THE HISTORY OF *IN REM* FORFEITURE – A PENAL LEGACY OF THE PAST

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1 Introduction

In rem[1] or civil forfeiture sanctions the confiscation of a defendant's property[2] before a criminal conviction has been obtained. As such, it violates the notion that ownership is an absolute right.[3] Ownership in Roman law was, however, never absolute – it tolerated restrictions.[4] Similarly, it is generally accepted today that legislative measures have resulted in key limitations of the traditional concept of ownership.[5]

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1 An *in rem* civil action is an action against the property as opposed to an *in personam* action which is against a person. In the context of forfeiture this implies that two different actions for the same offence may be taken against a defendant: one against his person, the criminal action, and one against his property, the *in rem* action.

2 S 1 of the *Prevention of Organized Crime Act* 121 of 1998 (hereafter "*POCA*") defines the term "defendant" as "a person against whom a prosecution for an offence has been instituted irrespective of whether he or she has been convicted or not ...". This section further favours a broad definition of property. It defines property as "money or any other movable, immovable, corporeal or incorporeal thing and includes any *rights, privileges, claims and securities and any interest* therein and all proceeds thereof" (my emphasis). "Interest" is defined in s 1 as any right that a person may have.

3 This feature is traced back to Roman and Roman-Dutch law to which the modern South-African concept of ownership is compared (Kleyn & Borraine *Silberberg and Schoeman's The Law of Property* (1992) 162; Milton "Ownership" in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 692-699; Hahlo & Kahn *The Union of South Africa – The Development of its Laws and Constitution* (1960) 578).

4 Visser "The 'absoluteness' of ownership: the South African common law in perspective" 1985 *Acta Juridica* 48 n 7; Birks "The Roman law concept of dominium and the idea of absolute ownership" 1985 *Acta Juridica* 1; Van der Walt "The South African law of ownership: a historical and philosophical perspective 1992 *De Jure* 446; Hahlo & Kahn (n 3) 579. In addition, although s 25 of the Bill of Rights in the Constitution of the Republic of South Africa (Act 108 of 1996) sanctions the protection of property, the Constitutional Court has on occasion, after reviewing the legality of an expropriation, found that there is "an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve" (*First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 (CC) par 98 per Ackerman J). Circumstances may exist when it is permissible and in the public interest to confiscate property without compensation (Chaskalson J and Lewis J in *FNB v Minister of Finance* [2002] 7 BCLR 844 (SCA) pars 66 100; *National Director of Public Prosecutions v Cole* [2004] 3 All SA 745 (W) 756E-757E; Rautenbach "Die reg op eiendom – arbitrêre ontneming, proporsionaliteit en die algemene beperkingsbepaling in konteks" 2002 *TSAR* 813 820-821). In *National Director of Public Prosecutions v Prophet* [2003] 8 BCLR 906 (C)) Erasmus J observed that forfeiture not only prevents further illegal use of property, but also imposes economic penalties by removing profits from an offender (917A-C). It should, however, be remembered that the effects of forfeiture should never be treated in a "predetermined, mechanistic manner" (Van der Walt "Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause" 2000 *SAJHR* 45; *National Director of Public Prosecutions v Prophet* 917D). The fairness and justifiability of each case should be evaluated on its own merits and treated accordingly.

5 Van der Walt & Kleyn "Duplex dominium: the history and significance of the concept of divided ownership" in Visser *Essays on the History of Law* (1989) 258; Reid & Van der Merwe "Property law: some themes and some variations" in Zimmermann, Visser & Reid *Mixed Legal Systems in Comparative Perspective — Property and Obligations in Scotland and South Africa* (2004) 648-651.

Civil forfeiture was introduced by *POCA* as a method to combat crime.[6] Although the benefits of civil forfeiture, as opposed to criminal forfeiture, are undeniable,[7] some doubts have been expressed about the balance the action strikes between civil liberties and the need for law enforcement.[8]

In this article the historic purpose of civil forfeiture in English law is revisited[9] to ascertain why applications for civil forfeiture may be entertained by our courts before criminal convictions have been obtained. The English origins of civil forfeiture law are analysed since *POCA* is based on the *American Racketeer Influenced Corrupt Organisations Act*[10] and, in turn, American law of civil forfeiture derived from the ancient English premise that the forfeited property is guilty of an offence.[11] The usefulness of a comparative approach in assessing civil forfeiture in South African law has been highlighted by the Constitional Court in *National Director of Public Prosecutions v Prophet*:[12]

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6 Ss 37-62 of the Act deals with civil forfeiture. The Preamble of *POCA* (n 2) states: "And whereas there is a rapid growth of organised crime ... (which) present(s) a danger to public order and safety and economic stability, and have the potential to inflict social damage; and whereas the South African common law and statutory law fail to deal effectively with organised crime ... legislation is necessary to provide for a *civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence*; and whereas no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence ... legislation is necessary to provide for a *civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence ...*" (my emphasis).

7 Criminal forfeiture may be imposed only after the defendant has been convicted of a crime; whilst civil forfeiture entails civil proceedings against the property used in, or derived from, crime: *National Director of Public Prosecutions v Mohamed* [2002] 4 SA 843 (CC) pars 16C-D. Forfeiture legislation would have been redundant if not for a belief that criminals should not be allowed to profit from their crimes: *National Director of Public Prosecutions v Mohamed* pars 16B-C. Forfeiture legislation was promulgated in South Africa because the common law and existing statutory laws could not adequately deal with crime (see (n 6) above). Therefore, the need arose for a forfeiture action which provides the means to forfeit proceeds of crime, remove the incentive for crime, seize assets that facilitate crime, and remove all instrumentalities from criminal control: Erasmus J in *National Director of Public Prosecutions v Prophet* (n 4) 908A). Civil forfeiture does not focus on offenders but rather on the property used to commit a crime or which constitutes proceeds of crime. The guilt of the owner of property is not of primary importance to the proceedings since it aims for the removal of any benefit that a criminal retained due to his conduct: *National Director of Public Prosecutions v Mohamed* pars 17F-G.

8 Kennedy "Justifying the civil recovery of criminal proceeds" 2004 *J of Financial Crime* 10-11; Hyde *Forfeiting your Property Rights* (1995) 6-9.

9 As opposed to criminal forfeiture. S 39(1)(c) of the South African Constitution dictates that consideration of foreign law should be given by the courts in the interpretation of the Bill of Rights. Therefore, in evaluating the historic purpose of civil forfeiture, an action that results in the depravation of property, also the established law of the United States will be reviewed where appropriate.

10 1970 18 USC Ch 96. This Act was was passed in an effort to address the difficulties presented in tackling crime syndicates in the USA. Cf Palm "RICO forfeiture and the eighth amendment: When is everything too much?" 1991 *University of Pittsburgh Law Review* 1; Califa "RICO threatens civil liberties" 1990 *Vanderbilt Law Review* 807.

11 Holmes *The Common Law* (1923) 25-30; Maxeinor "Bane of American forfeiture law − banished at last?" 1977 *Cornell Law Review* 770-772; Schecter "Note − Drug forfeiture laws" 1990 *Cornell Law Review* 1153; *Austin v United States* 509 US 602 (1993) 611.

12 [2003] 8 BCLR 906 (C) 914E-H. This point was made also in *National Director of Public Prosecutions v Cole and others* [2004] 3 All SA 745 (W). At 752C-D Willis J noted in this regard that "I shall dwell briefly upon the [American] cases … because they provide some contextual colour to the issues with which the South African Courts are having to grapple in

> Civil forfeiture in South Africa is largely based on statutory provisions in the USA … The US in particular has had extensive experience with civil forfeiture. American case law may therefore be usefully studied comparatively. *In rem* forfeiture in the US has traditionally been based on the [English] theory that the property is guilty of an offence.

This article is not concerned with the constitutional arguments in favour of, or against, civil forfeiture. Rather, the existence of this drastic measure will be considered in light of the purposes it served historically.

With this in mind, the article is systematised as follows: First, the nature of civil forfeiture is highlighted and thereupon the origins of the action are discussed. A brief commentary concludes the article.

2 What is civil forfeiture?

In general, forfeiture renders property guilty of wrongdoing.[13] Blackstone justifies the action's existence as follows:[14]

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dealing with the interpretation and the application of the Act". In the 1990s South Africa experienced an unprecedented increase in crime associated with international organised drug-trafficking groups (Redpath "Forfeiting rights? Assessing South Africa's asset forfeiture laws" 2000 *African Security Review* 16). The USA, due to its concern about drugs entering South Africa, was quick to assist the country with the drafting of legislation against organised crime (Redpath 16). This endeavour resulted in the enactment of *POCA* (n 2) which is therefore based on American civil forfeiture law deriving from various English civil forfeiture actions (see 3 below).

13 Blackstone (Morrison *Blackstone's Commentaries on the Laws of England* Vol 2 (1895) 267-268) describes forfeiture as "a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, has sustained". In *National Director of Public Prosecutions v Mohamed* (n 7) Ackerman J stated that the purpose of *POCA* (n 2) is not to punish criminals, but to remove the incentive for crime to ensure that they do not benefit from their offenses (par 16). The Constitutional Court explained that conventional criminal penalties are ineffective as methods of deterrence since crime leaders retain much of their criminal gains even when found guilty (pars 14-15). By repossessing the results or profits accrued due to crime, the incentive to commit crime is reduced (Williams & Whitney *Federal Money Laundering* (1999) 355-557). Moreover, removing the instrumentalities of crime destroys criminal organisations. In fact, the primary objective of forfeiture is not to punish criminals, but to remove the incentive to commit crime (*National Director of Public Prosecutions v Mohamed* (n 7) par 28). Another point to consider is the interest of the public. One must weigh the impact of forfeiture and the loss of property not only against the severity of crime but also against the interest that the public has in its prevention (758E-F). Forfeiture is designed to serve public interest. In *National Director of Public Prosecutions v Cole* (n 4) Willis J observed that the lawless nature of drug crimes and the devastation they inflict have resulted in the recognition of forfeiture as a necessary tool to fight "a seriously harmful evil" (759H-I). Furthermore, the nature of an action *in rem* is not influenced by the language of the proceedings or by the fact that it may indirectly involve the owner of the relevant property. The fact that an owner of property may be brought before the court as a direct consequence of the *in rem* action does not alter the fact that it remains an action against property. Since the action *in rem* is a proceeding against an object its character is not changed if the confiscated property is given back to the owner by the provision of a substitute. Although it may resemble an action *in personam* due to the participation in the action of the owner of the property, it is nevertheless an action *in rem*.

14 Morrison (n 13) 382.

> The natural justice of forfeiture ... is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society, and hath no longer any right to those advantages which before belonged to him as a member of the community; among which social advantages the right of transferring ... property to others is one of chief.

Thus, property is confiscated as a penal measure for the offence for which the property was used, or to which it was connected.[15]

Civil forfeiture is recognised as a surrender or loss of property or rights without compensation.[16] Hyde, too, defines forfeiture as the loss of a right or property, but adds that it amounts to a penalty for an illegal act.[17] It is suggested that civil forfeiture is a legal action against an "inanimate object"[18] and therefore constitutes a legal fiction.[19] However, this description of a civil forfeiture action is inaccurate because it overemphasised the historical[20] purpose of the action instead of the current purpose that its serves: by depriving a person of his property, the so-called "inanimate object", the former is punished for his unlawful conduct. It is not the object of the civil forfeiture action that is held liable for the unlawful conduct but the person to whom it belongs. Therefore, the forfeited property is a mere means to an end – punishing a perpetrator for unlawful conduct.

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15 Kurisky "Civil forfeiture of assets: a final solution to international drug trafficking?" 1988 *Houston Journal of International Law* 249. In early English law property was forfeited in eight ways (Hovenden *Commentaries on the Laws of England in Four Books with an Analysis of the Work by Sir William Blackstone* Vol 2 (1829) 419-421; Morrison (n 13) 267-286): "1. By crimes; 2. By illegal alienations; 3. By non-presentation to a benefice, which is the non-payment of money to the church; 4. By Simony, which is the giving of money or a reward to any ecclesiastical dignity; 5. By non-performance of conditions; 6. By waste, which is the destruction of, or spoiling in a house or garden; 7. By breach of copyhold customs; and 8. By bankruptcy."

16 Gallant *Money Laundering and the Proceeds of Crime – Economic Crime and Civil Remedies* (2005) 54. Forfeiture is also defined as "something confiscated as a penalty for an offence ... to confiscate as punishment ... surrender or liable to be surrendered as a penalty ..." (Collins *English Dictionary – Desktop Edition and CD-rom* (2004) *sv* "forfeit" 606). The word "forfeiture" derived from two Latin terms, namely "*foris*", which means "outside", and "*facere*", which means "to do"".

17 Hyde (n 8) 26.

18 Hofmeyr "The role of civil forfeiture in the forthcoming prevention of organised crime legislation: a closer look" 1998 *Responsa Meridiana* 42. In this context the term "inanimate object" means to emphasise the fact that the forfeiture action is against a lifeless thing, something that is in actual fact unable to act as opposed to a thinking human that is capable of explaining his illegal conduct and accepting responsibility for it.

19 Hofmeyr (n 18) 42; Redpath (n 12) 16; Gallant (n 16) 57. A legal fiction is a supposition which is known to be untrue, but which is not allowed to be denied (Curzon *English Legal History* (1979) 87-88). It is employed to extend the jurisdiction of courts, to extend the scope of available remedies and to circumvent more ancient forms of action.

20 See 3 below.

3 The history of civil forfeiture

3 1 The Roman legal connection

Forfeiture actions originated in Roman law,[21] but some academics trace its roots back to Biblical times.[22] The Roman action was received into English law after Julius Caesar's invasion of Britain in 43 AD when England became a Roman province.[23]

The Roman administration of Britain was maintained for five centuries before the withdrawal of Roman officials led to the end of Britain's connections with Rome.[24] A renewed interest in Roman law appeared from the twelfth century in England.[25] Since the *Corpus Iuris Civilis* was favoured for its completeness, it competed with the English common law at English universities such as Oxford and Cambridge.[26] Unfortunately, the adoption of Roman law in England was unpractical at the time because the courts already operated on common-law principles.[27] Yet, despite this resistance, Roman law was sometimes referred to by the English courts during the thirteenth and fourteenth centuries. In addition, the commentaries of Bartolus, who was famous for his interpretation and commentaries of Roman legal principles, greatly influenced, *inter alia*, the English law of equity and the admiralty laws of the fifteenth and sixteenth centuries.[28]

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21 In Roman times, confiscation was part of the punishment for capital crimes (Curzon (n 19) 233-234). Confiscated goods were dedicated to God and destroyed. During the Imperial period, they were given first to the temple and later to the State treasury (Daams *Criminal Asset Forfeiture – One of the Most Effective Weapons against (Organized) Crime? A Comparative Analysis* (2003) 13-15).

22 See, eg, Finkelstein "The goring ox: some historical perspectives on *deodands*, forfeitures, wrongful death and the western notion of sovereignty" 1973 *Temple Law Quarterly* 180-183); Blackstone (Kerr *The Commentaries on the Laws of England of Sir William Blackstone* Vol 1 (1876) 301) who refer to Moses, saying that an ox, goring a man to death, must be stoned to death (*Exodus* 21:28-30) and *Deuteronomy* 19:5 (an ox that killed a bystander must be forfeited).

23 See Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 279.

24 According to Van Zyl (n 23) 279, although Roman institutions slowly disappeared with the departure of the Romans, their traditions were firmly adopted by the Church which subsequently played a pivotal role in the continued acceptance of Roman culture in England. From 871 to 899 Alfred the Great of Wessex, who had a high regard for Roman culture, commissioned the translation of certain Latin works into English. The single most importance factor that led to the reception of Roman law by the English was the arrival, in 1143, in England of the Roman law scholar, Vacarius, who came to study Roman law at Oxford University (Van Zyl (n 23) 280). Nevertheless, it is accepted that little reception of Roman law into English law occurred before the twelfth century.

25 Van Zyl (n 23) 280.

26 In fact, between 1216 and 1272 Henry III prohibited the studying of Roman law at Oxford University and in London (Van Zyl (n 23) 280). During his reign Edward I (1272-1307), the son of Henry III, likewise suppressed the acceptance of Roman law in England (Van Zyl (n 23) 280).

27 Van Zyl (n 23) 281. Yet Roman law left its mark on the English law, eg, the division of the law into public and private law is a Roman law concept.

28 Van Zyl (n 23) 84 282.

These early English laws impacted on modern forfeiture provisions too.[29] As will now be discussed, English common law describes three kinds of forfeiture,[30] namely forfeiture resulting from attainder, criminal or felony forfeiture and *deodand* forfeiture.

3 2 Attainder

The term "attainder" means to impose judgement of conviction and derives from the Latin word, "*attinctus*", meaning "stained" or "blackened".[31] It refers to the legal state of a person after conviction of a capital offence. Attainder was an automatic consequence of sentencing and had three consequences for the offender.[32] First, an offender's estate was forfeited, including both his personal effects at the time of conviction and any land he owned at the time of the offence. Secondly, the offender acquired a tainted reputation that precluded his heirs from inheriting his estate.[33] The third consequence of attainder was so-called "civil death" which disqualified a person from performing any legal act. It was subsequently abolished.

3 3 Forfeiture for felony[34]

Forfeiture for felony is the predecessor of criminal or *in personam* forfeiture actions.[35] The action originated in medieval times when the courts searched for a method of punishment in cases where tenants did not meet their obligations.[36] The concept of a "felon" was consequently created and evolved to include criminal offenses such as murder, rape, arson or robbery which resulted in the offender's property being forfeited to the Crown.[37]

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29 See 3 2-3 4 below.

30 According to Maxeinor (n 11) 771 forfeiture originated in the enactment of admiralty laws and not with *deodands*. A *deodand* is a form of forfeiture which permitted the Crown to confiscate an instrument that caused a person's death (Naylor "Follow the money methods in crime control policy" in Beare (ed) *Critical Reflections on Transnational Organised Crime, Money Laundering, and Corruption* (2003) 258-259; cf 3 4 below).

31 Curzon (n 19) 234; Morrison (n 13) 380).

32 Maxeinor (n 11) 770.

33 Known as "corruption of blood" (Morrison (n 13) 388).

34 The word "felony" derives either from the Latin word "*fel*", meaning "poison" or "venom", or from the words "*fee*" and "*lon*" meaning "property held under feudal tenure" and "a price" respectively (Curzon (n 19) 232). The concept of "felony" may also stem from the Teutonic words "*fee*" or "*feud*", and thus indicates a crime punishable by the loss of the fee (Morrison (n 13) 94). Felony therefore suggests a crime for which the penalty is loss of property. Blackstone accepted, however, that felonies which are not capital crimes existed, and similarly, capital crimes which are not felonies (Morrison (n 13) 99).

35 In criminal forfeitures the loss of property is imposed only after the conviction of a defendant.

36 Curzon (n 19) 233.

37 Morrison (n 13) 385-387; Hodgson *Profits of Crime and Their Recovery – A Report by the Hodgson Committee on the Profits of Crime and Their Recovery* (1984) par 1 3.

Forfeiture of the property of felons and traitors derived from a belief that property ownership is a right that stems from society so that one who breaks the rules of society must lose the privilege of ownership.

In the American case *CJ Hendry Co v Moore*[38] the court reviewed the historical development of civil forfeiture and explained that since feudal governments in the time of King Henry I profited from the seizure of property, the law was manipulated to raise benefits. A provision was consequently inserted in the *Magna Carta* which provided that the king may hold forfeiture land for a year and a day only after the offender's death, whereafter it was returned to the latter's heirs.

Subsequent forfeiture statutes relating to customs, shipping and revenue extended vicarious liability in England whilst the enactment of navigation acts in the seventeenth century led to the forfeiture of both illegal goods and the ship transporting it.[39] Due to a belief that the ship's owner should be blamed for entrusting the ship to the wrongdoer, the conduct of a seaman, even without the knowledge of a ship's owner, often resulted in the forfeiture of the whole ship.[40]

Proceedings in terms of the navigation acts were either *in personam* against the cargo's owner, or *in rem* against the cargo itself.[41] *In rem* proceedings were favoured because the burden of proof was on the ship's owner to refute forfeiture. With *in personam* proceedings the Crown had to prove the forfeiture by establishing that the ship or its crew was not British.

3 4 *Deodands*

Forfeiture has existed for centuries in the form of civil forfeiture which originated from the practice of *deodand*.[42] This is one of the oldest remedies of

38 318 US 133 (1943) 137-138. In the twelfth century King Henry II (Baker *An Introduction to English Legal History* (2002) xliii) increased his revenues through the criminal forfeiture of property belonging to convicted fugitives. In 1352, treason was established as an offence which was punishable with the forfeiture of property. This resulted in both the enrichment of the King and the elimination of opponents. By the eighteenth century, sixty per cent of capital crimes in England included criminal forfeiture as punishment. Attainder (see 3 2 above) also served as a way of forfeiting property to the Crown.

39 Maxeinor (n 11) 744. These navigation acts greatly influenced forfeiture laws in the United States (Naylor (n 30) 258).

40 *Austin v United States* (n 11) 612-613.

41 *Austin v United States* (n 11) 776. Thus, in terms of the navigation acts the Crown had two options: First, it could prosecute the owner of the illicit cargo by starting a criminal action, the action *in personam*, against him. Only after a guilty verdict was obtained, could forfeiture proceedings be commenced against the cargo. Thus, first, the forfeiture of the cargo was dependant upon a guilty verdict against its owner; and secondly, and in contrast, the Crown could proceed with a civil forfeiture action, the action *in rem*, against the illicit cargo which, if successful, would result in the forfeiture of the cargo to the Crown irrespective of whether the cargo's owner was criminally prosecuted.

42 According to Hyde (n 8) and Ronner ("Prometheus unbound: accepting a mythless

English law and may be traced back to early Chuch law and, before that, to ancient Greece and Rome.[43] It is also a predecessor of *in rem* forfeiture actions.[44]

It was mentioned earlier[45] that *deodand* forfeiture actions endeavoured the forfeiture of objects due to their alibility to cause harm. It derived from the idea that a thing that was capable of causing harm should be destroyed, the so-called personification theory.[46] The personification theory, which holds an object accountable for its crimes, originated from maritime law and was used to advance a theory about the development of maritime liens. In terms of the theory a ship is personified and regarded as an entity capable to contract and to act.[47] When damage was caused by a ship, it was regarded as the offender and subjected to forfeiture similar to property under the law of *deodands*.[48]

Two other theories applicable to maritime law also account for *in rem* forfeiture.[49] One theory, the procedural theory, explains that historically the reason for an arrest was to secure the appearance of the defendant in court. In the seventeenth and eighteenth centuries an action could be started by arresting a person or arresting any of his property. The other theory, the conflict theory, was developed as a result of the conflict between the common-law courts and the High Court of Admiralty. Since the latter was regarded inferior by the former, it could not establish jurisdiction *in personam* in an action.[50] Thus, the High Court of Admiralty employed *in rem* procedures to establish jurisdiction which resulted in *in rem* forfeiture actions.[51]

In *Calero-Toledo v Pearson Yacht Leasing Co*[52] the American Supreme Court noted in an *in rem* action that

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concept of civil *in rem* forfeiture with double jeopardy protection" 1996 *Buffalo Law Review* 671) the word "*deodand*" derived from the Latin phrase "*Deo dandum*" which means "given to God". *Deodand* objects were not forfeited themselves, but rather their value was paid to the Crown as a forfeiture (Finkelstein (n 22) 185).

43 Ronner (n 42) 670-671; Maxeinor (n 11) 770. The civilization of the second century BC convicted both animals and inanimate objects of wrongful acts in the Prytaneum (Hyde (n 8) 726).

44 The rationale for a *deodand* action lay in the assumption by the English King of the role of curator of values in the place of the Church (Finkelstein (n 22) 183).

45 See 3 1 above.

46 Kurisky (n 15) 249-250; Strafer "Civil forfeiture: protecting the innocent owner" 1985 *University of Florida Law Review* 842.

47 *Austin v United States* (n 11) 612; Thomas *Maritime Liens – British Shipping Laws* Vol 14 (1980) 6-8; Redpath (n 12) 16.

48 Redpath (n 12) 16.

49 Thomas (n 47) 9.

50 The prohibition did not, however, extend to objects or to bail money given in substitution of a defendant (Thomas (n 47) 9).

51 *Ibid*.

52 416 US 663 (1974) 684 where the American Supreme Court referred to remarks made by Story J in *The Palmyra* 12 Wheat. 1 (1827) 14-15.

> [t]he thing is ... primarily considered as the offender, or rather the offense is attached primarily to the thing ... [T]he practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independently of, and wholly unaffected by any criminal proceeding *in personam*.

This belief was subsequently expanded by a notion that the community, too, had to atone for an object's crime by providing compensation to the person responsible for keeping the peace, usually the king.[53] So, forfeiting property to God for the benefit of the community was observed as forfeiting assets to the Crown for the good of England,[54] a theory which became known as *in rem* forfeiture.[55]

It is noteworthy that *in rem* civil forfeiture was used by the Admiralty Courts to punish foreign owners of pirate ships who escaped because they were outside their jurisdiction.[56]

4 Modern dealings with the profits of crime

Following forfeiture for felony and *deodand*, the first attempt to deal with profits deriving from crime came in the late seventeenth and early eighteenth centuries.[57] Numerous statutes, providing for the forfeiture of property that was used in statutory offences, were applied in *in rem* actions in the Exchequer.[58] Other proceedings *in rem* were handled by justices of the peace[59] in forfeiture cases that originated under customary laws.[60]

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53 Eg, where a murderer absconded, the local community paid the king a *mundrum* (Kerr (n 22) 300) for the life that was taken. The amount of the *deodand* depended on the value of the offending item. The King took the proceeds and used them in honour of the deceased's soul (Ronner (n 42) 671).

54 Vecchi & Sigler *Assets Forfeiture – A Study of Policy and its Practice* (2001) 42.

55 Hyde (n 8) 17. All kinds of unnatural death, including suicide, had forfeiture of the offender's property to the Crown as a consequence. *Deodand* forfeitures were abolished in England in 1846 (Finkelstein (n 22) 197).

56 Redpath (n 12) 16.

57 *CJ Hendry Co v Moore* (n 38) 137-138.

58 *CJ Hendry Co v Moore* (n 38) 138. The Court of Exchequer originated in the time of Henry I. It fulfilled a type of treasury accounting function (Curzon (n 19) 164-167). Revenue functions were carried out on a board which was placed on a chequered cloth. Disputes concerning the tax collecting process were handled by the Exchequer. In the thirteenth century Henry III appointed special clerks to the Exchequer (Baker (n 38) xli). One of them, a lawyer, later acted as president over a group of chief barons who oversaw the Exchequer's legal work. The barons accompanied common law judges on circuit and became the Court of Exchequer which had three types of jurisdiction: common law, equity law and fiscal law. Before the adoption of the constitution in the American colonies, the common law courts had jurisdiction over all *in rem* forfeiture cases (*CJ Hendry Co v Moore* (n 38) 139).

59 They were knights tasked in 1195 by a royal decree with preserving the peace (Curzon (n 19) 211). By the fourteenth century, justices of peace were empowered to hear cases concerning trespasses and felonies, the latter which may result in the forfeiture of an offender's property (see 3 3 above).

60 According to Van Zyl (n 23) 57-58 the English common law derived from customary law

Although the idea that other goods may represent the goods subject to forfeiture existed from early on, it only became significant in the twentieth century.[61] Currently, five forfeiture models may be distinguished: criminal forfeiture; the forfeiture of things related to convictions; the forfeiture of objects *malem in se*;[62] civil forfeiture; and contractual forfeiture in terms of which deposits or interest are forfeited due to breach of contract.[63]

5 Commentary

Since Roman times, as a result of social, economic and political changes, the notion of ownership has altered. This is due to both limitations imposed by law and the conduct of property owners.[64] It has been suggested that absolute ownership is problematic in light of the high prevalence of crime in society.[65] However, the drastic consequences of civil forfeiture should not lightly be dismissed.

Historically, civil forfeiture was introduced as a penal measure, although it later evolved as a way to enrich the Crown. Current civil forfeiture measures are likewise born out of desperation to address crime and punish offenders. To this end, as was stated in the introduction to this article,[66] civil forfeiture is described in *POCA*[67] as a tool to combat crime. It was, moreover, acknowledged[68] that conventional criminal penalties are ineffective as methods of deterrence because crime leaders retain much of their criminal gains even when found guilty. Nevertheless, the nexus between an offence, the property earmarked for forfeiture and the conduct of its owner should at no time be too far removed.

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which the justices of peace based their decisions. The customs of towns and groups of people, such as merchants, contributed to this source of common law which preceded case law and legislation (61).

61 See 1 above regarding current forfeiture legislation: eg, the law of tracing means that propriety claims may be put forward by the original owner of goods to reclaim the value of the stolen goods.

62 *Malem in se* means that objects in their physical form testify to their illicit character, eg, metal plates used for the forgery of coins (Zander *Confiscation and Forfeiture Laws: English and American Comparisons* (1989) 5). Under traditional English laws, *malem in se* forfeitures ensured the removal of dangerous objects from the public. Proceedings were civil in nature and owners were given an opportunity to contest the action which was difficult seeing that possession of the objects was mostly illegal. The action is still employed today and enables the confiscation of objects whose possession or use is prohibited, eg, illegal firearms (Gallant (n 16) 56).

63 Gallant (n 16) 55-56. In contrast to the first two forfeiture models which concern punishment due to a criminal conviction, the forfeiture of things and objects are civil remedies, or *in rem* forfeitures in terms of which property may be forfeited irrespective of an offender's guilt.

64 Kleyn & Borraine (n 3) 163.

65 *Ibid*.

66 See 1 above.

67 See Preamble of *POCA* (n 6).

68 *National Director of Public Prosecutions v Mohamed* (n 7) par 16.

Limitations on the absoluteness of ownership should be understood as exceptions to the rule.[69] In this sense, and in light of the incidence of crime currently experienced in South Africa, the inclusion in *POCA*[70] of the ancient English *in rem* forfeiture practice, *deodand*, and its possible injustices[71] should be seriously considered. One may even argue that attainder or "civil death"[72] should be considered in cases where offenders are without means to forfeit. Obviously, the onus will be on the courts to ensure that drastic measures of this kind are imposed with circumspection and the necessary caution.

69 Van der Walt & Kleyn (n 5) 162.
70 Ss 37-62 of POCA (n 2).
71 Which were not discussed in this article due to the vastness of the topic.
72 See 3 2 above.