# SOME PROHIBITION FORFEITURE CASES—THE DOCTRINE OF VICARIOUS LIABILITY[1]

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On March 30, 1920 the Supreme Court of Appeals of Virginia decided three cases,[2] Burks, J., speaking for the court in each case, thereby establishing an unenviable record in the field of vicarious liability that we trust will never be repeated by any other commonwealth. Each case was submitted on an agreed statement of facts. In each case the automobile used in the illegal transportation of intoxicating liquor was forfeited, although the interveners were innocent and free from fault. In *Buchholz v. Commonwealth* the owner of the car (Mr. Buchholz, a hotel owner in the District of Columbia) instructed his chauffeur to take the car to a repair shop in the District. The chauffeur violated the owner's instructions and drove into Virginia and was later arrested in Richmond, Virginia, charged with the illegal transportation of ardent spirits. Under a statute of the District of Columbia, the chauffeur became a thief before taking the car from the District, whether the right given the chauffeur by the owner was that of custody or possession. The Virginia court disregarded the District of Columbia statute and declared that:

> ". . . the important inquiry is, Did the owner entrust his car to Chisholm [the chauffeur]? If he did, he must bear the consequences of his misplaced confidence. It is immaterial whether Chisholm had custody or possession".[3]

The court also said:

> "There are many nice distinctions between custody and possession, applicable chiefly in the administration of the criminal law where they have been practically eliminated by

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[1] This is c. IV of a book soon to be published under the general title "Ill-Starred Prohibition Cases".

[2] Buchholz v. Commonwealth, 27 Va. 794, 102 S. E. 760 (1920); Pennington v. Commonwealth, 127 Va. 803, 102 S. E. 758 (1920); King v. Commonwealth, 127 Va. 800, 102 S. E. 757 (1920).

[3] Buchholz v. Commonwealth, *supra* note 2, at 797, 102 N. E. at 761.

the statutes on embezzlement, but we do not regard them as applicable to the statute under consideration".[4]

In *Pennington v. Commonwealth* the agreed statement of facts showed that Pennington was engaged in the general automobile for hire business in Augusta, Georgia; that he had purchased the car that was later forfeited; that one Ricker had loaned Pennington $2100 for the purchase of the same; that he (Ricker) took a lien thereon and recorded the same; and that no part of the $2100 had been paid him. Pennington rented the car in question to one John Allen for the purpose of delivering books in the state of Georgia, with the express understanding and agreement that the car was not to be taken outside the state of Georgia. Pennington had no knowledge that the car was to be used for an illegal purpose or was to be taken outside of the state until he learned of its seizure in the state of Virginia. The court held that the car could be forfeited and that the innocent parties, Pennington and Ricker, must suffer. The court said:

> "We are not concerned with the fact that there was a breach of bailment on the part of Allen. . . . The question is, how did Allen acquire possession from the owner? Was it with his consent? Did the owner intrust him with the car? If so, then the owner must suffer the consequences of his misplaced confidence".[5]

The final case in this trilogy, crowning one glorious day of judicial effort on the part of the Supreme Court of Appeals of Virginia, is *King v. Commonwealth.* Here, under an agreed statement of facts, King, the intervener, held a lien for unpaid purchase money in the amount of $550, duly recorded prior to the seizure. He sold the car to one Marinosci, and the automobile was in charge of the purchaser at the time of seizure. King had no knowledge that the car was being illegally used. The court held that the innocent lienor was not protected.

In order to appreciate the significance of these three Virginia cases, we desire at this point to make some general observations.

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[4] *Ibid.*

[5] Pennington v. Commonwealth, *supra* note 2, at 806, 102 N. E. at 759.

These cases illustrate in a striking manner the doctrine of vicarious liability. Each case was submitted on an agreed statement of facts, and there is no question of the innocence of the owners or lienors. There is no room for any presumptions of bad faith or knowledge. Each case presents a clear record of an innocent party being punished because of some innate judicial feeling that thereby the "noble experiment" might succeed. It is the same urge that too often dominates enforcing officers and courts to initiate and defend lawless enforcement of the prohibition laws generally.

But, it may be said, why criticise the judges? The legislature of Virginia has laid down the drastic policy of forfeiture. If there is to be any blame, place it at the door of the legislature, where it rightly belongs. We believe this contention is unsound, for the reason that the court misinterpreted the Virginia statute.[6] In every one of these three cases the court cited with approval the case of *Landers v. Commonwealth*,[7] decided by the same court in November, 1919. In this case the court construed the Virginia Prohibition Act in such a way as to sacrifice the rights of innocent owners and lienors. Under such an interpretation they have emasculated that provision of the statute which requires that "all persons concerned in interest be cited to appear and show cause why the said property should not be condemned and sold to enforce the forfeiture. . . . " Why did not Buchholz, under a fair interpretation of the statute, have the right to defeat the forfeiture of the automobile being driven by a thief? If forfeitures are to be strictly construed as against the state, is there any justification for the court's distinction between a technical thief and an out-and-out thief? Disregarding the effect of the District of Columbia statute, at common law the chauffeur who converted to his own use the automobile of the master, after it had been put in his charge by the master, was guilty of a felony, and to make such a conversion larceny the felonious intent need not have existed in the servant's mind at the time of receiving

[6] Va. Laws 1918, c. 388, §57, amended by VA. CODE ANN. (1924) § 4675 (28).

[7] 126 Va. 780, 101 S. E. 778 (1919).

the property into his charge.[8] Why should not the case at bar be covered by that provision of the statute that gives to the owner the right to "appear and show cause why the said property should not be condemned and sold to enforce the forfeiture"?

Contrast the harsh construction of this Virginia court with that of the federal court in the case of *United States v. Brockley.*[9] The National Prohibition Act[10] expressly protects the rights of an innocent lienor, but says nothing as to the protection of the interests of an innocent owner. The court in this case construed the federal statute in a liberal manner so as to protect the innocent owner. We suspect that, in the case above, the Virginia court, with its emphasis centered on prohibition enforcement, would have sacrificed the innocent owner by construing the statute literally. There are two methods of approach in a forfeiture case, where the statute is somewhat equivocal; and the court is free to accept either alternative. It may assume the attitude of the Virginia court and stress the idea that the action is *in rem;* that the property itself is the offender and that as soon as the "guilty" chattel is found the matter is settled. On the other hand, the court may follow what might be characterized as the federal attitude, that chattels *per se* (at least in prohibition cases) do not offend, and that forfeiture proceedings are in substance criminal proceedings[11] and justified, if at all, as penalties necessarily inflicted on the owner. This leads to a strict construction as against the government. The former approach smacks of the common law *deodand* and the *noxal* liability of the Roman law.[12] The latter approach protects the admittedly innocent, and has behind it a respectable tradition of two hundred and fifty years in the evolution of the common law. In a case in 1672, Vaughan, C. J. said:

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[8] State v. Schingen, 20 Wis. 74 (1865). There are early authorities to the effect that the master is conceived to be in possession of goods entrusted to the servant, only so long as the servant is in the master's house, or with the master. Y. B. 21 Hen. VII, 17 (1506); WARREN, CASES ON PROPERTY (abridged ed. 1915) 60.

[9] 266 Fed. 1001 (M. D. Pa. 1920).

[10] 41 STAT. 315 (1919), 27 U. S. C. § 40 (1928).

[11] Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524 (1886).

[12] HOLMES, THE COMMON LAW (1909) 7 *et seq.*, 17 *et seq.*

". . . goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are".[13]

It should be of interest at this point to trace the evolution of the federal rule with reference to forfeiture in prohibition cases. One significant fact will emerge, and that is that the trend in the federal courts is away from the harshness of the Virginia doctrine. There are two federal statutes under which automobiles may be forfeited. One is a revenue statute,[14] the other is the prohibition statute.[15] There are several differences in the wording of the two sections.

(a) Section 26 of the prohibition statute protects the innocent lienor expressly and the owner by implication.[16] Section 3450 of the revenue statute does not protect the innocent owner or lienor except in case of theft or trespass without the owner's knowledge.[17]

(b) Section 26 is not applicable when the car is at a standstill, as the word "transportation" contemplates locomotion or movement. Section 3450 is not so restricted.[18]

(c) Section 26 requires a conviction of the driver of the offending automobile before the forfeiture machinery can be set in motion. If the driver escapes Section 3450 is still applicable.

(d) Section 26 provides for the return of the property seized upon the execution of "a good and valid bond with sufficient sureties". This procedure is not authorized under Section 3450.

(e) The sections differ as to method of sale. Section 26 provides that "the court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale". Section 3450

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[13] Shepard v. Gosnold, Vaughan 159, 172 (Eng. 1672).

[14] REV. STAT. § 3450 (1878), 26 U. S. C. § 1182 (Supp. 1928).

[15] *Supra* note 10.

[16] *Supra* note 9.

[17] United States v. One Ford Coupe, 21 F. (2d) 639 (S. D. Idaho 1927); United States v. One Buick Roadster, 280 Fed. 517 (D. Mont. 1922).

[18] For a general discussion of distinctions between the two sections, see Buckley, *Forfeiture of Vehicles for Unlawful Movement of Liquor: Under the National Prohibition Act—Under the Revised Statutes* (1924) 4 B. U. L. REV. 183.

provides for arbitrary forfeiture of any auto found with the goods; claims of ownership and lack of knowledge notwithstanding.

(f) Finally, Section 3450 covers the case where the automobile is being used for the removal, deposit and concealment of goods, upon which there is a revenue tax, with intent to defraud the government, and provides for forfeiture. Section 26 protects innocent parties.[19]

Immediately upon the passage of Section 26 the following queries arose: (1) Does Section 26 repeal Section 3450 so far as prohibition cases are concerned? (2) Does the government have an election as between Sections 26 and 3450? (3) If Section 3450 is applicable, to what extent can it be used?

The federal courts for a considerable time groped blindly, and it is possible to find an authority for almost every possible interpretation. In *Payne v. United States*[20] the court held that the revenue act is to be enforced so long as it does not conflict with the prohibition act. The revenue act is not repealed but is only suspended, where the facts of a particular case bring the matter under the prohibition act. Other courts held that the revenue act does not apply, and that all cases involving prohibition fall under the prohibition law.[21] The Supreme Court of the United States, in the case of *U. S. v. Yuginovich,*[22] held that Section 35 of the prohibition act, providing that "all provisions of law that are inconsistent with this act are repealed only to the extent of the inconsistency", should be construed in the light of the rule that later enactments repeal former ones practically covering the same field but fixing a lesser penalty. Several federal courts, acting on the above decision, held that Section 3450 had been repealed by Section 26.[23]

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[19] United States v. Sylvester, 273 Fed. 253 (D. Conn. 1921).

[20] 279 Fed. 112 (C. C. A. 5th, 1922).

[21] One Ford Touring Car v. United States, 284 Fed. 823 (C. C. A. 8th, 1922).

[22] 256 U. S. 450, 41 Sup. Ct. 551 (1921).

[23] United States v. One Haynes Auto, 274 Fed. 926 (C. C. A. 5th, 1921); United States v. One Paige Auto, 277 Fed. 524 (S. D. Tex. 1922); Lewis v. United States, 280 Fed. 5 (C. C. A. 6th, 1922); McDowell v. United States, 286 Fed. 521 (C. C. A. 9th, 1923).

To cure the effect of the *Yuginovich* decision and to remove the confusion in the federal courts, Congress passed the Willis Campbell Act.[24] Section 5 provides:

> ". . . that all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act."

Here is a brilliant illustration of a clarifying act that does not clarify. The decisions of the Supreme Court of the United States since the passage of the Willis Campbell Act have not been uniform. In *United States v. One Ford Coupe* [25] the court held that, in view of Section 5 of the supplemental act (the Willis Campbell Act), an implied repeal of Section 3450 by that act of the National Prohibition Act (Section 26) could not result from mere inconsistency, but must rest upon direct conflict. The court held that both statutes are operative. If the proper facts constituting a cause of action under Section 3450 are alleged, forfeiture could be had under that act. Further, the court said that Section 26 in its relation to the forfeiture of vehicles applies only to cases incident to the prosecution of persons transporting liquor in violation of that act, and does not protect innocent persons whose vehicles are forfeited under Section 3450.

The next important case decided by the Supreme Court of the United States, dealing with the interpretation of Sections 26 and 3450, is *Port Gardner Co. v. United States.*[26] The court held that the right to proceed under Section 3450 is lost, where the government has already proceeded against and convicted the driver of the vehicle on the charge of illegal possession and transportation. A similar view was expressed by the court in *Commercial Credit Co. v. United States,*[27] in which the court held that the

[24] 42 STAT. 223 (1921), 27 U. S. C. § 3 (Supp. 1928).
[25] 272 U. S. 321, 47 Sup. Ct. 154 (1926).
[26] 272 U. S. 564, 47 Sup. Ct. 165 (1926).
[27] 276 U. S. 226, 48 Sup. Ct. 232 (1928).

automobile containing liquor must be disposed of under Section 26, where the driver was convicted of unlawful possession incidental to transportation.

It should be noted that the tendency of the Supreme Court in both the *Port Gardner* and *Commercial Credit Company* cases is to accept the concurring opinion of Mr. Justice Stone in the case of *United States v. One Ford Coupe.*[28] His opinion has become so important that we quote at length:

> "I agree that the Willis-Campbell Act requires section 3450 of the Revised Statutes and Section 26 of the National Prohibition law to be so construed as to stand together insofar as they are not in direct conflict. I agree also that there conceivably may be a deposit or concealment of illicit liquor in an automobile with intent to defraud the United States of the tax upon it, which is not transportation within the meaning of Section 26, and to that extent the two sections are not in conflict. But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition law with intent to defraud the United States of the tax. In that case section 26, it seems to me, plainly directs that the seizure shall be made and proceedings for forfeiture of the seized vehicle had under that section. In that event section 26 saves the interest of the innocent owner or lienor from the forfeiture required by section 3450. It appears to me that the conflict in such a case is direct and that section 26 by its terms is controlling."

The Supreme Court of the United States has thereby committed itself to a liberal construction of the forfeiture statutes in favor of innocent parties. In interpreting Sections 26 and 3450 the highest court in the land has taken a position that reduces to a minimum the chance of vicarious liability.

There are four states that follow the harsh Virginia doctrine. In order to show how far the vicarious liability principle has travelled, we desire to discuss briefly one case from each of these four jurisdictions; namely, South Dakota, Kansas, Nebraska and Arkansas.

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[28] *Supra* note 25, at 335, 47 Sup. Ct. at 159.

In the case of *State v. One Studebaker Automobile*[29] the court construed the state statute in such a manner that the rights of the innocent mortgagee were forfeited. A South Dakota statute[30] provides that, in case of the transportation of intoxicating liquor in an automobile or other vehicle, the automobile or other vehicle so used shall be forfeited and "unless good cause is shown to the contrary by the owner" the same shall be sold by the sheriff of the county. The court construed this strictly so as to protect only the innocent owner. The court said:

> "Indeed there can be no such thing as an innocent holder of a chattel mortgage on an automobile since the enactment of Chap. 204 Laws 1925. The law plainly declares that an automobile used for the purpose of transporting intoxicating liquor is a *public nuisance,* and shall be forfeited".[31]

The appellant contended that:

> ". . . forfeitures are not favored in law, and a statute will not be construed to have that effect unless from the statute itself, in the light of its object and the existing conditions, it is manifest that the Legislature so intended, and the rule especially applies with reference to forfeitures of property of innocent persons".[32]

How did the court answer this contention? It held that to protect the innocent mortgagee would be placing a strained interpretation on the law, and, then, in order to bolster up its decision, the court introduced into the discussion the "public nuisance" doctrine, an expression that is not even mentioned in the statute.[33]

The Kansas case is *State v. Peterson.*[34] The question there was whether a holder in good faith of a mortgage on an auto-

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[29] 50 S. D. 408, 210 N. W. 194 (1926).

[30] S. D. REV. CODE (1919) § 10,303, amended by S. D. Laws 1925, c. 204.

[31] *Supra* note 29, at 412, 210 N. W. at 196. (Italics are the author's.)

[32] *Ibid.*

[33] The federal courts have adopted the opposite construction and have protected the innocent owner, although only the innocent lienor was expressly mentioned in the National Prohibition Act. See Note (1927) 25 MICH. L. REV. 659.

[34] 107 Kan. 641, 193 Pac. 342 (1920).

mobile was entitled to have his lien satisfied out of the proceeds of a sale, under the provisions of a forfeiture statute [35] declaring an automobile used in the transportation of intoxicating liquors to be a common nuisance. There was no question of the innocence of the mortgagee. The court construed the statute so as to sacrifice the innocent mortgagee's interest. The appellant's argument that such a construction is bad policy, because it destroys the security of mortgages, which in these days of large credit transactions it is the policy of the law to protect, was repudiated because the court felt that the legislature clearly intended to sacrifice the innocent mortgagee's interest. The court further dismissed the due process contention by stating that the statute was within the police power of the state and "the purpose of the sale and forfeiture was to make certain the abatement of the nuisance, and to promote the morals and health of the people".[36]

An extreme case from Nebraska is *Sandlovich v. Hawes*.[37] The plaintiff was engaged in the business of renting automobiles for hire. One Tucker, who rented the car from the plaintiff, used it for unlawfully transporting liquor. The plaintiff was admittedly innocent. The court held that he could not recover under a forfeiture statute that declared a car so used to be a common nuisance. Similar statutes in South Carolina and Alabama have been construed so as to protect innocent parties.[38]

In the Arkansas case of *White Auto Co. v. Collins* [39] another type of innocent party was mowed down by the vicious doctrine of vicarious liability. The appellant, the seller of an automobile, delivered possession to the buyer but retained title until payments had been made in full. The buyer illegally transported liquor in the car. The court held that the innocent conditional vendor had no protection under the forfeiture statute. It has been estimated that financing companies in the automobile

[35] KAN. REV. STAT. ANN. (1923) c. 21, § 2162.

[36] *Supra* note 34, at 647, 193 Pac. at 344.

[37] 113 Neb. 374, 203 N. W. 541 (1925).

[38] State v. Hughes, 203 Ala. 90, 82 So. 104 (1919); Maples v. State, 203 Ala. 153, 82 So. 183 (1919); Moody v. McKinney, 73 S. C. 438, 53 S. E. 543 (1906).

[39] 136 Ark. 81, 206 S. W. 748 (1918).

field, retaining title until all the payments have been made, actually participate in three-fourths of the annual four million sales transactions involving automobiles. The financial operations are estimated at two billion dollars annually.[40] Here is a legitimate business that is being unduly imposed upon and being forced to act at its peril, in order that a drastic prohibition enforcement policy may be carried out.

On what sound theory of social policy can the property rights of persons who have no knowledge of the unlawful use of their property be forfeited, justifiably? It is contended by some that it is necessary to forfeit property rights of innocent parties in order to enforce the prohibition laws. The proponents of this theory will argue that, if the property rights of parties innocent of the wrongful use of their property are not forfeited, it will open the door to collusion and afford a ready means of evading the law. It is said that any person desiring to engage in the illegal transportation of liquor could, by placing an encumbrance upon an automobile, minimize the financial investment and the hazard of the business. This is no doubt true, but it does not follow that effective enforcement of the prohibition laws indispensably requires that the innocent shall suffer by the imposition of the doctrine of vicarious liability. The man who desires to engage in the illegal transportation of liquor can purchase outright a second-hand car that will involve a very limited financial investment. One successful "haul" will net a profit sufficient to cover the original outlay. We contend that wherever possible the courts should place a construction on forfeiture statutes such as will protect the property rights of innocent parties, and then, as a safeguard, place the burden upon the person who claims to be innocent to prove by clear and satisfactory evidence that he is in fact innocent. By such a construction the property rights of innocent parties are not destroyed, while the property rights of the guilty are forfeited. The law has accomplished its proper object—justice. Under the present situation in five of our states the apparent object is enforcement at any price.

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[40] New York Times, Feb. 21, 1928, at 7.

Another vicious theory sometimes advanced is that an automobile, while being illegally used, is a common nuisance. The term "common nuisance" is a very general and abstract term. What the law should really aim to do is to punish the wrongful user. It certainly cannot be said that an automobile is unlawful *per se* because the very nature of the vehicle is admirably adapted to a quick "get away". If justice is to be maintained, the enforcement of prohibition should be restricted to the punishment of wrong-doers.

How far will the proponents of vicarious liability carry their doctrine, in the hope that thereby they will achieve an effective enforcement of the prohibition laws? After one has accepted their fundamental premise, there should be no difficulty in extending the doctrine (under "common nuisance" statutes) to the case where the owner is using his own car and is innocent, although liquor is found in the car. Suppose that, through malicious motive or as a practical joke, a person should buy a dozen bottles, and, after placing a quantity of intoxicating liquor in each, should place one of the bottles in each of the first dozen cars that he found parked on any city street. The next step would be to notify the prohibition enforcement unit. The prohibition sleuths would thus be afforded an admirable opportunity for improving their enforcement record. With a minimum of risk, they would simply stand by until their prey arrived. When the innocent owner attempted to drive the car away, he would be apprehended, the car would be searched, and a seizure and forfeiture would follow.

It will not do to waive aside this hypothetical case by characterizing it as fanciful, absurd, and impossible. Soon after the case of *Carroll v. United States*[41] was decided, the writer predicted[42] that the doctrine of that case would inevitably lead to the killing of many innocent motorists. At the time of utterance that prediction may have seemed absurd to some. Today we know that there have been scores[43] of legalized murders of inno-

[41] 267 U. S. 132, 45 Sup. Ct. 280 (1925).
[42] Black, *The Curse of the Carroll Case*, The Minute Man, Aug. 22, 1926.
[43] Chicago Tribune, Sept. 25, 1927.

cent motorists, in connection with which the prohibition enforcement unit has found aid and comfort in the doctrine of the *Carroll Case*.[44]

No specious plea of difficulty of enforcement should ever justify the recognition of the doctrine that the end justifies the means. Far better that the guilty go free than punish the innocent.

> "The damnable character of the bootlegger business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment . . . in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice' ".[45]

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[44] See Black, *A Critique of the Carroll Case* (1929) 29 COL. L. REV. 1068.

[45] McReynolds, J., dissenting, in Carroll v. United States, *supra* note 41, at 163, 45 Sup. Ct. at 288.