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Exemption of Automobiles From Levy Under Execution or Attachment

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EXEMPTION OF AUTOMOBILES FROM LEVY UNDER EXECUTION OR ATTACHMENT

By George A. Trout, of the Denver Bar

TODAY, when a lawyer secures a judgment on behalf of his client, he often finds that his work has just begun. Many judgment debtors, who, in more prosperous times, would pay without complaint, now say, either by their words or actions: "Try to collect. You can't find anything on which to levy." Confronted with this problem the lawyer sets out to discover any assets which may be applied to the satisfaction of his claim. Usually he finds the judgment debtor has an automobile. Less often he finds that the automobile is free from chattel mortgages or other liens, so that a substantial sum may be realized upon execution sale. When the automobile is found to be free from such mortgages and liens the question arises as to whether or not the judgment debtor may claim exemption under the provisions of Section 5915, Compiled Laws, 1921, the pertinent parts of which are as follows:

"*Other property exempt from execution.*—Sec. 19. The following property when owned by any person being the head of a family and residing with the same, shall be exempt from levy and sale upon any execution or writ of attachment, or distress for rent, and such articles of property shall continue exempt while the family of such person are removing from one place of residence to another within this state:

* * * * * * *

"Sixth—The tools and implements, or stock in trade of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value.

"Seventh—The library and implements of any professional man, not exceeding three hundred dollars.

* * * * * * *

"Ninth—One cow and calf, ten sheep, and the necessary food for all the animals herein mentioned for six months, provided or growing, or both; also, one farm wagon, cart or dray, one plough, one harrow, and other farming implements, including harness and tackle for team, not exceeding fifty dollars in value.

"Provided. * * * and, Provided, also, further, That the tools, implements, working animals, books and stock in trade, not exceeding three hundred dollars in value of any mechanic, miner or other person not being the head of a family, used and kept for the purpose of carrying on his trade and business, shall be exempt from levy and sale on any execution or writ of attachment while such person is a bona fide resident of this state."

The right of a judgment debtor to claim exemption of an automobile under the provisions above, and the like right of a defendant whose property has been attached before judgment, which is governed by the same provisions and principles, is the subject of this article. Particularly, is an auto-

mobile a tool or implement of a mechanic, etc., under section six and the provision concerning persons not the heads of families? Is it an implement of a professional man? And is it a farm wagon, cart or dray, or other farming implement?

The Colorado Supreme Court has considered only whether an automobile is a farm wagon. The case of People v. Corder, 82 Colorado 318, was an action against a sheriff for a wrongful levy on exempt property. A demurrer to the complaint was sustained and judgment of dismissal was entered. The judgment of the district court was reversed on writ of error, and the Court said:

"We agree with plaintiff in error that the word 'farm wagon' ought to be regarded as including a farm wagon moved by mechanical as well as by animal power. Stichter v. Bank (Tex. Civ. App.), 258 S. W. 223, holds that a Ford truck is exempt as a 'wagon' under the Texas statute, and we see no reason why such a vehicle might not be a farm wagon if used as such, and since the complaint alleges that the automobile in question was a farm wagon, we think that that allegation is of an ultimate fact which must be taken as admitted by the demurrer. If the defendants traverse it, it is a question for the jury."

The automobile claimed to be a farm wagon in this case was a five-passenger Buick touring car valued at $1,200.00.

The Texas courts, in conformity with the case of Stichter v. Bank, quoted in People v. Corder, supra, consistently have held that an automobile is a buggy or carriage within the meaning of the exemption statutes. Laning v. Langford Inv. Co. (Tex. Civ. A.), 36 S. W. (2d) 1079, Malone v. Kennedy (Tex. Civ. A.), 272 S. W. 509, Hammond v. Pickett (Tex. Civ. A.), 158 S. W. 174, Parker v. Sweet, 60 Tex. Civ. A. 10, 127 S. W. 881. In the case of Stichter v. Southwest National Bank, supra (quoted in Corder v. People), the claimant was not only allowed his Ford truck as a farm wagon but a Cadillac automobile was exempted as a family carriage.

An Iowa farmer, the head of a family, was the owner of a wagon, a Sampson truck and a Ford automobile. The automobile and truck, with other property, were seized by the sheriff under a writ of attachment. He claimed, and the lower court held, that the Sampson truck was a proper tool or implement, and that the Ford automobile was an exempt vehicle under the exemption statute. The Supreme Court of Iowa reversed the district court, holding that both exemptions were improper, and remanded the case with instructions to allow

the claimant to make an election between the wagon, Sampson truck or Ford automobile, any one of them being exempt as a vehicle. Farmers Elevator and Live Stock Co. v. Satre, 196 Iowa 1076, 195 N. W. 1011. The statute used the words: "wagon or other vehicle."

The same court held in Wertz v. Hale, 234 N. W. 534, that it could not extend the plain terms of the statute so as to exempt to a debtor a team, wagon, and harness, and also an automobile.

The Iowa Supreme Court had previously held that under a code provision granting an exemption of a team and wagon or other vehicle with the proper harness or tackle, an automobile was exempt, being a vehicle within the meaning of the statute, even though moving by its own motive power. Lames v. Armstrong, 162 Iowa 327, 144 N. W. 1, Waterhouse v. Johnson, 194 Iowa 343, 189 N. W. 669, Weaver v. Flocke, 195 Iowa 1085, 192 N. W. 123.

An automobile belonging to a bankrupt, who had no other carriage, was a "'carriage" within Sess. Laws, Okl., 1905, c. 18, s. 1, Subd. 10, exempting to a debtor one carriage or buggy. Patten v. Sturgeon, 214 F. 65, 130 C. C. A. 505.

The Supreme Court of Utah in Spangler v. Corless, 61 Utah 88, 211 P. 92, 28 A. L. R. 72, held that an automobile used by a physician in making professional visits was within a statute exempting from execution one horse with vehicle and harness or other equipments used by a physician in making his professional visits.

On the other hand the Minnesota Supreme Court in Whitney v. Welnitz, 153 Minn. 162, 190 N. W. 57, 28 A. L. R. 68, held that an automobile was not exempt from levy and sale on execution against the owner, either as a "wagon, cart or dray." The court said that an automobile was primarily a pleasure vehicle, and not adapted for the purpose for which the exemption was granted. It further stated that the statute at one time had contained the word "vehicle," but it had been stricken by amendment, and this should be taken into consideration.

The Court of Appeals of California appears to have reached a conclusion directly contrary to the decision in

Spangler v. Corless, supra, for in Conlin v. Trager, 84 Cal. A. 730, 258 P. 433, it held that an automobile was not "other equipment" under a statute exempting "one horse with vehicle or other equipment used by a physician," etc., holding that "other equipment" clearly referred to other equipment which could be used with a horse.

The Court followed Crown Laundry, etc., Co. v. Cameron, 39 Cal. A. 617, 179 P. 525, where exemption of a Ford automobile was denied a laundry driver, using it continuously in his work, on the ground that a motor drawn vehicle was not a cart, wagon, dray, truck, coupe, hack or carriage, as the statute plainly said that such exempt vehicles were those which might be drawn by "one or two horses."

The Supreme Court of Tennessee in the case of Prater v. Reichman, 135 Tenn. 485, 187 S. W. 305, denied the exemption of an automobile for reasons similar to those expressed by the Minnesota Supreme Court. The opinion was written in 1916, and the court said of an automobile:

"It is a vehicle whose owner is usually well able to pay his debts."

One wonders whether any court now would make the same comment.

It would appear that in a majority of the jurisdictions where the question has been presented an automobile is a vehicle, carriage or wagon within the meaning of the exemption statutes, and that the Colorado Supreme Court is with the majority in holding that it is a matter of fact as to whether or not an automobile is a "farm wagon." Those courts which hold to the contrary do so on the ground that a self-propelled vehicle was not in existence or contemplated when the statutes were passed, and their meaning should not be extended by inference. They also say that the context of the statutes specifically limits the exemptions to vehicles drawn by animals, but the difference between these statutes and those wherein the contrary has been held is so slight that the conclusions can hardly be explained on the grounds mentioned by the courts.

At this point it is appropriate to mention that even when statutes specifically mention automobiles they are not always exempted from execution or attachment. Their use may not

be such as to bring them within the contemplated exemptions, or the owner may not come within the classes of persons exempted. Such an instance is shown in the case of Meyers v. Rosenzwaig, 27 Arizona 286, 232 P. 886, where an automobile used by a real estate agent in his business of finding purchasers and making sales and transfers, collecting rents, and looking after mortgages and insurance was held not exempt under the Arizona Civil Code, 1913, par. 3302, sub. 12, a real estate agent not being a laborer, and not being enumerated under the professionals. The words "or other laborer" were said to be intended to describe persons in the same class as those enumerated.

A different and more difficult question is whether an automobile may properly be classified as a tool or implement.

The nearest Colorado holding found upon that question is in the case of Watson v. Lederer, 11 Colorado 577, an action brought against a constable by an assayer for the seizure of a horse, harness and wagon, claimed to be exempt under Gen. St. p. 602, and the proviso thereof identical with the proviso of the present statute referring to a person not the head of a family. From a judgment of non-suit by a justice of the peace plaintiff appealed to the county court where he received judgment. The defendant appealed to the Supreme Court from the county court judgment. It appeared that plaintiff was accustomed to drive to different mines with his horse and wagon for the purpose of obtaining samples of ores. The court said:

"It appears that the horse, harness and wagon were as essential to his business as the assaying apparatus. The whole property owned by him was therefore exempt, provided it did not exceed $300 in value."

The decision is somewhat unsatisfactory when applied to this discussion for two reasons. First, the judgment of the county court was reversed, as there was nothing to show the value of certain property released by the officer from the levy, and its value alone might have reached the limit allowed by the statute. Second, the horse alone, might properly come under the definition of a working animal. The buggy and harness were not expressly said to be tools or implements, although that conclusion is inferred.

An automobile truck used in his business by a fuel dealer was held exempt from sale under execution as a "tool" in

Federal Agency Inv. Co. v. Baker, 122 Kan. 460, 252 P. 262. A sedan owned by the same debtor was held not exempt, there being no proper showing as to its use.

An automobile, when used as an "implement" by a farmer in conducting his farming operations, was held exempt from levy or execution in Printz v. Shepard, 128 Kan. 210, 276 P. 811.

A foreman on construction work, who used his automobile to transport workmen and tools back and forth on out-of-town jobs, and whose position as foreman partly depended upon this use, was held entitled to exemption of the automobile in Dowd v. Heuson, 122 Kan. 278, 252 P. 260.

The Arizona statute, subdivision 12, paragraph 3302, Civil Code, 1913, exempted from execution, attachment or sale on any process (among other things) "one automobile by the use of which * * * a chauffeur * * * habitually earns his living. Mack levied on an automobile owned by Boots who moved to vacate the levy. The evidence was that Boots was a machinist, doing various sorts of repair work, and that he used the automobile to convey himself to and from his work, to haul people who were helpers, and to haul his tools and machinery, for which uses his employer paid him about $20 per month, and also paid for his automobile upkeep. The court, in Mack v. Boots, 29 Ariz. 16, 239 P. 794, held that the use of his automobile was only incidental to his main trade or business—that of a machinist, and that his claim for exemption should have been disallowed, the case being remanded for further proceedings. But the court said:

"Under subdivision 5, par. 3302, supra, the tools or implements of a mechanic or artisan necessary to carry on his trade are exempt. We think a machinist is a mechanic and as such could claim the exemption of said subdivision 5."

But the court did not clearly state that the automobile would be exempt as a "tool or implement," or whether it was meant that the claimant could apply for the release of his other tools under this section.

In the case of A. Wilbert's Sons Lumber Company v. Ricard, In re Ricard, 167 La. 416, 119 So. 411, it was held that the exemption statute (Civ. Code Art. 2705, and Code Prac. Art. 644) did not require a showing that the trade, calling, or profession in which a tool or instrument is used was the exclusive means by which a debtor obtained a living to

entitle him to exemption thereof from seizure. The Court of Appeal was held not justified in denying the exemption of a motor truck, used by the lessee of a farm to transport slaughtered beeves to market as an instrument necessary for the exercise of the trade or profession from which he gains his living, on the assumption that he made his living on a farm and his other trade or calling was a mere speculative side line.

A bus used to transport school children was held to be a "tool" or "instrument" within the Louisiana statue in the case of Hammer v. Johnson (La. App.), 135 So. 77, the court being satisfied from the evidence that the defendant depended upon the compensation yielded him by the operation of his truck as a school bus for his living.

An automobile was said to be a tool or instrument of a county doctor under the same statute in Webb v. Lacarde (La. App.), 135 So. 262.

The Supreme Court of Iowa has reached a different result on the ground that it is not warranted that automobiles should be exempted as tools or instruments when there is in the statute a specific classification under which they clearly belong, to-wit: vehicles. Farmers' Elevator and Live Stock Company v. Satre, supra; Wertz v. Hale, supra.

The defendant in the case of First State Bank of Perkins v. Pulliam, 112 Oklahoma 22, 239 P. 595, claimed exemption of a Ford automobile on the ground that he was a "veterinary" and "oil scout," and it was necessary for him to use the car in his business, and he was the head of a family. The Oklahoma statute (Sec. 6604, Comp. Okl. St. 1921) specifically provided that "automobiles and other motor vehicles shall not be exempt from attachment, execution and other forced sale." The court held that the automobile was not entitled to exemption as a "tool" or "apparatus," and said that although it had heard Ford automobiles called many names, that it had never heard these terms applied to them.

In proceedings by judgment creditors against a judgment debtor for the sale of an automobile under execution the judgment debtor claimed exemption which was denied by the trial court. The judgment of the trial court was affirmed in Gordon v. Brewer, 32 Ohio A. 199, 166 N. E. 915, the

court holding that while the automobile was a convenience it was not a necessity, and that to exempt it would subject the meaning of the phrase "implements of trade" to a variety of uncertainties and change with every set of circumstances.

The Supreme Court of the Province of Alberta, in Burns v. Christensen, 16 Alberta L. R. 394, 28 A. L. R. 77, held that an automobile of a licensed professional chauffeur was not within a statute exempting the tools and necessary implements to the extent of $200 used by the execution debtor in the practice of his trade or profession.

Likewise the Supreme Court of Quebec, in the case of Robitaille v. Asselin, 49 Quebec Superior 1, held that an automobile of the value of $1400, even if it was the only vehicle which the party owned, was not exempt because of the fact that he used it to earn his living as a cabman.

From the foregoing cases it is evident that there is considerable difference of opinion as to whether or not an automobile is a tool, implement or instrument of trade. The Supreme Court of Kansas and the Supreme Court of Louisiana have allowed automobiles to be exempted as tools or instruments. The Supreme Court of Arizona denied the exemption of an automobile because the owner was not regularly engaged as a chauffeur, but suggested that it was entitled to exemption as the tool or implement of a mechanic. The Supreme Court of Iowa has denied the exemption as a tool or implement, for the reason that the statute specifically exempts vehicles, and an automobile is a vehicle, hence not entitled to any additional classification. The Supreme Court of Oklahoma held that an automobile cannot be exempted as tool or apparatus where the statute specifically prohibited the exemption of automobiles. The Court of Appeals of Ohio has ruled that the classification of an automobile as a tool or implement would be too uncertain and dependent upon the facts of each case to allow its exemption as tool or instrument. The provinces of Alberta and Quebec hold an automobile does not come within the meaning of tool or implement, as the words refer to a number of articles (being plural in the statute), the gross value of which is less than the statutory exemption.

Logically, and literally, an automobile cannot be said to

be a tool or implement of trade, and the courts which have refused its exemption as such have reached a more reasonable construction of the term, and one probably more in accord with the intention of the legislatures. The courts which have reached the opposite construction have, in a large measure, done so to give effect to the beneficent intention of the exemption laws, and have followed the usual rule that such statutes should be liberally construed. They also have the support of a respectable number of cases of the pre-automobile age, exempting vehicles of various sorts as tools or implements. (See examples given in 25 C. J. 51, and notes.) These cases hold that whether a particular implement is or is not necessary to the debtor depends in a large measure upon what his trade, profession or business may be. 25 C. J. 51. The holding of our Supreme Court in Watkins v. Lederer, supra, is not sufficiently definite to lend much aid, and when the question is directly presented the Supreme Court may flatly say that an automobile is not a tool or implement, or it may examine the facts and determine the case upon the use to which the machine is put by the claimant, and whether it is reasonably adapted to and necessary for him to do his work, if his occupation is within the favored classes.

No case has been found exempting an automobile or automobiles as "stock in trade," but it does not seem unreasonable to say that some used car lot proprietor might claim one or more machines kept by him for sale, providing their value did not exceed the statutory exemption.

The value of the property claimed to be exempt may become a material matter when claim for exemption is made by the debtor. This has been considered only once in connection with an automobile in Colorado. That was in the case of People v. Corder, supra. As before noted, the debtor claimed exemption of a Buick touring car valued at $1,200 as a "farm wagon." The court said the clause "not exceeding $50 in value" qualified the words "other farming implements," and had no reference to what preceded them, so that the automobile would be exempt regardless of value if it was shown to the satisfaction of the jury that, in fact, it was a farm wagon. This seems to be the finding in similar cases when there is no limitation of value in the statute. It was argued in

the case of Spangler v. Corless, supra, that exemption of a very expensive automobile might be claimed by some debtor. The court answered the argument by saying that the debtor might also make claim for exemption of a $5,000 carriage, silver-mounted harness, and a horse worth as much more, but that the value still would be immaterial. The Supreme Court of Iowa expressed the opinion that some limitation of value upon automoble exemptions should be set by the legislature. Waterhouse v. Johnson, supra. These courts do not seem to have considered the fact that the model, type and value of the automobile would be a material element in determining its reasonable adaptability or necessity for the use claimed in the exemption. This would be particularly true in Colorado where all the classifications under which exemption of an automobile might be claimed except that of "farm wagon" probably are subject to a limit of value set forth in the statute.

The Supreme Court of Colorado has made statements indicating it would not exempt a tool or instrument, or stock in trade, exceeding the value set by the statute. In the case of Watkins v. Lederer, supra, it said the essential difference between the provision and the last four sections of the act was the "amount or value of the property exempted" and held that the whole property of the assayer was exempted "provided it did not exceed $300 in value." Likewise, in Martin v. Bond, 14 Colorado 466, stock in trade was said to be exempt "to the extent specified in the statute." In Harrington v. Smith, 14 Colorado 378. the court said where the execution debtor has only a precise number "or property of the exemption value" under the statute, then and in such a case a levy and sale under an execution is absolutely illegal.

The only cases found where the value of automobiles was taken into consideration were the Canadian cases of Burns v. Christensen, supra, and Robitaille v. Asselin, supra, where the court held a single chattel exceeding in value the limit set in the exemption statue could not be exempted as a tool or implement.

Horses exceeding in value the amount of exemption were held not to be exempt in Everett v. Herrin, 46 Maine 357, and State v. Jungling, 116 Missouri, 162, 22 S. W. 688.

A different conclusion was reached in Lovell v. Richings (1906), 1 K. B. 480, 75 L. J. K. B. 287, 94 L. T. 515, 54 W. R. 392, 22 T. L. R. 316 (considered and distinguished in Burns v. Christensen, supra). The action was for distress for rent on a stable which was occupied by a cab driver. The only article on the premises proved to be a cab of the value of more than five pounds, which was seized. It was held that the cab was privileged from seizure under S. 147 of the county court's act, 1888, as an implement of the man's trade, and the fact that it was above the value of five pounds, the upper limit set by the statute, did not exclude the operation of the exemption.

The cases of Smith v. Pueblo Credit Association, 82 Colorado 364, and Blum v. Kasick, No. 13,042, decided by the Supreme Court of Colorado March 7, 1932, have not been discussed. The former was an action against a sheriff for treble damages for wrongful attachment of an automobile valued at $175. The ground for which exemption had been claimed did not appear. The court said that the question of whether the automobile was lawfully exempt was not before it, as that had been determined between the parties in the previous action. The latter case was similar. Judgment had been entered in the district court of the City and County of Denver and in pursuance of a writ of execution therein the sheriff of Boulder county levied on the claimant's automobile. He filed a claim for exemption with the sheriff on the ground that it was used in his business. Without notice to claimant the district court of the City and County of Denver heard this claim, and denied his claim for exemption. The Supreme Court held that under these circumstances the District Court of Denver was without jurisdiction to enter such an order, and had no summary power to determine the claim. The judgment debtor was said to have two remedies. He could submit to the jurisdiction of the court out of which the execution issued and ask that it determine his claim, or he could notify the sheriff in possession of the property claimed to be exempt of such claim, and demand its return, and, in the event of sale thereafter, he could pursue the remedy provided by statute for such illegal sale.

From the foregoing it will be seen that in Colorado it

is a question of fact, for the jury, as to whether or not an automobile is a "farm wagon." Whether or not it is a "tool or implement" has not been directly decided, but the indications are that such determination is one of fact, hinging not upon its character as a vehicle, but upon the use for which exemption is claimed, and the suitability and adaptability of the automobile for that use—and its actual employment therein. As a "farm wagon" the Supreme Court has held the automobile's value immaterial. If the court follows its statements in other cases, and similar holdings of other American courts, if exemption is claimed under any other statutory ground, only such automobiles as are worth less than the amount exempted would be privileged from seizure, and an automobile exceeding in value the statutory amount would be subject to attachment or levy.

DICTA,
Louis A. Hellerstein, Editor in Chief,
1020 University Building,
Denver, Colorado.

Gentlemen: Error of law: In the January number, your digester understood the 3rd rule announced in Wolford vs. Bankers Co., to be: "The contention that an office in a private corporation is a franchise is untenable." Not so. The court holds it *is* a franchise, hence *quo warranto* is the remedy. See also Grant vs. Elder, 64 Colo. 104.

Yours truly,

NISI PRIUS.

SPECIAL NOTICE

Pursuant to the By-Laws, President Albert J. Gould, Jr., has appointed the following Nominating Committee to nominate a President, two Vice-Presidents and two Trustees: William E. Hutton, chairman; Dexter G. Blount, Elmer L. Brock, Simon J. Heller, Ernest L. Rhoads. The By-Laws provide that members desiring to suggest names for the consideration of the Committee shall forward the same to the Secretary. February 25, 1933.

JOHN A. CARROLL, *Secretary*,
THE DENVER BAR ASSOCIATION.

Joseph Mosko and Gordon Slatkin announce that they have formed a partnership under the firm name of Mosko & Slatkin.