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Commonwealth v. One 1958 Plymouth Sedan: Search and Seizure in Forfeiture Proceedings for Liquor Law Violations

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COMMONWEALTH v. ONE 1958 PLYMOUTH SEDAN: SEARCH AND SEIZURE IN FORFEITURE PROCEEDINGS FOR LIQUOR LAW VIOLATIONS

In *Commonwealth v. One 1958 Plymouth Sedan*[1] the Pennsylvania Supreme Court recently held that the rule excluding from a criminal prosecution evidence obtained as the result of an illegal search and seizure have no application in a proceeding for forfeiture of an automobile used in violating the state liquor laws. In this case, two enforcement officers of the Pennsylvania Liquor Control Board,[2] while stationed at a point in New Jersey across the Delaware River from Philadelphia, observed a black Plymouth sedan, the back end of which was unusually low. The officers followed the vehicle across a bridge into Pennsylvania. Acting without a warrant, they proceeded to stop and search the car. As a result of the search they discovered 375 bottles of whiskey and wine which did not bear Pennsylvania tax seals.[3] The car and its contents were seized and a petition was filed in quarter sessions court to have the vehicle forfeited. That court denied the petition and ordered the car returned on the ground that the evidence was obtained as the result of an illegal search and seizure[4] in violation of the fourth amendment. This decision

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1. 414 Pa. 540,, 201 A.2d 427, *cert. granted* 379 U.S. 927 (1964). This Note was written before the Supreme Court heard oral argument on the case. See U.S.L. WEEK 4387 (April 27, 1965), for the Court's unanimous decision reversing the Pennsylvania Supreme Court and remanding the case to that court for further proceedings.

2. PA. STAT. ANN. tit. 47, § 2-209 (1952) provides:

> Such employes of the board as are designated "enforcement officers" or "investigators" are hereby declared to be peace officers and are hereby given police power and authority throughout the Commonwealth to arrest on view, except in private homes, without warrant, any person actually engaged in the unlawful sale, importation, manufacture or transportation, or having unlawful possession of liquor, alcohol or malt or brewed beverages, contrary to the provisions of this act or any other law of this Commonwealth. Such officers and investigators shall have power and authority, upon reasonable and probable cause, to search for and to seize without warrant or process, except in private homes, any liquor, alcohol and malt or brewed beverages unlawfully possessed, manufactured, sold, imported, or transported, and any stills, equipment, material, utensils, vehicles, boats, vessels, animals, aircraft, or any of them, which are or have been used in the unlawful manufacture, sale, importation or transportation of the same. . . .

3. U.S. CONST. amend. XXI, § 2 authorizes a state to prohibit the transportation or importation of intoxicating liquors into its jurisdiction in violation of its laws.

4. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Many state constitutions have a similar provision. See, *e.g.*, PA. CONST. art. I, § 8.

Carroll v. United States, 267 U.S. 132 (1925), held that the fourth amendment must be construed in a manner which will conserve public interests as well as individual

was reversed by the Pennsylvania Superior Court which held that the search and seizure were founded upon probable cause. On appeal the Pennsylvania Supreme Court affirmed, but on different grounds.

The purpose of this Note is to analyze the historical basis of the concept of forfeiture and to evaluate its status in the development of the law of search and seizure.

Forfeiture has been known to the law for thousands of years, and its peculiar historical background has had a marked effect upon virtually every aspect of the modern forfeiture proceeding.[5] At common law there were two forms of forfeiture proceedings. The first involved forfeiture of a felon's property incident to a criminal proceeding against him.[6] Under the early law of England, the real and personal property of all felons was forfeited.[7] However, the proceeding was in personam in nature and the forfeiture did not attach until the offender was convicted. The second type of forfeiture was created by statute and was in rem in nature. It attached to the res itself, as in the case of proceedings in rem in admiralty.[8] The basis of this second type of forfeiture proceeding was the concept of deodand, which decreed that any chattel which caused a person's death be forfeited to the crown. This concept probably had its origin in the Mosaic Code.[9] People in medieval times were inclined to endow objects with a personality and to attribute to them a sense of responsibility. If an object in motion caused a death, the object, rather than its owner, was made the defendant in the action. This particular anachronism has lingered with remarkable tenacity in the modern law of forfeiture.

Although deodand was never a part of the common law of this country, its counterpart was found in the early Customs and Internal Revenue Acts.[10] At the end of the seventeenth century, admiralty jurisdiction in Pennsylvania was vested in the Provincial Council,[11] but forfeiture cases under the Navigation Acts were tried in the common law courts.[12] Since the time of these

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rights and therefore the search and seizure of an automobile, without a warrant, is valid if the officer has reasonable cause to believe the vehicle is carrying contraband. The application of this rule, however, is often exceedingly complicated. Possibility alone cannot justify stopping and searching all automobiles being lawfully used on the highways in the hope that some criminals will be found. See also Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931).

5. See HOLMES, THE COMMON LAW 1-38 (1881).

6. JONES, BLACKSTONE'S COMM. 2266 (1915).

7. DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 495 (1963).

8. See The Palmyra, 25 U.S. (12 Wheat.) 1 (1827).

9. "When an ox gore a man or woman and they die, he shall be stoned and his flesh shall not be eaten, but the owner of the ox shall be quit." *Exodus* 21:28.

10. The Court in Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921), recognized the analogy of forfeiture to deodand in the early acts.

11. LOYD, EARLY COURTS OF PA. 68 (1910).

12. The Fame was condemned in the Supreme Court of Pennsylvania in 1726.

early ties with admiralty, the United States Supreme Court has uniformly held a libel action for forfeiture to be an in rem proceeding.[13] This holding has been criticized as being a pure legal fiction and useless relic of the past.[14] However, in *Goldsmith-Grant Co. v. United States*,[15] Mr. Justice McKenna defended this procedure on the ground that it is the most convenient method of approach in effecting a confiscation. He went on to say that "whether the reason for § 3450 [now § 7301 of the 1954 Internal Revenue Code requiring forfeiture of any conveyance used to conceal or remove goods with the intent to defraud the United States of any tax thereon] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[16]

Not until the 1920's did forfeitures play a large role in the law of this country. It is estimated that between 1920 and 1930, the United States Government seized and reported for forfeiture 52,000 automobiles, 1400 boats, and other property valued at $100,000,000.[17] Since that time the number of statutes providing for the forfeiture of property used as an instrumentality for violation of state or federal laws has been steadily increasing,[18] and the large number of reported cases attest to their extensive utilization.

While in the instant case, *Commonwealth v. One 1958 Plymouth Sedan*, both the appellant and the Commonwealth directed their arguments chiefly to the validity of the search and seizure, the supreme court dismissed this question without deciding it. The court concluded that the rule excluding illegally obtained evidence did not apply to a forfeiture proceeding, since such an action is in the nature of a civil proceeding in rem rather than a criminal proceeding.[19]

A proceeding in rem is directed not against the individual, but against the property which is utilized to violate the particular law, the property being assigned a power of participation in the offense and being thus viewed as an offender.[20] Accordingly, the property is found guilty and condemned as

4 PA. STATUTES AT LARGE 1682-1801, at 422-26, 429-31 (1897). See also the Pa. Merchant, condemned by a jury in the court of common pleas at Chester, 1695, RECORD OF THE COURT OF CHESTER COUNTY 1681-1697, at 366-69 (1910).

13. Various Items of Personal Property v. United States, 282 U.S. 577 (1931); Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921); Dobbin's Distillery v. United States, 96 U.S. 395 (1887); The Palmyra, 25 U.S. (12 Wheat) 1 (1827).

14. See McDonald, *Automobile Forfeitures and the Eighteenth Amendment*, 10 TEXAS L. REV. 140 (1932); Statutory Penalties—A Legal Hybrid, 51 HARV. L. REV. 1092 (1938).

15. 245 U.S. 505 (1921).

16. *Id.* at 511.

17. See Williams, *Forfeiture Laws*, 16 A.B.A.J. 572 (1930).

18. For a typical list of statutes providing for forfeiture proceedings see State v. Sherry, 86 N.J. Super. 296, 206 A.2d 773 (1965).

19. 414 Pa. 540, 542, 201 A.2d 427, 429 (1964).

20. See United States v. Brig Malek Adhel, 43 U.S. 210 (1844); The Palmyra,

though conscious instead of insentient.[21] The forfeiture is made ancillary to the criminal offense. However, analysis reveals that a libel proceeding in which forfeiture of property is sought is not a typical civil proceeding, but is more in the nature of a criminal sanction.[22] In *Boyd v. United States*[23] the Supreme Court recognized this distinction: "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."[24]

A civil offense involves a wrong or breach of duty between individuals and civil proceedings are remedial in nature; a criminal offense involves a public wrong and the objective behind a criminal proceeding is largely punitive in nature. If an objective guide to classification is whether the purpose of the proceeding is remedial or punitive, forfeiture proceedings clearly should be labeled criminal. If the statute were truly remedial the defendant would be permitted to show that the value of the property to be forfeited would exceed any reasonable compensation to society for the wrong done. Since this is not permitted, the proceeding would seem to be punitive in purpose and therefore criminal under this test.

To sustain the proposition that an illegal search and seizure does not preclude the possibility of forfeiting a vehicle which has been used to violate the liquor laws, the court in *One 1958 Plymouth Sedan* relied upon two Supreme Court decisions. In *United States v. One Ford Coupe Automobile*,[25] the vehicle used to conceal illicitly distilled liquor was seized by a state prohibition agent. In a proceeding for forfeiture of the automobile the agent's authority to make such a seizure was challenged. The Court, while recognizing that the agent acted without legal authority, nevertheless held that where property declared forfeited by a federal statute is seized under such circum-

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25 U.S. (12 Wheat) 1 (1827); United States v. One 1947 Chrysler Brougham Sedan, 74 F. Supp. 970 (E.D. Mich. 1947); United States v. One 1940 Packard Coupe, 36 F. Supp. 788 (D. Mass. 1941).

21. For a full analysis of the derivation of in rem proceedings see C. J. Hendry Co. v. Moore, 381 U.S. 133 (1943).

22. See United States v. One 1963 Cadillac Hardtop, 220 F. Supp. 841 (E.D. Wis. 1963); United States v. One 1947 Oldsmobile Sedan, 104 F. Supp. 159 (D.N.J. 1952). *Contra.* Lord v. Kelly, 223 F. Supp. 684 (D. Mass. 1963). See also Mack v. Westbrook, 148 Ga. 690, 98 S.E. 339 (1919), where the court succinctly observed:

> A proceeding in rem is in effect a proceeding against the owner as well as a proceeding against the goods, for it is his breach of the law which has to be proven to establish the forfeiture, and it is his property which is sought to be forfeited.

Id. at 697, 98 S.E. at 343.

23. 116 U.S. 616 (1886).

24. *Id.* at 633-34.

25. 272 U.S. 321 (1926).

stances, the United States can adopt the seizure as though it were originally authorized.[26]

In a similar case, *Dodge v. United States*,[27] the Court upheld the right of the United States to forfeit a boat used to carry liquor across navigable waters where the seizure had been by local officials acting without authority. Speaking through Mr. Justice Holmes, the Court said that seizure of the boat by an unauthorized person would not preclude the Government from bringing a subsequent action for its condemnation and sale because the Government could adopt the seizure and give it retroactive effect.[28]

In applying these decisions to the fact situation in *One 1958 Plymouth* two significant facts should be noted. In the first place, both decisions were concerned with the effect of an illegal seizure on the jurisdiction of the court —not with the exclusion of evidence obtained as the result of an illegal search and seizure. One can assert a "right" to property because of his ownership and the fact that he asserts his ownership right illegally will not affect his ownership right. The following example illustrates the proposition: B steals a watch from A and sells it to C who is an innocent purchaser. If A assaults C to gain possession of the watch, his substantive ownership rights in the watch are not reduced, though he may be liable in a tort action.

An illegal seizure would not affect the jurisdiction of the court in the absence of a statute providing otherwise. Thus, even where an automobile is seized illegally, that fact alone should not bar its forfeiture if there is sufficient admissible evidence to establish the occurrence of the act upon which the forfeiture is grounded. That this was the distinction being made in the *Dodge* case could be argued from the words of Mr. Justice Holmes:

> The owner of the property suffers nothing that he would not have suffered if the seizure had been authorized. However, effected, it brings the object within the power of the Court, which is an end that the law seeks to attain, and justice to the owner is as safe in the one case as in the other. The jurisdiction of the Court was secured by the fact that the *res* was in the possession of the prohibition director when the libel was filed. . . . We can see no reason for doubting the soundness of these principles when the forfeiture is dependent upon subsequent events any more than when it occurs at the time of the seizure, although it was argued that there was a difference.

26. See also Wood v. United States, 41 U.S. (16 Peters) 339 (1842); The Caledonian, 17 U.S. (4 Wheat.) 60 (1819); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 116 (1818).

27. 272 U.S. 530 (1926).

28. See, however, Cook v. United States, 288 U.S. 102 (1933), where the seizure of a vessel on the high seas was forbidden by the terms of a treaty between the United States and Great Britain. It was held that the United States lacked authority to ratify the seizure because by imposing upon itself the limitations set forth in the treaty authority to make the seizure in its own right was lacking.

> They seem to us to embody good sense. The exclusion of evidence obtained by an unlawful search and seizure stands on a different ground.[29]

The second factor to be noted is that since both the decisions discussed above were prior to *Elkins v. United States*,[30] neither case was concerned with the introduction of evidence considered unlawful under the fourth amendment. At the time of these decisions there was no constitutional restriction on the admission of evidence illegally obtained by local officials and turned over to federal authorities. Provided the tainted evidence was obtained without participation of the federal officers, it could legally be handed to them on a "silver platter" and thereby become admissible in the federal courts. The *Elkins* case struck down the "silver platter" doctrine, ruling that evidence illegally obtained by state agents and turned over to federal officers is no longer admissible in federal courts in criminal actions.[31] Thus, if the exclusionary rule is applicable to in rem proceedings brought by the Government, it could be argued that the two cases discussed above are inapplicable with regard to the question of whether illegal evidence should be excluded from such proceedings.[32]

Federal decisions early held that the legislature may, in a proper case, validly subject the offender to both a criminal prosecution and to a civil suit to recover a penalty or effect a forfeiture; this on the theory that criminal and civil liability is but one sanction enforceable in two proceedings.[33] The fiction of separating one offense into a civil-criminal dichotomy has been a fertile source of legal inconsistencies.[34] An examination of the federal decisions dealing with forfeiture proceedings reveals an area fraught not only with complexities and ambiguity, but also a lack of uniform interpretation of prior decisions.[35] Questions of double jeopardy and res judicata are frequent where

29. 272 U.S. at 532.

30. 364 U.S. 206 (1960).

31. The fourth amendment protects only against "unreasonable governmental intrusion" into a person's privacy. Where evidence is gathered by private individuals in a manner which would be unlawful if done by governmental authority, there is no invasion of the constitutional security and the evidence is admissible. See Burdeau v. McDowell, 256 U.S. 465 (1921); Sackler v. Sackler, 16 App. Div. 2d 423, 299 N.Y.S.2d 61 (2nd Dept. 1962); Walker v. Penner, 190 Ore. 542, 227 P.2d 316 (1951).

32. See *e.g.*, Rogers v. United States, 97 F.2d 691 (1st Cir. 1938).

33. See in re Leszynsky, 15 Fed. Cas. No. 8279 (C.C.N.Y. 1879); United States v. Mt. Clemens Beverage Co., 23 F.2d 885 (D.C. Mich. 1927). For criticism of this view see Stout v. State, 36 Okla. 774, 130 Pac. 553 (1913).

34. See *Statutory Penalties—A Legal Hybrid*, 51 HARV. L. REV. 1092 (1938).

35. Compare Coffey v. United States, 116 U.S. 436 (1886), with Helvering v. Mitchell, 303 U.S. 391 (1938) and Various Items of Personal Property v. United States, 282 U.S. 568 (1931). In *Coffey* the Court held that a judgment of acquittal in a prior criminal proceeding operated as a bar to any in rem forfeiture based upon the existence of the same facts. The *Mitchell* case held that an action following a criminal acquittal would be precluded only if its objective was punishment. Forfeiture of goods was held

there are multiple proceedings involving the offending objects as well as the offending persons.[36] Acquittal of the driver of the car in a criminal action would not necessarily affect the forfeiture proceeding because here a different defendant, the vehicle itself, is being proceeded against. While it is perfectly clear that the vehicle could do nothing without the human agency, who has already been found innocent, still the car might be adjudged guilty. The fiction involved here has been criticized on the ground that if carried to its logical end, the rights of innocent owners or mortgagees might be disregarded once the "guilty" chattel has been obtained.[37] Thus, a stolen car, used to violate the liquor laws could be forfeited even though its owner is free from any negligence or guilt.[38] Questions of statutory construction[39] and due process[40] have also added to the confusion in judicial interpretation.

Perhaps the most controversial issue, however, has been the effect upon the forfeiture proceeding of an illegal search and seizure. The various circuit

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to be remedial rather than punitive. *Various Items of Personal Property* clouded the issue further by holding that double jeopardy does not apply to an in rem proceeding since there the property itself is on trial.

36. See note 35 *supra*. The division of authority in regard to double jeopardy and res judicata seems to be due primarily to the many variations in the facts and circumstances present in each case. See also 51 HARV. L. REV. 1092 (1938); 31 COLUM. L. REV. 291 (1931).

37. See 34 HARV. L. REV. 200 (1920). In Pennsylvania it is within the discretion of the court as to whether in a forfeiture proceeding innocent owners or lien holders should be protected. Commonwealth v. One 1962 Chrysler Hardtop Sedan, 201 Pa. Super. 478, 193 A.2d 636 (1963); Commonwealth v. One 1957 Chevrolet Sedan, 191 Pa. Super. 179, 155 A.2d 438 (1959).

38. 53 Stat. 1291 (1939); 49 U.S.C. 782 (1951) provides that property is not subject to forfeiture where it was obtained from the owner by a violation of state or federal criminal law. In United States v. One 1941 Chrysler Brougham Sedan, 74 F. Supp. 970 (E.D. Mich. 1947), a car was obtained from an automobile rental service after an agreement was signed providing that it would not be used in violation of federal laws. It was subsequently used to violate the narcotics laws. The court denied the owner's claim that a car so obtained by the bailee was taken from him in a manner entitling him to benefit from the exception. The court distinguished between false pretenses and larceny, and held the former to be no grounds for dismissal.

39. Some courts hold that these statutes are remedial and should be liberally construed according to the intention of the legislature. United States v. Stowell, 133 U.S. 1 (1889); United States v. One Ford 4-Door Galaxie Sedan, 202 F. Supp. 841, (E.D. Tenn. 1962); United States v. One Saxon Automobile, 257 Fed. 251 (1919). Other courts placing emphasis upon the criminal nature of the proceedings, adhere to the general rule that criminal statutes should be construed strictly. United States v. One Ford Coach, 307 U.S. 219 (1939); United States v. One 1946 Mercury Sedan Automobile, 199 F.2d 499 (5th Cir. 1952); United States v. One 1947 Oldsmobile Sedan, 104 F. Supp. 159 (D.N.J. 1952).

40. Since forfeiture is relied on not so much to punish wrongdoers as to apply a drastic remedy for law violation, those in charge of enforcing the laws have desired to forfeit all property wrongfully used, without regard to its ownership. The constitutionality of statutes which permit the confiscation of vehicles despite the owners' innocence have been repeatedly upheld. Van Oster v. Kansas, 272 U.S. 405 (1926); Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921); United States v. Stowell, 133 U.S. 1 (1888); Dobbin's Distillery v. United States, 96 U.S. 395 (1887).

courts are in disagreement as to whether the tainted evidence will be admitted. In the instant case the court cited several Fifth Circuit cases for the proposition that the legality of the search and seizure cannot be raised in a forfeiture proceeding.[41] Other circuits, however, are of the opinion that a motion to suppress is proper in a civil forfeiture action.[42] In *United States v. 5, 608.30 in United States Coin and Currency*,[43] the court followed the ruling in *Boyd* that forfeiture proceedings are quasi-criminal in nature, and held that a motion to suppress illegally obtained evidence is proper, even though the Federal Rules of Civil Procedure, unlike the Federal Rules of Criminal Procedure,[44] do not expressly provide for such a motion.

Contraband property may fall into either of two distinct classes. First, there is property which can have no lawful use when in the hands of the particular defendant, such as narcotics.[45] Secondly, there is property which is, in and of itself lawful, but which can become contraband because of the way in which it is used. The automobile used for the transportation of illicit liquor is an example of the second class. In cases involving property of the latter type there must be testimony as to how the property was used in order for it to be classified as contraband.[46] Therefore, the validity of the search and

41. Martin v. United States, 277 F.2d 785 (5th Cir. 1960); United States v. Carey, 272 F.2d 492 (5th Cir. 1959); Grogan v. United States, 261 F.2d 86 (5th Cir. 1958); Sanders v. United States, 201 F.2d 158 (5th Cir. 1933). While each decision contains language to support this interpretation, the courts at times seem to confuse the problem of the effect of the illegal seizure on the court's jurisdiction with the effect of such seizure on the admissibility of the evidence. An earlier Fifth Circuit case, Walker v. United States, 125 F.2d 395 (5th Cir. 1942), held that where agents had gone upon the premises without a search warrant, found a still and then arrested the claimant, evidence obtained by the illegal search and seizure would not be admissible in a libel proceeding for the forfeiture of two automobiles seized in the inclosure in which the still was located.

42. The First Circuit in Rogers v. United States, 97 F.2d 691 (1st Cir. 1938), held that admission in a forfeiture proceeding of evidence obtained under an illegally issued search warrant was reversible error. This decision was reaffirmed in United States v. One 1960 Lincoln Two-Door Hard-Top, 195 F. Supp. 205 (D. Mass. 1961). United States v. Physic, 175 F.2d 338 (2nd Cir. 1949), adopted the rule that a motion to suppress should be granted in a libel where there is no proof that the search was conducted on the basis of reasonable hearsay. The decision held that before the contraband is admissible in evidence the government must show that there were sufficient factors present to lead a reasonable man to believe that the car involved in the libel actually carried such contraband. See also United States v. Butler, 156 F.2d 897 (10th Cir. 1946); Brock v. United States, 12 F.2d 370 (8th Cir. 1926); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962).

43. 326 F.2d 359 (7th Cir. 1964).

44. FED. R. CRIM. P. 41(e).

45. In Jones v. United States, 362 U.S. 257 (1960), the Court held that where possession was the basis for conviction in a federal court, the defendant would be allowed to make a motion to suppress evidence even if from a strict legal viewpoint he had no property or possessory interest in the evidence. See also United States v. Jeffers, 342 U.S. 48 (1951).

46. See Hemenway & Moser Co. v. Funk, 100 Utah 72, 106 P.2d 779 (1940).

seizure should be a proper issue in determining the admissibility of evidence. The distinction between the two types of contraband property has been recognized in cases involving the right to trial by jury. Where property of the first category is involved it has been held that there is no right to jury trial[47] while there is such a right where the res is property of the second type.[48]

The court in *One 1958 Plymouth Sedan* cited *United States v. Jeffers*[49] and *Trupiano v. United States*[50] for the proposition that where the illegally seized evidence is contraband the claimant is not entitled to have the property returned to him. It should be noted, however, that both decisions were concerned with property of the first category—narcotics and illegal distilling equipment. Both of these were prohibited from having these items in their possession by statute. In *United States v. Burns*,[51] on the other hand, it was held that liquor, illegally seized from a vessel could not be used as evidence that it was being illegally transported into the United States. Such evidence could not be used to establish the fact that the liquor was contraband, and the cargo was therefore ordered returned.[52]

One of the factors contributing to the conflicting decisions in this area is the many definitions and interpretations of the concept of "property right."[53] The term "contraband" is sometimes used in the loose sense of property which a person has no right to possess. The court in *One 1958 Plymouth Sedan* reasoned that since, under the Liquor Code, there were no property rights in the automobile after it crossed the state line, there could be no illegal search and seizure within the prohibition of the fourth amendment. This is the same specious reasoning used in colonial days to support the general warrants for seizure of smuggled goods, emphasizing the thing sought for seizure rather than the right of the people to be secure in their possessions.

The argument is fallacious for a number of reasons. First, it proceeds on the premise that since the proceeding is against the property itself, and since an inanimate object can have no constitutional rights, there can be no constitutional questions involved. This is merely an extension of the fiction upon which the entire proceeding is based. Secondly, if one may not have

47. POMEROY, EQUITY JURISPRUDENCE § 1941 (4 ed. 1919).

48. State v. 1920 Studebaker Touring Car, 120 Ore. 254, 251 Pac. 701 (1926); Keeter v. State, 82 Okla. 89, 198 Pac. 866 (1921); Colon v. Lisk, 153 N.Y. 188, 47 N.E. 302 (1897).

49. 342 U.S. 48 (1951).

50. 334 U.S. 699 (1948).

51. 4 F.2d 131 (S.D. Fla. 1925).

52. *Accord.* Brock v. United States, 12 F.2d 370 (8th Cir. 1926); Petition of Shoemaker, 9 F.2d 170 (D.C. Pa. 1925).

53. In State v. Evans, 74 Utah 389, 279 Pac. 950 (1929) it was held that contraband liquor could still be the subject of larceny on the theory that ownership remains in the unlawful possessor until confiscation by the state even though a statute provided that no property rights shall exist in intoxicating liquors.

property rights in contraband, why does the Liquor Code, in express terms, forbid the search and seizure of a dwelling house without a warrant?[54] This provision recognizes the possibility of possessory rights in liquor beyond the power of an arbitrary search and seizure. Since no search may legally deprive a man of his lawful possessions, it is a circular argument to say that a vehicle used for the illegal transportation of liquor is contraband and for that reason cannot be possessed. The fallacy of the argument is that the conclusion ultimately to be reached, namely, whether the vehicle is contraband, is assumed by the court and included among the premises from which it is supposed to follow. A similar argument was presented in the *Jeffers* case where the Court decided that Congress, in abrogating property rights in certain goods, had intended such action merely as an aid in fighting organized crime,[55] not to abolish the defendant's property rights in the contraband for purposes of applying the exclusionary rule of evidence.

The Supreme Court has never passed on the precise question of whether evidence obtained in violation of the fourth amendment is admissible in a civil proceeding.[56] Language in a number of Supreme Court decisions, plus the fact that the scope of constitutional protection of individual rights is continually being broadened, would suggest that such evidence may be held inadmissible by the Court even in a civil case.

In the *Boyd* case the Government brought forfeiture proceedings against thirty-five cases of imported plate glass upon which no customs duties had been paid. The defendants were ordered to produce certain invoices, under penalty of being bound by the prosecutor's statement of their contents. The Court said that since the forfeiture proceedings are of a quasi-criminal nature, "they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . ."[57]

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54. See note 1 *supra*.

55. It has been the experience of our enforcement officers that the best way to strike at commercialized crime is through the pocketbooks of the criminals who engage in it. By decreasing the profits which make illicit activity of this type possible, crime itself can also be decreased. Vessels, vehicles, and aircraft may be termed "the operating tools" of dope peddlers, counterfeiters, and gangsters. They represent tangible major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the Government. H.R. REP. No. 1054, 76th Cong., 1st Sess. 2 (1939).

56. Justice Goldberg in his concurring opinion in Cleary v. Bolger, 371 U.S. 392, (1963) noted that the effect of the fourth amendment in civil cases in the federal courts is not totally settled. See also, Maul v. United States, 274 U.S. 501 (1927), where the Court left open the question of whether the ruling in Dodge v. United States, 272 U.S. 530 (1926), would be followed if the seizure by federal officers had been unlawful.

57. 116 U.S. at 634. The reasoning of this decision was criticized in 9 A.B.A.J. 773 (1923).

Twenty-eight years later, *Weeks v. United States*[58] firmly established the exclusionary rule, holding that evidence obtained by federal officials in violation of the fourth amendment would no longer be admissible in any federal criminal action.

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority and to forever secure the people their persons, houses, papers and effects against *all* unreasonable searches and seizures under the guise of law. *This protection reaches all alike, whether accused of crime or not,* and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws.[59]

Silverthorne v. United States,[60] arose out of an illegal search and the seizure of records of a corporation while two of its officers who had been indicted were being detained following their arrest. Photographs and copies of material papers were made and a new indictment was framed based upon the knowledge thus obtained. Application was made for the return of the records unlawfully taken. The district court ordered the originals returned but impounded the photographs and copies. Subpoenas to produce the originals were then served and the district court, although it had previously found that all the papers had been seized in violation of the parties' constitutional rights, ordered the defendants to comply. The Supreme Court, in reversing the lower court's decision, said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*"[61]

The current attitude toward lawless law enforcement, demonstrated in *Mapp v. Ohio,*[62] gives new vitality to the claim for exclusion of tainted evidence in all lawsuits, civil as well as criminal. *Mapp* held that tainted evidence is excluded by virtue of the Constitution itself not merely by rule of Court.[63] Since the operation of the exclusionary rule is the result of the constitutional requirements of both the fourth and fourteenth amendments, the former policy arguments justifying a different rule for civil cases would seem to be

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58. 232 U.S. 383 (1914).
59. *Id.* at 391-92. (Emphasis added.)
60. 251 U.S. 385 (1920).
61. *Id.* at 392. (Emphasis added.)
62. 367 U.S. 643 (1961).
63. In Ker v. California, 374 U.S. 23 (1963), the Court recognized that the principles governing the admissibility of evidence in federal trials are derived not only from the Constitution but also from the rules formulated by that Court in its supervisory authority over federal courts. These rules have no applicability to the state.

of little weight.[64] If the Government has seized evidence in violation of the Constitution, the exclusion of the fruits of the seizure would appear to be required by constitutional command in *any* type of action.

Reason would seem to dictate that until there is a judicial determination that the property is forfeited, any private rights in the property should receive fourth amendment protection, notwithstanding that the forfeiture, once decreed, relates back to the time of the commission of the offense.[65] Since a motion to suppress evidence would precede a determination on the issue of forfeiture, it should be error for a court, in ruling on the motion, to assume that title to the property had already passed to the state. This approach can be justified both on the theory that admission of the evidence violates the fifth amendment rule against self-incrimination and that the exclusion of the evidence is the only practical means of enforcing the fourth amendment's guarantee against unreasonable searches and seizures.[66]

While reason would seem to require the return of property which is not contraband per se where no legally obtained evidence is available to establish its use, the question is more difficult where the property involved is contraband per se. Contraband per se may be divided into that which is harmless, *e.g.*, a roulette wheel, and that which represents a potential danger to the public, *e.g.*, heroin. In some cases, particularly where the latter type of contraband property is involved, the potential danger to society in failing to seize the property will override the importance of discouraging violations of the fourth amendment.[67] Where to draw the line is not always clear,[68] but it would seem that mere suppression of the evidence without a return of the contraband would be sufficient to prevent flagrant abuse of the police power. Certainly from an historical point of view, the decision in *One 1958 Plymouth Sedan* can be considered a consistent result. Once the basic fictions of

64. See Adams v. New York, 192 U.S. 585 (1904); 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961). The rationale for the common-law rule was that any evidence which would enable the court to determine the truth ought to be admissible, and therefore the courts would not look behind the evidence to see how it was obtained.

65. This was the position taken by the court in People v. Gale, 46 Cal. 2d 253, 294 P.2d 13 (1956).

66. See Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960).

67. In United States v. 10000 Gallons of Intoxicating Liquor, 287 F. 375 (D.C. Mass. 1923) the court held that the illegal seizure and detention of spirits by government officers cannot be defended or justified by the illegality of the owner's possession. See also Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920); People v. Marxhausen, 204 Mich. 559, 171 N.W. 557 (1919).

68. In Ker v. California, 374 U.S. 23 (1963), the Court held that:

> [T]he reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment.

Id. at 33.

statutory forfeiture are accepted—that the res, and not the user, is the offender, that forfeiture occurs immediately upon commission of the offense, and that the action is not criminal in nature there can be no other conclusion. Query, however, whether fiction should prevail over reality, especially where constitutional rights are in danger of being swept away. Certainly fiction, in the absence of strong public policy considerations, should not prevail in the case of forfeiture of goods not in themselves pernicious. As one writer has said: "[L]ogic rebels at the thought that automobiles used in liquor cases are more guilty than automobiles used for murder, robbery, or rape."[69] Chattels do not offend, and if their forfeiture is to be justified it must be as a penalty inflicted upon their owners.

The court's reasoning in *One 1958 Plymouth Sedan* seems unsound because in effect it encourages illegal searches for contraband and could lead to uncontrolled police surveillance of state borders.[70] An illegal search violates the identical privacy, whether its fruits be used to convict in a criminal prosecution or to forfeit personal property in a civil action. The constitutional question here involved is of extreme importance and should not be obscured by the character of the offense charged. "However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness."[71]

The broad interpretation of the language of the fourth amendment coupled with the quasi-criminal nature of forfeiture proceedings dictate that as between a state's power to collect lawful taxes and the possibility that some guilty persons will escape punishment by application of the exclusionary rule, the policies underlying the provisions of the federal and state constitutions should be enforced to prevent further violation of individual rights, even at the cost of some tax evasion.

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69. McDonald, *Automobile Forfeitures and the Eighteenth Amendment*, 10 TEXAS L. REV. 140, 142 (1932).

70. See the dissenting opinion of Justice Flood in Commonwealth v. One 1958 Plymouth Sedan, 199 Pa. Super. 428, 435, 186 A.2d 52, 56 (1962).

71. Miller v. United States, 357 U.S. 301, 313 (1958).