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G. D. H.

West Virginia University College of Law

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STUDENT NOTES AND RECENT CASES

INTOXICATING LIQUORS—CONFISCATION AND SALE OF AUTOMOBILE ENGAGED IN THE UNLAWFUL TRANSPORTATION OF INTOXICANTS IN ITS EFFECT ON THE INNOCENT OWNER OF THE VEHICLE—NATURE OF THE PROCEEDING.—The enactment of State and Federal prohibition enforcement Acts, passed in pursuance to amendments to the State and United States Constitutions,¹ the Federal amendment giving the State and National governments concurrent powers, and the confiscation and sale of rum-running automobiles, as provided in said statutes, gives rise to very practical questions relating to the nature of the condemnation proceeding by which the vehicle unlawfully transporting intoxicating liquors is forfeited. In this regard, the pertinent provisions of the West Virginia statute are found in sections 14 and 17 of Chapter 32A, of the Code. Section 14 provides (*inter alia*) that:

“All automobiles, cars, boats (other than railway cars, and steamboats), wagons, aircraft, beasts of burden, or vehicles of any kind that are used to bring or carry excessive quantities of intoxicating liquors into the State, or from one place to another within the State, or that are known or found to contain excessive quantities of intoxicating liquors * * * * * shall be subject to seizure, forfeiture, and confiscation by the state. * * * * * The state tax commissioner and the prosecuting attorney, or either of them may institute a suit in equity in the circuit court * * * * *, making all proper persons parties thereto. If the circuit court upon the hearing shall find that [in substance, the seized vehicle was thus unlawfully transporting intoxicants into or within the State,] said court shall adjudge such property to be a common and public nuisance, and shall enter an order directing that the same be sold by the sheriff of the county, at public auction, to the highest bidder, for cash; provided, however, that if the court shall find that the bona fide owner of any vehicle of conveyance or other property seized and proceeded against under the provisions of this section did not know of, consent to or acquiesce in such unlawful use of said property, and that said owner had no cause to believe that said property was being, or intended to be, so unlawfully used, as aforesaid, then said court shall enter an order releasing said property to the true owner thereof.”

¹ CONSTITUTION OF WEST VIRGINIA, Art. VI, §46 (ratified 1912); CONSTITUTION OF THE UNITED STATES, XVIII Amendment (1920).

Section 14 further provides that a "bona fide lienor of any such property shall be entitled to file his petition and become a party to any proceeding in equity under this section, and shall be permitted to share in the proceeds of the sale of any such property, as his interest may appear," but that neither husband nor wife to offender shall be deemed bona fide owners within the meaning of this Act; that "either the state or the defendant shall have the right of appeal from the judgment of the circuit court," if the value of the confiscated property is not less than one hundred dollars; and that notice of such sale shall be made by publication in a newspaper in the county for four weeks and posted at the door of the court house. Section 17 prescribes that the suit shall be brought in the name of the state.

The Supreme Court of Appeals has recently been twice called upon to consider cases arising from confiscation proceedings brought under these two sections. In the earlier case,² the owner intervened; and the Supreme Court held that, although the intervenor put the seized automobile into the possession of the accused under such an agreement as in West Virginia amounts to a conditional sales contract, he was entitled to the release of the car, and that the stipulation in a memorandum, accompanying the "bailment" (as the Court intimates that it would be treated in Pennsylvania, which was the *locus contractus*) for immediate maturity of deferred installments and giving the lessor the right to repossess the property, was not in itself evidence of knowledge or ground of belief on the lessor's part of the lessee's intent to devote the property to an unlawful use. Neither this case nor the later decision,³ which, while arising from a confiscation, was considered in the appellate Court solely with reference to a procedural point, throws much light upon the question as to whether the proceeding under the West Virginia prohibition statute to confiscate and sell rum-running vehicles binds only the parties to the suit, or is conclusive upon the whole world. If the suit is a proceeding strictly *in rem*, it forever concludes the rights of everyone in the subject-matter of the action;⁴ but if it is only *quasi in*

² State v. Chester Hall and the White Co., 91 W. Va. 648, 114 S. E. 250 (1922).

³ State v. Crockett, 94 W. Va. 423, 119 S. E. 165 (1923).

⁴ The Belgenland, 114 U. S. 355 (1885).

rem, it affects and determines only the rights and interests of the parties before the court, in relation to the property involved.⁵

The question, indeed, is a very practical one, as the confiscation and sale of "bootleg" automobiles is of not infrequent occurrence. Let us suppose, for instance, that A is caught in the act of transporting "excessive quantities of intoxicating liquors" (to use the language of the statute) into, or through West Virginia, in an automobile. The state brings a proceeding in equity for the condemnation and sale of the car. At the hearing it does not appear that A is not the owner of the confiscated vehicle. Notice of the sale is published in a newspaper of the county for four weeks, and is posted at the front door of the court house. B, in good faith, buys in the car for value, at the sheriff's sale. It later develops that the true owner of the automobile was C, who during all this time had been living in a distant county of the state, or in another state, and that he knew nothing, as a matter of fact, of the seizure, condemnation, and sale of his car; it also appears that C leased the machine to A, but without knowledge that A would put it to an unlawful use. Let us assume, further, that there was a stipulation in the lease, such as there was in *State v. Chester Hall and the White Company*,⁶ by virtue of which C was entitled to repossess the automobile, if it should be put to an unlawful use. Should B in a case such as is here suggested, be compelled to give up the car, or be held liable to compensate C in some other manner? B acted in good faith, in buying the property at the judicial sale, in accordance with a valid decree of a court of equity, and paid a valuable consideration. True enough, if the owner of the machine had known of the pendency of the proceeding, he would have intervened, and the Court, if satisfied as to his innocence, would have ordered his automobile released to him. But in contemplation of law, all parties interested (including C) would have constructive notice by the publication and posting; there would be nothing to indicate that C was the rightful owner; and the decree of the court purported to direct and enable the sheriff to sell the property and convey a good title to the buyer.

⁵ *Woodruff v. Taylor*, 20 Wt. 65 (1847).

⁶ *Supra*, n. 3.

Yet, on the other hand, it *was* C's automobile that was condemned and sold; and C, as a matter of fact, had no actual knowledge of the proceeding by which his property was forfeited, and, therefore, no actual notice to come in and defend his rights.

It might plausibly be contended that the same principles apply here as in the case of a ship brought into a prize court, on account of running a blockade. Yet there is this essential difference: The seizure of a vessel entering or leaving a port in violation of a blockade is the exercise of the war power of a sovereign state, striking at the enemy belligerent in a struggle in which the state is engaged in preserving perhaps its very political existence, while seizure of a rum-running vehicle is unquestionably an exercise of the state's police power,—that power which “extends to all matters affecting the peace, order, health, morals, convenience, comfort and safety of its citizens.”⁷ However much controverted may be the precise scope of the police power, if there ever was a clear case for its exercise, it is here presented.

In the case of the blockade runner, if the true owner of the offending vessel intervenes before the actual condemnation of the ship as a prize, and proves to the satisfaction of the court that his property had been used without his authority, or knowledge, or consent, as, for example, where a neutral vessel is seized by a German crew who employ it in running the British blockade,—there, by the principles of international law, the property captured by the blockading nation should be restored to the innocent owner, who has not been negligent, or otherwise at fault. But if the condemnation has already taken place and the boat sold as a prize, the former owner is concluded, on the ground that the confiscation is an *in rem* proceeding. The next proposition for consideration is whether the condemnation of the blockade runner, which, it is agreed, is *in rem*, is so analogous to that of the rum-running automobile as to make the forfeiture of the latter an *in rem* proceeding,—and, therefore binding upon the whole world, rather than a suit *quasi in rem*, and conclusively adjudicating the rights only of

⁷ McQUILLAN, MUNICIPAL CORPORATIONS, §889 (1913); *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S. E. 105 (1915).

the parties thereto. In the absence of West Virginia decisions directly in point, the reported cases of other states have been examined to ascertain the manner in which their courts have handled the question here under discussion.

Blakemore⁸ lays down the proposition that "the seizure of an automobile because unlawfully used in the transportation of liquor is a proceeding *in rem*," in stating the rule of law enunciated in a number of jurisdictions, including Alabama,⁹ and Virginia.¹⁰ And it has been decided in New York that the state need prove its case only by a preponderance of the evidence.¹¹ In Maine, the purchaser of an automobile takes subject to the rights of an innocent claimant.¹² Likewise, in Alabama, although the court has declared the confiscation of liquor-carrying vehicles to be an action *in rem*, it is held that where the owner is innocent in regard to the unlawful use of his automobile, it is erroneous to sell the car, and the proceeds of the sale should be returned to him.¹³ This proposition finds support in the dissenting opinion of Stephen J., of the Georgia court, who strongly insists that where the wife's car, while in the possession of the husband who is using it to transport intoxicants without the owner's consent or knowledge, is seized and sold on condemnation, she may assert her rights in an action of trover against the purchaser at the condemnation sale;¹⁴ and in New York the owner of property taken illegally may maintain an action of replevin.¹⁵ In this connection, it should be borne in mind that the West Virginia statute¹⁶ provides the "husband or wife to an offender shall not be deemed bona fide owners within the meaning of this act."

In a few states, however, a vehicle used in the illegal transportation of liquor may be forfeited merely on evidence that the owner voluntarily parted with possession, without evidence of guilty knowledge or negligence on his part, as in Virginia,¹⁷ where the automobile is forfeited notwithstanding a prior recorded lien;¹⁸ or in Nebraska, where

⁸ BLAKEMORE ON PROHIBITION (2nd ed.), p. 580 (1925).

⁹ *In re One Ford Automobile*, 205 Ala. 193, 87 So. 842 (1921).

¹⁰ *Landers v. Commonwealth*, 126 Va. 780, 101 S. E. 778 (1919).

¹¹ *In re Holcomb*, 192 N. Y. S. 407 (1921).

¹² *State v. Paige Touring Car*, 120 Me. 496, 115 Atl. 275 (1921).

¹³ *Eckl v. State*, 205 Ala. 466, 88 So. 567 (1921).

¹⁴ *Hennon v. Jones*, 25 Ga. App. 525, 103 S. E. 784 (1920).

¹⁵ *Gatto v. Murray*, 190 N. Y. S. 360; *People ex rel Wallace, Dist. Atty. v. Christman Municipal Court Justice, et al.*, 191 N. Y. S. 704 (1921).

¹⁶ W. VA. CODE, c. 32A, §14 and §17, *supra*.

¹⁷ *Buchholtz v. Commonwealth*, 127 Va. 794, 102 S. E. 760 (1920).

¹⁸ *Pennington v. Commonwealth*, 127 Va. 803, 102 S. E. 768 (1920).

the court has held that, although the plaintiff sold the car to the accused and recorded a first mortgage lien, the vendor is not protected.¹⁹ Nevertheless, relief from forfeiture rests in the discretion of the trial court;²⁰ and no forfeiture will be declared, moreover, where the real owner had no knowledge of the illegal transportation and was not guilty of negligence in failing to prevent such use of his property, according to an Alabama decision;²¹ and a similar view is expressed by the Oklahoma court.²² Thorpe²³ believes that the statutes of many states, as expressive of the legislative intent, do not contemplate the condemnation of the property of those who have not aided in the unlawful transportation, and were not charged with knowledge that their property would be so used, and he cites a number of cases in support of that proposition, including cases from Alabama,²⁴ Idaho,²⁵ and Maine.²⁶ In the Idaho Case, the captured car was sold under a conditional sales contract, which stipulated that the vendor should retain title, ownership, and right to possession until Muir, the buyer, should pay the last instalment; Muir leased the car to a third party, to be used in liquor carriage, of which arrangement the seller was unaware, until after the seizure—and the court held that the vendor was entitled to recover the vehicle, and that replevin lay against the sheriff for its detention. Blakemore²⁷ reaches the conclusion that the interest of the innocent owner or lienor is not forfeited, in most states, if he has been guilty of neither complicity nor negligence.

On the other hand, it has been held²⁸ that, in the Kansas statute providing for forfeiture of vehicles employed in violation of the prohibition law, there was clearly no legislative intent to protect the rights of innocent owners or mortgagees and, further, that such an enactment does not violate the "due process" clause of the Federal Constitution; and the court declares that "it is within the police power of the state to provide for the forfeiture of property used in violation of a criminal statute, and to provide expressly that the

¹⁹ Robinson Cadillac Motor Car Co. v. Ratekin, 104 Neb. 369, 177 N. W. 337 (1920).

²⁰ Mason v. Commonwealth, 137 Va. 819, 120 S. E. 133 (1923).

²¹ Briscoe Motor Car Co. v. State, 204 Ala. 231, 85 So. 475 (1920).

²² One Buick Car v. State, 77 Okl. 233, 188 Pac. 108 (1920).

²³ THORPE, PROHIBITION AND INDUSTRIAL LIQUOR §946 (1926).

²⁴ Briscoe Motor Car Co. v. State, *supra*, n. 21.

²⁵ Naylor v. Simmons, 33 Idaho 320, 194 Pac. 94 (1920).

²⁶ State v. One Buick Automobile, 122 Me. 280, 119 Atl. 666 (1923).

²⁷ BLAKEMORE ON PROHIBITION, *supra*, n. 8.

²⁸ State v. Peterson, 107 Kan. 641, 193 Pac. 342 (1920).

rights of an owner or mortgagee, however innocent of the intent or purpose for which the property is to be used, shall be forfeited, and such law is not open to the objection that it violates the fourteenth amendment by taking property without due process of law." Equally harsh is the rule in Virginia, where it has been adjudicated that, if an automobile is used by a member of the owner's family without his consent for transporting liquor unlawfully, it may be forfeited, and in the requisite proceeding personal service on the owner is not necessary.²⁹ But, as the writer has pointed out *supra*, a milder rule prevails in many jurisdictions, as in Georgia,³⁰ or in Alabama, in which State it has been held that the owner is entitled to the return of his machine, operated without his permission or consent by a younger brother in violation of the State prohibition law.³¹

Under the National Prohibition Act the innocent owner of a vehicle unlawfully engaged in the carriage of intoxicants is protected,³² but the owner must show good cause why his property should not be forfeited.³³ The Volstead Act repealed the prior statute providing for forfeiture of vehicles used for illegal transportation.³⁴ But the confiscation of vehicles employed in the carriage of liquors on which the Federal tax has not been paid is absolute;³⁵ and this harsh result likewise follows, in condemnation proceedings under the Indian Appropriation Act of March 2, 1917, relating to the importation of intoxicants into Indian country.³⁶

It must be admitted, in conclusion, that no very satisfactory general rule can be deduced from the conflicting views taken by the various jurisdictions, as to the precise nature of the forfeiture proceedings. Alabama, for instance, calls the confiscation a suit *in rem*, and, nevertheless, holds that the innocent owner or lienor is entitled to be relieved against its effects; while Virginia's attitude, in denying protection to such owner or lienor, is squarely *contra*. In many of the cases cited, the decision turns upon the legislative intent as expressed in the widely varying statutes of the various States; therefore, the cases must be studied in the light of

²⁹ Landers v. Commonwealth, *supra*, n. 10.

³⁰ Mays v. Curry, 150 Ga. 290, 103 S. E. 458 (1920).

³¹ *In re Gattina*, 203 Ala. 517, 84 So. 760 (1919).

³² United States v. Brockley, 266 Fed. 1001 (1920).

³³ United States v. One Shaw Automobile, 272 Fed. 491 (1921).

³⁴ United States v. One Haynes Automobile, 268 Fed. 1003 (1920).

³⁵ Goldsmith-Grant Co. v. United States, 254 U. S. 505 (1921).

³⁶ United States v. One Seven Passenger Paige Car, 259 Fed. 641 (1919).

the dissimilar statutes upon which they are based. Huddy³⁷ summarizes the situation thus: "In some states the forfeiture is absolute, regardless of the innocence of the person asserting a claim on the machine; but generally the rights of an innocent lienor or owner may be asserted and protected by the court." As it was pointed out *supra*, the West Virginia Court has not been called upon to decide whether the rights of the morally innocent owner of a seized automobile would be concluded by the condemnation of his property, if, through no negligence or other fault on his part, he did not intervene to assert his interests until after the hearing and the sheriff's sale to a purchaser in good faith and for valuable consideration. But since the legislative intent seems to direct the penalty primarily against the person using the vehicle in violation of the prohibition enactment rather than against the vehicle itself, the writer ventures to suggest that, if the supposed situation should arise in this State, the Court might be inclined to treat the proceeding, as to such innocent claimant, as a suit *quasi in rem*, and grant him relief, although it is possible that our Court might follow the Virginia decisions on this question.

—G. D. H.

³⁷ Huddy on Automobiles §1302 (1924).