



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Bert Ford, Administrator
Texas Liquor Control Board
Austin, Texas

Dear Sir:

Opinion No. 0-4893

Re: What procedure should be followed in retaining possession of any vehicle or property seized, that is being used to illegally transport liquor in a dry area? And related questions.

We have your letter of recent date requesting the opinion of this department on the questions stated therein which reads as follows:

"Article 1, Section 44, of the Texas Liquor Control Act reads as follows:

"It is further provided that if any wagon, buggy, automobile, water or air craft, or any other vehicle is used for the transportation of any illicit beverage or any equipment designed to be used for illegal manufacturing of illicit beverages, or any material of any kind which is to be used in the manufacturing of illicit beverages, such vehicle together with all such beverages, equipment, or material shall be seized without warrant by any representative of the Board or any peace officer who shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested and all principals, accomplices, and accessories to such unlawful act, under the provisions of law, in any court having competent jurisdiction; but said vehicle of conveyance shall be returned to the owner upon execution by him of a good and

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valid bond, with sufficient sureties in a sum double the appraised value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide judgment of the court. The court upon conviction of the person so arrested shall order the alcoholic beverages disposed of as provided in this Act, and unless good cause to the contrary is shown by the owner, shall order the sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the seizure, and the cost of the sale, shall pay all liens, according to priorities, which are established by intervention or otherwise at said hearing or in other proceedings brought for said purpose, as being bona fide and as having been created without the lien or having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor and shall pay the balance of the proceeds to the Board to be allocated as permit fees. All liens against property sold under this section shall be transferred from the property to the proceeds of its sale. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper in such city or county, any newspaper having circulation in the county, once a week for two (2) weeks and by handbills posted in three (3) public places near the place of seizure, and if no claimant shall appear within ten (10) days after the publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid to the Board to be allocated as permit fees. - - - (3)

*Under authority of the above Section an inspector of the Texas Liquor Control Board apprehends a person illegally transporting liquor in a dry area and seizes the vehicle used in the transportation.

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"The provisions of Section 44 above quoted are not clear with reference to the method of retaining possession of any vehicle or property so seized, pending trial of criminal complaints, and the procedure, necessary to perfect sale and disposition of such property after conviction.

"Your valued opinion is requested on the following questions:

"1. After seizure and pending the trial of criminal complaints against the defendant in county court, what procedure, if any, is required of the officer seizing said property to retain possession thereof.

"2. After conviction of the defendant in county court on the criminal charges and, if appealed, pending the final disposition of criminal charges, who is entitled to possession of said property.

"3. After final conviction, what procedure is necessary to secure sale and disposition of the seized property.

"4. If a civil action in the form of a suit in behalf of the State against the defendant is required, in which court will jurisdiction of such action lie?"

We have carefully considered the above stated questions in connection with Article 666-44, Vernon's Annotated Penal Code, and the case of Pharris v. Kimbrough, 118 S. W. (2d) 661, and answer your questions as follows:

1. It will be noted that the statute referred to (Article 666-44, supra,) among other things, provides in effect that when any peace officer or representative of the Board charged with the duties of enforcing the criminal laws of this State shall discover any person in the act of transporting in violation of the law any illicit

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beverage or any equipment designed to be used for the illegal manufacturing of illicit beverages, or any material of any kind which is to be used in the manufacture of illicit beverages, such vehicle or vehicles (as named in the statute) together with all such beverages, equipment or material shall be seized without warrant by such representative of the Board or any peace officer who shall arrest any person in charge thereof. Such officer or officers shall at once proceed against the persons arrested and all principals, accomplices and accessories to such unlawful act under the provisions of law in any court having competent jurisdiction but any vehicle or conveyance so seized shall be returned to the owner upon execution by him of a good and valid bond, or sufficient surety in a sum double the value of the property, which bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide judgment of the Court. Other portions of the statute provide for the intervention of those interested as lien holders or otherwise in the property and for setting up their respective claims thereto. After the conviction and after the claims of priority of lien holders or others are established in the property a court of competent jurisdiction is authorized to order the seized property sold after paying the prior claim of lien holders, if such there be, then the statute provides for the disposition of the remaining funds, if any. After the representatives of the Board or any peace officer has seized any vehicle used in the illegal transportation of illicit beverages and arrested the person in charge thereof and proceeded against the person arrested in a court of competent jurisdiction, there is no other procedure required and the officer seizing the same is entitled to the possession of such property pending the trial of criminal complaints against the defendant in the county court, unless said defendant executes a bond as authorized by said statute.

In answer to your second question, it is our opinion that after conviction of the defendant in the county court on the criminal charge or charges, and the case is appealed, the representative of the Board or peace officer seizing said property in the first instance shall

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retain possession of the same until final disposition of the case by the appellate court.

In support of our answer to your second question we quote from the case of *Phariss v. Kimbrough*, supra, as follows:

" . . . If appellant were acquitted of the charge of unlawfully transporting liquor, the automobile would be immediately redelivered to him, because the state has no right of appeal in such case. In the event he is convicted, and if he were entitled to retain possession of the automobile and its use pending an appeal and final judgment in the Court of Criminal Appeals, which necessarily consumes a great deal of time, the automobile would be greatly diminished in value or worthless at the conclusion or final determination of the case on appeal. The mere fact that the property was required to be delivered to the sheriff on the date of the trial does not deprive him of the value of the property nor its use, except pending the hearing and determination of his guilt in connection with the offense. The statute fully protects him in authorizing his replevy of the property pending a trial of his case; and if he is convicted, then the sheriff or person into whose custody the automobile is returned is required to proceed in a court of competent jurisdiction and secure a forfeiture of the automobile and a sale thereof as directed by the statute; . . . In such a proceeding the sheriff need only show that Phariss has been finally convicted of the offense of illegally transporting liquor, because under the statute involved and the authorities, the guilt of the automobile, or the state's right of forfeiture, is imputed upon the conviction of the owner or person using the automobile in the commission of the offense; and relates back to the date of the commission of the offense. The proceeding is therefore not to forfeit; but to enforce the forfeiture that has resulted under the statute from the conviction of unlawful transportation

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of intoxicating liquor, in the commission of which offense the automobile was used. . . ."

In answer to your third question, it is our opinion, that the county court upon conviction of the person arrested shall order the sale by public auction of the property seized. It will be noted that Article 666-44, expressly provides in part, "The Court upon conviction of the person so arrested shall order the alcoholic beverages disposed of as provided in this Act, and unless good cause to the contrary is shown by the owner, shall order the sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the seizure, and the cost of the sale, shall pay all liens, according to priorities, which are established by intervention or otherwise at said hearing or in other proceedings brought for said purpose, as being bona fide and as having been created without the lien or having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor and shall pay the balance of the proceeds to the Board to be allocated as permit fees. All liens against property sold under this Section shall be transferred from the property to the proceeds of its sale."

We now consider your fourth question. We assume that you have in mind some civil action regarding the sale of the property seized under Article 666-44. As heretofore stated, said statute requires the court in which the conviction was had to order the sale by public auction of the property seized.

Trusting that the foregoing fully answers your inquiries, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*

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APPROVED AUG 11 1942

Gerald C. Mann
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