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## SALES-CRIMINAL LAW- ELEMENTS OF UNLAWFUL SALE OF NARCOTICS

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SALES—CRIMINAL LAW—ELEMENTS OF UNLAWFUL SALE OF NARCOTICS—Appellant, known to be peddling morphine, was contacted by a federal narcotic inspector who posed as a prospective purchaser. A price having been agreed upon, appellant permitted the inspector to handle and examine several of the tablets. After stating that he would take the drug, the inspector placed appellant under arrest. From a conviction of selling narcotics in violation of the Harrison Act,<sup>1</sup> appellant appealed. *Held*, affirmed. A sale of narcotics is not complete without

<sup>1</sup> 38 Stat.L. 785 (1914) §2, 26 U.S.C.A. (Supp. 1946) §2554(a).

payment of the purchase price or delivery, but the facts here warranted a jury in finding that delivery was made. *Barnett v. United States*, (9th Cir. 1949) 171 F. (2d) 721.

While the conviction in the principal case is sound, the court's holding that a sale is not complete without payment or delivery seems incorrect. These technical requirements existed in the ancient law of sales,<sup>2</sup> but it has long been settled in both England<sup>3</sup> and the United States<sup>4</sup> that property in specific goods, in a deliverable state, passes when the parties so intend, and no formalities beyond the manifestation of such intention are necessary.<sup>5</sup> Payment of the purchase price or delivery may indicate the actual intent of the parties, but mutual assent is the controlling element, and where the bargain has been made, property is presumed to pass immediately, even though the seller may retain possession until payment of the purchase price.<sup>6</sup> In some transactions, such as cash sales, nonpayment may be used to rebut the presumption of intent.<sup>7</sup> Because the Harrison Act nowhere defines a "sale" of narcotics, it was early held that, in interpreting the act, the general law of sales was applicable. In the leading case of *Hammer v. United States*,<sup>8</sup> one of the first cases involving an unlawful sale of narcotics, the court concluded that mere agreement on all terms of the sale was a violation of the act, the sale, for that purpose, having been consummated. The court in the principal case cites the *Hammer* case, along with cases where the facts clearly showed formal delivery. In the latter decisions, however, it is significant that delivery was never actually held to be an independent requirement of sale.<sup>9</sup> The court in the principal case also incorrectly cites Williston as authority for its position; Williston has expressly rejected the requirement of payment or delivery.<sup>10</sup> It is difficult to see how the requirements laid down by the court in the principal case would ever operate to protect innocent parties, while, at the same time, they clearly furnish wrongdoers with useful technical arguments. It is submitted that the court's requirement of a finding of delivery is an unjustifiable limitation on the government's power to prevent unlawful traffic in narcotics.

*Robert W. Shadd, S. Ed.*

<sup>2</sup> For an excellent discussion, see Ames, "Parol Contracts Prior to Assumpsit," 8 HARV. L. REV. 252 (1894). See also 2 WILLISTON, SALES, rev. ed., §260 (1948).

<sup>3</sup> *Tarling v. Baxter*, 6 Barn. & C. 360, 108 Eng. Rep. 484 (1827); Brown, "The Law of Contract in England and Scotland," 15 JURIDICAL REVIEW 391 (1903).

<sup>4</sup> *Hatch v. Oil Co.*, 100 U.S. 124, 25 L.Ed. 554 (1879); VOLD, SALES, 123 (1931). For exhaustive authority, see 2 WILLISTON, SALES, rev. ed., §261 (1948).

<sup>5</sup> This has been codified in the Uniform Sales Act, §18(1), and the English Sale of Goods Act, 56 & 57 Vict., c. 71, §17 (1894).

<sup>6</sup> *Hatch v. Oil Co.*, supra, note 4. See also Uniform Sales Act, §19, Rule 1.

<sup>7</sup> *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E. (2d) 305 (1946).

<sup>8</sup> (C.C.A. 2d, 1918) 249 F. 336. The court relied heavily on *Hatch v. Oil Co.*, supra, note 4.

<sup>9</sup> *Fisk v. United States*, (C.C.A. 6th, 1922) 279 F. 12. See also *Leon v. United States*, (C.C.A. 9th, 1923) 290 F. 384; and *Trueba v. United States*, 263 U.S. 710, 44 S.Ct. 37 (1923).

<sup>10</sup> 2 WILLISTON, SALES, rev. ed., §§263 and 343 (1948).