

Oberndorfer: Forfeiture Remission: A Comparative Study of British, Canadian, a
**FORFEITURE REMISSION: A COMPARATIVE STUDY
OF BRITISH, CANADIAN, AND
UNITED STATES POLICY**

Prestina Edna Starks and Felix Mike lived together from August, 1974, to February, 1975. On the evening of December 11, 1974, Mr. Mike received a telephone call from a friend requesting a ride to the Los Angeles International Airport. Mr. Mike consented to the request, and Ms. Starks permitted him to use her car. She used his larger car to pick up friends so that they could meet Mr. Mike at a restaurant.

Mr. Mike's passenger asked to stop at the Marriott Hotel near the airport. At the hotel the passenger sold heroin to an undercover agent which resulted in the arrest of both the passenger and Mr. Mike. Ms. Starks' car, a 1974 Mercury Cougar, was seized at the time of arrest.¹

During the forfeiture trial² that followed, the court found that Ms. Starks "was not involved in or aware of the wrongful activity."³ Even though they had lived together for several months, there was no evidence that Ms. Starks knew that Mr. Mike would be involved in narcotics trafficking; furthermore, no evidence was produced to show that Mr. Mike knew the trip to the airport would involve him in a narcotics sale.⁴

Neither Ms. Starks nor Mr. Mike was a party to the forfeiture trial. Rather, the proceeding was against the 1974 Mercury Cougar XR 7, pursuant to the United States Code.⁵ That code provides for the forfeiture of any property used, or intended for use, to transport or facilitate the transport of a controlled substance.⁶

1. United States v. One 1974 Mercury Cougar XR 7, 397 F. Supp. 1325 (C.D. Cal. 1975).

2. *Id.* The purpose of the trial was to prove that the automobile was used to transport heroin, a controlled substance, in violation of the Controlled Substances Act, 21 U.S.C. § 881 (1976). See note 6 *infra* for the pertinent provisions of the statute.

3. 397 F. Supp. 1325, 1327.

4. *Id.* at 1325.

5. Controlled Substances Act, 21 U.S.C. § 881 (1976).

6. *Id.* Section 881 provides in pertinent part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of

Prior to trial, Ms. Starks' petition to the appropriate agency for the return of her car had been denied.⁷ However, the trial court, departing from established authority, reversed the administrative decision and effectuated the return of the vehicle.⁸

A system that allows the forfeiture of a vehicle belonging to an innocent⁹ party deserves close scrutiny. The forfeiture¹⁰ and remission¹¹ provisions of the United States, Great Britain, and Canada will be examined in order to compare the various statutory approaches to forfeiture remission. This comparative study is designed to expose infirmities inherent in United States forfeiture remission laws. Proposals will be recommended to resolve these inequities. These proposals will be based upon an examination of United States, British, and Canadian statutory guidelines, as well as applicable case law.

I. THE CONCEPT OF FORFEITURE

The term "forfeiture" refers to a government's power to force the surrender of property used in contravention of its laws.¹² The concept of forfeiture has its origin in the ordinances of Mosiac law.¹³ The inanimate object, by way of legal fiction, was deemed guilty of the wrongdoing.¹⁴ Common law adopted this fiction in the

this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state.

7. 397 F. Supp. 1325. Ms. Starks exhausted all available administrative remedies by petitioning the Drug Enforcement Agency for the return of her automobile. She appealed the denial of remission to the United States Attorney General. The appeal was also denied.

8. *Id.* Courts have no authority to remit property forfeited pursuant to the Controlled Substances Act. See notes 106 and 113 *infra*, and accompanying text.

9. For present purposes an innocent party may include, but is not limited to, lienholders or owners with an interest in the forfeited property who are free from complicity in the offense and without knowledge of the wrongdoer's propensity for participation in illegal activity.

10. See note 12 *infra*, and accompanying text.

11. Remission is the return of forfeited property to the owner of record.

12. See generally Finkelstein, *The Goring Ox*, 46 TEMP. L.Q. 169 (1973); Comment, *Due Process in Automobile Forfeiture Proceedings*, 3 UNIV. OF BALT. L. REV. 270 (1974).

13. *Exodus* 21:28. "When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh not be eaten . . ."

14. See *United States v. United States Coin & Currency*, 401 U.S. 715, 719-20 (1971).

form of deodands.¹⁵ An action *in rem* against the “thing” has preserved this legal fiction.¹⁶

At common law the prevailing philosophy was that the severity of the law of deodands should be counter-balanced by giving due regard to “‘the moral innocence of the party incurring the penalty.’”¹⁷ However, United States law,¹⁸ with one exception,¹⁹ has disregarded the issue of the moral innocence of the owner or lienholder of transportation property.²⁰

Once the government determines that property has been used for illegal purposes, it is “seized as forfeited”;²¹ the owner ceases to have a right to possess property so used.²² Proceedings are required to finalize the forfeiture. These proceedings are referred to as condemnation or forfeiture proceedings.

The return of forfeited property to the owner of record is called remission. If the property is not remitted, the claimant may

15. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), states: “Deodand derives from the Latin *Deo dandum*, ‘to be given to God.’”

16. See, e.g., United States v. One 1962 Ford Thunderbird, 232 F. Supp. 1019 (N.D. Ill. 1964).

17. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 695 (1974) (Douglas, J., dissenting). Juries at common law considered the issue of the owner’s innocence in deciding whether his property should be forfeited. This consideration lessened the severity of forfeiture.

18. Tariff Act of 1930, 19 U.S.C. § 1618 (1976), *as amended by* Pub. L. No. 91-271, § 301(hh), 84 Stat. 291. Section 1618 provides:

Whenever any person interested in any vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: *Provided*, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.

The authority of the Secretary of the Treasury to remit or mitigate under this section has been delegated to the Attorney General. See 28 C.F.R. § 9.1 (1977).

19. 18 U.S.C. § 3617 (1976). See note 28 *infra*.

20. See generally United States v. One 1951 Cadillac Coupe DeVille, 108 F. Supp. 286 (W.D. Pa. 1952); United States v. One 1958 Pontiac Coupe, 298 F.2d 421 (7th Cir. 1958); United States v. One 1967 Cadillac Coupe Eldorado, 415 F.2d 647 (9th Cir. 1969). See also note 106 *infra*, and accompanying text.

21. See generally cases cited in note 20 *supra*. Property is deemed to have been forfeited from the time of its proscribed use.

22. See note 87 *infra*, and accompanying text.

be compensated for all or part of its value. This is known as mitigation, although remission and mitigation are generally treated as one concept.²³

II. PROVISIONS FOR FORFEITURE AND REMISSION

The forfeiture laws enacted by Britain, Canada, and the United States all have similar provisions. Each country has a statute that provides for the forfeiture of transportation property used in violation of customs laws. However, the laws of each country providing for remission of forfeitures vary significantly.

The British leave the question of remission to the sole discretion of the Commissioners of Customs and Excise. Judicial review of the Commissioner's decision is not allowed. The United States approach to remission of forfeitures, except those involving violations of liquor related internal revenue laws, is similar to the British system. In the United States, statutory provisions for remission of forfeitures arising out of liquor law violations provide for the exercise of judicial discretion. This procedure substantially conforms to the Canadian approach to forfeitures of property belonging to innocent parties.

The divergent treatment of forfeitures in the United States, Britain, and Canada warrants a brief examination of the laws of each country. This examination will be followed by a comparative study of the merits of each system.

A. *United States*

An innocent person's property may be forfeited for violations of customs laws,²⁴ the transportation of controlled substances,²⁵ transportation in violation of provisions of the Internal Revenue Code of 1954,²⁶ and the transportation of certain articles of contra-

23. For the purpose of this comment, reference to remission is understood to include mitigation.

24. Tariff Act of 1930, § 595a, 19 U.S.C. § 1595a (1976), provides in part:

(a) Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unloading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, shall be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.

25. Controlled Substances Act, 21 U.S.C. § 881 (1976). See note 6 *supra*.

26. Int. Rev. Code of 1954, 26 U.S.C. § 7301(e) (1970), *as amended by* Pub. L. No. 85-

band.²⁷ With one exception,²⁸ each of these statutes incorporates by

859, § 204(8), 72 Stat. 1429; and I.R.C. § 7302. After describing taxable property and the fraudulent avoidance of payment thereof, section 7301(e) provides:

Any property (including aircraft, vehicles, vessels, or draft animals) used to transport or for the deposit or concealment of property described in subsection (a) or (b), or any property used to transport or for the deposit or concealment of property described in subsection (a), may also be seized, and shall be forfeited to the United States.

Section 7302 provides in part:

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

27. 49 U.S.C. §§ 781, 782 (1970). Section 781 provides in part:

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

Part (b) of section 781 defines "contraband article." Included in that definition are narcotic drugs, certain firearms, and certain "coin or obligation or other security of the United States or of any foreign government." Section 782 provides in part:

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited

Similar provisions relating to common carriers and stolen transportation property set forth in note 6 *supra* are included in this section.

28. 18 U.S.C. § 3617 (1976). The remission of forfeited transportation property seized pursuant to internal revenue liquor laws is decided by the court. Section 3617 provides in pertinent part:

(a) Jurisdiction of court.

Whenever, in any proceeding in court for the forfeiture, under the internal-revenue laws, of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquors, such forfeiture is decreed, the court shall have exclusive jurisdiction to remit or mitigate the forfeiture.

(b) Conditions precedent to remission or mitigation.

In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft, as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any State relating to liquor, and (3) if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the

reference the remission provisions of the Tariff Act of 1930.²⁹ Under this Act, the sole issue before the trial court in a forfeiture proceeding is whether the transportation property was used for the proscribed purposes.³⁰ The innocence or good faith of the owner or lienholder is irrelevant.³¹

1. *Provisions of the Tariff Act of 1930.* Property seized by United States customs officers will be appraised to determine its fair market value.³² For transportation property with a fair market value of \$2,500 or less, customs officers will publish, for three consecutive weeks, a notice of seizure and intention to forfeit.³³ If a claim for remission is filed, the claimant is required to post a bond.³⁴ The United States Attorney will then institute a forfeiture proceeding against the seized property.³⁵ If no claim is made, the transportation property is summarily condemned by an administrator as forfeited.³⁶ Once forfeited, the vehicle may be put into government service or sold.³⁷ Property valued at more than \$2,500 is referred to the United States Attorney for forfeiture proceedings even if no claim is made.³⁸

Prior to a forfeiture action, a party seeking remission of forfeited property may petition the agency which seized the property. An agency decision not to remit is appealable to the Attorney General.³⁹ The Attorney General "may remit or mitigate with such

claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation.

29. See Controlled Substances Act, 21 U.S.C. § 881(d) (1976); I.R.C. § 7327; 49 U.S.C. § 784 (1970). 49 U.S.C. § 784 is typical of the sections which refer to customs law for remission and mitigation purposes:

All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels and vehicles for violation of the customs laws; the disposition of such vessels and vehicles or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof

30. See *United States v. One 1961 Cadillac Hardtop Automobile*, 207 F. Supp. 693 (E.D. Tenn. 1962).

31. *Id.* See also cases cited at note 20 *supra*.

32. Tariff Act of 1930, 19 U.S.C. § 1606 (1976).

33. *Id.* § 1607.

34. *Id.* § 1608. *Contra*, *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976). The court struck down the bond requirement of 250 dollars where the claimant was unable to pay it.

35. Tariff Act of 1930, 19 U.S.C. § 1608 (1976).

36. *Id.* § 1609.

37. *Id.* §§ 1609 & 1612. See also Controlled Substances Act, 21 U.S.C. § 881(e) (1976).

38. Tariff Act of 1930, 19 U.S.C. § 1610 (1976).

39. *Id.* § 1618. See also 28 C.F.R. § 9.3 (1977).

terms and conditions as he deems fair and just” if: the claimant was not willfully negligent; the claimant had no intention to defraud the revenue or violate the law; or, there were mitigating circumstances.⁴⁰ Further, the petitioner must establish “a valid, good faith interest in the seized property as owner or otherwise.”⁴¹ The petitioner must also show that he had no knowledge or reason to believe that the wrongdoer had a record or reputation for violating United States laws or state laws for related crimes.⁴²

2. *Due Process.* Forfeiture laws, and the failure of the government to remit forfeited property belonging to innocent owners, have frequently been attacked on due process grounds.⁴³ The principle set forth in *Van Oster v. Kansas*⁴⁴ assists in understanding the court’s reluctance to uphold due process challenges to forfeiture laws:

[C]ertain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner. So here the legislature, to effect a purpose clearly within its power, has adopted a device consonant with recognized principles and therefore within the limits of due process.⁴⁵

The courts continue to ignore due process challenges to forfeitures. In the case of *United States v. One 1957 Oldsmobile Automobile*,⁴⁶ the Fifth Circuit Court of Appeals reversed a district court decision which ordered the remission of the seized vehicle to the claimant, General Motors Acceptance Corporation. The Fifth Circuit found that the lower court had exceeded its authority.⁴⁷ The lower court reasoned that because only a “very small quantity”⁴⁸ of

40. Specific guidelines for the remission of forfeitures under 19 U.S.C. § 1618 are set forth in 28 C.F.R. §§ 9.3 & 9.5 (1977).

41. 28 C.F.R. § 9.5(c) (1977).

42. *Id.*

43. *See generally* Lee v. Thornton, 538 F.2d 27 (2d Cir. 1976); United States v. One 1974 Mercury Cougar XR 7, 397 F. Supp. 1325 (C.D. Cal. 1975); United States v. One 1967 Ford Mustang, 457 F.2d 931 (9th Cir. 1972).

44. 272 U.S. 465 (1926).

45. *Id.* at 467-68.

46. 256 F.2d 931 (5th Cir. 1958).

47. The only issue properly before the court was whether the proscribed activity, which led to the forfeiture of the vehicle, had occurred. *See also* United States v. One 1967 Cadillac Coupe Eldorado, 415 F.2d 647 (9th Cir. 1969). On appeal, only the issue of due process was reviewed by the court.

48. Thirteen grams. 256 F.2d 931, 932.

marijuana was found in the possession of a passenger, and there was no evidence that the driver knew he was transporting marijuana, it would be "unconscionable" to allow forfeiture of the car.⁴⁹ The Fifth Circuit found that neither the small quantity of marijuana, nor the innocence or good faith of the owner, was a basis for remission.⁵⁰ The court stated, as a matter of settled law, that a forfeiture under the forfeiture statute⁵¹ was not an unconstitutional taking without just compensation.⁵²

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁵³ the United States Supreme Court ruled that "seizure for purposes of forfeiture is one of those 'extraordinary situations that justify postponing notice and opportunity for a hearing.'"⁵⁴ The Court noted that postponement of notice and opportunity to be heard will withstand constitutional scrutiny if: 1) the existence of significant governmental interests permits assertion of *in rem* jurisdiction over property; 2) a preseizure hearing might frustrate the purpose of the statute since the property might be removed, destroyed, or concealed; and 3) seizure is determined and initiated by the government.⁵⁵

The Ninth Circuit Court of Appeals rejected another due process attack on forfeiture statutes⁵⁶ in *United States v. One 1967 Ford Mustang*.⁵⁷ In that case, appellant argued that the statutes in question were penal in nature; therefore, they were unconstitutionally vague insofar as they were applied to penalize an innocent lienholder.⁵⁸ The court reasoned that since the proceeding was not penal in nature, forfeiture was a valid exercise of federal police power rather than a taking.⁵⁹ The district court for the northern district of Illinois, in *United States v. One 1962 Ford Thunderbird*,⁶⁰ reached the same conclusion. The court noted that, "we cannot, under the guise of vagueness, nullify a statute which enacts a policy with which we may not agree."⁶¹ The court likened the loss a

49. *Id.* at 932.

50. *Id.* at 933.

51. 49 U.S.C. § 782 (1970). See note 27 *supra*. Exceptions for common carriers and stolen vehicles are also provided in this section. See, e.g., note 6 *supra*.

52. 256 F.2d 931 (5th Cir. 1958).

53. 416 U.S. 663 (1974).

54. *Id.* at 677, quoting *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972).

55. 416 U.S. 663, 679.

56. 49 U.S.C. § 782 (1970). See note 28 *supra*.

57. 457 F.2d 931 (9th Cir. 1972).

58. *Id.*

59. *Id.*

60. 232 F. Supp. 1019 (N.D. Ill. 1964).

61. *Id.* at 1021.

lienholder suffers upon forfeiture of transportation property to the loss a creditor suffers upon the execution of a criminal. Neither constitutes an unconstitutional taking.⁶²

Notwithstanding the impressive authority upholding forfeitures on due process grounds, several courts have attempted to strike down the laws as they are applied to innocent owners of transportation property.⁶³ While other courts have upheld forfeitures, they have been critical of the laws as they are applied.⁶⁴ Lower court mistrust of the forfeiture doctrine is easily understood in light of the United States Supreme Court comment in *United States v. United States Coin & Currency*:⁶⁵

Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism And this court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment.⁶⁶

Transportation property in which an innocent party has an ownership interest continues to be forfeited. A denial of remission of such property is unjust and unfair. Consequently, the courts may find they are unable, in good conscience, to uphold forfeitures as to innocent parties. The legislature is left with two alternatives: first, it may alleviate some of the courts' concerns regarding innocent parties by allowing judicial review of forfeiture remission decisions; second, Congress may do nothing, in which case the courts may become more inclined to strike down forfeitures as to innocent par-

62. *Id.* at 1022.

63. *See* *United States v. One 1974 Mercury Cougar XR 7*, 397 F. Supp. 1325 (C.D. Cal. 1975) (forfeiture of a vehicle deemed to be the property of a party innocent of any wrongdoing held invalid on due process and other grounds). *Cf.* *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976). In *Lee*, forfeiture of transportation property belonging to a party guilty of statutory violations was held invalid on due process grounds, specifically, lack of adequate notice and opportunity to be heard. The court held that immediate post-seizure hearings are required "to avoid unreasonable continuation of the government custody of the vehicles." *Id.* at 31.

64. *See* *United States v. One 1967 Ford Mustang*, 457 F.2d 931, 932-33 (9th Cir. 1972); *United States v. One 1961 Cadillac*, 207 F. Supp. 643 (E.D. Tenn. 1962). In both cases the courts lamented the harshness of the forfeiture provision they felt compelled to uphold; *but see* *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). The general rule is that seizure without prior notice and hearing is violative of the fifth amendment to the United States Constitution. However, forfeiture is an exception to the general rule. Furthermore, Puerto Rico had no remission provisions in their forfeiture statutes.

65. 401 U.S. 715 (1971).

66. *Id.* at 720-21.

ties on due process grounds.⁶⁷

3. *Internal Revenue Liquor Laws.* Remission procedures for forfeitures resulting from violations of internal revenue liquor laws are to be contrasted with the procedures discussed above. Exclusive jurisdiction to remit seized property is vested in the court, rather than in the Attorney General.⁶⁸ Consequently, the court may consider the issue of the claimant's innocence in addition to the foundational issue of whether the property was used in violation of the law.

Several factors must exist before the court will order remission of forfeited property: first, the claimant's interest in the property must have been acquired in good faith; second, the claimant must have had no knowledge or reason to have known that the transportation property would be used in violation of the internal revenue liquor laws; and third, if the claimant's interest arises out of a contract or agreement, he must show that he made an adequate inquiry into the record or reputation of the wrongdoer as to prior violations of these laws.⁶⁹

B. Great Britain

The Customs and Excise Act of 1952⁷⁰ is the most recent piece of British legislation involving customs forfeitures and procedures for remission. This Act repealed and re-enacted the Customs Laws Consolidation of 1876.⁷¹

The principle section of the 1952 Act dealing with the forfeiture of transportation property provides that any ship, aircraft, vehicle, or animal will be subject to forfeiture if it has been "used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture."⁷² A vehicle may be forfeited under this section for the mere incidental carriage of a prohibited item.⁷³ A separate section provides for the forfeiture of any transportation property con-

67. See, e.g., *United States v. One 1974 Mercury Cougar XR 7*, 397 F. Supp. 1325 (C.D. Cal. 1975).

68. 18 U.S.C. § 3617(a) (1976). See note 28 *supra*.

69. *Id.* § 3617(b). See note 28 *supra*.

70. Customs and Excise Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c.44, sched. (1952). There have been various amendments to the 1952 Act and related legislation but none are within the scope of this comment.

71. Customs Laws Consolidation, 39 & 40 Vict., c.36, §§ 169 *et seq.* (1876).

72. Customs and Excise Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c.44, § 277 (1952).

73. *Commissioners of Customs and Excise v. Bradley*, [1959] 1 Q.B. 219. The owner of forfeited trucks avoided paying the proper duty on oil he subsequently used for consumption

structed for the purpose of concealment.⁷⁴

The procedural guidelines for forfeiture and forfeiture remission are embodied in Schedule Seven of the 1952 Act.⁷⁵ The Commissioners of Customs and Excise are granted complete discretion to do "as they see fit" with any "thing" seized or forfeited as a re-

by the offending vehicles. The forfeiture of the vehicles was upheld as prohibited carriage in violation of customs laws even though the oil was not transported as cargo.

74. Customs and Excise Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c.44, § 75 (1952). There are also special provisions for ships exceeding 250 tons register. *Id.* §§ 278 & 279. Section 278 provides in part:

(1) [A] ship of two hundred and fifty or more tons register shall not be liable to forfeiture under or by virtue of any provision of this Act, except under section seventy-five thereof, unless the offense in respect of or in connection with which the forfeiture is claimed—

(a) was substantially the object of the voyage during which the offence was committed; or

(b) was committed while the ship was under chase by a vessel in the service of Her Majesty after failing to bring to when properly summoned to do so by that vessel.

(3) The exemption from forfeiture of any ship under this section shall not affect any liability to forfeiture of goods carried therein.

75. *Id.* sched. 7, which provides in part:

1. The Commissioners shall give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof:

[N]otice shall not be required . . . if the seizure was made in the presence of—

(a) the person whose offence or suspected offence occasioned the seizure; or

(b) the owner or any of the owners of the thing seized or any servant or agent of his; or

(c) the master or commander.

2. Notice . . . shall be given in writing

3. Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners

5. If . . . no such notice has been given . . . the thing in question shall be deemed to have been duly condemned as forfeited.

6. Where notice . . . is duly given . . . the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited.

7. Where any thing is . . . condemned or deemed to have been condemned as forfeited . . . the forfeiture shall have effect as from the date when the liability to forfeiture arose.

8. Proceedings for condemnation shall be civil proceedings

10. (1) [T]he thing seized was . . . the property of the claimant at the time of the seizure.

(2) [T]he claimant shall give such security for the costs of the proceedings

(3) If any requirement of this paragraph is not complied with, the court shall give judgment for the Commissioners.

11. [E]ither party may appeal against the decision of that court to a court of quarter sessions.

Paragraph 15 concerns "[p]roperty of a body corporate, of two or more partners or of any number of persons exceeding five" Paragraph 16 provides in part:

Commissioners may at any time if they see fit . . . deliver it up to any claimant . . . or if the thing is a living creature . . . sell or destroy it.

sult of violations of the Customs and Excise Act.⁷⁶ Once the Commissioners decline to remit property for which a claim has been made, the court must condemn that property.⁷⁷ The only issue before the court is whether the "thing" seized was liable to forfeiture at the time of seizure.⁷⁸ The courts may not consider mitigating circumstances⁷⁹ and have no discretion to remove transportation property from that class of "things" forfeited once it is determined that the property was properly subject to forfeiture.⁸⁰ Therefore, once the Commissioner has denied remission and the property has been condemned by the court, the claimant has no remaining remedy.

C. Canada

The Canadian Customs Act of 1952⁸¹ was revised and re-enacted in 1970.⁸² With a few minor exceptions⁸³ the revised Act is substantially similar to the 1952 Act.

The Customs Act of 1970 contains sections which provide for the forfeiture of a vessel or vehicle used in violation of the Act.⁸⁴

76. *Id.* § 288. The relevant provisions are:

The Commissioners may, as they see fit—

- (a) stay, sist or compound any proceedings for an offence or for the condemnation of any thing as being forfeited under the customs or excise Acts; or
- (b) restore, subject to such conditions, if any, as they think proper, any thing forfeited or seized under the said Acts; or
- (c) after judgment, mitigate or remit any pecuniary penalty imposed under the said Acts.

77. *Id.* sched. 7, para. 6. See note 75 *supra*.

78. Customs and Excise Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c.44, sched. 7, para. 7 (1952). See note 76 *supra*.

79. Customs and Excise Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c.44, sched. 7, para. 6 (1952). See note 75 *supra*.

80. See *DeKeyser v. British Ry. Traffic and Electric Co., Ltd.*, [1936] 1 K.B. 224.

81. Customs Act, CAN. REV. STAT. c.58 (1952).

82. Customs Act, CAN. REV. STAT. c.C-40 (1970).

83. Recent changes in the Customs Act involve, for the most part, an extension of Canada's territorial waters. These changes are not within the scope of this comment.

84. Customs Act, CAN. REV. STAT. c.C-40, §§ 182(1), 183(1) & 231(1) (1970). Section 182(1) provides:

If any goods are unlawfully imported on any railway, they shall be seized and forfeited, and the car in which the goods were so imported shall be seized and detached from the train and forfeited.

Section 183(1) provides:

All vessels, with the guns, tackle, apparel and furniture thereof, and all vehicles, harness, tackle, horses and cattle made use of in the importation or unshipping or landing or removal or subsequent transportation of any goods liable to forfeiture under this Act, shall be seized and forfeited.

Section 231(1) provides:

All goods shipped or unshipped, imported or exported, carried or conveyed, contrary to this Act or to any regulation, and all goods or vehicles, and all vessels,

Under these sections, property seized as forfeited⁸⁵ is condemned by the Deputy Minister of Revenue. However, a claimant may file an action to avoid automatic condemnation by submitting a written request within one month from the day of seizure.⁸⁶ Automatic condemnation is supported by the court's reasoning that "forfeiture results *ipso facto* from the commission of the offense and no act of any customs officials . . . can undo that forfeiture."⁸⁷

Although Canadian forfeiture laws appear superficially to be harsh, the procedure serves to protect the rights of the innocent claimant by providing access to the courts at critical stages in which injustice is most likely to occur. For example, the Deputy Minister of Revenue is required to give written notice to any owner or other claimant that a seizure has occurred.⁸⁸ Once notice is given, the claimant must submit, within thirty days of the date of seizure, evidence in support of his claim for remission.⁸⁹ If a claim is made, accompanied by supporting evidence, the Deputy Minister may, in his discretion, forfeit or remit the seized property; alternatively, the Deputy Minister may assess a monetary penalty against the claimant. The Deputy Minister may also elect to submit the matter for judicial determination.⁹⁰ If the latter course is not followed, the Deputy Minister's decision is final unless the claimant gives written notice of non-acceptance within thirty days of the decision.⁹¹ Once a notice of non-acceptance is filed, the Deputy Minister may either reconsider his decision or submit the issue for judicial determination.⁹² If the issue is submitted to the court, the court is empowered to "decide according to the right of the matter."⁹³

This procedure, which vests in the Deputy Minister the discretion to forward the matter for judicial determination, is counterbal-

with regard to which the requirements of this Act or any regulation have not been complied with, or with respect to which any attempt has been made to violate the provisions of this Act or any regulation, are liable to forfeiture.

85. Since a vehicle is considered forfeited at the moment the wrong is done it is seized as forfeited. See note 21 *supra*, and accompanying text.

86. Customs Act, CAN. REV. STAT. c.C-40, § 153 (1970), which provides in part:

All vessels, vehicles, goods or other things seized as forfeited shall be deemed and taken to be condemned without suit . . . unless . . . some person . . . within one month from the day of seizure, payment or deposit, gives notice in writing to the seizing officer at the nearest port that he claims or intends to claim the same.

87. *Re Bank of Montreal and Dombowsky*, [1972] 24 D.L.R. 3d 297, 302 (1969).

88. Customs Act, CAN. REV. STAT. c.C-40, § 161 (1970).

89. *Id.*

90. *Id.* § 163(1).

91. *Id.* § 164.

92. *Id.* § 165.

93. *Id.* § 166.

anced by a procedure which provides the claimant direct access to the courts. Following the direct access procedure, the "owner, mortgagee, lienholder, or holder of any like interest" may submit, within sixty days of the date of seizure, a written application to the court "for an order declaring his interest."⁹⁴ The courts strictly adhere to this time requirement.⁹⁵

If the claimant applies for direct access to the courts, the court will issue an order that the claimant's interest is not affected by the seizure⁹⁶ if: the claimant is innocent of complicity in the offense or of collusion with the offender; and, the claimant has "exercised all reasonable care in respect of the person" he allowed to be in possession of the vehicle or vessel at the time it was seized. The claimant must have made reasonable inquiry that the property was not likely to be used for purposes contrary to the Act.⁹⁷ Either party may appeal the decision of the court.⁹⁸

III. A COMPARISON OF FORFEITURE REMISSION PROCEDURES

Britain, Canada, and the United States have each adopted divergent approaches to the remission of forfeited property. Britain favors unreviewable administrative discretion. Canada tempers administrative discretion with judicial review. The United States has adopted both approaches.⁹⁹ What follows is a comparative study of these procedures. This analysis will expose the inequities of forfeiture remission procedures set forth in the United States Tariff Act of 1930.

94. *Id.* § 168(2).

95. *Croteau v. Robidoux*, [1958] Que. C.B.R. 338. The plaintiff, though denied remission because he filed his claim late, was permitted to sue the wrongdoer for damages arising out of the forfeiture of plaintiff's vehicle.

96. Customs Act, CAN. REV. STAT. c.C-40, § 168(5) (1970).

97. *Id.* § 168(5) which provides:

Where, upon the hearing of an application, it is made to appear to the satisfaction of the judge

(a) that the claimant is innocent of any complicity in the offence resulting in such seizure or of any collusion with the offender in relation thereto

(b) that the claimant exercised all reasonable care in respect of the person permitted to obtain the possession of such vessel, vehicle, goods or thing to satisfy himself that it was not likely to be used contrary to this Act or, if a mortgagee or lienholder, he exercised such care with respect to the mortgagor or lien-giver, the claimant is entitled to an order that his interest is not affected by such seizure.

98. *Id.* § 168(6). Property may also be recovered subsequent to condemnation proceedings by filings pursuant to § 263(1). As provided by § 265, there is a three-year statute of limitations on both the recovery of forfeited property and the enforcement of penalties under the Act.

99. See notes 6, 24, 26 & 27 *supra*; *contra*, see note 28 *supra*.

A. Administrative Review

Remission laws which provide for unreviewable administrative discretion assume the laws will be administered with fairness and justice.¹⁰⁰ This assumption prevails in Britain.¹⁰¹ United States courts, on the other hand, have fostered a sense of unbridled power in the executive to remit forfeited property. This subtle distinction is elucidated in pronouncements by the courts of the two countries.

In *DeKeyser v. British Railway Traffic and Electric Co., Ltd.*, the Kings Bench stated that “[o]ne must assume that the commissioners will act reasonably and without undue hardship if an application is made to them to remit the forfeiture which the law has imposed on some vehicle.”¹⁰² Twenty-eight years later the Sixth Circuit Court of Appeals restated the well-settled United States view:

The purpose of the remission statutes was to *grant the executive power* to relieve against the harshness of forfeitures. The *exercise of the power*, however, was committed to the discretion of the executive so that he could temper justice with mercy or leniency. Remitting the forfeiture, however, constituted an *act of grace*.¹⁰³

The impact of this judicial attitude is manifested in the United States by a plethora of cases in which innocent parties have been unable to secure remission of forfeitures. Conversely, in Britain there have been relatively few cases contesting an administrative decision concerning remissions.¹⁰⁴

The exercise of administrative discretion embodied in the Tariff Act of 1930¹⁰⁵ has resulted in the denial of remission, as well as judicial review, of forfeited property.¹⁰⁶ It is well-settled that in-

100. The assumption is that the guidelines will be followed and applied equitably. This assumption is implicit in the grant of the power to remit.

101. The inference drawn from the fact that so few British cases have challenged remission decisions is that the Commissioners adhere to the guidelines and make, therefore, equitable decisions.

102. [1936] 1 K.B. 224, 232.

103. *United States v. One 1961 Cadillac Hardtop Automobile*, 337 F.2d 730, 733 (6th Cir. 1964) (emphasis added).

104. Cases challenging British administrative decisions have challenged classifications and definitions rather than the decision itself. *See generally DeKeyser v. British Ry. Traffic and Electric Co., Ltd.*, [1936] 1 K.B. 224.

105. 19 U.S.C. § 1618 (1976).

106. *See generally Simons v. United States*, 497 F.2d 1046 (9th Cir. 1974); *United States v. One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States v. One 1958 Pontiac Coupe*, 298 F.2d 421 (7th Cir. 1958); *United States v. Andrade*, 181 F.2d 42 (9th Cir. 1950); *United States ex rel. Walter E. Heller & Co. v. Mellon*, 40 F.2d

nocence is no bar to forfeiture.¹⁰⁷

The Attorney General is not without guidance in his determination of remission cases. Indeed, both the statute¹⁰⁸ and the Code of Federal Regulations¹⁰⁹ provide guidelines to aid him in his determination. The question, then, is whether the Attorney General has followed these guidelines. It appears that he has not.¹¹⁰ A Ninth Circuit district court, in *United States v. One 1974 Mercury Cougar XR 7*, denounced the Attorney General's failure to remit as "a clear abuse of discretion."¹¹¹ This pronouncement marks a departure from well-settled authority.¹¹² A contra view was expressed in *United States v. One 1961 Cadillac Hardtop Automobile*, in which the court followed established authority by declaring that, notwithstanding the abuse of executive discretion, the judiciary had no jurisdiction to intervene.¹¹³ The court reasoned that the Administrative Procedures Act¹¹⁴ expressly exempted from judicial review matters committed to the discretion of an administrative agency.

The court in *One 1974 Mercury Cougar XR 7* distinguished *One 1961 Cadillac* as having been decided prior to the United States Supreme Court's ruling in *Citizens to Preserve Overton Park v. Volpe*.¹¹⁵ The *Overton Park* decision led the district court in *One*

808 (D.C. Cir.), *cert. denied*, 281 U.S. 766 (1930); *United States v. One 1951 Cadillac Coupe DeVille*, 108 F. Supp. 286 (W.D. Pa. 1952).

107. See generally note 20 *supra*.

108. Tariff Act of 1930, § 618, 19 U.S.C. § 1618 (1976).

109. 28 C.F.R. §§ 9.3 & 9.5 (1977).

110. This conclusion is inferred from the plethora of actions challenging administrative decisions denying remission and the expressed sentiment of many courts that abuse of discretion frequently occurs. Compare *One 1974 Mercury Cougar*, *infra* note 111, with *One 1961 Cadillac Hardtop*, *infra* note 113.

111. 397 F. Supp. 1325, 1332 (C.D. Cal. 1975).

112. See notes 20 and 106 *supra*.

113. 337 F.2d 730 (6th Cir. 1964).

114. See note 117 *infra*.

115. 401 U.S. 402 (1971). Petitioners challenged the Secretary of Transportation's decision to commit federal funds to finance the construction of highways through public parks pursuant to authority granted by the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1976). Upon court challenge, the Secretary defended on the ground that his decision was not subject to judicial review. This contention was rejected by the Court:

Section 701 of the Administrative Procedure Act, 5 U.S.C. § 701, provides that the action of "each authority of the Government of the United States," which includes the Department of Transportation, is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no "showing of 'clear and convincing' evidence of a . . . legislative intent" to restrict access to judicial review.

Similarly, the Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception

1974 *Mercury Cougar XR 7* to hold that the customs remission statute¹¹⁶ was neither committed by law to administrative discretion nor expressly withheld from judicial review; therefore, the court could review claims for remission denied by the Attorney General.¹¹⁷ The reasoning of *Overton Park*, as applied to the remission statute in *One 1974 Mercury Cougar XR 7*, is still subject to appeal.

In *United States v. One 1969 Plymouth Fury Automobile*,¹¹⁸ the Fifth Circuit Court of Appeals reversed a district court decision remitting property to a finance company. The specious reasoning of the court of appeals was that "a company financing the purchase of automobiles knows that it runs the risk of having its interest forfeited if the car is used to transport contraband."¹¹⁹ The Fifth Circuit, *en banc*, denied a rehearing¹²⁰ over the dissent of six judges.¹²¹ The dissent argued that the forfeiture statutes, viewed in conjunction with the remission statute, envision the imposition of a penalty only for significant involvement in a criminal enterprise.¹²² The dissent therefore rejected the notion of forfeiture of an innocent per-

The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

401 U.S. at 410 (citations omitted).

In *One 1974 Cougar XR 7*, 397 F. Supp. 1325 (C.D. Cal. 1975), the district court applied this reasoning to the customs law remission statute and determined that Attorney General decisions are subject to judicial review.

116. Tariff Act of 1930, § 618, 19 U.S.C. § 1618 (1976).

117. Administrative Procedure Act, 5 U.S.C. § 701 (1976). *See* note 14 *supra*. Section 701 provides in part:

(a) This chapter applies, according to the provisions thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means such authority of the Government of the United States, whether or not it is within or subject to review by another agency

Section 702 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

The Eighth Circuit Court of Appeals has held that 5 U.S.C. §§ 701 *et seq.* do not grant courts the substantive right of review. *United States v. One 1973 Buick Riviera*, 560 F.2d 897, 900 n.2 (8th Cir. 1977), *citing*, *Califano v. Sanders*, 430 U.S. 99 (1977); and *criticizing*, *United States v. One 1967 Mercury Cougar XR 7*, 397 F. Supp. 1325 (C.D. Cal. 1975).

118. 476 F.2d 960 (5th Cir. 1973), *reh. denied*, 509 F.2d 1324 (5th Cir.), *cert. denied*, 423 U.S. 838 (1975). A denial of remission to a finance company was upheld.

119. 476 F.2d 960, 961.

120. 509 F.2d 1324 (5th Cir. 1975).

121. *Id.*

122. *See United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974).

son's property as a consequence of the acts of another.¹²³

It has been judicially recognized that the courts may exercise jurisdiction over remission cases arising out of the Tariff Act of 1950¹²⁴ if the executive fails to exercise its authority.¹²⁵ Although most courts have refused to review the Attorney General's decision in remission cases, one circuit has reaffirmed the concept of judicial review in cases where the executive fails to act.¹²⁶ Prior to judicial intervention, however, these courts have required an allegation that the Attorney General failed to properly exercise discretion.¹²⁷

B. Judicial Review

With one exception,¹²⁸ United States procedure in remission cases, which is characterized by judicial non-intervention, stands in stark contrast to the Canadian approach to forfeiture remissions. The latter promotes active judicial participation and provides a model worthy of emulation. In *Touzin v. Minister of National Revenue*,¹²⁹ the petitioner requested the Quebec Superior Court to declare his interest in the forfeited vehicle unaffected by the seizure.¹³⁰ Applying the statutory guidelines,¹³¹ the court concluded that the petitioner: 1) had satisfied the requirement of establishing an ownership interest in the claimed vehicle, despite the violator's substantial contribution to the purchase price; 2) was innocent of complicity in the offense or collusion with the offender; and 3) had satisfied the requirement of reasonable inquiry that the vehicle would not be used contrary to the provisions of the Act.¹³² These factual findings supported the court's decision to effectuate remission of the vehicle to the petitioner.

A Canadian court will, however, uphold a forfeiture without remission if certain disqualifying factors exist. For example, the court may deny an appeal for remission if the innocent party ac-

123. 509 F.2d 1324 (5th Cir. 1975).

124. 19 U.S.C. § 1618 (1976).

125. *Cotonificio Bustese, S.A. v. Morgenthau*, 121 F.2d 884 (D.C. Cir. 1941).

126. *See United States v. One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), *cert. denied*, 409 U.S. 980 (1972). *See also Pullman Trust and Savings Bank v. United States*, 225 F. Supp. 860 (N.D. Ill. 1964).

127. *See generally* cases cited at note 126 *supra*.

128. *See* notes 137-141 *infra*, and accompanying text.

129. 102 Can. Crim. Cas. 222 (Que. 1952).

130. Customs Act, CAN. REV. STAT. c.42, § 179 (1927). (Re-enacted as Customs Act, CAN. REV. STAT. c.C-40, § 168 (1970)).

131. Customs Act, CAN. REV. STAT. c.C-40, § 168(5) (1970).

132. *Touzin v. Minister of National Revenue*, 102 Can. Crim. Cas. 222 (Que. 1952).

quires his interest after the date of forfeiture,¹³³ since it is the accomplishment of the prohibited act which vests the right of forfeiture in the government.¹³⁴ The court may also deny an appeal if the interest of the claimant is inadequate to justify remission.¹³⁵ Further, a finding that the claimant failed to make adequate inquiry into the potential illegal use of the vehicle¹³⁶ may result in the court's denial of relief.¹³⁷

The Commissioner knows that his decisions are subject to review. Consequently, he may be more inclined to limit the exercise of discretion by strictly adhering to the statutory guidelines. This may account for the fact that so few Canadian cases have challenged the Commissioner's decisions.

Forfeiture remission pursuant to United States internal revenue liquor laws is similar to Canadian law; both provide for judicial participation in remission decisions. The power to remit lies within the exclusive jurisdiction of the courts.¹³⁸ The issue of the claimant's innocence is examined by the court in conformity with the statute.¹³⁹ Both laws, unlike their British and United States customs law counterparts, empower the court to consider the claimant's innocence as a factor in determining whether to forfeit, remit, or mitigate.

In *United States v. One 1949 Chevrolet Coach*,¹⁴⁰ the United States appealed a remission granted by the district court pursuant to the forfeitures remission statute under the internal revenue liquor laws.¹⁴¹ The claimant had purchased a conditional sales contract from an automobile dealer. In granting remission, the court

133. Since title to the property vests in the government at the time the wrong is committed, *see* note 134 *infra*, an attempt to acquire title to such property would be ineffective. Thus, the claimant has no "interest" upon which he may base his claim as required by Customs Act, CAN. REV. STAT. c.C-40, § 168(2). *See generally* Deputy Minister of National Revenue, Customs and Excise v. Proulx, [1970] 10 D.L.R.3d 585 (1969).

134. *See* Deputy Minister of National Revenue, Customs and Excise v. Proulx, [1970] 10 D.L.R.3d 585 (1969); *General Motors Acceptance Corp. v. The Queen*, [1954] 3 D.L.R. 132 (1953).

135. *Babb v. The Queen*, 35 Can. Crim. Cas. 365 (1965).

136. *Re Fitzpatrick and Industrial Acceptance Corp.*, [1959] 42 Mar. Prov. 42 (Nfld. 1958); *Tilden Drive Yourself Co. v. Deputy Minister of National Revenue for Customs and Excise*, [1955] Que. C.B.R. 379, 112 Can. Crim. Cas. 62.

137. Section 168(5)(b) of this Act provides that a claimant must make a reasonable inquiry into the possible use of the vehicle in contravention of the provisions of the Act. Customs Act, CAN. REV. STAT. c.C-40, § 168(5)(b) (1970).

138. 18 U.S.C. § 3617(a) (1976).

139. *Id.* § 3617(b). *See* note 69 *supra*, and accompanying text.

140. 102 F. Supp. 373 (W.D. Okla. 1951), *aff'd*, 200 F.2d 120 (10th Cir. 1952).

141. 18 U.S.C. § 3617 (1976).

concluded that: 1) the claimant had an ownership interest acquired in good faith; 2) the claimant had no knowledge or reason to believe that the vehicle was being or would be used in violation of liquor laws; and 3) the claimant's obligation of inquiry was adequately discharged¹⁴² since, unbeknown to the claimant, a "straw purchaser" with no record was the purchasing party.

In another forfeiture action the court went further, holding that a claimant bank was entitled to remission even though it made no inquiry since "if inquiry had been made of the officers named in the applicable statute, such inquiry would not have revealed information that [the mortgagor violator] was engaged in the illegal whiskey business."¹⁴³

IV. NEED FOR REVISION

It is clear that if *United States v. One 1974 Mercury Cougar*¹⁴⁴ had been decided in the Canadian system, or under United States liquor laws, the owner of the vehicle would have been granted remission without litigation. Indeed, but for the Attorney General's "abuse of discretion," the car would have been remitted under the Code of Federal Regulations guidelines.¹⁴⁵ Abuse or not, the vehicle in question would never have been remitted to Ms. Starks if the district court had not ignored precedent by reviewing the Attorney General's decision on the issue of the claimant's innocence.

The United States law on remission of forfeitures is drastically in need of revision. The courts find it more and more difficult to justify the taking of an innocent person's transportation property based on an anachronistic code of justice that disallows judicial discretion to decide "according to the right of the matter."¹⁴⁶ Six judges of the Fifth Circuit Court of Appeals, dissenting in the denial of a rehearing on *United States v. One 1969 Plymouth Fury Automobile*,¹⁴⁷ expressed their disdain for the concept of forfeiture as regards innocent owners: "This rationale [that innocence and good faith are immaterial] is barbaric, a vestigial relic of deodand. It is anomalous to treat an innocent lien-holder as harshly as the

142. See note 69 *supra*, and accompanying text.

143. *United States v. One 1972 Ford Pickup Truck*, 374 F. Supp. 413, 415 (E.D. Tenn. 1973).

144. 220 F. Supp. 1325 (C.D. Cal. 1975).

145. 28 C.F.R. § 9.5(c) (1977).

146. Customs Act, CAN. REV. STAT. c.C-40, § 166 (1970). See note 93 *supra*, and accompanying text.

147. 509 F.2d 1324 (5th Cir. 1975).

criminal owner of the automobile.”¹⁴⁸

A. Proposals

1. *Administrative Procedure.* Forfeiture remission procedures should be made uniform in both their application and administration. At present, several federal agencies are empowered to seize property as forfeited.¹⁴⁹ Each agency is authorized to remit seized property pursuant to provisions in the Tariff Act of 1930¹⁵⁰ which embodies the customs law. Each agency, however, adopts its own guidelines to administer forfeiture remissions prior to the final appeal to the Attorney General. It is proposed that all initial petitions for remission be administered by customs officers.¹⁵¹ This procedure should also be applied to property forfeited pursuant to internal revenue liquor laws. Consolidation of the administration of remission procedures would lead to a more uniform application of prescribed standards for remission.

2. *Judicial Review.* The final decision of the Attorney General regarding the remission of forfeitures should be made reviewable by a federal district court in all cases. Because unremitted property is proceeded against by the government, judicial review of the Attorney General's decision regarding the claimant's innocence and entitlement to remission could be made at the time of the trial.

Presently, for remissions of property seized pursuant to internal revenue liquor laws, the trial judge is empowered to exercise sound discretion to afford relief to innocent parties having an interest in the condemned property. He may remit or mitigate the forfeiture as reason and justice allow.¹⁵² This policy should be expanded to include judicial review for remissions of all forfeitures. The decision of the district court should be reversed on appeal only in the most extreme circumstances.¹⁵³

148. *Id.* at 1325.

149. Agencies typically authorized to handle forfeitures are law enforcement agencies under the Treasury Department and the Department of Justice. They include, but are not limited to, the Drug Enforcement Agency, Customs Service, Federal Bureau of Investigation, and the Secret Service.

150. Tariff Act of 1930, § 618, 19 U.S.C. § 1618 (1976).

151. It might also be feasible to form an independent body to consider all initial petitions since remission is merely an ancillary function of an agency's activities. This function could, therefore, be easily separated from agency operations.

152. *See United States v. One 1947 DeSoto Sedan*, 87 F. Supp. 1005 (W.D. Mo. 1949).

153. *See Beaudry v. United States*, 105 F.2d 987 (5th Cir. 1939).

3. *Guidelines.* Parties with an ownership interest in transportation property, excluding possessory interest, should be advised of precautionary measures to be taken to shield themselves from forfeiture liability. In this regard, the guidelines set forth in the United States internal revenue liquor law and the Canadian customs law should serve as an exemplary model.¹⁵⁴

Under United States law, the first prerequisite to remission is that the claimant's ownership interest in the seized property be acquired in good faith.¹⁵⁵ The second requirement is that the claimant have no knowledge or reason to know that his property would be used for illegal purposes.¹⁵⁶ Canadian law phrases the latter requirement in terms of the claimant's innocence of complicity in the offense or collusion with the offender.¹⁵⁷ Although the burden of proving lack of knowledge or reason to know may be greater than the burden of showing innocence of complicity or collusion, the former would appear to be a reasonable requirement.

The third prerequisite to remission is contingent upon the existence of a contract or agreement between the claimant and violator. The statute places a burden of inquiry upon designated officials as to the purchaser's record or reputation.¹⁵⁸ United States case law has not imposed this requirement of inquiry on businesses which negotiate contracts or agreements for the rental of automobiles. Canadian law, however, has imposed a requirement of reasonable inquiry in such transactions.¹⁵⁹

154. See notes 131 and 132 *supra*, and accompanying text.

155. 18 U.S.C. § 3617(b) (1976) and Customs Act, CAN. REV. STAT. C.C-40, § 168(2) (1970).

156. 18 U.S.C. § 3617(b) (1976).

157. Customs Act, CAN. REV. STAT. C.C-40, § 168(5)(a) (1970).

158. 18 U.S.C. § 3617(b) (1976). See note 118 *supra*, and accompanying text. See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), in which the Court held that a floating standard might be employed to determine whether the claimant discharged his duty:

[I]t would be difficult to reject the Constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-90.

159. Customs Act, CAN. REV. STAT. C.C-40 § 168(5)(b) (1970), requires that the claimant exercise "all reasonable care . . . to satisfy himself that [the vehicle] was not likely to be used contrary to this Act . . ." See *Tilden Drive Yourself Co. v. Deputy Minister of National Revenue for Customs and Excise*, [1955] Que. C.B.R. 379. For the United States position, see

V. CONCLUSION

Clearly, it is feasible to formulate a system of remission which would afford an innocent party claiming an interest in forfeited transportation property the greatest opportunity to secure remission. It has been demonstrated that such a system would be not only feasible, but workable, practical, and beneficial. Legislative inaction to remedy the present inequities serves to perpetuate an anomaly which deprives an innocent party of his property. On the other hand, it may cause the judiciary to slowly defect to safer constitutional ground and judicially legislate a remedy for the innocent.

Ron H. Oberndorfer

United States v. Rent-A-Car Service of Florida, Inc., 239 F.2d 379 (5th Cir. 1956); Harris v. United States, 215 F.2d 69 (4th Cir. 1954).