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Forfeiture of Property Used in Illegal Acts

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NOTES

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A gambling ship off the coast of New York is seized by the Coast Guard. A Miami taxi driver sells a package of heroin to a government agent and the company's taxi is seized. Internal revenue agents descend upon an illegal still and seize everything in sight, including a tractor-trailer used in hauling sugar. A panel truck carrying a load of obscene books, films, and phonograph records from Philadelphia to Boston is stopped and seized by federal officers in Connecticut. Treasury Department agents break into a warehouse used as the site of a counterfeiting operation and seize the printing press, the counterfeit bills, and the real money which they are offered as a bribe. An airplane lands with a cargo of slot machines, dice tables, sawed-off shotguns, and silencers, and is immediately seized by federal agents.

Although the above incidents are mostly fictitious, the laws under which all of the property named would be forfeited to the United States are very real, and these laws constitute a severe and effective weapon in combatting organized crime. As the Committee on Ways and Means of the House of Representatives reported in 1939, in considering a bill providing for the forfeiture of certain contraband articles and the vehicles in which they are transported:

> It has been the experience of our enforcement officers that the best way to strike at commercialized crime is through the pocketbooks of the criminals who engage in it. By decreasing the profits which make illicit activity of this type possible, crime itself can also be decreased. Vessels, vehicles, and aircraft may be termed "the operating tools" of dope peddlers, counterfeiters, and gangsters. They represent tangible major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the Government.[1]

Statutory Forfeiture and Deodand

The type of forfeiture provided for by the statutes to be discussed here must be distinguished from the forfeiture of the property of convicted felons at common law. Statutory forfeiture is the heir of the ancient law of deodand as found in the Mosaic law. "If an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten, but the owner of the ox shall be quit."[2] Blackstone described the religious aspect of deodand as it was found in the laws of England:

> By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner: though formerly destined to a more superstitious purpose. It seems to have been originally designed in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death: and for that purpose ought properly to have been given to holy church: in the same manner as the apparel of a stranger found dead, was applied to purchase masses for the good of his soul.[3]

A passage quoted by Holmes[4] from a book identified by him only as one written about 1530 indicates the nature of the action. "Where a man killeth another with the sword of John of Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." The proceeding was against the object by which death

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1 H. R. Rep. No. 1054, 76th Cong., 1st Sess. 2 (1939). For a similar report see H. R. Rep. No. 2751, 81st Cong., 2d Sess., U.S. Code Cong. & Ad. News 2952 (1950).

The quoted report also claimed that the Anti-Smuggling Act of August 5, 1935, 49 Stat. 517, which provided for forfeitures, was largely instrumental in the decrease in the loss of revenue because of liquor smuggling from a post-repeal peak in 1935 of $30 million annually to practically nothing in 1939.

2 *Exodus* 21:28.

3 1 Blackstone, Commentaries 301.

4 Holmes, The Common Law 24-26 (1881).

was brought about, not against the owner, and the innocence or guilt of the owner was irrelevant. Holmes pointed out the reason it was necessary well into the 19th century to state in all indictments for homicide the instrument causing the death and its value: "as that the stroke was given by a certain penknife, value sixpence, so as to secure the forfeiture."

As might be expected, this peculiar historical background of present-day statutory forfeiture proceedings has led to some curious, startling, and questionable results. On many points the law on this subject abounds in confusion, but the answer given by one court to an innocent owner whose automobile was being forfeited seems to be contained implicitly in many of the decisions.

> This is a proceeding in rem, against the car, in which the law ascribes to it a power of complicity and guilt in the offense. * * * It is no longer necessary to quote in support of this well established doctrine the common law as to deodands or the Mosaic law as to the punishment inflicted on an ox which gores a man.[5]

No matter how rank the fiction, then, or how weak the foundation, if repeated often enough it becomes well established law and it is no longer necessary even to consider its shaky underpinnings. Even the Supreme Court took this position in *J. W. Goldsmith, Jr.-Grant Company v. United States*,[6] where the Court stated that the arguments made by the petitioner—that forfeiture of the automobile of an innocent conditional sales vendor used by the purchaser in bootlegging should be condemned as a violation of due process—might be upheld if the case were one of first impression. "But whether the reason for § 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[7]

Forfeiture Under Federal Statutes

From the earliest times the laws of the United States have contained provisions for the forfeiture of property used in various illegal ways. An Act of July 31, 1789,[8] provided for seizure and forfeiture of vessels unloaded without a permit or not in open day or for the illegal transfer of goods from one ship to another. Similar provisions, such as an Act of July 13, 1886,[9] the forerunner of 26 U.S.C. § 7301[10] which calls for forfeiture of property used in defrauding the United States of revenue, have been enacted throughout the years, until today, when the total of such forfeiture statutes adds up to a system comprehensive enough to include nearly every conceivable type of property which might be used in conducting the business of organized crime.

One of the most important of present-day forfeiture statutes is 49 U.S.C. §§ 781-788[11] providing for seizure of vessels, vehicles, and aircraft used in concealing or transporting certain classes of articles defined as contraband, including illegally obtained or possessed narcotics, firearms possessed in violation of the provisions of the National Firearms Act,[12] and counterfeit money, securities, and the means of producing them. This statute by its terms makes applicable to this class of forfeitures the provisions of 19 U.S.C. §§ 1602-1619[13] relating to administration of laws on forfeitures for violations of customs and navigation laws. Included in these provisions are rewards to

5 United States v. One 1940 Packard Coupe, 36 F. Supp. 788-790 (D. Mass. 1941).
6 254 U.S. 505 (1921).
7 *Id.* at 512; *accord,* United States v. One 1940 Packard Coupe, 36 F. Supp. 788 (D. Mass. 1941).
8 1 Stat. 29 (1789).
9 14 Stat. 157 (1866).
10 Int. Rev. Code of 1954, § 7301.
11 53 Stat. 1291-92 (1939) (amended by 64 Stat. 427 (1950)).
12 48 Stat. 1236 (1934).
13 46 Stat. 754-58 (1930) (amended by 49 Stat. 527 (1935), 62 Stat. 869 (1948)).

informers;[14] authorization for federal authorities to use forfeited vessels, and aircraft for Government purposes is also provided for.[15]

Another important class of forfeiture statutes deals with liquor violations. Property which may be forfeited under these statutes includes liquor being introduced into the Indian country along with the means of transporting it there,[16] liquor involved in violations of 18 U.S.C. §§ 1261-1265 and vessels or vehicles used in transporting such liquor,[17] and stills which are unregistered,[18] set up without a permit,[19] or on which the owner has failed to give bond.[20] The most sweeping of the statutes provides for forfeiture of any property used by any person engaged in distilling spirits with intent to defraud the United States of the tax thereon, such property to include:

> all distilled spirits or wines, and all other stills or apparatus, fit or intended to be used for the distillation . . . of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith . . . and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on. . . .[21]

Other statutes forfeit property used in gambling,[22] counterfeiting,[23] customs violations,[24] narcotics violations,[25] misuse of vessels,[26] bribery,[27] and obscene materials.[28] Broad provisions for enforcement of internal revenue laws provide for forfeiture of: any property used or intended for use in violation of internal revenue laws,[29] any property removed, deposited, or concealed with intent to defeat any tax imposed by the Internal Revenue Code,[30] and property "in the possession or custody or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws."[31]

The case of *United States v. One Ford Coupe*[32] provides a good illustration of the way in which the taxing power plus forfeiture of goods used in violation of tax laws can be used as a weapon against commercialized crime. A tax was levied upon the business of distilling and distributing spirits, but the National Prohibition Act[33] made these activities illegal. There was no way for a distiller to pay the tax if he wanted to, for there were no liquor tax stamps and no officers authorized to collect the tax. The claimant, who was seeking to prevent the forfeiture of his automobile which was used to transport and conceal liquor on which the tax had not been paid, argued unsuccessfully—although three members of the Supreme Court agreed with him—that this was not really a tax at all but a penalty, and that to enforce such a

14 46 Stat. 758 (amended by 49 Stat. 527 (1935), 62 Stat. 869 (1948)).
15 62 Stat. 840 (1948).
16 18 U.S.C. §§ 3113, 3116 (1958).
17 18 U.S.C. § 3615 (1958).
18 INT. REV. CODE OF 1954, § 5601.
19 *Id.*, § 5602.
20 *Id.*, § 5604.
21 *Id.*, § 5606.
22 64 Stat. 1135 (1951) (illegal shipments of gambling devices, failure to register gambling devices); 18 U.S.C. § 1082 (1958) (gambling ships).
23 18 U.S.C. § 492 (1958); 53 Stat. 1291 (1939) (amended by 64 Stat. 427 (1950), as amended, 49 U.S.C. § 781 (b) (3) (1958)).
24 18 U.S.C. § 2274 (1958); 46 Stat. 754-58 (1930), as amended 19 U.S.C. §§ 1602-1619 (1958); 49 Stat. 528 (1935), 46 U.S.C. 325 (1958).
25 53 Stat. 1291-92 (1939) (amended by 64 Stat. 427 (1950), as amended 49 U.S.C. §§ 781-783 (1958)).
26 18 U.S.C. 1082, 2274, 3615 (1948); 60 Stat. 1097 (1946), 46 U.S.C. § 103 (1948); 49 Stat. 528 (1935), 46 U.S.C. 355 (1958).
27 18 U.S.C. § 3612 (1958).
28 *Id.*, § 1465.
29 INT. REV. CODE OF 1954, § 7302.
30 *Id.*, § 7206 (4).
31 *Id.*, § 7301.
32 272 U.S. 321 (1926).
33 41 Stat. 305 (1919); 42 Stat. 222 (1921).

penalty by forfeiture of the property of an innocent owner violates due process of law. The majority held, however, that "a tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make such law-breaking less profitable."[34]

The relatively large number of cases reported on this subject is an indication that the forfeiture laws are extensively utilized. The following statistics, supplied by the Intelligence Division of the Internal Revenue Service and representing property seized as a result of wagering and coin-operated gaming device raids, give some indication as to what must be the magnitude of forfeitures each year under all of the statutes.[35]

	FY 1961	FY 1962
Autos	107	151
Value	$152,056	$195,161
Coin-operated devices	224	207
Value	$ 33,848	$ 15,901
Coin contents	$ 6,526	$ 8,328
Cash	$400,795	$368,874
Other Property	$ 23,327	$ 13,753

Procedural Aspects

Probably because of the fact that the earliest forfeiture statutes dealt with customs and navigation violations, forfeiture proceedings today still bear traces of this lineage. The action is brought in the form of a libel of information (complaint) in admiralty, and it is governed to some extent by Admiralty Rule 22, 28 U.S.C. following section 723. But where the seizure takes place on land, the action is one at law and the resemblance to a suit in admiralty ends with the process and initial pleadings.[36]

Even though some courts have on occasion said that forfeiture is a punishment,[37] the federal courts agree that a forfeiture proceeding is a civil action in rem. The consequences of this classification, however, have been a source of disagreement in such matters as double jeopardy, res judicata, search and seizure, and the effect of forfeiture laws on innocent third parties.

One matter of controversy is the construction to be given to forfeiture statutes. The Supreme Court has said that statutes to prevent frauds upon the revenue are enacted for the public good and are to be construed fairly and reasonably so as to carry out the intention of the legislature and are not to be construed strictly in favor of the defendant as are most statutes which provide for penalties.[38] In *United States v. One Ford Coach*,[39] however, the Court took the contrary view that "forfeitures

34 272 U.S. at 328.

35 Letter from H. Alan Long, Director, Intelligence Division, Internal Revenue Service, on file with the NOTRE DAME LAWYER.

The Justice Department was unable to supply any statistics on forfeitures related to organized crime.

36 Eureka Productions, Inc. v. Mulligan, 108 F.2d 760 (2d Cir. 1940). See Dobbin's Distillery v. United States, 96 U.S. 395 (1877).

37 *E.g.*, Boyd v. United States, 116 U.S. 616 (1886); United States v. One 1947 Oldsmobile Sedan, 104 F. Supp. 159 (D. N.J. 1952).

38 United States v. Stowell, 133 U.S. 1 (1889); *accord*, United States v. One 1960 Ford 4-Door Galaxie Sedan, 202 F. Supp. 841 (E.D. Tenn. 1962); *contra*, C.C. Co. v. United States, 147 F.2d 820 (5th Cir. 1944); United States v. One Cadillac Eight Automobile, 285 Fed. 173 (M.D. Tenn. 1918).

39 307 U.S. 219 (1939).

are not favored; they should be enforced only when within both letter and spirit of the law."[40]

Since the proceeding is a civil action at law,[41] a jury trial is required, but there is disagreement among the courts as to the degree of proof required in such proceedings. In a forfeiture action under the Pure Food and Drug Act,[42] it was held that the Government was required to establish its case by "clear and satisfactory evidence," but in *United States v. One 1955 Mercury Sedan*,[43] the trial judge was reversed for holding that in forfeiture cases a degree of proof greater than a preponderance is necessary to establish the forfeiture, and in *United States v. Twelve Ermine Skins*[44] the court held that not only is the degree of proof in a forfeiture case the same as in any civil action but that the court may even grant judgment n.o.v. or direct a verdict for the Government.

Multiple proceedings involving both the offending persons and the offending objects create problems of double jeopardy and res judicata. At common law the forfeiture of goods and chattels of convicted felons to the Crown was not, strictly speaking, a proceeding in rem, but was a part, or a consequence of, the conviction. In these cases it was necessary for the Crown to produce the record of conviction in order to establish its right to the forfeiture.[45] But statutory forfeiture is a proceeding in rem. Nevertheless, it has been held that a forfeiture proceeding brought subsequent to a conviction which arose out of the same transaction constitutes double jeopardy. In *United States v. One Distillery*,[46] after one stockholder had been convicted of violating internal revenue laws, the Government brought an action to forfeit the property of the wine company. The court sustained the defense of the other stockholders to the second proceeding that the company was being placed in double jeopardy. This holding was, however, expressly rejected in a later case[47] where two officers of a company had been acquitted of violations of laws relating to oleomargarine and the Government subsequently brought suit to forfeit the company's property. The court held that the company had not been put in jeopardy in the criminal prosecution since its property could not have been affected by it, and since the defendants in the criminal proceeding were not parties to the forfeiture proceeding. This second approach was adopted by the Supreme Court in *Various Items of Personal Property v. United States*,[48] where the prior conviction of a corporation and its officers was held not a bar to forfeiture in a later proceeding, and in *Helvering v. Mitchell*,[49] where the defendant was acquitted in a criminal proceeding for failure to pay income taxes and claimed that a subsequent civil action to impose a penalty for nonpayment was barred because it constituted double jeopardy. The Court held that Congress could and did apply both civil and criminal penalties to the same offense, and that to do so does not place the defendant in double jeopardy.

In other cases the courts have treated the problem as one of res judicata. One of the earliest cases which is relevant to the point was *The Palmyra*.[50] In that case, a libel against a ship alleged to have been used in piracy, the objection was raised that no forfeiture could take place because Congress had not provided a criminal

40 *Id.*, at 226; *accord,* United States v. One 1947 Oldsmobile Sedan, 104 F. Supp. 159 (D. N.J. 1952).

41 Martin v. United States, 277 F.2d 785 (5th Cir. 1960); Eureka Productions, Inc. v. Mulligan, 108 F.2d 760 (2d Cir. 1940).

42 Van Camp Sea Food Co., Inc. v. United States, 82 F.2d 365 (3d Cir. 1936).

43 242 F.2d 429 (4th Cir. 1957).

44 78 F. Supp. 734 (D. Alaska 1948).

45 The Palmyra, 25 U.S. (12 Wheat.) 1 (1827).

46 43 Fed. 846 (S.D. Cal. 1890).

47 United States v. Manufacturing Apparatus, 240 Fed. 235 (1916).

48 282 U.S. 577 (1931); *accord,* United States v. One Machine for Corking Bottles, 267 Fed. 501 (W.D. Wash. 1920); *cf.,* The K-569, 50 F.2d 180 (E.D. N.Y. 1931).

49 303 U.S. 391 (1938).

50 25 U.S. (12 Wheat.) 1 (1827); *accord,* United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926); United States v. One 1937 Model Ford Coach, 57 F. Supp. 977 (W.D. S.C. 1944).

penalty for piracy as defined in the forfeiture statute. As one reason for holding that conviction of a crime is not an essential prerequisite of forfeiture, the Supreme Court said that the forfeiture action is in rem and therefore independent of, and wholly unaffected by, any criminal proceedings in personam. This holding would seem to preclude any res judicata effect of a prior criminal action, but in *Coffey v. United States*[51] the Court distinguished *The Palmyra* nearly out of existence. In *Coffey* it was held that a prior acquittal of the owner of the property on the charge of attempting to defraud the United States of internal revenue taxes on whiskey was res judicata and a bar to a subsequent suit for forfeiture of the still and other personal property. The argument that the different degrees of proof required in the two cases would prevent the first from being res judicata was rejected. *The Palmyra* was distinguished on the basis that in that case both the Government and private parties were plaintiffs, while in this case the Government was both prosecutor and sole plaintiff.

The decision in *Coffey* received what the Third Circuit has characterized as a "bad press,"[52] but it has never been overruled, although that same court said that it is in a tenuous position after *Helvering v. Mitchell,* supra, which dealt with a fifty per cent penalty imposed in a civil action upon a taxpayer who was acquitted in the criminal action for failure to pay the tax. There it was held that the different quanta of proof required for imposing liability preclude the application of the res judicata doctrine to the subsequent civil proceeding. Tenuous though it may be, the vitality of *Coffey* was reaffirmed as recently as 1959 when it was held that it, and not *Helvering v. Mitchell,* controlled in a case where the claimant was previously acquitted of the criminal charge.[53]

Search and Seizure

Probably the most controverted and confused question in forfeiture proceedings is that of the effect of illegal searches and seizures. At common law the forfeiture was conceived of as taking place immediately upon the commission of the illegal act. The government then had the option of enforcing the forfeiture by an appropriate proceeding. This concept of the immediate vesting of property rights in the government upon the commission of a proscribed act seemingly has been adopted by Congress in enacting such forfeiture statutes as 26 U.S.C. § 7302,[54] which makes it unlawful to have or possess any property intended for use in violating the internal revenue laws and declares that "no property rights shall exist in such property." If no property right exists in the property, it then logically follows, of course, that a seizure of it by the government cannot be illegal. As will be seen, however, this simplistic approach has not always been adopted by the courts.

As the Supreme Court pointed out in two early cases,[55] the common law allowed any person at his peril to seize any property subject to forfeiture, and if the government adopted the seizure, this confirmation was retroactive and completely justified the seizure. It is the seizure which gives jurisdiction to the court, and the question of the legality of the search which uncovered the property, and the seizure thereof, is distinguished in some of the cases from the legality of the search and seizure of the evidence used to establish the forfeiture.

In *Dobbin's Distillery v. United States*[56] the claimant, owner of the land and building on which the lessee, without the claimant's knowledge, was operating an illegal still, objected to the introduction as evidence of certain illegally seized private

51 116 U.S. 436 (1886).
52 United States v. One Dodge Sedan, 113 F.2d 552 (3d Cir. 1940). Authorities criticizing the case are collected in the court's first footnote.
53 United States v. One 1956 Ford Fairlane Tudor Sedan, 272 F.2d 705 (10th Cir. 1959).
54 INT. REV. CODE OF 1954, § 7302.
55 The Caledonian, 17 U.S. (4 Wheat.) 60 (1819); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 116 (1818).
56 96 U.S. 395 (1877).

books, letters, and memoranda found in an open box in a room occupied by the lessee as a private office. The Supreme Court held the objection to be without merit since the action was against the property and not against the claimant. A proceeding in rem to forfeit illegally imported plate glass,[57] however, was held by the Court to be essentially criminal in nature. As a result, the order of the trial court to produce certain records which the Government needed to prove its case was held invalid by reason of the prohibitions of the fourth and fifth amendments. The National Prohibition Act[58] authorized enforcement officers to stop and search vehicles without a warrant whenever they had probable cause to believe that such vehicle was being used to transport contraband liquor. This procedure was declared by the Supreme Court not to constitute an unreasonable search and seizure and evidence thus obtained was held admissible in a criminal action against the bootleggers.[59] Since it was admissible in a criminal action, it follows that such evidence could also be used in a civil forfeiture proceeding.

The Court adopted the common law theory of government confirmation of seizures in *United States v. One Ford Coupe Automobile*,[60] in which a car was seized without authority by a prohibition agent instead of by an internal revenue officer as provided by statute. It was held to be well-settled law that where property subject to forfeiture is seized by one having no authority to do so, the United States may adopt the seizure as if it had been made by one duly authorized. A similar result was reached in a case holding that the fact that the boat in question was seized illegally by city police and turned over to federal authorities did not prevent the district court from having jurisdiction since the Government could adopt the seizure and give it retroactive effect.[61] *Cook v. United States*[62] presented the unusual situation of a treaty governing the legality of a seizure. The treaty provided that British vessels could be searched for contraband liquor if they were within one hour's traveling time of the shore. The Court held that the Government could not adopt a seizure which violated the treaty because made at too great a distance from shore, since the Government itself had no authority to make the seizure. A recent case which might have an effect on the question of adoption of illegal seizures is *Elkins v. United States*,[63] in which the "silver platter" doctrine, by which federal officers were allowed to use evidence illegally obtained and turned over to them by state officers, provided there was no collusion between them, was overturned by the Supreme Court.

Since the Supreme Court has never decided the precise question whether the Government may forfeit an article which was seized in an illegal manner by federal officers who were otherwise qualified to make the seizure, the Courts of Appeals have been free to disagree on the matter, which they have done. The Court of Appeals for the First Circuit, although it has taken the position that the fourth amendment's prohibition against unreasonable searches and seizures makes evidence thus obtained inadmissible in civil actions,[64] has held that the basic fact essential to jurisdiction of the court in a forfeiture action is the court's actual or constructive possession of the offending article, and the fact that the property was seized unlawfully is irrelevant.[65] This position was recently reaffirmed in *Interbartolo v. United*

57 Boyd v. United States, 116 U.S. 616 (1886).
58 41 Stat. 305 (1919); 42 Stat. 222 (1921).
59 Carroll v. United States, 267 U.S. 132 (1924).
60 272 U.S. 321 (1926).
61 Dodge v. United States, 272 U.S. 530 (1926).
62 288 U.S. 102 (1933).
63 364 U.S. 206 (1960).
64 Rogers v. United States, 97 F.2d 691 (1st Cir. 1938).
65 Strong v. United States, 46 F.2d 257 (1st Cir.), *appeal denied*, 284 U.S. 691 (1931); *accord*, United States v. Four Thousand One Hundred and Seventy One Dollars, 200 F.Supp. 28 (N.D. Ill. 1961); United States v. One Cadillac Eldorado Convertible, 148 F. Supp. 752 (E.D. Ill. 1957).

States,[66] where federal agents, acting without a warrant, seized an automobile which was innocently parked on a public highway seventeen days after the offense was committed. The court indicated that if it were writing on a clean slate it would probably require a search warrant under these circumstances since the contrary rule

> permits government agents to summarily sweep automobiles off the streets without any legal process, so long as at one time, however remote, those officials believe that the vehicle was used in furthering of an illicit or proscribed activity. The *ipse dixit* of the officer or the agent is all that is required. However, since infallibility or omniscience is scarcely expected, the official may well be wrong and the car which is seized might well belong to an entirely innocent person.[67]

In *United States v. Eight Boxes Containing Various Articles of Miscellaneous Merchandise*[68] the Second Circuit overruled its earlier holding[69] that a seizure which is illegal under the fourth amendment prevents the court from obtaining jurisdiction over the property upon the filing of a libel of forfeiture. The Fourth, Fifth, and Sixth Circuits are in agreement that an illegal seizure does not bar a forfeiture of the property so seized, the Fourth Circuit saying that it cannot sanction the practice of federal agents entering private property of one not involved in any violation to seize an automobile, but that the statute requires that holding,[70] the Fifth Circuit contending that the legality of the search and seizure cannot even be raised in such a proceeding,[71] and the Sixth Circuit deciding that it would be against public policy to restore illegal or contraband articles to the owner even if the seizure was illegal.[72]

The Third Circuit disagrees, however, and it has held that an unlawful seizure, even though made with a warrant, bars a forfeiture proceeding. In *United States v. Plymouth Coupe*[73] state police officers armed with a warrant raided a still and arrested the operators, from whom they learned that a man in a 1941 Plymouth had visited the premises earlier that night. Three months later two investigators of the Alcohol Tax Unit, to whom this information had been passed on, entered the yard of the car owner without a warrant and drove the car and a truck away. The United States Attorney admitted the illegality of the seizure, but contended that the Government could adopt it. Relying on its own prior holdings, and distinguishing *Dodge v. United States*,[74] supra, on the basis that that case involved a seizure by state and not federal officers, and citing *Maul v. United States*,[75] in which the question whether an illegal seizure by federal officers may be adopted by the United States was left open by the Supreme Court, the Third Circuit refused to permit the forfeiture. The argument that a seizure made under the National Prohibition Act by local officials who had no authority to do so could be adopted by the Federal Government similarly failed to impress the Ninth Circuit. The court expressly declined to follow an early Supreme Court decision on adoption and said that only articles lawfully taken into possession can be forfeited.[76]

In *United States v. Butler*[77] the Tenth Circuit refused to enforce the forfeiture of a car being used by a bootlegger illegally seized by the Oklahoma City police, who turned it over to federal authorities. The evidence obtained by the seizure was excluded, the criminal case was dismissed, and forfeiture denied because of the lack of evidence. The case does not seem to go beyond the narrow holding of insuf-

66 303 F.2d 34 (1st Cir. 1962).
67 *Id.*, at 37-38.
68 105 F.2d 896 (2d Cir. 1939).
69 In re Phoenix Cereal Beverage, 58 F.2d 953 (2d Cir. 1932).
70 Weathersbee v. United States, 263 F.2d 324 (4th Cir. 1958).
71 Martin v. United States, 273 F.2d 785 (5th Cir. 1960).
72 Bourke v. United States, 44 F.2d 371 (6th Cir.), *cert. denied*, 282 U.S. 897 (1930).
73 182 F.2d 180 (3d Cir. 1950).
74 272 U.S. 530 (1926).
75 274 U.S. 501 (1927).
76 United States v. Loomis, 297 Fed. 359 (9th Cir. 1924).
77 156 F.2d 897 (10th Cir. 1946).

ficient evidence or to decide that an illegal seizure cannot support a forfeiture. This suggested reading of the *Butler* decision was the holding in a case where Chicago police officers entered defendant's apartment without a warrant and caught him in the act of stuffing money and betting slips behind a radiator.[78] The defendant's motion to suppress the evidence obtained by the illegal entry was granted, but the court denied the contention that the money was not subject to forfeiture because of the unlawful seizure.

Seizure of vehicles suspected of carrying illegal or contraband articles is justified under the statutes if the officer had probable cause to suspect that a violation was being committed. A leading case on the question of what constitutes "probable cause" is *United States v. Physic,*[79] in which a United States narcotics agent received a letter from the department's Boston office informing him that a car suspected of carrying narcotics "might go to New York City." The agent spotted the car the following day on the Merritt Parkway and called the Connecticut state police, who seized the car and found narcotics concealed in it. The district court denied the motion of the car owner to suppress the evidence seized in this manner. Reversing this decision, the Second Circuit said that it would hold, hesitantly, that the search of the automobile would have been valid if based on sufficient hearsay, "But . . . we think that the government must prove at least what the hearsay was, and that it must be such as would have led a reasonable man to believe that the car carried the contraband."[80] This "probable cause," as used in 19 U.S.C. § 1615,[81] was defined in one case as being less than prima facie proof but more than mere suspicion.[82] At the trial the Government has only the burden of proving that probable cause existed for institution of the suit; once that has been done the burden of proof in the case as to any circumstances or defense which will prevent the forfeiture from taking place is on the claimant.[83]

Effect on Innocent Persons

Statutory forfeitures are particularly harsh in their effect on innocent third parties: owners, lienholders, mortgagees, conditional sales vendors, and others similarly situated. The above-quoted passage from the Mosaic law clearly indicates that deodand was directed against the offending object and not against the owner. Holmes pointed out that to the common law the innocence of the owner of the offending article was irrelevant. This concept has been carried over into modern law, and the constitutionality of forfeiting the property of persons who have not violated any law was upheld in *Van Oster v. Kansas,*[84] where the Supreme Court held that it is not a violation of due process for a state to forfeit the property of an innocent party who entrusts it to another, who in turn uses the property in violation of state liquor laws.

The federal statutes which deal with the unlawful use of vessels, vehicles, and aircraft in transporting contraband articles provide that such property is subject to forfeiture regardless of the innocence of the owner, except (1) in the case of common carriers, where some complicity in the offense on the part of the owner or agent is required, or (2) where the property was obtained from the owner by

78 United States v. Four Thousand One Hundred and Seventy One Dollars, 200 F. Supp. 28 (N.D. Ill. 1961).

79 175 F.2d 338 (2d Cir. 1949).

80 *Id.* at 339; *accord,* United States v. Bosch, 209 F. Supp. 15 (1962); *contra,* United States v. One 1955 Pontiac Starchief Custom Hardtop Coupe, 148 F. Supp. 755 (E.D. Ill. 1957).

81 46 Stat. 757 (1935).

82 United States v. One 1949 Pontiac Sedan, 194 F.2d 756 (7th Cir. 1952).

83 United States v. One Dodge Coupe, 43 F. Supp. 60 (S.D. N.Y. 1942); United States v. One 1951 Cadillac Coupe De Ville, 108 F. Supp. 286 (W.D. Pa. 1952).

84 272 U.S. 465 (1926); *accord,* Platt v. United States, 163 F.2d 165 (10th Cir. 1947); Associates Investment Co. v. United States, 220 F.2d 885 (5th Cir. 1955).

a violation of state or federal criminal law.[85] A constitutional attack on the exception for common carriers was rejected in *United States v. One 1957 Oldsmobile Automobile*,[86] the court holding that Congress did not deny to others equal protection of the laws by making what the court considered a reasonable classification.[87]

The possibility of a constitutional attack from another direction was suggested in a case which arose under the False Claims Act.[88] Forfeiture of two thousand dollars as a civil penalty for each violation was found by the court to be constitutionally unassailable even where the Government showed no actual damage and where the admitted purpose of the penalties was punishment.[89] A punishment, then, can constitutionally be imposed by means of a civil proceeding in which the proof required is only a preponderance of the evidence and with the additional anomaly that a verdict may be directed for the Government. But the court went on to say that although the eighth amendment's prohibition against cruel and unusual punishments is generally thought to apply only to criminal penalties, "there would seem to be no basis in reason why a court could not invoke the Eighth Amendment, either specifically or by analogy, to prevent an abuse of the power of punishment though it be only manifested in a civil form."[90] No attempt to invoke the eighth amendment as suggested by this court in a forfeiture case has been found, even though, for example, a jet airliner conceivably could be forfeited because a passenger was carrying a few marihuana cigarettes with knowledge of the pilot.[91]

Remission and Mitigation

Provision has been made in the federal statutes for some mitigation of the harshness of forfeitures by way of exceptions to the general rule of the owner's innocence being no bar to forfeiture, and by the remission process. Reference has already been made to the statutes providing for exemptions for common carriers and for property obtained from the owner by violations of the criminal laws. An innocent owner, lienholder, mortgagee, or seller who had no knowledge of the intended use of the vehicle or vessel in violation of the internal revenue laws relating to liquor is also protected, provided he made certain specified inquiries before entrusting the offender with an interest in the object.[92]

The primary means of relief from forfeitures, however, is provided for in the remission and mitigation statute.[93] With the exception of forfeitures for violations of the internal revenue laws relating to liquor, in which cases the United States District Courts have authority to remit or mitigate forfeitures, the sole authority for remission or mitigation is in the Attorney General. Originally this power was exercised by the Secretary of the Treasury, but by executive order[94] the power has been transferred to the Attorney General.

In *Florida Dealers and Growers Bank v. United States*[95] the district court granted summary judgment against the claimant, a bank which had brought the action for remission of the forfeiture of an automobile used by the purchaser in liquor violations. The Court of Appeals reversed on the ground that remission, since good conscience and equity are the controlling considerations in acting upon it, should be based on established facts and not merely on those assumed for the

85 53 Stat. 1291 (1939); 49 U.S.C. § 782 (1951).
86 256 F.2d 931 (5th Cir. 1958).
87 The House Committee on Ways and Means reported in 1939 that up to that time no vessel, vehicle, or aircraft operating as a common carrier had ever been forfeited under the customs laws. H.R. REP. No. 1054, 76th Cong., 1st Sess. 4 (1939).
88 REV. STAT. §§ 3490, 5478; 31 U.S.C. § 231 (1954).
89 Toepleman v. United States, 263 F.2d 697 (4th Cir. 1959).
90 *Id.*, at 700.
91 *Cf.*, Associates Investment Co. v. United States, 220 F.2d 885 (5th Cir. 1955).
92 62 Stat. 840 (1948), 18 U.S.C. § 3616 (b) (1951).
93 46 Stat. 757 (1930), 16 U.S.C. § 1618 (1960).
94 Exec. Order No. 6166, 5 U.S.C. §§ 124-132 (1933).
95 279 F.2d 673 (5th Cir. 1960).

purpose of summary judgment. Where the district court has no jurisdiction to grant remission, however, no amount of equity or innocence or hardship will justify it in doing so, as the Fifth Circuit pointed out in reversing a district court's remission of a forfeiture on grounds that the quantity of narcotics found in the car was very small, the owner was completely innocent, and it would be "unconscionable" and "very wrong to take this car away from this old woman and the young man who are trying to pay it out."[96]

Where the statute places remission or mitigation of forfeitures within the discretion of an administrative official, the discretion is absolute and unreviewable even for abuse of discretion or arbitrary exercise of the authority.[97] In *United States v. Gramling*,[98] an action for forfeiture of a taxicab which the employee-driver had been using in peddling narcotics, the owner had asserted its complete innocence and lack of knowledge of any wrongdoing in applications for remission to the Bureau of Narcotics and to the Attorney General. The Attorney General refused to grant the requested relief and the district court reversed his decision. The district court was in turn reversed by the Court of Appeals, despite the fact that

> the District Judge concluded as a matter of law that there was no substantial evidence to support the action of the Treasury Department [and the Attorney General] in the rejection of the sworn petition of the claimant for the remission or mitigation of forfeiture; that such refusal was an abuse of discretion, unreasonable and arbitrary . . . that the claimant was entitled to a hearing before his property could be confiscated. . . .[99]

The appellate court held that innocence or good faith of the claimant is no defense to the action and that the courts have no authority to review the actions of the Attorney General in remission cases. A similar result was reached in a case where the Attorney General refused to remit the forfeiture of an automobile used in transporting heroin without the knowledge of the holder of a lien on the car.[100] The court held that it had no jurisdiction under the Administrative Procedure Act[101] to review the Attorney General's action since the remission power falls under the exception of section 10 of that act, which expressly excludes judicial review of agency action "by law committed to agency discretion." Since remission is purely a matter of grace, the court said; appeals for relief from unjust and unreasonable results should be directed to Congress.

Analysis and Recommendations

Forfeiture's peculiar historical background, then, has had a marked effect upon nearly every aspect of the proceeding, including the construction to be given to the statutes, the problems of double jeopardy and res judicata, search and seizure, degree of proof, the effect on third parties, and remission and mitigation procedures. In many cases, it is submitted, these results are unnecessary and undesirable and can be overcome without any great sacrifice of the public interest in law enforcement. Congress has clearly indicated, in the committee report quoted above, the real purpose of forfeiture statutes. They are intended to deprive those who engage in commercialized crime of the means of carrying on their nefarious activities. It is in terms of this purpose, then, that the operation of these statutes should be considered.

The enlightened Blackstone made slighting reference to the "superstition" connected with the law of deodand in the "blind days of popery." It is questionable whether subsequent days have seen exhibited any clearer vision on the subject.

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96 United States v. One 1957 Oldsmobile Automobile, 256 F.2d 931 (5th Cir. 1958).
97 United States v. One 1951 Cadillac Coupe De Ville, 108 F. Supp. 286 (W.D. Pa. 1952).
98 180 F.2d 498 (5th Cir. 1950).
99 *Id.* at 500.
100 United States v. One 1957 Buick Roadmaster, 167 F. Supp. 597 (E.D. Mich. 1958).
101 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1952).

Once the basic premises of statutory forfeiture are accepted — that the thing and not the person is the offender, that forfeitures occur immediately upon commission of the offense, and that the action is not criminal in nature, being instead a proceeding in rem — many of the excessively harsh results which have been discussed previously follow by the inexorable logic. The courts have indicated a number of times, however, that given the opportunity to begin over again, they would not permit these same results to obtain.[102] Since it is unlikely that the courts, except possibly in the area of searches and seizures, will make any substantial changes in the law on forfeiture as it has developed, the court in *United States v. One 1957 Buick Roadmaster*[103] probably was correct in saying that it is up to Congress to correct the injustice and unreasonableness in these laws.

One solution to most of the problems involved in forfeiture would be for Congress clearly to define forfeiture as a punishment to be inflicted in a criminal proceeding. This would, in effect, make statutory forfeiture more analogous to the forfeiture of the property of convicted felons at common law than to the law of deodand. Questions of burden of proof, res judicata, double jeopardy, and search and seizure would then be settled in the same manner as these issues are now decided in the ordinary criminal action. Problems of the rights of innocent third parties and of remission would not arise if the action were clearly recognized as a punishment inflicted on the wrongdoer for his crimes and in order to deprive him of the means of committing further offenses, for due process would forbid the infliction of such punishment upon an innocent person. Remission would then be unnecessary since at present the provisions for remission and mitigation of forfeitures are simply a recognition of the fact that there must be some means of correcting the injustice of depriving a person who is wholly innocent of any wrongdoing of valuable property because of the crime of another.

The solution suggested here is the approach taken in statutes such as 16 U.S.C. § 171,[104] which provides for forfeiture of property used by poachers in killing or trapping animals in Glacier National Park. Forfeiture in this situation is made an additional penalty upon conviction of the offender. If this suggested solution were adopted, an exception to the ordinary rules regarding return of illegally seized property would seem to be necessary in the case of articles intended or suitable only for use in illegal activities.[105] Sawed-off shotguns, smuggled narcotics, and counterfeit money are illustrative of the category.

That this suggestion probably will not be adopted is conceded. Drastic changes in such long-established practices as forfeiture do not come easily and the present system has certain advantages for the Government and its enforcement officers. Recognizing forfeiture as a criminal punishment would increase the difficulties of enforcing forfeitures and would prevent the present practice of bringing a separate forfeiture action after the criminal prosecution has resulted in an acquittal. Prohibiting forfeiture of the property of innocent persons might also cut down considerably the amount of revenue presently realized from forfeiture proceedings. Blackstone called the practice of granting deodands to particular subjects as royal franchises "a perversion of their original design." To continue the present practice of forfeiting property of innocent persons because it produces revenue and makes enforcement easier would also be a perversion of the real purpose of forfeiture laws.

Since the sweeping change suggested might not be adopted, other proposals for meeting particular aspects of the problem will be considered.

The purpose which Congress professes it is seeking to implement by means

102 *E.g.*, Interbartolo v. United States, 303 F.2d 34 (1st Cir. 1962).
103 167 F. Supp. 597 (E.D. Mich. 1958).
104 38 Stat. 700 (1914).
105 In Trupiano v. United States, 344 U.S. 699 (1948), the Supreme Court held the illegally seized evidence of illegal distilling operations inadmissible, but denied return of the property to the defendant on the ground that it was contraband. *Accord,* United States v. Jeffers, 324 U.S. 48 (1951); United States v. Bosch, 209 F. Supp. 15 (E.D. Mich. 1962).

of forfeiture statutes has already been set out. It is doubtful that this purpose is furthered by confiscation of the property of persons who are innocent of any participation in the illegal activity involved and who in the ordinary course of life had no reason to suspect that the person to whom property was entrusted would be so involved. A statutory provision precluding forfeiture upon a finding such as suggested in the preceding sentence would, it seems, remove a source of injustice without serious impeding the policy of punishing those who engage in organized criminal activities and depriving them of the tools of their trade.

Remission or mitigation of forfeitures seems, as was pointed out above, to be a recognition of the injustice which can result from the process. Remission, it is true, might be compared to the pardoning or clemency power of the executive, but it seems that the analogy is not apt. If the pardon of a convicted person (or object) were all that is involved, there would seem to be no necessity for an additional procedure such as remission in this area. But a pardon is meant for one who in the eyes of the law has been proved guilty. Remission recognizes that a wholly innocent person, or one whose only fault was in being too trusting, is being deprived of valuable property. If this ameliorating device is to remain as the main remedy for possible injustices, then there seems to be no reason why the power to remit or mitigate in all cases should not be put within the discretion of the district courts as it is now in cases of violations of internal revenue laws regarding liquor. The district judge, having heard the entire case, should be in a better position to determine whether the ends of justice will be served by remission or mitigation than is the Attorney General. Besides, the present practice of allowing the Attorney General arbitrary and unreviewable discretion over the property of others is contrary to that basic tenet of American law that discretion is to be exercised only in a reasonable manner. If the power of remission is to remain solely with the Attorney General, however, his decisions should at least be subject to judicial review.

In some of the cases in which motions to suppress evidence obtained in an illegal search and seizure were denied, the reason assigned was that the fourth and fifth amendment guarantees are personal and thus may not be asserted by the innocent owner who was not in possession of the goods at the time of the seizure.[106] If the question is approached from a strict constitutional viewpoint, these holdings may be sound, but the courts have not felt comfortable in approving some of the practices which have thus been found to be constitutionally unassailable. If the question is considered from the viewpoint of enforcing standards of conduct upon law enforcement officials, however, the question of which party was in possession of the illegally seized object becomes irrelevant. It would not be surprising, therefore, in light of the attitude toward lawless law enforcement demonstrated in such cases as *Elkins v. United States*[107] and *Mapp v. Ohio*,[108] if the Supreme Court were, in the exercise of its general supervisory powers over the federal courts, to declare such evidence inadmissible.

Similar considerations to those just expressed might also be expected to lead the Supreme Court to reconsider some of its earlier holdings which have indicated, at least to a majority of the Courts of Appeals, that mere physical possession of the object, no matter how obtained, is sufficient to confer jurisdiction upon the court in forfeiture proceedings. Police lawlessness seems to be no less objectionable in this situation than in other cases where the Court has condemned it, and the power of the Supreme Court over the lower courts might also be used to prevent them from taking jurisdiction where the object was seized illegally.

106 Dodge v. United States, 272 U.S. 530 (1926); United States v. One 1955 Cadillac Eldorado Convertible, 148 F. Supp. 752 (E.D. Ill. 1957); United States v. One 1948 Cadillac Convertible Coupe, 115 F. Supp. 723 (D. N.J. 1953); *cf.*, Dobbin's Distillery v. United States, 96 U.S. 395 (1877).

107 364 U.S. 206 (1960).

108 367 U.S. 643 (1961).

No amount of zeal for the suppression of commercialized criminal activity, nor blind adherence to ancient traditions of law meant for another era, it is submitted, should be permitted to maintain in existence the anomalies and injustices in the law of forfeiture. This weapon can and should be used effectively against its proper and intended targets, but it is not necessary that innocent persons should, as at present, be swept along and made to suffer with the guilty and be required to appeal to a completely arbitrary discretion as their only redress.

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