

*Equity - Assessment of Costs - Obscene Materials*

1. In equity cases, the taxation of costs is left to the sound discretion of the trial court.
2. The purchase price of alleged obscene materials is a necessary expense incurred in the District Attorney's investigation.
3. Where a decree is entered, the fact materials are not found obscene does not prevent the court from placing the purchase price of the materials on the defendant as costs.

*John R. Walker, District Attorney, Counsel for the Commonwealth*

*Carl Max Janavitz, Counsel for Defendant*

OPINION AND ORDER

Eppinger, P.J., July 25, 1984:

The District Attorney of Franklin County filed an equity action to restrain Fayetteville News and Tobacco, Inc., from selling, lending, distributing, exhibiting or giving away certain alleged and enumerated items of obscene material. The action was filed under Section 5903(g) of the Crimes Code, 18 Pa. C.S.A. 5903(g)<sup>1</sup> after a Pennsylvania State Trooper had purchased the material for \$60.37.

The defendant appeared at a hearing by counsel and, without admitting the material was obscene, stipulated that the court could make an order enjoining the defendant from the further sale, etc. of the material mentioned in the complaint. In making the order, the court placed all of the taxable costs on the defendant.

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<sup>1</sup> The Code in this subsection provides, in part "the attorney for the Commonwealth may institute proceedings in equity in the Court of Common Pleas of the county in which any person violates or is clearly about to violate this section for the purpose of enjoining such violation." §5903 makes it unlawful for a person, knowing the obscene character of the materials involved to sell, lend, distribute, exhibit, give away or show to persons 17 years of age or over such material.

The District Attorney filed, and the Prothonotary taxed, a bill of costs which included the purchase price of the material. The defendant has paid only the filing fees and Sheriff's costs, contending that it may not be required to pay the \$60.37 purchase price of the material. The matter is before the court after the District Attorney and the defendant filed a stipulation of facts to avoid a hearing.

Rules of Civil Procedure Nos. 1523 through 1527 govern the assessment of costs in equity proceedings. Rule 1523 permits a court to allow costs, Rule 1526 says generally they should follow the decree and Rule 1527 says they shall be taxed by the Prothonotary, subject to an appeal to the court. From a procedural standpoint, as these costs have been taxed by the Prothonotary, this is like an appeal under Rule 1527.

Case law also supports the court's authority in the taxation of costs. In *Shapiro v. Shapiro*, 424 Pa. 120, 138-9, 224 A.2d 164, 174 (1966), it was held that in equity cases the taxation of costs is left to the sound discretion of the court. See also 9 P. L. E. *Costs* §32, p. 239 and 20 C. J. S. *Costs* §61, p. 317, *Cadillac Real Estate Co. v. Roddy Realty*, 41 D&C2d 199 (Luzerne 1966). It is proper for the judge to determine what expenses are necessary. *Commonwealth v. Hower*, 267 Pa. Super. 182, 191, 406 A.2d 754, 758 (1979). The assessment of costs in equity being peculiarly within the sound discretion of the court, absent an abuse of discretion, the court's determination will not be disturbed. *Stotsenburg v. Frost*, 465 Pa. 187, 194, 348 A.2d 418, 422 (1975).

We find that in order for this case to proceed, it was necessary for the Commonwealth to buy the items. Under Sections 5903(a) and 5903(h) of the Crimes Code the sale of obscene material is a criminal offense. If the District Attorney had filed and successfully prosecuted this as a criminal action, the purchase price would have been a necessary expense incurred in the investigation, and under the County Code, 16 P.S. §1403, when approved by the District Attorney and the Court, would have become a part of the costs. From philosophical and legal points of view, in the taxing of costs it should not make a difference whether the action is a criminal one or one in equity. The District Attorney argues this is especially true since under §5903(g) of the Crimes Code to obtain an injunction, the Commonwealth must prove the material obscene beyond a reasonable doubt, and the defendant has the right to a trial by jury.

The defendant argues that the taxation of costs is regulated by Section 1726 of the Judicial Code, 42 Pa.C.S.A. §1726, and emphasizes that the "governing authority" shall prescribe by general rule the standards governing the imposition and taxation of costs, including what they are and who shall bear them. The defendant concludes its argument, however, that the "governing authority" is the legislature and that no rules have been established by the legislature or by the committees or bodies that may have power legally delegated to them. This conclusion is in error. The governing authority under the Judicial Code in this instance is the Supreme Court, see 42 Pa.C.S.A. 102, and the Supreme Court has made the rules which have been heretofore cited.<sup>2</sup> It is not an unlawful delegation of legislative authority to permit a judge to determine what expenses are necessary. *Commonwealth v. Hower*, supra.

Defendant also argues that the materials purchased here are not contraband per se. We agree, of course. But that is not an issue in this case, nor do we think the fact that the material was not found to be obscene is relevant. What is important, and authorized the court to approve the purchase price of the material as an item of costs, is that a decree was entered concluding the case.

Finally, the defendant suggests it should not be required to pay these costs because "The items purchased are still in the sole possession of the Commonwealth of Pennsylvania and no offer of their return has been made." This argument suggests that the material has some value to the Commonwealth and if returned would have some value to the defendant. It is difficult for us to follow this theme logically, for the defendant has stipulated and the court has ordered that it may not sell this material at its place of business. Certainly the Commonwealth cannot dispose of it for a price.

<sup>2</sup> Our research has revealed, and footnote No. 5 in *Gold & Co. v. Northeast Theater Corp.*, 281 Pa. Super. 69, 75, 421 A.2d 1151, 1154 (1980) confirms, that similar standards have not been set by the Supreme Court in cases at Law. The footnote, however, does affirm that allowance of costs in equity is within the court's sound discretion, citing *Stotsenburg*, supra, and Pa.R.C.P. 1526.



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## ORDER OF COURT

July 25, 1984, it is ordered that the expense of purchasing the alleged obscene material is a taxable cost and allowed in these proceedings, the taxing of the costs by the Prothonotary is affirmed, and it is ordered that the defendant shall pay to the Prothonotary the sum of \$60.37.

IN RE: FORFEITURE OF ONE 1973 FORD TRUCK, C.P.  
Franklin County Branch Criminal Division, Volume 5, Page 152

### *Liquor Code - Forfeiture of Vehicle - Proof of Illegal Use*

1. The Commonwealth may not use an earlier prosecution and conviction of employees of a beer distributor for illegal sale of liquor as proof against the truck in a separate matter.
2. Forfeiture of a vehicle under the liquor code is discretionary with the court.
3. At a forfeiture hearing the Commonwealth has the initial burden to produce evidence that the property in question was unlawfully possessed or used.

*Frederic G. Antoun, Jr., Assistant District Attorney, Attorney for Commonwealth*

*Dennis A. Zeger, Esquire, Attorney for Respondent*

*James M. Schall, Esquire, Attorney for Defendants*

### OPINION AND ORDER

EPPINGER, P.J., June 4, 1984:

In this proceeding, we are asked to declare forfeited a 1973 Ford truck owned by Evelyn Clevenger, who is also the owner of a beer distributorship in McConnellsburg, Pennsylvania. The petition for forfeiture filed by the Commonwealth, alleges that on December 8, 1982, the truck "was used to deliver brewed beverages to an unlicensed 'speak-easy' for illegal resale (of alcohol beverages) in violation of . . . the Liquor Code." We learned in the evidence that the establishment was in the Village of Fort Loudon and that it was known as the Orchard Motel or Fort Loudon Hunter's Club.

The owner of the truck denied it was used for an illegal purpose and appeared at the hearing to contest the forfeiture.

The Commonwealth sought to introduce evidence that Paul Johnston and Rex Akers, both of whom were in the truck on December 8th were charged with and convicted by a jury of selling malt or brewed beverage to a person engaged in the business of illegally selling liquor or malt or brewed beverages. The owner objected to the admission of this evidence and when the Commonwealth argued that such evidence was admissible to prove the illegal use of the truck, we reserved ruling and heard the remainder of the case. We should have sustained the owner's objection and now do. The Commonwealth may not use an earlier prosecution and conviction to show illegal activity. *Commonwealth v. Confiscated Liquor*, 91 PA. Super. 165, 169-70 (1927). In the criminal proceedings, the issue was the guilt or innocence of the defendants. This action was brought against the truck and the owner was not represented in the criminal cases. Since that is so, the Commonwealth must produce original and direct evidence of the unlawful use. *Id.*, at 171.

There was also evidence that Malcolm Joe Butler, the owner of the motel, was placed on ARD after the place was raided November 21, nearly a month before these events. He was charged with selling liquor and malt or brewed beverages without a license. That record was likewise inadmissible.

Forfeiture proceedings are governed by the Liquor Code, 47 P.S. §6-601 et seq., and forfeiture is discretionary with the court. Code §6-602 (e); *Commonwealth v. One 1956 Oldsmobile Sedan (Stoner)*, 202 Pa. Super. 571, 573, 198 A.2d 414 (1964). "Judicial discretion, however, requires action in conformity with the law upon the facts and circumstances before the court after hearing and due consideration." *Pa. L.C.B. v. McClairan*, 20 Pa. Cmwlth. Ct. 300, 303, 342 A.2d 153, 154 (1975). At the time of the hearing, the Commonwealth has the initial burden to "produce evidence that the property in question was unlawfully possessed or used", §6-602(e), in order to sustain the petition for forfeiture. *Commonwealth v. 20 Full Cases of Beer*, 163 Pa. Super. 418, 422, 62 A.2d 111, 113 (1948).

Besides the convictions of Johnston and Akers and the ARD order accepted by Butler, the only evidence the Commonwealth presented was the testimony of a state police officer. He said that before December 8, 1982, he had obtained a search warrant for