

TRACING THE ROOTS OF FORFEITURE AND THE LOSS OF PROPERTY IN ENGLISH AND AMERICAN LAW

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ABSTRACT

Restriction of the freedom and rights of an owner to do with his property as he pleases is not a new phenomenon in legal jurisprudence, but restrictions are limited by legislative provisions and regulations. Interference with private property rights by state authorities may have dire consequences for an owner, and could give rise to forfeiture procedures when the property was used in violation of a law or for illegal purposes. The controversy is further exacerbated by the distinction between forfeitures *in rem* without prior conviction, which is a civil action directed against the so-called guilty property, and an action *in personam* or a criminal forfeiture, which forms part of the sentencing process after conviction and is directed against the owner personally.

Asset forfeiture has an ancient history and tradition and the roots may be traced back to biblical justifications as a form of punishment. *In rem* forfeiture originated from the English common law concept of deodands. An inanimate object or animal that caused the death of a person was accused as the offender, and its value was forfeited to the king. Unlike deodands, forfeiture for felonies or treason is an ancient Saxon and early English common-law doctrine where *in personam* forfeiture was recognised. Upon conviction, all of a person's land and property – real or personal – were forfeited to the Crown. This resulted in the corruption of blood, with the

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consequences that the bloodline of any person convicted and attained became stained or blackened and his descendants or family were prohibited from inheriting.

The English common-law concept of *deodand* did not become part of the legal tradition in colonial America, and forfeiture for felony was almost never recognised. *In rem* forfeiture appeared for the first time in the United States' admiralty cases which were adapted from the English Navigation Acts of the seventeenth century. Any ship or vessel involved in piracy or slave trafficking was seized and forfeited, based on the guilty property fiction. The thing was considered as the offender, irrespective of the guilt of the owner. Civil and criminal forfeiture of the instruments of crime have survived constitutional scrutiny for many years, and are still applicable today, but are expanded to include a much broader variety of crimes. In conclusion the implications of these common law developments for South Africa are discussed.

Keywords: Forfeiture; *deodands*; *in rem* forfeiture; *in personam* forfeiture; statutory forfeiture; ownership; loss of property; felonies; organised crime

1 Introduction

The evolution of asset forfeiture law is aptly described by Casella¹ as

a tale of constant expansion and adaptation. Like a rare species of plant that has been plucked from the biological niche where it first evolved, adapted to new uses and new environments, and disseminated across the globe to serve new purposes that humans find useful, the practice of asset forfeiture has been lifted from the remote corner of admiralty and customs law where it was conceived, applied to an ever-growing set of new crimes and circumstances, and has become a powerful tool of law enforcement routinely applied in tens of thousands of criminal cases.

The imposition of limitations on an owner's right to do with his property as he pleases is not a new phenomenon in legal jurisprudence.² The roots of forfeiture of tainted property may be traced back to Biblical notions of punishment, where a provision in the Old Testament stipulates that an ox that gores and kills a person must

1 Cassella 2009: 50. The law of forfeiture and its procedures are arcane and reminiscent of ancient concepts and admiralty practices; see, also, Pimentel 2012: 3. The word "forfeiture" is derived from two Latin words, namely *foris*, which means "outside", and *facere*, which means "to do"; Van Jaarsveld 2006: 140. See Hausner 2015: 1921 who defines the term as "the taking of property derived from a crime, or which makes a crime easier to commit or harder to detect".

2 See *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seenvnarayan* 2004 (2) SACR 208 (SCA) par 28 where the court warned that property owners "cannot be supine", encouraging them to refrain from illegal activities where property is implicated in the ambit of crime. The SCA held in *Mazibuko v National Director of Public Prosecutions* [2009] 3 All SA 548 (SCA) par 18 that the law must take its course when property owners use their property to conduct criminal activities.

be stoned irrespective of its owner's negligence, and its flesh shall not be eaten.³ Forfeiture, therefore, rendered the property guilty of wrongdoing, and not the person. This doctrine had been developed as a legal concept in early English common law.⁴ Blackstone,⁵ when analysing the Laws of England in 1758, described forfeiture as a punishment "annexed by law to some illegal act, or negligence of the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein".

Although ownership was regarded as the most comprehensive of all real rights in early Roman law, it was limited by certain prohibitions. Principles of morality, ethics, religion and public law required the *censores* to prevent the misuse of property in conflict with the general interest by the promulgation of applicable legislation.⁶ Van Jaarsveld⁷ noted that forfeiture procedures had their origins in Roman law, which was received into English law when England became a Roman province after the invasion of Britain by Julius Caesar in AD 43. Goods that were confiscated as punishment for capital crimes were dedicated to the gods and then destroyed. Forfeiture actions like these were established practice during the imperial period,⁸ when the confiscated goods were first delegated to the temple and then forfeited to the state treasury.

Coming from a rich English experience and liberty is the maxim "every man's home is his castle"⁹ which derives directly from the *Magna Carta* of 1215.¹⁰ The popularity of this expression was evident in a civil case during 1604. In *Semayne's Case*¹¹ the right of a homeowner to protect his house against unlawful entry also applied to the King's agents. However, recognition was given to authoritative officers to enter after proper notice to execute the King's process of attachment and forfeiture of property.

3 Exodus 21:38. The references are voluminous, but see Slavinskiy 2014: 1624; Van den Berg 2015: 921; Cassella 2009: 24.

4 Slavinskiy 2014: 1624.

5 Blackstone 1765-1769: 269; Van Jaarsveld 2006: 139.

6 See Van Zyl 1983: 133-134.

7 Van Jaarsveld 2006: 141.

8 27 BC-AD 565. See Van Zyl 1983: 8-9, where the author refers to the emperor Justinian who made a substantial contribution to the conservation of Roman law.

9 Fraenkel 1921: 361.

10 *Ibid*; Greek 2016: *passim*. According to Greek the Crown signed the *Magna Carta* as part of an agreement to return forfeited land which escheated to the Crown after a year and a day. A clause furthermore stipulated that the Crown would renounce any claim to forfeiture on the ground of felony, and that forfeited land should be returned to the rightful heirs only after the death of the offender. In *CJ Hendry co v Moore* 318 US 133 (1943) 137-138 an American court explained that feudal governments during the reign of King Hendry I profited from the forfeiture of property and thereby manipulated the harvesting of benefits. See, also, Van Jaarsveld 2006: 143.

11 *Semayne's Case* (1604) 5 Co Rep 91 a 77 ER 194 (KB) (i).

This article focuses on the historical development in – and distinction between – English and American law of forfeitures *in personam* (criminal), which forms part of the sentencing process after conviction, and *in rem* (civil) where tainted property is forfeited to the state without prior conviction. The controversy is further exacerbated by the application of civil forfeiture procedures which are still applicable in today's legal discourse. The analysis of the English origins of forfeiture law may have permeated to South Africa's Prevention of Organised Crime Act¹² (POCA) promulgated to combat the growing phenomenon of organised crime.

Three kinds of forfeiture were established in English and American law, namely deodands; forfeiture for felony or treason upon conviction (attainder); and statutory forfeiture.¹³ These will now be discussed separately.

2 Deodand forfeiture

Traditionally, asset forfeiture dates back to the eleventh century English common law where the law of deodands was zealously applied throughout England.¹⁴ It

12 Act 121 of 1998. This was emphasised by the court in *Mazibuko v National Director of Public Prosecutions* [2009] 3 AII SA 548 (SCA) par 26. POCA is based on the American Racketeer Influenced and Corruption Organizations Act of 1970 (RICO), which derived from the ancient English doctrine that the property in question is guilty of the offence. See Van Jaarsveld 2006: 138. It was underscored by the US Supreme Court in *United States v Ursery* 518 US 267 (1996) 275, where the court held that *in rem* forfeitures means “that it is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned”. In criminal forfeiture “it is the wrongdoer in person who is proceeded against, convicted, and punished”. This was also emphasised by the US court in *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 684 where it was held that a proceeding *in rem* is independent of and wholly unaffected by a proceeding *in personam*. The question has been posed whether *in rem* forfeitures are not merely “criminal forfeiture dressed up in sheep's clothing”. See, further, Young 2009: 4. Criticism by Young suggests that the same objectives are achieved by civil forfeiture when compared to criminal forfeiture, but without the procedural safeguard and the protection of human rights applicable to criminal forfeiture. Interestingly, during the period from 335 to 322 BC Aristotle observed that criminal conduct does not originate from a desire to fulfil shortcomings, but “to fulfil a craving for superfluities with a view to painless delight”. See, also, Kruger 2008: 2.

13 *Austin v United States* 509 US 602 (1993) 610.

14 This is perceived in leading case law where asset forfeiture laws were traced back to the enforcement of English statutes and common law by colonies long before the adoption of the US Constitution. See *Austin v United States* 509 US 602 (1993) 611-613; *United States v Bajakajian* 524 US 321 (1998) 340-341; *United States v Ursery* 518 US 267 (1996) 274. Greek 2016: 2 remarked that during the period from 1066 to 1087 William the Conqueror instituted a land tenure system which bestowed absolute ownership and title of all land to the Crown. However, large portions of land were given to William's supporters who became lords of these estates. The lords were allowed to appropriate parcels of land to sub-vassals where obligations needed to be fulfilled, and free peasants worked the land and paid rent. Feudalism in England was consequently abolished in 1660.

was finally abolished by Parliament in 1846 because the system was thought to be irrational.¹⁵

Deodand originated from the Latin phrase *deo dandum*, meaning “to be given to God”. An important rule of this law was *omnia quae movent ad mortem sunt dedanda* which prescribed that any movement of an animal or object which caused, directly or indirectly, an immediate fatal accident of a King’s subject was regarded as a deodand and was then confiscated and forfeited to the Crown.¹⁶ In the *Calero-Toledo*¹⁷ case the Supreme Court observed that the origins of deodand are traceable to biblical and pre-Judeo-Christian practices, where the instrument of death was accused and religious expiation was required.¹⁸ Van den Berg¹⁹ observed that deodand was a transformation of an earlier action called noxal surrender where property was surrendered to the wronged party, rather than to the state. This action had developed during the ninth century laws of Alfred the Great.

Deodands were unknown in parts of the United States or of little use when applied. During the American Revolution, the colonies promulgated laws justifying the *in personam* forfeiture of the estate of any person convicted of loyalty to the king of England.²⁰ After the Revolution and the adoption of the Constitution the use of common-law forfeiture was restricted to treason cases and statutory provisions enacted by Congress for other crimes. A form of civil forfeiture was passed into law by Congress during 1789, authorising the seizure and forfeiture of ships in violation of customs regulations, and ships that were engaged in piracy and slave trafficking.²¹

15 Pervukhin 2005: 237; Grossman 1991: 682. Hadaway 2000: 84 notes that the deodand doctrine was used to endorse the concept that the sovereign could take legal action based on the guilt of the *res* or thing, irrespective of the culpability of its owner.

16 *Austin v United States* 509 US 602 (1993) 610; *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 681; see Greek 2016: 8, who explains that the object was forfeited to the king or local lord based on the legal fiction that it was capable of future harm and should be destroyed; Festekjian 1996: 714; Schwarcz & Rothman 1993: 290; Slavinskiy 2014: 1624. See, further, Pervukhin 2005: 237-238 who indicated that a distinction was drawn between circumstances where the thing or chattel that caused the death was in motion or not. A moving object would not be regarded as a deodand if it was a fixture. The author, at 255, explains that the “fixture rule” appeared for the first time in 1664, and that a fixture is any real property when physically fastened to the land or building to enhance its utility. Church bells, for example, were regarded as fixtures “because the bell is *already* given to God and to the church”.

17 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 663.

18 *Ibid.* See, further, *Austin v United States* 509 US 602 (1993) 610; Grossman 1991: 681; Ross 2000-2001: 261; Schwarcz & Rothman 1993: 290; and Berman 1999: 10, 24 who explain that the biblical treatment of an ox indicated that the actions against non-human transgressors were envisaged as crimes against the community. The punishment of stoning was reserved for only a few types of crimes, and the offended community served as the common executioner. See n 3 above with reference to *Exodus* 21:38.

19 Van den Berg 2015: 873.

20 Grossman 1991: 682-683; Van Jaarsveld 2006: 144; Doyle 2016: 2; Van den Berg 2015: 873-874.

21 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 663, 683; Doyle 2016: 2; Ross 2000-2001: 261; Grossman 1991: 683; Simser 2009: 16; Cassella 2001: 665; Cassella 2009: 24.

The doctrine behind this theory was primarily that an inanimate object or the instrument of death was accused and characterised as the offender and not the owner. Therefore it was an established principle that “[w]here a man killeth another with the sword of John at Stile, the sword shall forfeit as deodand, and yet no default is in the owner”.²² The king could take forfeiture action, justified by the theory of taint or the guilt of the deodand.²³ Generally, deodands were not taken away from their owners, but the value of the accused offending object or animal was established by coroners’ inquests and grand juries. The owner was entitled to the recovery thereof once a fine, an amount equal to the value of the deodand, was paid to the Crown. The proceeds of these funds were applied to religious uses and were often distributed among the poor or used to compensate the victim’s family.²⁴ However, Pervukhin²⁵ emphasises that deodand adjudications were not often challenged in an open court as no clear evidence existed that the common law was conscientiously applied by coroners’ juries. Jurists and judges tended to imitate their predecessors, and deodand rules were transferred from treatise to treatise, and from century to century, which ultimately determined how deodands were interpreted.

It is clear that deodand forfeitures were *in rem* procedures, where actions were instituted against the offending object itself, and not against the owner. Although the archaic nature of deodand survived in England until 1846, it did not become part of the common-law tradition of South Africa.²⁶

3 Forfeiture for felonies

Felonies or “attainder”²⁷ were the largest category of forfeitures in English law.²⁸ The roots of forfeiture stemmed from the word “felony” and were perceived in ancient Saxon and Scandinavian legal thought, which survived the Norman invasion of 1066, and put into practice in the legal system of feudal England. Felony originated from the Saxon words *fee* or landholding, and *lon* or price. When combined, the meaning may

22 Festekjian 1996: 714.

23 Berman 1999: 2; Van Jaarsveld 2006: 144; Hadaway 2000: 84; Whatley 1997: 1286-1287; Winters 1987: 458; Reed 1994: 259-260.

24 Campbell 2010: 18; Doyle 2016: 1-2; Pervukhin 2005: 237, who also notes that the money, more often than not, went directly into the royal coffers where it intermingled with other sources of revenue. At 245 he further observes that the practice of deodand was applied on a regular basis throughout the sixteenth and seventeenth centuries. For example, in 1524 a woman was killed when thrown off her horse, and the coroners’ jury found that the mare had murdered her. From the sixteenth to the eighteenth century boats, carts, animals and trees were declared deodands and forfeited to the Crown.

25 Pervukhin 2005: 239.

26 Boudreax & Pritchard 1996: 602.

27 This word is derived from the Latin word *attinctus* which means “stained” or “blackened”.

28 Boudreax & Pritchard 1996: 602.

be defined as an act or omission that could result in the loss of property.²⁹ However, Kesselring³⁰ noted that while the word designated a certain type of offence, forfeiture constituted and defined the legal effect of felony.

Unlike deodands, the focus was on the human offender where early English common law also recognised criminal or *in personam* forfeiture upon conviction of a person for felony or treason. All land and property were directly forfeited to the Crown as an established penalty for treason and a convicted felon escheated³¹ his land to the lord, and his chattels to the king. A convicted traitor forfeited all of his property, real and personal, to the Crown.³² The distinction between real and personal property was important. It was also complex. The forfeiture of real property for felony was land held in “fee simple”, whereas personal property included “chattels real”, such as leases on land, and “chattels incorporeal” or “chooses-in-action” such as shares or intangibles that could be “reduced into possession”.³³ The *circa* 1187-1189 classic legal treatise known as *Glanvill* endorsed the doctrine that “from traitors, all lands and chattels to the king, and from felons, all chattels to the king and all lands to the lord after the king’s year and a day”, which was also enshrined as a rule in the Magna Carta and the *Prerogativa Regis*.³⁴

The justification for these forfeitures was based on the theory that all land and property were held by the Crown as part of an allegiance pact between the king and society. Any breach of a criminal law was esteemed an offence against the king’s peace, and property rights were accordingly denied.³⁵

29 Simser 2009: 15.

30 See Kesselring 2009: 203, who also noted that the word is Frankish in origin, initially earmarked as a disloyalty between “lord and vassel or a violation of the feudal bond”.

31 According to Winters 1987: 459 escheat is “an obstruction in the normal course of the descent of property whereby the property reverts back to the original grantor”. Greek 2016: 2 points out that “escheat” has French, rather than Saxon, origins, and distinguished two types of escheats. Firstly, the *propter defectum sanguinis* was regarded as a form of civil escheat when there was no heir to inherit the property and the land reverted back to the lord. Secondly, the use of *escheat propter delictum tenentis* was based on the feudal principle that all land would revert to the lord as a result of a failure on the part of a vassal to perform his duty to the lord, such as the commission of a felony.

32 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 682; *Austin v United States* 509 US 602 (1993) 610. See, also, Greek 2016: 3; Doyle 2016: 2; Winters 1987: 458; Simser 2009: 15; Boudreax & Pritchard 1996: 602-603.

33 Kesselring 2009: 204.

34 *Ibid*; Greek 2016: 3.

35 See Winters 1987: 457. Van Jaarsveld 2006: 142-144 notes that the concept “felon” was initially created by the courts to serve as punishment for tenants who failed to meet their obligations. This method of punishment was further developed to include criminal offences such as murder, rape, arson and robbery, where the offender’s property was forfeited to the Crown. The belief was that the privilege of ownership is lost once the rules of society were broken.

With even more draconian consequences, escheat and forfeiture procedures resulted in the corruption of blood, which may have permeated to the legacy of the feudal system. Any person convicted and attained for treason or a felony forfeited all of his lands and personal property to the Crown.³⁶ Criminal forfeiture in combination with corruption of blood was referred to as forfeiture of estate or common law forfeiture because of its total deprivation of property and all property rights.³⁷ Corruption of blood meant that a convicted criminal's bloodline, for generations to come, was corrupted and could neither inherit lands, or any other heritage from his ancestor, nor transmit them by descent to any heir, nor retain property he already had.³⁸ Forfeiture and corruption of blood was only possible following both a conviction by a jury and attainder. Attainder was a judicial declaration of a person's civil death, and corruption of blood occurred as a consequence of a sentence to death for high treason or felony.³⁹ Attainder consolidated the power of the Crown where "children are pledges to the prince of the father's disobedience".⁴⁰

The notion that a convicted felon's blood became corrupted, resulting in his property no longer being heritable had dire consequences for his family and creditors. Not only did this become part of the explanation for the loss of land, but also the reason why the widow of a felon received no inheritance in the land.⁴¹ She lost all rights she might have had to her so-called reasonable parts of his personal property. The same applied to leases or other chattels held jointly. Outstanding debts due to a felon became due to the Crown, but if the felon owed debts, these now died with him. All interested parties and victims lost their claim to property that might, in different circumstances, have been rightfully considered theirs.⁴²

These far-reaching consequences, according to Greek,⁴³ were based on the religious justification stemming from the biblical concept that the sins of the fathers

36 Doyle 2016: 2; Greek 2016: 3; Winters 1987: 457; Pimentel 2012: 8; Shaw 1990: 171.

37 *Austin v United States* 509 US 602 (1993) 613; Pimentel 2012: 8; Doyle 2016: 2; Greek 2016: 3; Shaw 1990: 171. See Kesselring 2009: 205 who distinguishes between treason cases where all of the offender's property were forfeited to the Crown, and felony cases where "real estate technically *escheated*", whereas the personal property and the year, day, and waste of the land were "forfeit". The law provided that lands escheated to lords in cases where tenants died without heirs, irrespective of how many children an attainted felon might have had.

38 Pimentel 2012: 8; Doyle 2016: 2; Greek 2016: 3; Shaw 1990: 171; Berman 1999: 24; Kesselring 2010: 115.

39 Doyle 2016: 2; Greek 2016: 4. See, too, Winters 1987: 457 who observes that the punishment of the felon as well as his ancestors and heirs would serve as a more effective deterrent measure in comparison to personal punishment.

40 Boudreax & Pritchard 1996: 604.

41 Kesselring 2009: 205. According to Greek 2016: 3 loss of a widow's dower usually consisted of one-third of her husband's lands. An attainted felon and his wife's dower rights could only be avoided when a crime was statutorily exempted by Parliament.

42 Kesselring 2009: 208.

43 Greek 2016: 4, 9. Forfeiture and the corruption of blood were eventually nullified in England, but only decades after it had been rejected by the American colonists.

would be visited upon their sons. Attainder forfeitures, however, were justified as “an appropriate sanction for the property owner’s violation of the social compact”.⁴⁴ The noxious effects of corruption of blood survived without impediment until 1814 when England repealed this doctrine. It was only applied to the crimes of murder and treason.⁴⁵

4 Statutory forfeiture

The founders of the American Republic had a different interpretation of the nature of property and the limitations of property rights by government. Property was regarded as a natural right which formed the cornerstone of individual liberty.⁴⁶ The deodand concept in English common law did not become part of the legal tradition in colonial America,⁴⁷ and forfeiture of estate was a rare phenomenon. After the Revolution, forfeiture of estate was viewed as being so abhorrent that the framers of the Constitution declared unconstitutional those extreme punishments upon conviction for treason. Article 3, paragraph 3, of the Constitution provides that “Congress shall have the power to declare the punishment of treason, but no attainder to treason shall work the corruption of blood, or forfeiture except during the life of the person attainted”.⁴⁸ The First Congress of 1787 promulgated the Act of 30 April 1790 which restricted the use of forfeitures of estate in other crimes or felonies.⁴⁹ Another predominant antecedent of modern forfeiture featured in the revenue section of the Exchequer in pre-colonial England, and was later used quite

44 Boudreax & Pritchard 1996: 603.

45 *Idem* 604; Kesselring 2009: 223.

46 Boudreax & Pritchard 1996: 604.

47 Brodley 1997: 694; *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 682; Doyle 2016: 2; Winters 1987: 457. See, also, Greek 2016: 10 who emphasises the important reason leading to the rejection of the English system as a whole by the American colonists referred to the manner in which American courts had been created. The authority to establish courts in England rested with the king whilst the power to create courts in the American colonies relied on/was based on several sources, namely: first, “through powers granted by the King in charters; second, through the exercise of the royal prerogative; third, through the creation of certain subordinate governmental organizations; and fourth, through creation of legislation”. This resulted from the difference in origin of the various colonies, such as royal colonies which were under the direct control of the Crown, chartered colonies with vested governing rights and proprietary colonies where vast authority was granted to a single owner.

48 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 682-683; Pimental 2012: 8; Winters 1987: 458; Boudreax & Pritchard 1996: 604.

49 This Act expired on 1 Nov 1986. See Winters 1987: 458; Reed 1994: 256; Pimental 2012: 8. This was underpinned in *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 682-683 where the court stated that forfeitures, as a consequence of a federal criminal conviction, have not been permitted. Forfeiture of estate resulting from a conviction for treason has been constitutionally prescribed by Art III § 3 “though forfeitures of estate for the lifetime of a traitor have been sanctioned”.

extensively in the American colonies against smuggling, the enforcement of tax laws and other revenue evasive schemes. According to Doyle,⁵⁰ contemporary American forfeitures are clearly a descendant of English statutory or commercial forfeiture.

4 1 Admiralty cases

The concept of *in rem* forfeiture first appeared in the United States' admiralty cases which were adapted from the British Navigation Acts of the seventeenth century.⁵¹ The Navigation Act, 1651, which was applied for two centuries, was regarded as the most important piece of legislation in this regard and consisted of the basic formula for civil forfeiture. The American colonies were seen as "residents of England" under the Navigation Act. After 1660 it was illegal to import and export goods from the colonies unless British ships with three-fourths English crew members were used.⁵² The Act of 3 March 1819 was enacted by the First Congress authorising the forfeiture of any ship or vessel engaged in slave trafficking and from which any "piratical aggression"⁵³ was attempted.⁵⁴

The most distinctive rationale for *in rem* forfeitures was that it was typified as the personification theory, where inanimate objects were stigmatised with a tainted or criminal personality and held accountable for the violation of federal laws.⁵⁵ This was described by the Supreme Court in *Goldsmith, Jr-Grant*⁵⁶ as a legal fiction "ascribing to the property a certain personality, a power of complicity and guilt in the wrong". The distinction between civil and criminal forfeiture was formulated in 1827 by the Supreme Court in its first notorious piracy decision, namely *The Palmyra*.⁵⁷ Story J held that "the thing is here primarily considered as the offender, or rather the offence

50 Doyle 2016: 3. See, also, *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) at 682 where the court points out that after the adoption of the Constitution, ships and cargoes involved in customs offences were subject to forfeiture under federal law; *Austin v United States* 509 US 602 (1993) 613; Hadaway 2000: 84 who describes that the Act of 31 Jul 1789 applied to protect the fiscal position of the US by the seizure and forfeiture of ships involved in customs violations. Van Jaarsveld 2006: 145 notes that the Court of Exchequer found its roots during the time of King Hendry I where it fulfilled a treasury accounting function.

51 Winters 1987: 459; Boudreax & Pritchard 1996: 605-606; Reed 1994: 258; Pimental 2012: 7; Hadaway 2000: 84. However, Van Jaarsveld 2006: 143 observes that the Crown, under the Navigation Acts, either had the option to institute an action *in personam* against the owner of the illicit cargo whereby the cargo was forfeited to the Crown after conviction, or an action *in rem* against the cargo without the owner being criminally prosecuted.

52 Greek 2016: 15; Reed 1994: 258.

53 Cassella 2003: 315; Casella 2009: 24; Simser 2009: 16.

54 Cassella 2001: 656.

55 Reed 1994: 258-259.

56 *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921) 510; Winters 1987: 460.

57 *The Palmyra* 25 US (12 Wheat) 1 (1827). The *Palmyra*, an armed vessel worth \$10 228 and chartered by the king of Spain, was seized and forfeited on suspicion of piracy. The captain contested the forfeiture based on the premise that the king was not culpable, and that the crew was never convicted of any crime. See Hadaway 2000: 84; Simser 2009: 16; Whatley 1997: 1278.

is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*". Accordingly, *in rem* proceedings stood independent of, and as a whole unaffected by, any *in personam* proceedings.⁵⁸

Seventeen years later, the Supreme Court decided a similar admiralty case in *Harmony v United States*.⁵⁹ Tort principles were invoked and the forfeiture of the ship was upheld for acts of piracy by its crew, without any reference to the innocence, conduct or character of the owner.⁶⁰ The court, in justifying the forfeiture of an innocent owner's ship, ruled that it was "the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party". In support of the ruling, the court reasoned that the ship was guided by its crew and master, and that their actions affected the ship.⁶¹ In similar vein, during the Civil War, Congress enacted powerful forfeiture proceedings in terms of the commonly known Confiscation Act of July 17 1862. This Act authorised drastic *in rem* forfeitures of any property owned by Confederate soldiers and sympathisers, and the forfeited property was used in support of the cause of the Union during the time of war. In *Miller v United States*,⁶² the first United States case in which a court ruled on the

58 *The Palmyra* 25 US (12 Wheat) 1 (1827) 14-15; *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 684; *Bennis v Michigan* 516 US 442 (1996) 447; Boudreax & Pritchard 1996: 597; Cassella 2009: 24; Winters 1987: 459; Van den Berg 2015: 867; Festekjian 1996: 716. See Pimental 2012: 9 who emphasises that this procedure was draconian. Vicarious liability not only attached to a sailor's single act in violation of express instructions by the owner, but an entire ship could be forfeited. Brodey 1997: 694 observes that the guilty property fiction used in admiralty cases was developed for practical reasons, rather than a belief that the property itself was guilty of criminal conduct. In *Austin v United States* 509 US 602 (1993) 615 the reason for *in rem* forfeitures was justified as a result of the lack of *in personam* jurisdiction over the owner of the property. Cassella 2009: 25 explains that admiralty *in rem* forfeitures was a matter of necessity in circumstances where a ship might be found within the jurisdiction of the US, but where the owner could not be found. Primarily, the reach of the courts was expanded to facilitate some source of compensation under these circumstances. This was confirmed by Lord Reid in *The Atlantic Star v Bona Spes* [1973] 2 WLR 795 where the court held that the right to arrest a ship is an ancient and necessary right, especially when difficulties are encountered to establish jurisdiction in an appropriate case, but "the arrest gives the arrester what may be a very necessary security".

59 43 US (2 How) 210 (1844), also referred to as *United States v The Brig Malek Adhel*. See, further, Brodey 1997: 695. This decision involved the forfeiture of an armed ship whose captain became mentally unbalanced and fired on other ships that it encountered.

60 *Harmony v United States* 43 US (2 How) 210 (1844) 233; Berman 1999: 8; Festekjian 1996: 717; Winters 1987: 459; Pimental 2012: 9.

61 *Harmony v United States* 43 US (2 How) 210 (1844) 238; Cupp 1997: 586; Pimental 2012: 9; Cassella 2003: 316, 323. See Winters 1987: 459-460; Brodey 1997: 695-696; Whatley 1997: 1287-1288.

62 *Miller v United States* 78 US (11 Wall) 268 (1870) 269. Reed 1994: 259-261 observes that this was the first decision where the court analysed the distinction between civil and criminal forfeiture, and held that the purpose of the Confiscation Act, 1862, was to delegate the legitimate exercise of Congress's war power authority. According to Kochan 2016: 3 President Lincoln objected during his lifetime to the provision of the Act which regulated the deprivation of property without prior conviction, and believed that confiscation should only be used as a temporary emergency measure. He argued that all property so seized should be restored to those from whom it was taken after the war.

application of the Confiscation Act after the Civil War, it was held that this was “an act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes”.

4 2 Extended forfeiture procedures and applicable case law

Between 1879 and 1920 Congress extended the application of forfeiture legislation beyond admiralty cases, although the Supreme Court consistently relied on the legal fiction that the property was guilty of the wrongdoing, with no regard for the innocence of the owner. In *Dobbin's Distillery*⁶³ the court upheld the forfeiture of a landlord's property and buildings where the tenant had operated a tax delinquent distillery, arguing that the offence attached to the property irrespective of the innocence of the owner.⁶⁴ Further, in 1921 and 1926 the court upheld the forfeiture of automobiles used to illegally transport untaxed liquor by persons other than the owner.⁶⁵ With reference to *The Palmyra*,⁶⁶ the court in *Goldsmith*⁶⁷ justified the anomalous forfeiture as a need to protect federal revenue, as well as the doctrine of the common law deodand “by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited”. The court reiterated that the fiction was a curious one, because goods cannot offend, forfeit or pay duties, “but men whose goods they are can”.⁶⁸ It was emphasised in *Austin*⁶⁹ that forfeiture as punishment runs through case law rejecting the innocent owner defence as a common law defence to forfeiture.⁷⁰ The forfeiture in these decisions was based on two theories, namely that the property is guilty of the offence, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. These theories embodied the notion that the owner was negligent when allowing his property to be misused, and must be punished.

63 *Dobbin's Distillery v United States* 96 US 395 (1877).

64 *Dobbin's Distillery v United States* 96 US 395 (1877) 396-397; Berman 1999: 9; Cassella 2009: 26; Festekjian 1996: 717-718; Cassella 2003: 317; Boudreaux & Pritchard 1996: 597.

65 See *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921); *Van Oster v Kansas* 272 US 465 (1926). In *Van Oster* the plaintiff had bought a car from a dealership and agreed that an associate could use it for business. The car was, however, used to illegally transport liquor, without the knowledge of the owner. The court argued that the innocence of the owner is irrelevant because certain uses of property were undesirable and the property must be removed as a preventative measure against such uses. See Cupp 1997: 587; Festekjian 1996: 718-719; Cassella 2003: 317.

66 *The Palmyra* 25 US (12 Wheat) 1 (1827).

67 *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921) 510-511; Reed 1994: 263; Berman 1999: 10.

68 In *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921) 510-511 the court held that this fiction is “firmly fixed” in American case law; Winters 1987: 460.

69 *Austin v United States* 509 US 602 (1993) 613.

70 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974); *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921); *Dobbin's Distillery v United States* 96 US 395 (1877); *Harmony v United States* 43 US (2 How) 210 (1844); *The Palmyra* 25 US (12 Wheat) 1 (1827).

According to Cassella⁷¹ it was increasingly clear that tainted property was subject to forfeiture because it was instrumental in the commission of the offence. Furthermore, it was necessary to confiscate such property to remove it from circulation, and those taxes or other payments could be recovered to which the government was entitled. Drastic changes were introduced in 1978 and 1984 when Congress amended the drug forfeiture legislation, allowing the forfeiture of the proceeds of crime, as well as property used to facilitate it.⁷²

The English common-law notion of criminal forfeiture was revisited in 1990 and applied to a wide variety of other crimes. In *Bajakajian*⁷³ the court observed that the English common law of criminal or punitive forfeiture was resurrected by Congress as part of the Racketeer Influenced and Corruption Organizations Act of 1970 [hereafter RICO] to combat organised crime and drug trafficking.

5 The relevance of forfeiture procedures in South Africa

The concepts and issues with which the United States has struggled is surprisingly familiar in South Africa which has also adopted civil and criminal forfeiture as a measure to combat organised crime in terms of the Prevention of Organised Crime Act 121 of 1998 [hereafter POCA]. The drafters of POCA consulted legislation of the United States, considered to be an omnibus of measures including criminal and civil forfeiture.⁷⁴ Although section 35(1)(b) of the Criminal Procedure Act 51 of 1977 provides for the forfeiture of any weapon or instrument used by a convicted offender to commit an offence, the legislative objectives of POCA are also clearly stipulated in its preamble. Firstly, measures are introduced to combat the rapid growth of organised crime, money laundering, criminal gang activities and racketeering, which present a danger to public order and safety, economic stability and sustainable growth, and with the potential to inflict social damage. Secondly, the South African common and statutory law have failed to deal adequately with organised crime and to keep pace with international developments. Therefore legislation was needed for the legalisation of the seizure and forfeiture of property concerned, or suspected to be concerned, in the commission of an offence. To achieve this objective, provision was made for a civil remedy; the restraint, seizure and confiscation of property; or

71 Cassella 2009: 26-27.

72 *Idem* 27; Cassella 2003: 318.

73 *United States v Bajakajian* 524 US 321 (1998) 332; Cassella 2003: 320.

74 See n 12 *supra* where it is noted that POCA was inspired by the guidelines formulated in the RICO statute. Chapter 5 of POCA regulates criminal or *in personam* forfeiture after conviction, which is directed at the proceeds of crime and the property of the defendant. Civil or *in rem* forfeiture, on the other hand, and without prior conviction, is regulated by ch 6, which is based on the so-called guilty property fiction, in accordance with the *dictum* of the court in *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 684.

the benefits derived from unlawful activities. POCA further provides that no person shall benefit from the fruits of their unlawful activities or that they may use their property to commit crime.⁷⁵

POCA is derived from transnational criminal law which refers to a body of law developed out of the need for international measures, such as treaties and conventions, to implement legislation in order to combat organised crime.⁷⁶ South Africa was one of the signatories to the United Nations Convention against Transnational Organised Crime (the Palermo Convention) on 14 December 2000 and 20 February 2004.⁷⁷ Some of the offences provided for in the Convention include the participation in serious crime (Art 2), participation in an organised criminal group (Art 5), as well as laundering the proceeds of crime (Art 6) and corruption (Art 8).⁷⁸ The court underscored in *National Director of Public Prosecutions v Prophet*⁷⁹ that civil forfeiture is largely based on statutory provisions of the United States, based on the English fiction that the property is rendered guilty of the offence. Forfeiture is designed to confiscate the offending property and to “require disgorgement of the fruits of illegal conduct”.⁸⁰ Willis J in *National Director of Public Prosecutions v Cole*⁸¹ quoted several judgments from the United States in which property was used to commit drug related offences, which rendered it an instrumentality of the offence. The court held as follows: “I shall dwell briefly upon the cases ... because they provide some contextual colour to the issues with which the South African Courts are having to grapple in dealing with the interpretation and application of the Act.”⁸² Furthermore, the court held that forfeiture orders can easily become not a weapon of justice, but a weapon of terror.⁸³ Nevertheless, the court made it clear that history demonstrates that these measures address the lawless nature of drug trafficking and

75 *Mohunram v National Director of Public Prosecutions* 2007 (2) SACR 145 (CC) par 146; *Prophet v National Director of Public Prosecutions* [2007] 2 BCLR 140 (CC) par 59; *National Director of Public Prosecutions v Mohamed* 2003 (4) SA 1 (CC) par 14; *Mazibuko v National Director of Public Prosecutions* [2009] 3 All SA 548 (SCA) par 26; *Falk v National Director of Public Prosecutions* [2011] 11 BCLR 1134 (CC) par 10; *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par 166.

76 For examples of international co-operation, see *Falk v National Director of Public Prosecutions* [2011] 11 BCLR 1134 (CC) par 1 read with n 1 *supra*.

77 Kruger 2008: 4.

78 Egan 2011: 170.

79 [2003] 8 BCLR 906 (C) par 22.

80 *National Director of Public Prosecutions v Prophet* [2003] 8 BCLR 906 (C) par [22]. The court underscored that the US in particular has extensive experience with civil forfeiture and may be usefully studied comparatively. See *United States v Ursery* 518 US 267 (1996) 69; Van Jaarsveld 2006: 138-139.

81 2005 (2) SACR 553 (W).

82 *National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W). *Idem* par 9, where reference is made, amongst others, to *Austin v United States* 509 US 602 (1993).

83 *National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) par 14.

the widespread devastation it causes. This has resulted in international consensus that forfeiture is a necessary tool in fighting a “seriously harmful evil”⁸⁴ in society.

Moseneke DCJ and Cameron J of the Constitutional Court strongly emphasise that corruption and organised crime “threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order”, and that when it flourishes, “sustainable development and economic growth are stunted … and stability and security of society is put at risk”.⁸⁵ In *National Director of Public Prosecutions v Mohamed*⁸⁶ the court noted that conventional criminal penalties are inadequate as measures of deterrence, as the leaders of groups engaged in organised crime benefit from and retain their criminal income, even when brought to justice and convicted. The importance of forfeiture procedures was further underscored by Van Heerden J in *Mohunram*,⁸⁷ when he stated that the need to combat criminal activities by depriving the perpetrators of their property which was obtained or used in the commission of crimes. The primary objective of POCA is not to punish the offender, but to remove the incentives and instruments to commit further crimes.⁸⁸ This was confirmed by Nkabinde J in *Prophet*⁸⁹ where the Constitutional Court held that the property is rendered guilty of contravening the law and not the owner. According to Cassella “[f]orfeiture … gives the criminal his just desserts”.⁹⁰

6 Conclusion

The development, adaptation and applicability of these ancient forfeiture procedures to modern versions were best described as follows by the court in *Calero-Toledo*:⁹¹

The customs, beliefs, or needs of primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it

84 Van Jaarsveld 2006: 139.

85 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par 166.

86 2003 (4) SA 1 (CC) par 15; *Falk v National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) [2011] 11 BCLR 1134 (CC).

87 *Mohunram v National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) 2007 (2) SACR 145 (CC).

88 *Mohunram v National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) [2007] 2 SACR 145 (CC) par 28; *Mazibuko v National Director of Public Prosecutions* [2009] 3 AII SA 548 (SCA) [2009] 3 AII SA 548 (SCA) par 26.

89 *Prophet v National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) [2007] 2 BCLR 140 (CC) par 58.

90 Cassella 2009: 32.

91 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 681; see, also, Cassella 2003: 320; Cassella 2009: 29. Van den Berg 2015: 876 emphasises that this decision is still applicable and provides much of the backbone in support of the modern understanding and justification of this doctrine.

is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

The *in rem* forfeiture of pirate ships and other instruments of crime not only survived constitutional scrutiny for two hundred years, but have remarkably expanded in modern times to include a much broader variety of property such as the forfeiture of vehicles, houses, bank accounts and all serious offences including money laundering, white collar crimes, child pornography and car-jacking where property was used to commit or facilitate a crime.⁹²

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