

In *Corpus Juris*, page 71, the authors say:

"Authority for the forfeiture or confiscation of a weapon however must be derived from the general law of the state, and where a statute is entirely silent as to confiscation of a weapon the court is in error to order its confiscation."

Section 11605, R. C. M., 1935, declares that,

"No conviction of any person for crime works any forfeiture of any property, except in cases which a forfeiture is expressly imposed by law; and all forfeitures to the state, in the nature of a deed and, or where any person shall flee from justice, are abolished."

This statute is in line with Section 9 of Article III of the Montana Constitution, which provides that, "No conviction shall warrant corruption of blood or forfeiture of estate."

In 56 *Corpus Juris*, page 1261, the authors declare that evidence used in a criminal case must be returned to the accused upon proper application, citing *State v. Ware* (Ore.) 154 Pac. 905, and *Robinson v. Inches* (Mich.) 190 N. W. 227.

It is my opinion that Simpson could have demanded the return of these guns after they were no longer needed by the state as evidence in the case. Inasmuch as Simpson has been executed, the guns would pass as personal property of his estate and the clerk of the court is authorized to deliver them to the person to whom the personal property of the estate has passed, or upon sufficient showing to any person who shows his right to claim these guns.

Opinion No. 273.

Criminal Law—Evidence—Weapons— Searches and Seizures—Guns.

HELD: Property legally seized other than by search warrant is to be returned to the owner or his heirs.

December 14, 1940.

Mr. Nat Allen
County Attorney
Ryegate, Montana

My dear Mr. Allen:

You have asked what disposition should be made of five guns used as evidence in the prosecution of Lee Simpson for murder, and now in the possession of the clerk of the district court. These guns were legally seized by the sheriff and his posse in the course of arrest of Simpson and investigation of this case.

If guns or other evidence are seized under a search warrant Section 12395, et seq., R. C. M., 1935, is applicable, and Section 12407, R. C. M., 1935, provides for the disposition of the property. Inasmuch as these guns were property used as a means of committing a felony, they would be retained subject to order of the court. No statute appears as to the disposition of property legally seized other than by a search warrant, therefore we must look to the general rules of law regarding the disposition of this type of property. The rule is that arrest does not alter property rights in property taken from arrested persons.

Ex Parte Craig, 4 Washington C. C. 710;

King v. Ham, 6 Allen (Mass.) 298;

Spaulding v. Preston, 50 Am. Dec. 68.