursuance of a statute. In other words, unless the statute specifically provides that the filing of a sworn statement of ownership containing the names of those other than bona fide owners shall be an offense, a person could not be prosecuted for

doing same. Furthermore, it is a well established rule that penal statutes must be strictly construed.

It will be noted that the offense defined in section 6310-12, *supra*, consists of (1) misrepresenting in a bill of sale or sworn statement of ownership the name or place of residence of the person executing and delivering the same; (2) forging, changing or counterfeiting any part of a bill of sale or sworn statement of ownership; (3) misrepresenting in a bill of sale or sworn statement of ownership the numbers on the automobile or otherwise misrepresenting the description of such automobile; and (4) misrepresenting or falsifying the name or address of the person purchasing such automobile.

It will likewise be noted that section 6310-13, General Code, defines as an offense the driving of an automobile by a resident of this state upon the public highways thereof without having a bill of sale of such automobile and without having first filed with the clerk of courts of the county of his residence a sworn statement containing the name, residence of each and every bona fide owner or owners of said automobile, the name of the manufacturer, the manufacturer's number as well as any other numbers thereon, and a general description of said automobile.

Inasmuch, therefore, as the above statutes do not specifically embrace the act of filing a sworn statement of ownership containing the names of persons who are not bona fide owners and bearing in mind that the statute must describe the act which is forbidden with reasonable certainty, it would consequently appear that the filing of a sworn statement of ownership containing names of persons other than bona fide owners, unless the name of the person executing and delivering such bill of sale is misrepresented, and unless the name of the person purchasing the automobile is misrepresented, would not be an offense punishable under the statutes of the State of Ohio.

I come now to the question of whether or not "B", under the facts stated in your communication, could be prosecuted, for failure to pay the tax.

Pertinent to said question is section 5546-43 of the General Code, which reads as follows:

"Whoever, being required by this act to make a return to the commission, fails or refuses to make such return within the time hereby or hereunder required, or making false or fraudulent return, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars for each offense."

Having stated heretofore that the use of the automobile in Ohio by "B" is subject to the tax, and that if said tax is not paid by the seller,

"B" would be required to file the return provided for in section 5546-29, General Code, manifestly the provisions of the above section would apply and, therefore, if "B" fails or refuses to make such return criminal proceedings could be instituted against "B" under the provisions of the above section.

Therefore, under the facts stated in your communication, it is my opinion that:

1. The use of the automobile in Ohio by "B" is subject to the tax provided for in section 5546-26 of the General Code.

2. If said tax is not paid by the seller and "B" does not file with the Tax Commission the return provided for in section 5546-29, General Code, "B" would be subject to the assessment and penalty provided for in section 5546-37, General Code.

3. While "C" would not be a bona fide owner of the automobile, "B" could not be prosecuted for filing a sworn statement of ownership naming "C" as the bona fide owner.

4. If "B" fails to file with the Tax Commission, the return provided for in section 5546-29, General Code, criminal proceedings could be instituted against him under the provisions of section 5546-43, General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5467.

APPROVAL—CONTRACT FOR HIGHWAY IMPROVEMENT IN
FAYETTE COUNTY, OHIO.

COLUMBUS, OHIO, May 5, 1936.

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