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Criminal Law—Requisites for Forfeiture of Vehicles Transporting Liquor in Violation of Law

From the early common law, the courts have lent added efforts to the cause of deterring violations of the criminal law by providing for condemnation and forfeiture of various instrumentalities used in the commission of crime. Today the Congress and the State Legislatures have, for the most part, adopted this policy by providing for forfeiture of various instrumentalities used in commission of crime as a specific penalty thereof. However, as a general rule, the legislative adoptions of the common law policy of forfeiture differ from the common law in one important respect: *American Jurisprudence*[1] points out that "forfeiture in many cases of felony did not attach at the early English common law where the proceeding was in rem until the offender was convicted." But, "the ancient doctrine requiring conviction of a personal offender does not apply to seizure and forfeiture created by statutes in rem, for the reason that the thing in such case is primarily considered as the offender or rather that the offense is attached primarily to the thing. . . ."

The practical importance of such a distinction may be illustrated in this manner: a culprit is engaged in violation of the state law by transporting non-tax paid liquor in an automobile. Upon being overtaken by law enforcement officers, the culprit determines discretion to be the better part of valor, abandons the automobile and its cargo and flees to safety. The officers are thus left with an automobile which is clearly being used in violation of the criminal law, but with no criminal defendant. It will be observed that under the common law, it would not be possible to proceed against the automobile in this case since there is no criminal defendant, but that under the in rem statutory type proceeding the absence of a criminal defendant would not be fatal.

In North Carolina the above illustration apparently occurs quite frequently. Although N. C. has a Statute providing for forfeiture of automobiles used in illegal transportation of liquor, uncertainty of its application to this type of situation has created something of a hiatus in the law, with attendant confusion on the part of law enforcement officers.[3]

G. S. § 18-6 provides in part as follows:

[1] 23 AM. JUR., *Forfeitures and Penalties* § 6 (1939). Dobbins's Distillery v. United States, 96 U. S. 395, 399 (1877); Various items of Personal Property v. United States, 282 U. S. 577, 580 (1931).

[2] United States v. The Ruth Mildred, 286 U. S. 67, 69 (1932); Commonwealth v. Certain Motor Vehicle, 261 Mass. 504, 508, 159 N. E. 613, 614 (1928).

[3] Based on numerous inquiries directed to the Institute of Government, Chapel Hill, N. C., from Law Enforcement Officers. N. C. Gen. Stat. § 18-6 appears to be the only statute in N. C. which provides for a *judicial* forfeiture of articles used in the commission of crime as a specific penalty thereof.

> "When any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquor in any . . . automobile . . . or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein . . . he shall take possession of the vehicle . . . and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested . . . said vehicle . . . shall be returned to owner upon execution by him of a good and valid bond . . . to return said property to the custody of said official on the day of trial to abide the Judgment of the court. All liquor seized under this section shall be held and shall upon the acquittal of the person so charged be returned to established owner, and shall within ten days of conviction . . . be destroyed . . . unless the claimant can show that the property seized is his property, and that the same was used in transporting liquor without his knowledge and consent . . . The court shall order a sale by public auction of the property seized."

Although the North Carolina Supreme Court has not had occasion for a direct holding on whether G. S.§ 18-6 would authorize the state to proceed directly against the automobile in the absence of a conviction of the criminal defendant, there is dicta which gives a strong indication that the state cannot do so. In *State v. Maynor*[4] where the defendant had been convicted of illegal transportation of non-tax paid liquor it was held that the court may at a subsequent term enter an order nunc pro tunc for the forfeiture and sale of the vehicle used for such transportation under G. S. § 18-6. The court then said, "The order of condemnation and sale of the vehicle seized is perforce no part of the personal judgment against the accused, *albeit both are dependent upon his conviction*."[5] (Italics added.) Then in a later case[6] the court ruled that where the jury had found the defendant guilty of transporting non-tax paid liquor and where defendant had admitted ownership, "all the essential facts necessary to authorize confiscation of defendant's automobile were before the court."[7]

Whether this interpretation of G. S. § 18-6 is right or wrong such language has necessitated the storing of each car involved in the situation where it has not been possible to proceed against the driver, with the result that there are many cars stored in North Carolina today with in rem proceedings made impossible by such interpretation.

It is of interest to contrast the language of G. S. § 18-6 with that of other federal and state statutes relating to condemnation and forfeiture

[4] 226 N. C. 645, 39 S. E. 2d 833 (1946).
[5] *Id.* at 646, 39 S. E. 2d at 834.
[6] State v. Vanhoy, 230 N. C. 162, 52 S. E. 2d 278 (1949).
[7] *Id.* at 165, 52 S. E. 2d at 280.

proceedings. For instance 18 United States Code § 3618 states "any conveyance, whether used by the owner or another in introducing or attempting to introduce intoxicants into the Indian country or into other places where the introduction is prohibited by treaty or enactment of Congress, shall be subject to seizure, libel and forfeiture." In *United States v. One Chevrolet Coupe,*[8] the court interpreting the statute, held automobiles used to introduce intoxicating liquors into Indian country may be seized and forfeited regardless of the owner's innocence. "It is the automobile itself that is the offender and it is immaterial what the circumstances are."[9]

Similar language is found in 46 United States Code § 325 dealing with licensed vessels: "whenever any licensed vessel . . . is employed in any trade whereby the revenue of the United States is defrauded . . . or found with merchandise of foreign growth . . . or any taxable domestic spirits, wines, or other alcoholic liquors, on which the duties or taxes have not been paid or secured to be paid, such vessel with her tackle, apparel and furniture, and the cargo, found on board shall be forfeited." In *United States v. The Ruth Mildred,*[10] the court held that for breach of the navigation laws under 46 United States Code § 325 the proceedings are strictly in rem and are not dependent upon a preliminary adjudication of personal guilt.

United States v. 25 Packages of Panama Hats,[11] was a proceeding to forfeit, for fraud of foreign consignors, goods not technically entered at the New York Customshouse. The Tariff Act[12] declared, "That if any consignor . . . shall enter . . . into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, or shall be guilty of any willful act or omission . . . whereby . . . United States . . . shall . . . be deprived of lawful duties, such merchandise . . . shall be forfeited. . . ." The Court held that there is no inconsistency in proceeding against the res if the wrongdoer is beyond the jurisdiction of the court. The very fact that the criminal provision of the statute does not operate extra-territorially against the consignor, would be a reason why the goods themselves should be subjected to forfeiture on arrival here. The consignor's absence would not relieve the goods from the liability to be forfeited."[13] There are other cases to the same effect.[14]

[8] 58 F. 2d 235 (9th Cir. 1932).
[9] *Id.* at 236.
[10] 286 U. S. 67 (1932).
[11] 231 U. S. 358 (1913).
[12] Tariff Act of Aug. 5, 1909, 36 Stat. 11, 97 Repealed, 38 Stat. 201 (1913).
[13] 231 U. S. at 362.
[14] In an early federal case the property seized was a distillery in the hands of a lessee. The acts of the lessee with intent to defeat the revenue were unknown to the owner. Nevertheless it was held that the distillery was subject to forfeiture. The court said: "A forfeiture proceeding under R. S. § 3257 or 3281 is in rem.

It may be noted that in the above statutes there has been no mention of prior conviction of the defendant before forfeiture proceedings may be instituted, and likewise the courts have not construed them as demanding such conviction. This type of statute is not confined to the federal codes, but may be found in many state statutes. A Kansas statute[15] states, "If the court shall find that said intoxicating liquors or other property . . . being used in maintaining a common nuisance, he shall adjudge forfeited so much thereof as he shall find was being so used. . . ." In *State v. McManus*[16] it was argued by defendant that before the property could be seized and condemned under this statute there must be a conviction of the person who unlawfully used such property. The court in its opinion categorically said, "we don't agree." "The property so kept and used is tried in a proceeding in rem, regardless of whether there has been an arrest or conviction of the person charged with maintaining such place."[17] It was also pointed out in this case that this was the practice in the courts of the United States where goods have been forfeited for non-payment of customs revenues.[18]

The code of Virginia[19] states, "if such illegally acquired alcoholic beverages . . . be found therein . . . shall seize the same, and shall also seize and take possession of such conveyance or vehicle and deliver the same . . . to the sheriff of the county . . . taking receipt therefor. . . . The officer making such seizure shall also arrest all persons found in charge of such vehicle . . . within ten days after receiving notice of any such seizure, the attorney for the Commonwealth shall file in the name of the Commonwealth, any information against the seized property. . . . Such information shall allege the seizure and set forth in general terms the grounds of forfeiture of the seized property, and shall pray that the same be condemned and sold. . . ." In *Ives v. Commonwealth*[20] the court held that a proceeding under this section to have an automobile condemned and sold because of a violation of the Alcoholic Beverage Control Act is a proceeding in rem rather than in personam and is a civil

It is the property which is proceeded against and by resort to a legal fiction, held guilty and condemned as though it were conscious, instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense." Dobbins Distillery v. U. S. 96 U. S. 395 (1877). Similar language may be found in a later federal case brought in a libel proceeding under the internal revenue laws. The court held that the dismissal of the criminal action does not bar the libel proceeding against the vehicle. Sneed v. U. S., 217 F. 2d 912 (4th cir. 1954).

[15] KAN. GEN. STAT. § 2496 (1942).
[16] 65 Kan. 720, 70 Pac. 700 (1902).
[17] *Id.* at 725, 70 Pac. at 701.
[18] Origet v. United States, 125 U. S. 240 (1888).
[19] VA. CODE ANN. § 4-56 (1950).
[20] 182 Va. 17, 27 S. E. 2d 906 (1943).

action against an automobile and not a criminal action against a person. South Carolina and Tennessee have statutes similar in effect.[21]

It has been suggested above that the North Carolina Court will not construe G. S. § 18-6 as allowing forfeiture proceedings before criminal conviction of the defendant as the above federal and state courts have done.

One clue to our court's interpretation of G. S. § 18-6 may be found in the Federal Courts construction of § 26 of the National Prohibition Act[22] which our act very closely follows. It provided "when the commissioner . . . shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any . . . automobile . . . or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein . . . he shall take possession of the vehicle . . . and arrest the person in charge thereof. Such officer shall at once proceed against the person arrested . . . but the said vehicle shall be returned to the owner upon execution by him of a good and valid bond . . . and to return said property to custody of said officer on the day of the trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to contrary is shown by the owner, shall order a sale by public auction of property seized." In construing this statute the court in *United States v. Slusser*[23] held, to authorize the forfeiture of a vehicle as having been used for illegal transportation of liquor under this section, the person in charge must previously have been arrested and convicted. And in the case of *"The J. Duffy"*[24] the court said under this section, "conviction of the person in charge of a vehicle, or the master of a vessel, seized while being used for this illegal transportation of liquor, is a condition precedent to the forfeiture of the vehicle or vessel. And in *United States v. The Ruth Mildred*[25] the court in distinguishing 46 United States Code § 325 from § 26 of the National Prohibition Act said that in the former statute her guilt was not affected, was neither enlarged or diminished, by the fact that the cargo happened to be one of intoxicating liquor. The government made out a case of forfeiture when there was proof that the cargo was other than fish. "Forfeiture under § 26 of The National Prohibition Act is one of the consequences of a successful criminal prosecution of a personal offender, and is ancillary thereto. While forfeiture under 46 United States Code § 325 for breach of navigation laws is strictly in rem and is not dependent upon a preliminary adjudication of personal guilt."[26]

[21] S. C. CODE LAWS §§ 4-11, 4-115 (1952); TENN. CODE ANN. § 57-622 (1955).
[22] 27 USCA § 40. Repealed 49 Stat. 872 (1935).
[23] 270 Fed. 818 (S. D. Ohio 1921). [24] F. 2d 426 (D. Conn. 1926).
[25] 286 U. S. 67 (1932).
[26] *Id.* at 69.

Thus the similarity between the two statutes and the respective cases construing same are clearly evident.

While it might be possible for our court to decide that G. S. § 18-6 does allow direct proceedings against the automobile in the absence of arrest and conviction of the criminal offender without doing violence to the language of the act, a literal reading of the statute seems clearly to lead to a contrary conclusion. There is, however, language in G. S. § 18-6 which could be seized upon to support condemnation and forfeiture proceedings without arrest and conviction. That language is "if no one shall be found claiming the . . . vehicle, the taking of the same with a description thereof, shall be advertized in some newspaper . . . and if no claimant shall appear within ten days after the last publication . . . the property shall be sold. . . ."

However, to interpret the above language as allowing condemnation and forfeiture proceedings without prior arrest and conviction of the culprit would be to take it out of context. For unlike many Federal statutes, G. S. § 18-6 protects the rights of innocent owners and creditors in the offending property. This section of the statute immediately precedes the above language, "and the officer . . . after deducting the expenses of keeping the property . . . shall pay all liens . . . which are established . . . and as having been created without the lienor having any notice that the carrying vehicle was being used for illegal transportation of liquor. . . . All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property: if however no one shall be found claiming. . . ." Thus the entire meaning of the phrase beginning "if no one shall be found claiming" is in all probability referring to the absence of a claimant as distinguished from the absence of a driver or criminal defendant.

Therefore in view of the literal language of the statute, and the interpretation given an almost identical federal statute, by the federal courts, the dicta found in the several North Carolina cases[27] suggesting that condemnation and forfeiture proceedings under G. S. § 18-6 are dependent upon arrest and conviction of the criminal offender seem sound.

Inasmuch as the offense of violating the liquor law must be proved prior to a forfeiture of the vehicle under either the typical in rem proceeding or the proceeding subsequent to the criminal conviction as contemplated by G. S. § 18-6, it would seem that either statutory policy proceeds upon an equal regard of the rights of owners.[28] For under the

[27] State v. Maynor, 226 N. C. 645, 39 S. E. 2d 833 (1946); State v. Vanhoy, 230 N. C. 162, 52 S. E. 2d 278 (1949).

[28] However, it might be noted that one difference between the two proceedings is that under the in rem proceedings only the civil burden of proof, a preponderance of the evidence, would be necessary to sustain a forfeiture, while under N. C. GEN. STAT. § 18-6, assuming a conviction of the criminal defendant is necessary for for-

present interpretation of our statute, a fleeing culprit may not only escape criminal conviction, but also might ultimately regain possession of his automobile.

Thus the writer suggests that the legislature take cognizance of the various questions raised from the language of G. S. § 18-6 and the ultimate confusion resulting therefrom, with a view towards clarification, or better still an adherence to what seems to be the general trend toward allowing condemnation and forfeiture proceedings without regard to prior arrest and convictions of the criminal defendant.

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Evidence—Admissibility of Truth Serum Test Results

The *Truth Serum Test*[1] has received practically no judicial recognition since its recent debut into the truth discovery field. The results of this test, usually taken voluntarily by the accused,[2] have continually been excluded by the courts primarily because statements or confessions made while examinees are under the influence of such drugs as sodium amytal and sodium pentothol are (1) unreliable,[3] (2) self-serving or

feiture, the required burden of proof to support forfeiture is proof beyond a reasonable doubt.

[1] This term has been frequently applied even though actually misleading, for the drugs are neither serum, nor do they always produce the "empirical" truth. After the drug is injected, the patient falls into a state of partial consciousness (twilight sleep) and becomes susceptible to interrogation until recovery which usually requires several hours. The drug eliminates repressive influences and ordinary restraints which under normal conditions lead to embarrassment and fear. Hallucinations in some instances have occurred. After recovery the patient is said to have no recollection of the transpired interview. The technical label for such an examination is *narcoanalysis*. Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L. J. 315 (1953); Muehlberger, *Interrogation Under Drug Influence*, 42 J. CRIM. L., C. & P. S. 513 (1951).

[2] Assuming defendant confesses during drug-induced interview to which he voluntarily submits, no claim of self-incrimination would bar such confession from evidence; however, such confessions are at present deemed unreliable, and hence, inadmissible. 3 WIGMORE, EVIDENCE § 841 (a) (1940). Evidence obtained from these interviews or from clues tendered therein, most likely would be admissible as would confessions given after presentation of test results to the examinee. Note, 62 YALE L. J. 315, 337 (1953); STANSBURY, EVIDENCE, § 186 (1946). Tests taken involuntarily must necessarily raise issues of self-incrimination and illegally obtained confessions. Such confessions will of course be held inadmissible when extracted while examinee is under the influence of injected drugs. Whether evidence discovered in such interview or whether confessions induced by test results would be held admissible will depend upon the laws applicable to particular jurisdictions in question. Despres, *Legal Aspects of Drug-Induced Statements*, 14 U. CHI. L. REV. 601 (1946). See, Note 32 N. C. L. REV. 98 (1954); 3 WIGMORE, EVIDENCE § 859 (1940); STANSBURY, EVIDENCE §§ 182-86 (1946). In regard to due process see Silving, *Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683 (1955).

[3] State v. Thomas, 79 Ariz. 158, 285 P. 2d 612 (1955); State v. Lindemuth, 56 N. M. 257, 243 P. 2d 325 (1952); Henderson v. State, 94 Okla. Crim. 45, 230 P. 2d 495 (1951), *cert. denied*, 342 U. S. 898 (1951). See notes 62 YALE L. J. 315 (1953); 46 J. CRIM. L., C. & P. S. 259 (1956); *annot.*, 23 A. L. R. 2d 1306