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divested by divorce decree.[77] Furthermore, trial courts still retain broad discretion to set aside property for the benefit of minor children.[78] The uncertainty which remains, however, concerns the degree of authority the trial court will be permitted to exercise in ordinary marital property division. By limiting the discretion of the court, it is possible that a divorce proceeding might eventually resemble a partition hearing rather than a balancing of the equities. With the elimination of fault as a basis for divorce it is doubtful that culpability or any other subjective consideration should affect what is essentially a division of property between cotenants.

Jerry Morell

CONSTITUTIONAL LAW—Due Process—State Is Required Under Texas Forfeiture Statute To Assume Burden of Proving Proceeds Were Used in Gambling Activity

State v. Rumfolo,
545 S.W.2d 752 (Tex. 1976).

On March 12, 1975, Johnny Rumfolo and a few friends were playing their regular Thursday night dice game in an apartment in Houston, Texas. The game had been under continuous surveillance by the police, one of whom was an undercover agent. That night the police were prepared to make a raid and complete their investigation. One of the players happened to see their approach and warned his fellow gamesters, who then proceeded to pick up their money. The officers arrested and searched the gamblers and seized all the cash present.

Since there was no prosecution following the raid, the magistrate to whom return was made ordered the money forfeited to the state in accordance with article 18.18(f) of the Texas Code of Criminal Procedure.[1] On

77. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 142 (Tex. 1977).
78. *Id.* at 142.

1. TEX. CODE CRIM. PROC. ANN. art. 18.18 (Supp. 1976-1977) states in part:

(b) If there is no prosecution or conviction following seizure, the magistrate to whom the return was made shall notify in writing the person found in possession of the alleged gambling device or equipment, altered gambling equipment or gambling paraphernalia, gambling proceeds, prohibited weapon, or criminal instrument to show cause why the property seized should not be destroyed or the proceeds forfeited.

. . . .

(f) If a person timely appears to show cause why the property or proceeds should

appeal to the county court, the gamblers failed to present evidence to show that the money seized was not gambling proceeds and the money was again ordered forfeited to the state. The Houston Court of Civil Appeals (Fourteenth District) held that because the forfeiture statute placed the burden of proof on the party whose property was to be forfeited, rather than on the state, it denied the gamblers due process.[2] Ruling paragraphs (b) and (f) of article 18.18 unconstitutional, the civil appeals court reversed the county court's forfeiture order.[3] On appeal to the Supreme Court of Texas, the Houston district attorney urged reinstatement of the forfeiture order on the ground that the state had provided Rumfolo and the others due process by giving notice of and conducting an evidentiary hearing in which it showed the cash impounded had been used in their gambling activity. Held—*Reversed.* The statute satisfies the requirements of due process by providing the claimants notice of a hearing and the opportunity to present evidence to contest the forfeiture; the state, however, must assume the burden of proving that the money was used for gambling and then trace it to the claimants.[4]

Contemporary forfeiture statutes originated from two sources: the law of deodand[5] and the common law of England.[6] Later, English statutes adopted the practice providing for forfeiture of objects used in violation of customs and revenue laws.[7] The statutory proceedings were conducted in the Court of Exchequer, which exercised jurisdiction in rem and employed

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not be destroyed or forfeited, the magistrate shall conduct a hearing on the issue and determine the nature of the property or proceeds and the person's interest therein. Unless the person proves by a preponderance of the evidence that the property or proceeds is not gambling equipment, altered gambling equipment, gambling paraphernalia, gambling device, gambling proceeds, prohibited weapon, or criminal instrument, and that he is entitled to possession, the magistrate shall dispose of the property or proceeds . . . .

2. Rumfolo v. State, 535 S.W.2d 16, 21 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd*, 545 S.W.2d 752 (Tex. 1976). The court of civil appeals also noted that the arrest and subsequent search were probably illegal but did not pursue the issue in light of its holding article 18.18 unconstitutional. *Id.* at 20.

3. *Id.* at 21.

4. State v. Rumfolo, 545 S.W.2d 752, 754 (Tex. 1976).

5. "Deodand" means "given to God." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.16 (1974). The value of a thing causing the death of one of the King's subjects was given to the Crown as deodand. Deodand was applied as a religious expiation for causing the death. *Id.* at 680-81. For additional background, see Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973).

6. Forfeitures at common law resulted from conviction for felonies or treason; depending on the crime, the chattels of the convicted prisoner went either to his lord or to the Crown. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974). Breach of the law was considered an offense to the King's peace and provided the basis for justifying the common law forfeitures. *Id.* at 682.

7. *Id.* at 682.

the fiction that the property, and not the owner, was the offender.[8] Since the owner was not on trial, his guilt or innocence was inconsequential.

Even before the American colonies drafted the Constitution, they adopted the practice of forfeiting contraband and applied the procedures of the Exchequer in exercising jurisdiction in rem.[9] The United States Supreme Court has found no constitutional objection to forfeiture and has considered it to be the only satisfactory means of eliminating the related illegal activites.[10] This rationale has been used to justify the forfeiture of an innocent owner's property as well.[11] Generally, as long as the forfeiture has been considered reasonably necessary to accomplish a legitimate purpose in the exercise of a state's police power, the forfeiture has been held constitutional.[12]

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8. *See id.* at 682; The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827). Forfeiture proceedings in the Exchequer were not strictly actions in rem, but in effect, that was the nature of the proceedings once a conviction was obtained. *Id.* at 14. The fiction that the property itself is the offender has continued to the present. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974); United States v. United States Coin & Currency, 401 U.S. 715, 720 (1971); Goldsmith-Grant Co. v. United States, 254 U.S. 505, 513 (1921). For example, in one case the Court noted that the government charged: "On one or more of the aforementioned dates . . . aforesaid respondents [*i.e.*, the money] had been used and were intended to be used in violation of the Internal Revenue Laws of the United States of America . . . ." United States v. United States Coin & Currency, 401 U.S. 715, 720 n.5 (1971).

9. C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943) (state common law forfeiture against a fishing net). The federal and state constitutions contain prohibitions concerning certain types of forfeitures. *See* U.S. CONST. art. III, § 3, cl. 2; TEX. CONST. art. I, §§ 19, 21.

10. In United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844), the Court stated:

> It is not an uncommon course in the admiralty, acting under the law of nations to treat the vessel . . . as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong . . . .

11. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 665-68, 687-88 (1974) (innocent lessor's boat forfeited when lessee illegally transported marihuana); Van Oster v. Kansas, 272 U.S. 465, 465-66, 468 (1926) (innocent owner's car forfeited when agent of car dealer who retained car as part consideration illegally transported liquor); State v. Richards, 157 Tex. 166, 167-69, 301 S.W.2d 597, 598-600 (1957) (innocent owner's car forfeited when borrower illegally transported narcotics); State v. Meyers, 328 S.W.2d 321, 322, 325 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) (upholding forfeiture of automobile where innocent owner with valid drug prescription transported drugs in unlabeled container and was wrongfully accused of illegal transportation of narcotics). *Contra,* Peisch v. Ware, 8 U.S. (4 Cranch) 347, 360-62, 365 (1808) (forfeiture denied where liquor not stamped because emergency measures necessary to preserve ship's cargo); State v. Young's Market Co., 369 S.W.2d 659, 660-64 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.) (failure of driver transporting liquor to have required shipping instruments a mere technical violation of Texas Liquor Control Act and not such a violation as to constitute liquor "illicit beverage" for purposes of forfeiture of truck and liquor).

12. State v. Richards, 157 Tex. 166, 171, 301 S.W.2d 597, 602 (1957) (forfeiture justified under police power to curb illegal transportation of narcotics); *see* Phariss v. Kimbrough, 118 S.W.2d 661, 664 (Tex. Civ. App.—Austin 1938, writ ref'd) (automobile used to unlawfully

Although forfeiture proceedings are characterized as civil actions, the label "civil" is not entirely accurate. Many courts have adopted the reference "quasi-criminal" for these actions since the phrase was first used in *Boyd v. United States*.[13] The designation "quasi-criminal" suggests that the rules pertaining to criminal actions might also apply to forfeiture proceedings. For example, the state might be required to prove its case against the property using the reasonable doubt standard of proof normally reserved for penal violations. While the constitutional protections against unreasonable searches and against compulsory self-incrimination have sometimes been allowed the defendant-owner in a forfeiture proceeding,[14] challenges to forfeiture of contraband on the ground that it works a denial of due process have been routinely defeated.[15]

The confusion concerning the nature of forfeiture actions is significant since the procedures used, protections applicable, and burden of proof required depend on whether the action is civil or criminal in nature. When a forfeiture is considered an in rem civil proceeding, the state need not establish the commission of a crime, and the owner must prove his right to the property.[16] On the other hand, if the forfeiture proceeding is determined to be criminal in nature, the state may be required to prove the commission of a crime "as in other penal cases."[17]

When forfeiture is viewed as an in rem action, one consequence is that the owner must establish his right to the property by a preponderance of

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transport whiskey subject to forfeiture upon conviction); Skipper-Bivens Oil Co. v. State, 115 S.W.2d 1016, 1017 (Tex. Civ. App.—Austin 1938, writ ref'd) (forfeiture of unlawfully produced oil justified under police power to conserve natural resources).

13. 116 U.S. 616, 634 (1886); *see, e.g.*, United States v. United States Coin & Currency, 401 U.S. 715, 718 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965); Bramble v. Richardson, 498 F.2d 968, 970-71 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974).

14. United States v. United States Coin & Currency, 401 U.S. 715, 722 (1971) (privilege against self-incrimination); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701-02 (1965) (exclusionary rule applied to objects unlawfully seized); Boyd v. United States, 116 U.S. 616, 634 (1886) (privilege against self-incrimination); Berkowitz v. United States, 340 F.2d 168, 173 (1st Cir. 1965) (seizure required to be lawful). *Contra*, Dodge v. United States, 272 U.S. 530, 532 (1926) (seizure need not be lawful); McColl v. Hardin, 70 S.W.2d 327, 329 (Tex. Civ. App.—San Antonio 1934, no writ) (seizure need not be lawful).

15. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974); Van Oster v. Kansas, 272 U.S. 465, 468 (1926); Goldsmith-Grant Co. v. United States, 254 U.S. 505, 513 (1921); State v. Richards, 157 Tex. 166, 169, 301 S.W.2d 597, 600 (1957); Phariss v. Kimbrough, 118 S.W.2d 661, 664 (Tex. Civ. App.—Austin 1938, writ ref'd). *See also* Fuentes v. Shevin, 407 U.S. 67, 88-92 (1972).

16. TEX. CODE CRIM. PROC. ANN. art. 18.18(f) (Supp. 1976-1977); *see* Hightower v. Larimore, 156 Tex. 267, 268-69, 295 S.W.2d 654, 655 (1956) (per curiam).

17. Tex. Laws 1955, ch. 300, art. 725d, § 6, at 812, *as amended*, TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.07(b) (1973); *see* McKee v. State, 318 S.W.2d 113, 118 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.).

the evidence.[18] While this might seem a serious denial of due process, there is precedent for placing the burden of proof on the claimant. For example, federal customs laws allow seizure of property and require the owner or possessor to prove his right to possession.[19] Some federal cases dealing with forfeitures have placed the burden on the claimant when sufficient evidence was presented to conclude probable cause existed for the seizure of the property.[20]

The Supreme Court in *Fuentes v. Shevin*[21] enumerated the procedural due process requirements for a taking of private property.[22] The basic prerequisites needed to afford the parties due process were held to be notice of the proceedings and the opportunity to be heard.[23] The Court recognized, however, that with regard to initial seizure "extraordinary situations" might arise that would justify postponing these requirements.[24] These standards were reiterated and applied to a forfeiture proceeding instituted by a governmental body in the case of *Calero-Toledo v. Pearson Yacht Leasing Co.*[25] In *Pearson,* the Court recognized that the use of the "extraordinary situation" exception could not in any way deprive a claimant of his right to due process.[26] The Court continued, however, stating that due process requires only that the defendant receive meaningful notice of the proceedings and the opportunity to be heard before his property may be forfeited lawfully.[27]

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18. TEX. CODE CRIM. PROC. ANN. art. 18.18(f) (Supp. 1976-1977); *see* Tex. Laws 1907, ch. 49, art. 388, at 107. Another consequence is the fiction that the property itself is the offender. See note 8 *supra* and accompanying text.

19. 19 U.S.C. § 1615 (1970) provides: "where the property is claimed by any person, the burden of proof shall lie upon such claimant . . . ."

20. *See* Fell v. Armour, 355 F. Supp. 1319, 1331 (M.D. Tenn. 1972); United States v. One Dodge Coupe, 43 F. Supp. 60, 62 (S.D.N.Y. 1942); *cf.* United States v. One 1975 Lincoln Continental, 72 F.R.D. 535, 540 (S.D.N.Y. 1976) (burden on government to show probable cause).

21. 407 U.S. 67 (1972).

22. *Id.* at 80.

23. *Id.* at 80. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), the Court said: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action . . . ." *Accord,* Robinson v. Hanrahan, 409 U.S. 38, 39-40 (1972) (per curiam).

24. Fuentes v. Shevin, 407 U.S. 67, 90 (1972). The Court listed three situations where a seizure without a prior hearing might be justified: first, when the seizure is necessary to secure an important governmental or public interest; second, when there is a particular need for prompt action; and third, when the state has strict control over its monopoly of legitimate force. *Id.* at 90-91.

25. 416 U.S. 663 (1974).

26. *Id.* at 678-79.

27. *See id.* at 678-79. The *Fuentes* Court interpreted several prior cases to support its statement that due process requirements of notice and hearing are not restricted to merely a few limited examples of property interests. Fuentes v. Shevin, 407 U.S. 67, 89 (1972); *see* Bell v. Burson, 402 U.S. 535, 540 (1971) (driver's license suspension hearing); Boddie v. Connecti-

In *State v. Rumfolo,*[28] the Supreme Court of Texas reviewed an appeal from the Houston Court of Civil Appeals (Fourteenth District) which had held the Texas statute that permits the state to forfeit gambling equipment to be unconstitutional as a denial of due process.[29] The Houston court had reasoned that the statute denied due process because it placed on the defendant-claimant the burden to show cause why the property seized should not be forfeited or destroyed.[30] Relying on *Gunn v. Cavanaugh,*[31] the civil appeals court had ruled that due process requires the burden of proof to rest on the party requesting the forfeiture.[32] In reversing the court of civil appeals, the supreme court distinguished *Gunn* from the instant case on the ground that *Gunn* had dealt with a forfeiture of parental rights, not property rights. The court held such an analogy improper since the two sets of rights were not determined by the same rules.[33] Factors the supreme court considered necessary to determine the bounds of due process included the civil nature of the action, with special emphasis on the fact that no conviction of the claimants was involved.[34]

The supreme court construed article 18.18 to place on the state the initial burden of showing that the property seized was used for gambling, and of tracing the property to the parties involved.[35] Since these obligations were fulfilled at a hearing, written notice of which had been provided the claimants, and where the claimants had been provided an opportunity to present evidence, the court reasoned that the requirements of procedural due process had been met.[36] The court continued, stating that in order for the claimants to have prevailed at the hearing provided them, they would have had to show the property was not gambling proceeds.[37] This burden of rebutting the state's evidence, the court found, was not incon-

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cut, 401 U.S. 371, 377 (1971) (access of welfare recipients to courts); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (termination of welfare benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (wage garnishment); Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (adoption proceedings).

28. 545 S.W.2d 752 (Tex. 1976).

29. Rumfolo v. State, 535 S.W.2d 16, 21 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd,* 545 S.W.2d 752 (Tex. 1976) (construing article 18.18 of the Texas Code of Criminal Procedure).

30. *Id.* at 20.

31. 391 S.W.2d 723 (Tex. 1965).

32. Rumfolo v. State, 535 S.W.2d 16, 20 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd,* 545 S.W.2d 752 (Tex. 1976). The court of civil appeals also held that due process requires the state to prove by a preponderance of the evidence that the property it seeks to forfeit was used illegally. *Id.* at 20. The *Gunn* case had held that where property rights were of "high importance," the party seeking to forfeit those rights would have to bear the burden of proof. Gunn v. Cavanaugh, 391 S.W.2d 723, 727 (Tex. 1965).

33. State v. Rumfolo, 545 S.W.2d 752, 754 (Tex. 1976).

34. *Id.* at 754.

35. *Id.* at 754.

36. *Id.* at 754.

37. *Id.* at 754.

sistent with the requirements of due process.[38] Accordingly, the court held that due process had not been denied the claimants and therefore reinstated the county court's forfeiture order.[39]

The supreme court's construction is at best difficult to reconcile with the wording of article 18.18(f). The court declared, "We construe Art. 18.18 to require the State to assume the burden to prove the proceeds were used in the gambling activity . . . ."[40] Perhaps sensing possible difficulty in justifying its construction of the statute, the court omitted a precise definition of the nature and extent of the burden it placed on the state. In arguing the unconstitutionality of the statute, the claimants noted the following statutory language: "Unless the person proves by a preponderance of the evidence that the property or proceeds is not . . . gambling proceeds . . . and that he is entitled to possession, the magistrate shall dispose of the property or proceeds . . . ."[41] While the court may have given a construction that seems appropriate for our society and the nature of the property involved, such an interpretation could be considered as approaching the limits of statutory construction.[42]

Aside from its decision on the due process issue, the court's emphasis on the civil nature of the proceedings, coupled with its holding, poses an additional problem of interpretation. When applying civil in rem procedures, courts have used at least three different theories to justify the forfeiture: prevention of future crimes,[43] protection of the public,[44] and punishment of the offender.[45] The prevention theory has appeared in cases where the court construed the action as remedial and felt it served as a deterrent to future occurrences of the violation.[46] The foundation of the protection theory has been the exercise of a state's police power to protect the public from dangerous objects.[47] Forfeitures under this theory are properly in rem proceedings since the action is directed against the property itself. Finally, under the punishment theory, forfeiture of property has

38. *Id.* at 754.

39. *Id.* at 754-55.

40. *Id.* at 754.

41. TEX. CODE CRIM. PROC. ANN. art. 18.18(f) (Supp. 1976-1977).

42. *Cf.* Ebert v. Poston, 266 U.S. 548, 554 (1925) (judicial function limited to ascertaining legislative intent); McPherson v. Blacker, 146 U.S. 1, 27 (1892) (courts cannot disregard plain meaning of statutory language to search for conjectured intent).

43. *See* United States v. Dixon, 347 U.S. 381, 382 n.1 (1954) (dicta) (approving characterization of other cases as preventative). *See also* Phariss v. Kimbrough, 118 S.W.2d 661, 663 (Tex. Civ. App.—Austin 1938, writ ref'd) (construing statute as aid to law enforcement).

44. *See* Lawton v. Steele, 152 U.S. 133, 142-43 (1894); State v. Richards, 157 Tex. 166, 171, 301 S.W.2d 597, 602 (1957).

45. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965).

46. United States v. Dixon, 347 U.S. 381, 382 n.1 (1954); Phariss v. Kimbrough, 118 S.W.2d 661, 663 (Tex. Civ. App.—Austin 1938, writ ref'd).

47. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965); State v. Richards, 157 Tex. 166, 169, 301 S.W.2d 597, 600 (1957).

been characterized as a penalty for committing the offense.[48] There is support for the proposition that a forfeiture founded on the punishment theory is the equivalent of a criminal penalty, and this view poses a difficult problem.[49] If a forfeiture may be considered a criminal penalty, in rem procedure would seem inapplicable to forfeiture proceedings conducted under the punishment theory since the guilt or innocence of the owner would be a necessary part of the proceedings.

In the instant case, since there had been no prosecution or conviction of the claimants, the forfeiture of the gambling proceeds appears to have been punishment for their engaging in the unlawful activity. Considered in this respect, the claimants were punished without having been convicted of an offense. While this result may not seem unfair considering the evidence available to the court in this case, applying in rem procedure to a person who could be found innocent were he afforded a trial seems inequitable.[50] Perhaps more likely to occur is the situation in which the amount forfeited exceeds the maximum punishment for the criminal offense.[51] The decision in *Rumfolo* could be construed as illustrating the inequity that results when the criminal justice process is merged with the civil procedure of forfeiture.[52]

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48. *See* United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965).

49. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965).

50. In addition to the many burdens that must be met by the state in any criminal prosecution, the accused gambler also would have involuntarily waived three defenses listed in the Penal Code section which proscribes gambling. The section reads in part:

(b) It is a defense to prosecution under this section that:

(1) the actor engaged in gambling in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

TEX. PENAL CODE ANN. § 47.02(b) (1974).

51. The offense of gambling is a Class C misdemeanor. *Id.* § 47.02(c). The maximum punishment for a Class C misdemeanor is a fine of $200. *Id.* § 12.23. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701-702 (1965).

52. The law is unsettled as to whether an acquittal in a criminal action would bar a subsequent civil forfeiture based on the same criminal conduct. *Coffey v. United States* appears to have held that an acquittal does bar the subsequent forfeiture. Coffey v. United States, 116 U.S. 436, 443 (1886). In noting that acquittal in a criminal prosecution barred a new trial, the court also stated that a subsequent civil suit "amounts to substantially the same thing, with a difference only in the consequences . . . ." *Id.* at 443. Texas cases on the point have distinguished the holding in *Coffey* by emphasizing the different issues involved and the different burdens of proof required in the civil action as opposed to criminal actions. *See* State v. Benavidez, 365 S.W.2d 638, 640 (Tex. 1963); Stewart v. State, 244 S.W.2d 688, 690 (Tex. Civ. App.—Texarkana 1951, writ ref'd). In a very recent Texas Supreme Court case, a forfeiture ordered under the sections of article 18.18 which establish the procedure to be used when no conviction is involved, was upheld even though the claimant had been convicted of the criminal offense of operating a gambling place. State v. Dugar, 553 S.W.2d 102 (Tex. 1977). The court held that since Dugar had not been convicted of an offense listed in

Forfeiture proceedings have been directed at two distinct classes of property. Property which may be used only for unlawful purposes or whose mere possession is unlawful or inherently dangerous has been termed "per se contraband."[53] The gambling proceeds that were seized in the raid of Rumfolo and the other gamesters fall into the other class of property, derivative contraband.[54] Property such as money, automobiles, ships and other personalty becomes derivative contraband when used for illegal means or in an unlawful manner. The policy rationale justifying forfeiture of derivative contraband is rooted in the punishment theory.[55] The cases involving derivative contraband clearly have indicated that the owner or possessor must receive meaningful notice and must have the opportunity to contest the action.[56] Article 18.18 does provide that the claimant in a forfeiture action who has not otherwise been convicted must be furnished with these due process safeguards.[57] The *Rumfolo* court's concern with the punitive effects of a forfeiture of derivative contraband can be detected in the emphasis placed on affording the defendants due process.[58]

The punitive effects of in rem forfeitures were recognized in Texas under the prior forfeiture statute concerning gambling equipment.[59] The language of the statute was similar to article 18.18 in placing the burden on the claimant to show cause why his property should not be forfeited.[60] The state was allowed to forfeit gambling proceeds seized from the players, provided the state could first establish a connection between the cash and

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section (a) of article 18.18, that the procedures conditioned on the absence of prosecution or conviction applied. *Id.* at 104. The court continued: "the basic premise of an in rem forfeiture proceeding that, while the possessor may not be guilty of any criminal offense, the property seized is of such a nature that it should be destroyed or confiscated by the State." *Id.* at 104.

53. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965).

54. *See id.* at 699-700.

55. *See* United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965).

56. *See, e.g.,* Robinson v. Hanrahan, 409 U.S. 38, 39-40 (1972) (per curiam); United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971). In Terrazas v. Donohue, 227 S.W. 206, 209 (Tex. Civ. App.—El Paso 1920), *aff'd,* 115 Tex. 46, 275 S.W. 396 (1925), the court stated in dicta: "A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court or an opportunity of being heard in his own defense is a violation of the elementary principles of law . . . ."

57. *See* TEX. CODE CRIM. PROC. ANN. art. 18.18(b), (f) (Supp. 1976-1977).

58. State v. Rumfolo, 545 S.W.2d 752, 754 (Tex. 1976).

59. Tex. Laws 1907, ch. 49, art. 388, at 107; *see* Jones v. Pettigrew, 328 S.W.2d 450, 451 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.).

60. Tex. Laws 1907, ch. 49, art. 388k, at 110, stated in part:

> Thereupon it shall be the duty of said Justice of the Peace, County or District Judge to note same upon his docket and to issue or cause the clerk of the court to issue a notice in writing to the owner or person in whose possession the articles seized, were found, commanding him to appear . . . and show cause why such articles should not be destroyed . . . .