

MISSOURI STATE PENITENTIARY: Prison-made Merchandise - Interpretation of Sumner-Ashurst Bill, H.R. #7940 as it relates to (1) shipping prison-made merchandise into any state or territory; (2) marking of such shipments; (3) seizure of prison-made goods; (4) parties against whom action shall be brought; (5) parties liable in case of reshipment of merchandise; (6) party liable through numerous transactions; (7) status of drop shipments; (8) interstate commerce feature.

August 1, 1935..



Mr. R.L. Chapman,  
Superintendent of Industries,  
Missouri State Prison,  
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter desiring interpretation and construction of certain phases of House Bill 7940 passed by the 74th Congress and approved by the President on July 24, 1935, containing eight separate questions, which are as follows:

- "(1) Our interpretation of Section One of this Act is that shipments of prison-made merchandise can be transported into any state or territory of the United States so long as such shipments are not made in violation of the laws of any such state or territory and comply with the provisions as to the marking of such shipments as herein set forth. Is this interpretation correct?
- (2) We construe Section Two as meaning the Missouri penal industries cannot ship any merchandise produced by them in interstate commerce unless such shipments are plainly and clearly marked as provided for in this section. Is this correct?
- (3) As provided in Section Three, can the Federal Government seize, hold, and condemn shipments of prison-made merchandise, the property of the State of Missouri, made in inter-state commerce in violation of the provisions of this legislation?
- (4) Under a further provision of this Act, can the Federal Government bring suit in the Federal Courts against the State of Missouri, the Department of Penal

Institutions of the State of Missouri, the various commissioners of the Department of Penal Institutions, or the Superintendent of Industries, for a violation of the provisions of same?

(5) Should the products of the Missouri penal industries, originally sold and shipped to a person or firm located or doing business in the State of Missouri, be reshipped in interstate commerce in violation of the provisions of this law, who would be liable for prosecution for such violation, the Missouri penal industries or the person or firm making such reshipment?

(6) If it is held that the person or firm owing the merchandise at the time illegal shipment was made is alone liable for prosecution for such violation, would this hold true through numerous transactions down to the individual consumer?

(7) Should the products of the Missouri penal industries be sold to any person or firm, the purchased articles remaining on our premises for drop-shipment \* to the points as specified by the purchaser, who would be liable for prosecution for such articles shipped in inter-state commerce in violation of the provisions of this legislation?

\* Drop-shipments show the name of the purchaser on the bill of lading as the shipper instead of the original source of the merchandise.

(8) Should a person or the agent of any firm purchase the products of the Missouri penal industries, paying cash for the same on our premises, and then transport these goods in inter-state commerce by means of a private vehicle not otherwise engaged in trucking or hauling for hire, who would be liable for prosecution for a violation of this law? Would such use cause a vehicle belonging to a private individual or firm to be held as engaging in inter-state commerce?"

The Act in its entirety is as follows:

"Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

"That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

"Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

"Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than \$1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

"Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

We shall attempt to interpret your eight individual questions in their numerical order.

## I

We think you are correct in your interpretation, as under the first section it is made unlawful for any prison-made goods to be shipped into another state in violation of the laws of that state.

This House Bill follows very closely the wording of the Webb-Kenyon Act passed by Congress on March 1, 1913. This Act related to the sale and transportation of intoxicating liquor and made it a violation for the same to be shipped into another state in violation of the laws of that state. The effect of the Act was to eliminate any interstate commerce protection or advantage by reason of a shipment or sale being interstate commerce. This was the effect of the decision in the case of Clark Distilling Co. v. Western Maryland R. Co., 61 L. Ed. 326. Therefore, we think House Bill 7940 takes away the immunity characteristic of interstate commerce and the protection and freedom which was originally enjoyed by prison-made goods, and that the interstate commerce feature in reality no longer applies to convict-made merchandise.

In the recent case of *McCormick v. Brown*, 286 U.S. 131, it was held that any shipment or transportation of intoxicating liquor into or out of the state can be controlled and regulated by the state without violating interstate commerce laws, and we deem the same applicable to the question of prison-made merchandise.

You are privileged to ship prison-made merchandise into any state or territory of the United States if the shipment in any manner does not violate the laws of said state or territory and the packages comprising the shipment are plainly and clearly marked as set forth in Section 2 of the Act.

## II

What we have said under Question 1 relating to the marking and labeling of shipments of prison-made goods is also applicable to Question 2, and we are in accord with your interpretation as contained in your question.

## III.

The Act provides for the seizure of convict-made merchandise and for a fine in each offense of not more than \$1,000.00. It seems that in such cases it is immaterial as to the owner of the merchandise; the action is brought against the article itself. It is the article itself that is the offender and is subjected to forfeiture or seizure.

This principle of law is enunciated in the case of *Dobbins's Distillery v. United States*, 96 U.S. 1.c. 399, as follows:

"Nor is it necessary that the owner of the property should have knowledge that the lessee and distiller was committing fraud on the public revenue, in order that the information of forfeiture should be maintained. If he knowingly suffers and permits his land to be used as a site for a distillery, the law places him on the same footing as if he were the distiller and the owner of the lot where the distillery is located; and, if fraud is shown in such a case, the land is forfeited, just as if the distiller were the owner. Burroughs, Taxation, 67.

"Cases arise, undoubtedly, where the judgment of forfeiture necessarily carries with it, and as part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of the pleadings it is clear that the proceeding is one of a criminal character; but where the information, as in this case, does not involve the personal conviction of the wrong-doer for the offense charged, the remedy of forfeiture claimed is plainly one of a civil nature; as the conviction of the wrong-doer must be obtained, if at all, in another and wholly independent proceeding. 1 Bish. Crim. Law (6th ed.), sect. 835, note 1; United States v. Three Tons of Coal, 6 Biss. 371."

In the case of automobiles being used in violation of the prohibition law, the Court in the case of Moss v. Summit County, 208 P. 507, said:

"\* \* \* Then, again, all the courts hold that the proceedings to forfeit automobiles which are used in violation of the provisions of the prohibition laws, whether state or Federal, are civil in their nature, and are proceedings in rem, since the automobile to be forfeited is treated as the offending thing.

Hoskins v. State, 82 Okla. 200, 200 Pac. 168; Kirkland v. State, 72 Ark. 171, 65 L.R.A. 76, 105 Am. St. Rep. 25, 78 S.W. 770, 2 Ann. Cas. 242; United States v. One Stephens Automobile (D.C.) 272 Fed. 188. To the same effect is State v. Davis, 55 Utah, 54, 184 Pac. 161. If, therefore, the taking of the automobile in question by the officer in the case at bar shall be considered as though it had been taken in a civil rather than in a criminal proceeding, the plaintiff, nevertheless, should not recover."

Another decision clearly showing that while it is not necessary that the owner of the merchandise be innocent and not a party to the crime, yet the goods may be seized, is found in 2 R.C.L., page 1397:

"Under a statute providing for a forfeiture of property used in violation of the act property may be subject to forfeiture thereunder, though the owner did not share in the guilt of the user of it, to whom he had intrusted possession and control. Thus where the owner of an automobile has entrusted the use and control of it to another it is subject to forfeiture where used in violation of the United States revenue laws providing for forfeiture of property so used, though the owner had no knowledge of the unlawful use. United States v. Mincey, 254 Fed. 287, 165 C.C.A. 575, 5 A.L.R. 211 and note. In this case the automobile was used by a servant of the owner without his master's knowledge or consent, to transport liquors in violation of the United States statute forfeiting conveyances used in the removal of goods or commodities with intent to defraud the United States of the tax thereon."

We are therefore of the opinion that the Federal Government may seize and condemn prison-made merchandise regardless of the fact that it be the property of the State of Missouri, for the reason that it is the property itself--the res--which is the offender. In every instance the decisions consulted show that the action for forfeiture and seizure was brought against the article itself, the owner and others involved not being included as parties.

#### IV.

If your question relates to an action to forfeit and seize the goods and the parties to the proceeding, then the decisions and the conclusion reached in Question 3 will apply; however, we will interpret your question to mean - in the event of a violation, who will be subject to prosecution or criminal action?

Referring to Sec. 1 of the bill it states "it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, etc." It is our opinion that the State itself would in no wise be involved. It is a well settled principle of law that in criminal actions the agents of the State or of persons cannot commit crimes and be absolved from the same for the reason that they are agents or employees and acting for the principle or for the State.

If the personnel of the department of penal institutions instructed, aided or assisted in violation of the Act, then they are personally liable to prosecution; likewise, the various commissioners of the department. If you as Superintendent of Industries carry out the transaction alone without the knowledge or without incriminating the other officials, then you alone would be subject to prosecution.

#### V.

Any prison-made merchandise shipped by you to any purchaser within the State of Missouri does not constitute any violation of the Act. If the party to whom the merchandise is shipped within the State reship the same to another state, then that party or parties alone are subject to prosecution, and no one connected with the Missouri penal industries would be subject to prosecution, provided no officer or employee entered into a conspiracy to violate the Act or knowingly aided or assisted in the reshipment of the goods.

## VI

It is our opinion that every transaction or transportation involving the shipment of prison-made merchandise from the State of Missouri to another state in violation of the laws of that state, that all persons connected with the transaction, aiding, assisting or in any wise involved in the violation, would be subject to prosecution, and each act or instance in which merchandise was so transported in violation of the act would constitute a separate and distinct violation of the act.

## VII

In view of the terms of the Act, we can discern no difference in the event drop shipments are made. The Act uses the following phraseology: "knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods \* \* \*" Bearing in mind your explanation of drop shipments, it appears that by the same you merely insert the purchaser's name as the consignor and you as the real vendor appear to be eliminated from the transaction.

We are of the opinion that drop shipments would in no wise relieve those participating in the transaction from prosecution. You would be knowingly assisting, aiding or participating in such shipment, which would be a violation of the Act.

## VIII

To be subject to and have the protection of interstate commerce, goods must be transported from one state to another under contract to purchase. In the event purchases come direct to the prison, the merchandise is received, the same paid for, and the transaction is then and there final and closed, then we are of the opinion that the transaction has lost its interstate commerce feature even though the parties be residents of different cities.

In the decision in the case of Ware & Leland v. Mobile County, 209 U.S., l.c. 411, the Court said:

"While the general principles applied in these cases are not to be denied, there is a class of cases which hold that contracts between citizens of different states are not the subjects of interstate commerce simply because they are negotiated between

citizens of different states, or by the agent of a company in another state, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contracts incidentally affect interstate trade."

Speaking of insurance policies being transactions in interstate commerce, the Court, in the case of Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357, said:

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent to the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect--are not executed contracts--until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia, by a citizen of New York whilst in Virginia, would constitute a portion of such commerce."

We base the above conclusion on the two above decisions. However, we wish to remind you of the provisions of the Act which are broad enough to incriminate you, or any other person, if you knowingly aid or assist in the transportation of the goods. If those elements do not enter into the transaction, then the purchaser alone is liable if he transports prison-made merchandise into another state in violation of the laws of that state and would be subject to prosecution under the Act regardless of the manner in which the merchandise was so transported into the other state.

We do not deem it your duty when purchases are made in the manner outlined in your question, to make private investigation and determine the ultimate destination of the merchandise so purchased.

For your further information, we are of the opinion that when prison-made merchandise is shipped to another state and it is necessary for the shipment to traverse the borders of the third state in arriving at its final destination, the same would not constitute a violation in the third state. With reference to this question, the Court, in the case of *Hauschild v. State*, 221 S.W. 196, said:

"The state can forbid and punish the transportation of intoxicating liquor across the state and into another state only in case the proposed use in the state into which it was to be taken was contrary to law there, so that the transportation was deprived of the protection of the commerce clause of the federal Constitution by this act."

We are further of the opinion that persons purchasing prison-made merchandise in other states, when desiring it for their own personal use, the same does not constitute a violation of the Act, as was held in the case of *Theo. Hamm Brewing Co. v. Chicago, R.I. & P. Ry. Co.* (D.C. Minn. 1913) 215 F. 672:

"The Webb-Kenyon Act does not render illegal the shipment of liquor in interstate commerce to a consignee desiring it for his personal use, though without a permit required by the law of his state."

We have noted the laws of a number of states and in most instances they appear to prohibit the sale of prison-made goods in the open market; therefore, the purchase of prison-made goods by an individual for his personal use does not violate the laws of such states, as was said in the case of *Sturgeon v. State*, 17 Ariz. 513, 154 P. 1050; 0

"In the following cases it was held that liquors purchased for the personal use of a person are not invalidated by the Webb-Kenyon Act when not prohibited by the law of the state where the purchaser lives." (Cases cited).

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

---

ROY McKITTRICK,  
Attorney General.

OWN:AH