Forfeiture of Aircraft Used in Crimes - The Consequences to the Innocent Owner or Security Interest Holder

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FORFEITURE OF AIRCRAFT USED IN CRIMES—
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OWNER OR SECURITY INTEREST
HOLDER

STEPHEN A. YOUNGMAN

FORFEITURE OF AIRCRAFT used in crimes is proba-
bly, at most, a remote concern to the typical aircraft
owner or to one who makes a loan which is secured by an
aircraft. An aircraft, however, is subject to forfeiture for a
wide variety of criminal activities. Forfeiture statutes may
even lead to forfeiture of an innocent owner’s aircraft or of
an aircraft in which a person holds a security interest. While
such a result may seem very inequitable to the innocent
owner or security interest holder, the basis for allowing these
forfeitures is deeply rooted in the history of forfeiture law.
This comment will trace the development and history of
forfeiture as applied to innocent owners and security interest
holders. Recent federal court decisions will be examined,
and the present state of the law will be discussed. Addition-
ally, possible bases for avoiding forfeiture of the innocent

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2 For purposes of this comment, an innocent owner is one who had no knowledge of any illegal use of his property and who did not participate in the illegal activity. See infra text accompanying note 107.

3 A security interest is defined by the Uniform Commercial Code as “an interest in personal property or fixtures which secures payment or performance of an obligation.” U.C.C. § 1-201(37) (1977). See infra text accompanying notes 113-160 for a discussion of forfeiture of the property of an innocent owner.

4 See infra text accompanying notes 6-107 for the history of forfeiture law.

5 See infra notes 6-107.
owner's or security interest holder's property will be suggested.

I. HISTORICAL BACKGROUND

The rationale for allowing forfeiture of an aircraft irrespective of the culpability of the owner or security interest holder has its roots in Biblical times. In the Old Testament's Book of Exodus it is said: "If an ox gore a man that he dies, the ox shall be stoned, and his flesh not eaten." The ox is considered the offending object without regard to the conduct of its owner. This idea of property being the offending object is also evidenced in Greek and Roman law, where forfeiture of the death-causing object was unrelated to the fault of the owner. This concept of forfeiture without fault was enunciated by Blackstone in his Commentaries on the Laws of England in which he stated: "It matters not whether the owner were concerned in the killing or not; for, if a man kills another with my sword, the sword is forfeited as an accursed thing.

The concept of the "deodand" developed in England as the basis for forfeiture of property of an innocent owner.

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9 O. Holmes, supra note 7, at 7-8. In the Greek law, if a man was killed by an inanimate object, it was to be "cast beyond the borders." Id. at 8. In Roman law if damage was done by an animal or inanimate object, it had to be surrendered or, in the alternative, the owner had to pay for the damage. Id.
10 1 W. Blackstone, Commentaries 301 (T. Cooley ed. 1899).
11 A deodand is "any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to pious uses." Black's Law Dictionary 392 (5th ed. 1979).
12 Smith, supra note 7, at 661; Note, Aircraft Forfeitures—Illegal Activities, supra note 7, at 388.
Forfeited property passed to the King, purportedly for use by the Church in saving the soul of the person killed by the object. More likely, however, the King used such property for charity or in order to support the deceased’s family. The concept of deodands was eliminated in England, probably due to the increased number of accidental deaths during the industrial revolution. While deodands were formally abolished in 1846 by the Act for Compensating the Families of Persons Killed by Accidents, in a case decided the same year, the court nevertheless continued to follow the principle that property could be forfeited regardless of the owner’s fault.

The historical background for forfeiture discussed above was instrumental in the development of the law of forfeiture in the United States as applied to innocent owners and security interest holders. One important decision early in this development was The Palmyra. That case involved a Spanish vessel which the United States seized on the high seas pursuant to a statute for piracy. In an action for condemnation of the vessel, the lower court called for the return of the

13 W. Blackstone, supra note 10, at 300.
14 Smith, supra note 7, at 661; Note, Aircraft Forfeiture — Illegal Activities, supra note 7, at 388.
15 Smith, supra note 7, at 661; Note, Aircraft Forfeiture — Illegal Activities, supra note 7, at 388; see infra note 17 and accompanying text.
16 Note, Aircraft Forfeiture — Illegal Activities, supra note 7, at 388.
17 Id. See 1846, 9 & 10 Vict. ch. 62.
18 Regina v. Woodrow, 15 M. & W. 404, 153 Eng. Rep. 907 (Exch. 1846). In that case a tobacco dealer received adulterated tobacco products from the manufacturer. The penalty for possession of such adulterated tobacco products was forfeiture of 200 pounds of such tobacco products. Although the defendant claimed to have no knowledge of the adulteration, the court held that knowledge of the condition was not a requirement of the statute and ordered the forfeiture. 153 Eng. Rep. at 910.
19 Note, Aircraft Forfeiture — Illegal Activities, supra note 7, at 388.
20 25 U.S. 1 (12 Wheat) (1827); See Note, Aircraft Forfeiture — Illegal Activities, supra note 7, at 389.
22 25 U.S. at 2.
23 An action for condemnation under admiralty law is an action in rem to declare a captured vessel as a prize, or to forfeit the vessel to the government for violation of laws. BLACK'S LAW DICTIONARY 264 (5th ed. 1979).
ship to its owner. The United States Supreme Court declared the action to be a proceeding in rem under authority of an act of Congress. The primary argument asserted against forfeiture was that before a proceeding against the vessel could have been instituted in rem, a conviction in personam should have been entered for the offense of piracy. The Court noted that at common law personal property was forfeited to the Crown for felonies, as forfeiture was the consequence of a person's conviction. The Court, however, found this common law view inapplicable to statutorily created forfeitures in rem. In justifying forfeiture of the vessel, the Court stated: "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing . . . ." The Court viewed the proceeding in rem against the ship as independent of and unaffected by any personal criminal prosecution against the offenders. 

The Palmyra established that a forfeiture proceeding is brought against the property, independent of any proceeding against the property owner, and the theoretical groundwork was thus laid for forfeiture of property regardless of the

24 25 U.S. at 2.
25 A proceeding in rem is an action against the property itself or to enforce rights in that property. Pennoyer v. Neff, 95 U.S. 714, 734 (1877).
26 25 U.S. at 5. See supra note 21 for the Congressional acts which authorized the action.
27 An action in personam is an action against the person. BLACK'S LAW DICTIONARY 711 (5th ed. 1979).
28 25 U.S. at 8. At the time of the action against the ship, the statute did not provide for personal punishment for the offense of piracy. Id. at 9.
29 Id. at 9.
30 Id.
31 Id.
32 Id. To explain the rationale of the proceeding against the ship as being independent of a personal criminal prosecution, the Court stated:

If the argument at the bar [the requirement of personal conviction] were well founded, there could never be a judgment of condemnation pronounced against any vessel coming within the prohibitions of the acts on which the present libel is founded; for there is no act of Congress which provides for the personal punishment of offenders who commit 'any piratical aggression, search, restraint, depredation or seizure,' within the meaning of those acts. Such a construction of the enactments, which goes wholly to defeat their operation, and violates their plain import, is utterly inadmissible.

Id.
owner's or security interest holder's wrongdoing. The Palmyra, however, did not completely develop forfeiture law as applied to the innocent owner or security interest holder. The Court in The Palmyra referred to the conviction of an offender rather than an owner or security interest holder. Consequently, the lack of a statute punishing piracy provided a basis for upholding the forfeiture in The Palmyra, while today personal punishment is provided for activities which subject an aircraft to forfeiture.

The idea that an owner's property can be subject to forfeiture without his having committed any wrongdoing was further developed by the United States Supreme Court in Dobbins Distillery v. United States. In Dobbins Distillery the owner leased a distillery to a third party. While operating and in possession of the distillery, the lessee allegedly failed to keep required records, falsified the records kept, and refused to deliver, in violation of the statute, these records to revenue officers. As a result of the lessee's actions, the distillery was forfeited. The distillery owner defended the forfeiture action by claiming that he had no knowledge of the lessee's several alleged violations. Nonetheless, the United States Circuit Court for the District of Iowa ordered the property forfeited and the Supreme Court affirmed that order.

As in The Palmyra, the Court based its decision on the rationale that the action proceeded against the property itself, rather than against the owner. The Court held that the property was subject to forfeiture because of its contribution

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33 Id.
34 See supra note 28.
35 See supra note 1 for some statutes that may provide for an aircraft forfeiture.
36 96 U.S. 395 (1878).
37 Id. at 396.
38 Id. See An Act Imposing Taxes on Distilled Spirits and Tobacco, and for Other Purposes, 25 Stat. 125, 142-43 (1868).
39 96 U.S. at 395.
40 Id. at 397.
41 Id. at 404.
42 Id. at 399. See supra text accompanying note 31 for the rationale of the Court in The Palmyra holding that the offense attaches to the thing.
to the illegal acts of the lessee. 43 The Court found the owner’s lack of knowledge irrelevant since the owner, in leasing the land as a distillery, was subject to any illegal use that might be made of the property. 44 The basis of the forfeiture, therefore, was that the offense attached to the distillery itself and not to the owner’s action. 45

Forfeiture, as applied to the holder of a security interest, was considered by the Supreme Court in Goldsmith-Grant Co. v. United States. 46 Goldsmith-Grant involved the forfeiture of a Hudson automobile used in violation of tax laws. 47 Goldsmith-Grant Co. (“the Company”) sold the automobile, but retained title until the full amount was paid. 48 The purchaser used the automobile to transport untaxed liquor, and the car was subsequently forfeited. 49 The Company stated that it had neither knowledge of, nor reason to suspect any illegal use of the automobile. 50 Nevertheless, the property was ordered forfeited. 51

The Company argued that the forfeiture was “taking of property without just compensation in violation of due process” 52 since it, as owner, was without knowledge of and had

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43 96 U.S. at 399. Refering to the role of the property in the illegal acts, the Court stated:

[T]he forfeiture . . . is aimed against the distillery, and the real and personal property used in connection with same, including the real estate used to facilitate the operation of distilling, and which is conducive to that end as the means of ingress or egress, and all personal property of the kind found there.

Id.

44 Id.

45 Id. at 401.

46 254 U.S. 505 (1921).

47 See An Act of Congress passed July 13, 1866, 14 Stat. 98, 151 which provides:

Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities . . . shall be forfeited, . . . and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited.

48 Id. at 509.

49 Id.

50 Id.

51 Id.

52 The Fifth Amendment to the United States Constitution provides in part that no
not participated in any illegal activities. The Company also argued that property is regularly entrusted to others in the course of business and for other reasons, and that Congress could not have intended to provide for the forfeiture of an innocent owner's property. Although the Court noted that the Company's argument was convincing, it concluded that the government's interest in upholding its laws outweighed the innocent owner's interest in his property.

The Court imposed a duty upon the property owner to prevent illegal uses of his property, stating: "Congress interposes the care and responsibility of [the owner] in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong." Stating that its own approach was not novel, the Court compared its approach to that of the concept of deodands. The Court also cited Blackstone for the premise that the owner's negligence in entrusting his property may be a basis for its subsequent forfeiture. The Court stated that although the forfeiture provisions may be harsh or unfair, they are "too firmly fixed in the punitive and

person "be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. See also United States v. One (1) 1972 Wood, 19 Foot Custom Boat, 501 F.2d 1327 (5th Cir. 1974).

254 U.S. at 510.

Id.

Id. In considering the argument as plausible, the Court stated: "If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tasks of human conduct." Id.

Id.

Id. Explaining the rationale of giving the property the "power of complicity and guilt in the wrong" the Court stated:

It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental. If we should regard simply the adaptibility of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a "thing" that can be used in the removal of "goods and commodities" and the law is explicit in its condemnation of such things.

Id. at 513.

Id. See supra note 11 and accompanying text for a discussion of the concept of deodands.

254 U.S. at 510-11. See supra text accompanying note 10 for Blackstone's premise.
remedial jurisprudence of the country to be now displaced."\(^6\)

The Supreme Court in *Van Oster v. Kansas*\(^6\) further supported the notion that the history of forfeiture and governmental interest may displace the innocent owner's interest. In *Van Oster*, an automobile purchaser, pursuant to a sales agreement, allowed the seller to use the automobile for business purposes.\(^6\) An associate of the seller used the automobile to transport liquor illegally and the car was subsequently forfeited.\(^6\) Although the automobile owner argued that the seller illegally used the car without the owner's knowledge or authority, the trial court ordered forfeiture of the automobile, and the Kansas Supreme Court affirmed that order.\(^6\)

The automobile owner asserted that such forfeiture would violate due process of law because of her lack of knowledge and involvement.\(^6\) The United States Supreme Court, however, found the owner's lack of knowledge or involvement irrelevant to the decision.\(^6\) The Court explained that a state not only has authority to forfeit property used illegally by the owner, but that it also has authority to forfeit property so used by one in possession of such property.\(^6\) The Court noted that its decision not only complied with the history of forfeiture,\(^6\) but that it was also justified by Congress' inten-

\(^{60}\) 254 U.S. at 511 (citing Dobbin's Distillery v. United States, 96 U.S. 395). See supra text accompanying notes 36-45. The Goldsmith-Grant Court also relied on *The Palmyra* as advancing the prevailing view of imposing forfeitures on innocent owners. See supra notes 20-22 and accompanying text.

\(^{61}\) 272 U.S. 465 (1926).

\(^{62}\) Id. at 465-66.

\(^{63}\) Id. at 466. The Kansas statute provided that any vehicle used to transport liquor illegally could be forfeited. Id.

\(^{64}\) Id.

\(^{65}\) Id. See supra text accompanying note 53 for similar argument.

\(^{66}\) 272 U.S. at 467.

\(^{67}\) Id. See also United States v. One Ford Coupe, 272 U.S. 321 (1926) (decided the same day). In *One Ford Coupe* an automobile was used in the illegal transportation of liquor. The owner of the automobile claimed to have no knowledge of the illegal use. The Court, however, reasoned that the owner's innocence was no defense to the forfeiture, stating: "[If] a forfeiture may be had [by the statute] for such use of a vehicle to evade a tax on illicitly distilled liquor, the interests of innocent persons in the vehicle are not saved." 272 U.S. at 325.

\(^{68}\) 272 U.S. at 467. In upholding the decision the Court stated: "It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it." Id.
tion that forfeiture be used as a secondary measure to prevent such illegal uses. The Court, therefore, concluded that an owner relinquishing possession of his property is subject to the peril of possible forfeiture. The Court easily rejected the owner’s due process argument by relying on previous decisions.

The above-mentioned Supreme Court decisions established a harsh doctrine of forfeiture with regard to the innocent owner or security interest holder. Although such forfeiture seemed deeply entrenched in American jurisprudence the Court, in 1929, began to retreat from this firm position. In United States v. One 1936 Ford V-8 Deluxe Coach the Court considered the sale of an automobile by a dealer to a purchaser who was acting on behalf of his brother. The dealer assigned the sales contract to a credit agency which, before accepting the contract, made a thorough investigation of the apparent purchaser. Believing that the purchaser was uninvolved in illegal activities, the credit agency purchased

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69 Id. at 467-68. See also General Motors Acceptance Corp. v. United States, 286 U.S. 49 (1932). In that case, General Motors Corporation intervened as owner of an automobile that was used for transporting liquor illegally. Although General Motors Corporation was an innocent party, the Court reasoned that the order of forfeiture should be upheld because “forfeiture of vehicles bearing smuggled goods is one of the time-honored methods adopted by the Government for the repression of the crime of smuggling.” 286 U.S. at 56.

70 272 U.S. at 467. The Court reasoned that this idea would also supply an additional measure against illegal uses and relieve the courts from determining if any form of collusion existed between the innocent owner and the person using the property illegally. Id. at 467-68.

71 See supra notes 52-53 and accompanying text for a discussion of the due process argument.

72 272 U.S. at 468 (citing Goldsmith-Grant Co. v. United States, 254 U.S. 505; Dobbins Distillery v. United States, 96 U.S. 395). See supra notes 36-60 and accompanying text for a discussion of these cases.


74 Id. at 222. The automobile was sold to Guy Walker, the person who used the vehicle illegally. The contract under which the car was sold, however, was executed in the name of Paul Walker, brother of Guy Walker, apparently so Guy Walker’s wife would be unable to interfere with the contract. Guy Walker had a record of prior illegal activities. Id.

75 Id. at 223. The credit company investigated Paul Walker before accepting the contract by seeking references from local police authorities. No investigation was made of Guy Walker. Id.
the contract.76 The brother and true purchaser did, in fact, use the automobile in violation of revenue laws, and the car was subsequently forfeited.77

The United States Supreme Court, in an action for remission of the forfeiture,78 retreated somewhat from its former position and upheld the remission of forfeiture of the automobile ordered by the Court of Appeals for the Fourth Circuit.79 The Court stated that facts and surrounding circumstances must be examined on a case-by-case basis to determine if forfeiture is necessary.80 Furthermore, the Court stated that an

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76 Id. at 224.
77 Id. at 221.
78 The petition for remission is an alternative measure an innocent owner may use to prevent forfeiture of his property. See infra text accompanying notes 212-219 for a discussion of the petition for remission.
79 See supra text accompanying notes 20-72 for a discussion of the position of the Supreme Court prior to One Deluxe Coach. See also Liquor Law Repeal and Enforcement Act of August 27, 1935, 49 Stat. 872, 878, relied on in One Deluxe Coach, 307 U.S. at 221. The Act provides:
Sec. 204(a) 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) 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, which ever 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 the 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.

Id.

80 307 U.S. at 225. In interpreting the statute allowing forfeiture, the Court stated: [I]n our view Congress did not intend to impose upon the lienor the obligation to ascertain at his peril the identity of every person having an
innocent owner or security interest holder should be afforded relief where justified. The Court reasoned that a truly innocent party should not have his property forfeited unless such forfeiture is within the "letter and spirit of the law." In justifying remission of the forfeiture, the Court noted that forfeiture is not a favored remedy; it was originally intended to protect revenues, not to punish without fault. Accordingly, the order of the Circuit Court remitting the forfeiture was affirmed.

Supreme Court activity relating to an innocent owner's or security interest holder's forfeiture of property remained unchanged until 1971. In United States v. United States Coin & Currency, however, the Court rejected a forfeiture. That case involved the conviction of a defendant for failure to register as a gambler and to pay the required gambling tax. A forfeiture proceeding was instituted against the $8,674 which was in the defendant's possession at the time of his arrest.

interest in the property and to make inquiry of the law enforcement officers as to the previous record and reputation of every such person, unless from the documents themselves or other surrounding circumstances the lienor possesses information which would lead a reasonably prudent and law-abiding person to make a further investigation.

Id.
The Court apparently reasoned that the loan company was under no duty to make further investigation since the documents it had showed the name of the person it investigated. Compare One Deluxe Coach (surrounding circumstances must be examined to determine if forfeiture is necessary and relief should be given where justified) with Van Oster, 272 U.S. 465, 467 (owner of property gives possession to another at the peril of forfeiture). See supra note 70 and accompanying text.

n 307 U.S. at 226. The Court reasoned that in the proper case, the innocent owner should be allowed relief from forfeiture. Id.

n Id.


n 307 U.S. at 236. The development of the law of forfeiture as applied to innocent owners, however, was based on the premise that fault of the owner is irrelevant. This view continues to be applied. See infra note 101 and accompanying text.

n 307 U.S. at 238.


Id. at 716.

Id.
The trial court ordered forfeiture of the money and the Court of Appeals for the Seventh Circuit affirmed the order. The United States Supreme Court set aside the criminal conviction and forfeiture, ordering the money returned.

The government argued that the defendant's criminal intent was irrelevant to the forfeiture action. The Court found this argument unconvincing, although noting that history and prior decisions supported it. The Court explained that forfeiture statutes could not be used alone but must be considered in conjunction with other forfeiture-related statutes, particularly the mitigation statutes. The Court stated that forfeiture statutes, when viewed in that light, "[obviously] are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." Thus, in United States Coin, the Court declared that innocent owners were free of possible forfeiture of their property used illegally while in another's possession.

United States Coin's requirement of "significant involvement" in the illegal activity would therefore seem to protect the airplane owner who innocently loaned his plane to another. Also, the person with a security interest in such aircraft could hardly be found to be a participant in any criminal activity solely by virtue of holding a security interest. The statutes would nevertheless continue to provide for forfeiture of an aircraft when the owner's criminal activity warranted such forfeiture.

The most recent Supreme Court case addressing the issue of forfeiture as applied to an innocent owner or security interest holder is Calero-Toledo v. Pearson Yacht Leasing Company. Calero-Toledo involved the lease of a yacht by its owner to a

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90 Id.
91 Id. at 717.
92 Id. at 718-19.
93 Id. at 719 (citing Goldsmith-Grant, 254 U.S. 505; One Deluxe Coach, 307 U.S. 219). See supra notes 46-60 and 73-85 and accompanying text.
95 401 U.S. at 721-22 (emphasis added).
96 Id. at 724.
lessee who violated the law by bringing illegal drugs on board the yacht. As a result of the lessee's illegal activity, the yacht was forfeited pursuant to a Puerto Rican statute. The yacht owner's sole connection with the illegal activity was his lease of the yacht to those who violated the law. The owner, therefore, was neither involved in nor knowledgeable of the lessee's illegal activities.

The Court in Calero-Toledo traced the early history of the forfeiture action as applied to innocent property owners and noted that innocence was not a defense to such action. Relying on its earlier decisions, the Court reiterated the princi-

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97 Id. at 665.
98 Id. at 665-66. See P.R. LAWS ANN., tit. 24 § 2512(a) (Supp. 1973) which provides: § 2512 Forfeitures  
(a) The Following shall be subject to forfeiture to the Commonwealth of Puerto Rico:  
(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this chapter;  
(2) All raw materials, products, or equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting of any controlled substance in violation of this chapter;  
(3) All property which is used, or intended for use, as a container for property described in clauses (1) and (2) of this subsection;  
(4) All conveyances including aircraft, vehicles, mount 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 clauses (1) and (2) of this subsection.
99 416 U.S. at 668.
100 Id. at 680-83. Mere innocence of the owner continues to be denied as a defense. See, e.g., United States v. One 1975 Pontiac Lemans, 621 F.2d 444 (1st Cir. 1980) (claimant's lack of knowledge or involvement in the illegal activity does not preclude forfeiture of automobile because it is the property which is "guilty and hence deserving of confiscation"); United States v. One 1975 Ford Pickup Truck, 558 F.2d 755 (5th Cir. 1977) (holding that forfeiture is proper unless claimant can prove that possession of the property was taken without the owner's consent); United States v. One 1972 Toyota Mark II, 505 F.2d 1162 (8th Cir. 1974) (holding that innocence is no defense to a forfeiture action); Devito v. United States Dept. of Justice, Drug Enforcement Admin., 520 F. Supp 127 (E.D. Pa. 1981) (finding that in addition to proving innocence, the owner must prove she did all reasonably possible to prevent an illegal use); United
ple that the thing is guilty, not its owner. It also emphasized that forfeitures ordered against innocent owners furthers the laws against criminal activity and deters criminal conduct by discouraging such activity. The Court distinguished United States Coin, stating: "[that case] did not overrule prior decisions that sustained application to innocents of forfeiture statutes . . . not limited in application to persons 'significantly involved in a criminal enterprise.' The Court, however, stopped short of declaring forfeiture appropriate in every case. In fact, the Court specifically set forth two situations in which forfeiture by the innocent owner or security interest holder would be inappropriate:

It therefore has been implied that it 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 pur-
poses and was not unduly oppressive.\textsuperscript{107} Because the innocent owner in \textit{Calero-Toledo} relinquished possession of the yacht voluntarily and made no attempt to comply with the Court's second exception, the property was ordered forfeited.\textsuperscript{108}

\section*{II. Post \textit{Calero-Toledo}}

The cases following \textit{Calero-Toledo} have resulted in divergent views on forfeiture of the property of innocent owners and security interest holders.\textsuperscript{109} The courts generally have had no problem with the first exception enunciated in \textit{Calero-Toledo},\textsuperscript{110} which involved the taking of property without the owner's consent. The courts in such situations hold that the property should be returned to the owner.\textsuperscript{111} Controversy has arisen, however, with regard to the second exception of \textit{Calero-Toledo}. That exception involves the situation in which the owner lacks knowledge of the illegal activities and does all reasonably possible to prevent such activities.\textsuperscript{112} The following examination of the post \textit{Calero-Toledo} cases reveals how the courts have interpreted the \textit{Calero-Toledo} exceptions.

\subsection*{A. Cases Allowing Forfeiture}

\textit{United States v. One 1971 Cheverolet Corvette,}\textsuperscript{113} decided by the United States District Court for the Eastern District of Pennsylvania, involved the purchase of an automobile by a married woman.\textsuperscript{114} Although the automobile was purchased with the purchaser's own earnings and was considered to be her property alone,\textsuperscript{115} title to that automobile was placed both in

\begin{itemize}
  \item \textsuperscript{107} \textit{Id. at} 689-90.
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} See infra 113-178 for the interpretations given by the lower federal courts of the \textit{Calero-Toledo} exception.
  \item \textsuperscript{110} See supra text accompanying note 107.
  \item \textsuperscript{111} \textit{See, e.g.}, \textit{United States v. One 1975 Ford Pickup Truck}, 558 F.2d 755 (5th Cir. 1977).
  \item \textsuperscript{112} See supra text accompanying note 107 for the Court's enunciation of the second \textit{Calero-Toledo} exception.
  \item \textsuperscript{113} 393 F. Supp. 344 (E.D. Pa. 1975).
  \item \textsuperscript{114} \textit{Id. at} 345.
  \item \textsuperscript{115} \textit{Id.} The relevance of the car being considered the wife's alone is that the innocent
her and her husband's names. The husband had a history of criminal activity and was warned several times by his wife not to use her automobile in any illegal manner. The purchaser, however, permitted the husband to use the automobile often, and he had his own set of keys. The husband eventually used the automobile while passing counterfeit bills, and it was subsequently forfeited.

The purchaser claimed to have no knowledge of the fact that her husband used or intended to use the automobile for an illegal activity. Therefore, based on the Calero-Toledo exceptions to forfeiture, she argued that her automobile should not be forfeited. The district court disagreed, stating: "It is clear that Mrs. Fisher did not take all steps that could reasonably be expected to prevent her husband from using the vehicle for illicit purposes." The court noted that since the husband had a criminal history, yet was allowed to use the automobile, the owner had not done all reasonably possible to prevent the illegal use, so that the automobile should be forfeited. The court additionally noted that placing title of the automobile in both spouse's names arguably was enough to show that the husband had access to the automobile. Therefore, although the Calero-Toledo exceptions were considered by the court, it apparently gave a strict reading to the second Calero-Toledo exception and relied more heavily on the established history of allowing forfeiture regardless of the owner defense could not be raised if the husband was considered as an owner. See supra note 2 and text accompanying note 107 for the definition of an "innocent owner."

116 393 F. Supp. at 345.
117 Id. This claim constituted a part of the wife's argument that she had done all she could reasonably do to prevent her property from being put to an illegal use. Id. at 348.
118 Id. at 345.
119 Id. at 344.
120 Id. See also United States v. One 1977 Cherokee Jeep, 639 F.2d 212 (5th Cir. 1981) (ordering vehicle forfeited when husband used it illegally although wife professed no knowledge or involvement in the illegal activity).
121 393 F. Supp. at 348.
122 Id. See also, United States v. One 1975 Pontiac Lemans Vehicle, 621 F.2d 444, 448 (1st Cir. 1980) (claimant failed to show all steps were taken to prevent an illegal use of her property).
123 393 F. Supp. at 348.
124 Id.
owner's wrongdoing.\textsuperscript{125}

The United States District Court for the District of Hawaii used similar reasoning in\textit{United States v. Four (4) Pinball Machines}.\textsuperscript{126} That case involved the lease of pinball machines subject to a special tax.\textsuperscript{127} The pinball machines were seized because of the lessee's failure to pay the tax.\textsuperscript{128} The owner of the machines argued that it was an innocent owner and not "significantly involved in the criminal activity."\textsuperscript{129} Nevertheless, the district court ordered forfeiture of the machines stating: "The courts are not unsympathetic to the truly 'innocent' owner."\textsuperscript{130} The court held that although the owner of the property, was "uninvolved and unaware of" any illegal use of the property, it failed to show that it had done all reasonably possible to prevent such use of its property.\textsuperscript{131}

In\textit{United States v. One 1973 Buick Riviera Automobile},\textsuperscript{132} the United States Court of Appeals for the Eighth Circuit faced a situation in which an automobile owner's son used the automobile to transport marijuana.\textsuperscript{133} As a result of the son's illegal activity, the automobile was forfeited.\textsuperscript{134} The owner's defense to the forfeiture action was his lack of knowledge of any illegal use of his automobile.\textsuperscript{135} The district court gave little weight to the owner's asserted defense, however, and

\begin{footnotes}
\textsuperscript{125} The forfeiture of the vehicle, in spite of the owner's lack of knowledge and non-participation in the criminal activity, coupled with a warning not to use the property illegally, seems to indicate that the forfeiture was based on the theory that innocence is irrelevant. See supra note 101 for similar holdings.
\textsuperscript{127} Id. at 1004.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 1006.
\textsuperscript{130} Id. at 1006-07.
\textsuperscript{131} Id. at 1009. The case seems somewhat harsh in that the machines were forfeited for failure of the lessee of the machines to pay a required tax while the owner of the machines was at all times willing to pay the applicable tax to prevent forfeiture. Id. at 1004.
\textsuperscript{132} 569 F.2d 897 (8th Cir. 1977).
\textsuperscript{133} Id. at 898. The amount of marijuana found in the vehicle was 234 pounds. Id. Compare Calero-Toledo, 401 U.S. at 665-66, in which forfeiture was ordered where only one marijuana cigarette was found. See supra note 98 and accompanying text.
\textsuperscript{134} 560 F.2d at 898.
\textsuperscript{135} Id. at 899.
\end{footnotes}
granted the government's motion for summary judgment.\textsuperscript{136}

On appeal to the Eight Circuit, the owner reasserted his innocence, and the government argued that the owner's innocence was irrelevant to the action.\textsuperscript{137} The court agreed with the government, stating that an owner's innocence is not a defense to the forfeiture of his illegally-used property.\textsuperscript{138} The court reasoned that it was unnecessary to consider the Calero-Toledo exception of whether the owner had done all he could reasonably do to prevent illegal uses of his property.\textsuperscript{139} Furthermore, the court concluded that even if this exception was considered, the defense would fail because the owner had notice of the possibility of his son's illegal activities, yet permitted him unrestricted use of the automobile.\textsuperscript{140} The owner thus could not meet the second Calero-Toledo exception, as he failed to do everything reasonably possible to prevent illegal use of his property.\textsuperscript{141}

\textit{United States v. Six Thousand Seven Hundred Dollars ($6,700.00) in United States Currency,}\textsuperscript{142} involved money embezzled from an estate in Puerto Rico and illegally brought into the continental United States.\textsuperscript{143} Representatives of the Puerto Rican estate argued that the estate clearly was an innocent party, so that the money therefrom should not be for-

\begin{itemize}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id. at 900.}
\item \textsuperscript{138} \textit{Id. (citing General Motors Acceptance Corp. v. United States, 286 U.S. 49 (1932) (holding that forfeiture of property is a "time-honored" method for prevention of further criminal activity); The Palmyra, 25 U.S. 1 (1927) (proceeding against the property is independent of any personal criminal prosecution against the offenders); Goldsmith-Grant Co. v. United States, 96 U.S. 395 (1878) (holding that property has "a power of guilt and complicity in the wrong"); United States v. Brig Malek Adhel, 43 U.S. 210 (2 How.) (1844) (treating the property as the offender regardless of the conduct of the owner)).}
\item \textsuperscript{139} 560 F.2d at 901. See supra text accompanying note 107. In reference to the Calero-Toledo exceptions, the court stated: "[w]e need not decide whether Pearson Yacht provides a potential defense to forfeiture proceedings based on the owner's innocence, however, because even if such defense were available, it could not be supported here." \textit{Id.}
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} 615 F.2d 1 (1st Cir. 1980).
\item \textsuperscript{143} \textit{Id. at 1-2.}
\end{itemize}
feited. The court, affirming the district court’s order of forfeiture, however, found that the estate was not an innocent party, as it did not take all reasonably possible steps to avoid the illegal use of its property. The court found that the estate tainted its innocence by mistakenly authorizing individual withdrawals by its co-administrators. The court found that this mistake took the case out of the Calero-Toledo exceptions, stating: “To be sure, there may be a subclass of innocent persons to whom forfeiture provisions constitutionally cannot be applied, but the estate’s answer failed to allege sufficient facts to bring the estate within that subclass.”

The United States Court of Appeals for the Sixth Circuit, in United States v. One 1951 Douglas DC-6 Aircraft, considered a case involving the interest of the security interest holder in an aircraft where forfeiture was ordered by the district court. As part of the security agreement between the security interest holder and the owner, a clause prohibiting any illegal use of the aircraft was inserted in the agreement. The owner nevertheless used the aircraft for such activities without the security interest holder’s knowledge. Although the security interest holder claimed to be innocent of any illegality, the court held that the security interest holder “failed to prove that he exercised due diligence in preventing the use of his collateral” in an illegal activity. In so deciding, the court relied on the trial court’s finding that the holder failed to “take effective and affirmative steps to see that a properly licensed pilot operate it; that it was not involved in illegal nar-

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144 Id. at 2.
145 Id. at 3.
146 Id. The estate deposited its liquid assets in an account but through error did not require the signatures of both administrators to make withdrawals. One of the co-administrators wrote a check on the account without the signature of the other administrator and went to South America with the money. The court determined that the money brought into the United States had to be from the estate account since there was apparently no other way the absconding administrator could otherwise obtain that amount of money. Id. at 2.
147 Id. at 3.
150 Id. at 15.
151 667 F.2d at 503.
cotic traffic; and that it was properly registered with United States authorities, including his security claim as collateral.152

The United States Court of Appeals for the Tenth Circuit rejected a similar defense in *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*.153 The innocent owner in that case received the airplane in payment of a debt.154 The aircraft was flown in violation of customs laws and was subsequently seized and ordered forfeited by the district court.155 The seizure, however, took place six months after the owner had acquired title, and the owner was totally unaware of any use of his aircraft during that time.156

The owner’s defense was that he was without knowledge of the illegal use of the aircraft,157 but, the Tenth Circuit held this defense was insufficient.158 The court stated that “the owner’s apparent complete inattentiveness to the aircraft for a period in excess of six months may certainly be deemed negligence in light of the *Calero-Toledo* standard.”159 In reaching its decision, the court noted that the forfeiture was harsh but reasoned that the governmental interest in preventing crimes outweighed this harshness.160

B. Cases in Which Forfeiture Was Not Ordered

The decisions of the lower Federal courts discussed above seem somewhat harsh when applied to the interest of the innocent owner or security interest holder. On similar fact situations, other courts have reached the opposite and seemingly fairer result. In *United States v. One 1974 Cougar XR-7*,161 a vehicle was seized while in the possession of the owner’s live-in

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152 525 F. Supp. at 16.

153 671 F.2d 414 (10th Cir. 1982).

154 Id. at 415-16.

155 Id. When coming back into the United States from Mexico, the plane failed to give the required advance notice and did not land at a customs airport. Id.

156 Id. at 415-16.

157 Id. at 416.

158 Id. at 418.

159 Id.

160 Id. at 417. See supra note 60 and accompanying text for similar reasoning.

boyfriend\textsuperscript{162} who used it to transport heroin.\textsuperscript{163} The California district court stated that although the owner was well acquainted with the person using the vehicle illegally, there was no evidence that the owner had any knowledge of this particular illegal activity.\textsuperscript{164} The court reasoned that the exceptions of \textit{Calero-Toledo} applied and thereby prevented forfeiture, holding that the innocent owner had done all that she could reasonably do to prevent the illegal use of her property.\textsuperscript{165}

In \textit{United States v. One 1972 Chevrolet Blazer Vehicle},\textsuperscript{166} a forfeiture was ordered by the trial court in a situation involving the illegal use of the vehicle by the owner’s father.\textsuperscript{167} Although the father drove the vehicle with his son’s permission, the son asserted that he neither consented to the illegal use of the vehicle nor had knowledge of such use.\textsuperscript{168} The trial court granted the government’s motion for summary judgment and ordered forfeiture, noting that, although forfeiture is a harsh rule, an owner is required “to know more about his buyer, to know more about his lessee, to know more about the person to whom he loaned the car . . . .”\textsuperscript{169} The Ninth Circuit reversed the order granting summary judgment, however, and held that the owner should have the opportunity to present the defense on remand.\textsuperscript{170}

Forfeiture was denied by the United States District Court for the Western District of Pennsylvania in \textit{United States v. One

\textsuperscript{162} Id. at 1326.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 1328.
\textsuperscript{165} Id. The circumstances to which the court refers are basically similar to cases where forfeiture was ordered. See, e.g., supra text accompanying notes 114-124. The court in \textit{One 1974 Cougar} appears to be applying a more favorable reading of the \textit{Calero-Toledo} standards to the innocent owner.
\textsuperscript{166} 563 F.2d 1386 (9th Cir. 1977).
\textsuperscript{167} Id. at 1387.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 1388.
\textsuperscript{170} Id. at 1391. For similar holdings, see \textit{United States v. One Tintoretto Painting Entitled “The Holy Family With Saint Catherine and Honored Donor,”} 691 F.2d 603 (2d Cir. 1982); \textit{Devito v. United States Dept. of Justice, Drug Enforcement Admin.}, 520 F. Supp. 127 (E.D. Pa. 1981).
1976 Lincoln Mark IV.\textsuperscript{171} In that case, an owner loaned his automobile to his brother-in-law who subsequently used it to transport heroin from Detroit to Pittsburgh.\textsuperscript{172} There was no evidence that the owner was involved in any of the illegal activities or that he had any knowledge of any possible illegal use of his automobile.\textsuperscript{173} Although the court stated that innocence provided no defense to a forfeiture proceeding,\textsuperscript{174} it did note that the \textit{Calero-Toledo} exception would prevent forfeiture if the owner had done all reasonably possible to prevent the illegal use of his property.\textsuperscript{175}

The court explained that this exception was not easily met, as it called for an affirmative duty to protect the property from illegal uses.\textsuperscript{176} In attempting to delineate the nature of this affirmative duty, the court stated that "what one 'reasonably could be expected [to do] to prevent criminal use of property is a standard that must be tailored to individual circumstances."\textsuperscript{177} Under the circumstances of this case, the court reasoned that forfeiture should not be allowed because the owner "did all that could be reasonably expected of him to prevent illegal use of the vehicle" and to order forfeiture of the vehicle "would be only to deprive an innocent party of his car."\textsuperscript{178}

\section*{III. Other Defenses to the Forfeiture Action}

Even if an innocent owner or security interest holder cannot prove that he did everything reasonably possible to prevent illegal use of his property, other defenses exist which may entitle him to keep his property. These defenses may be used in addition to the \textit{Calero-Toledo} exception explained above. These defenses will be discussed under headings as

\footnotesize{\textsuperscript{171} 462 F. Supp. 1383 (W.D. Pa. 1979).}
\footnotesize{\textsuperscript{172} Id. at 1386.}
\footnotesize{\textsuperscript{173} Id.}
\footnotesize{\textsuperscript{174} Id. at 1387. See supra note 101 for similar holdings.}
\footnotesize{\textsuperscript{175} 462 F. Supp. at 1387.}
\footnotesize{\textsuperscript{176} Id. at 1391. Contrasting this duty with the innocence of an owner the court stated that "[i]t connotes an affirmative duty, whereas innocence of crime and ignorance of potential wrongdoing are passive conditions." Id.}
\footnotesize{\textsuperscript{177} Id.}
\footnotesize{\textsuperscript{178} Id.}
follows: lack of probable cause, illegal search and seizure, the scope of the forfeiture statutes, prompt adjudication and the petition for remission or mitigation.

A. Lack of Probable Cause

The showing of probable cause is often essential to the government’s action for forfeiture, as most statutes make such a showing a prerequisite to forfeiture. Thus, if the innocent owner or security interest holder can prove a lack of probable cause, he may be able to destroy the government’s case. Once the government establishes a showing of probable cause, however, the burden of proof shifts to the owner or security interest holder to show, by a preponderance of the evidence, that the property is not subject to forfeiture.

Generally, courts evaluate probable cause in a forfeiture action under the same standard as that in other search and seizure cases. By this standard, the cause must be “reasonable under the circumstances.” Probable cause may also be defined as a “reasonable ground for belief that the property is being used illegally requiring less than prima facie proof but more than a mere suspicion.” Once the government establishes probable cause, it may seize property with-

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179 Smith, supra note 7, at 667.
180 Id. See United States v. Fourteen (14) Handguns, 524 F. Supp. 395 (S.D. Tex. 1981) (finding that once the government shows probable cause, the burden of proof shifts to the claimant); United States v. One 1977 Chevrolet Pickup, 503 F. Supp. 1027 (D. Colo. 1980) (finding that the government has the burden of proving probable cause and the claimant has the burden of showing that the forfeiture action is outside the statute); United States v. Twenty-Six Firearms, 485 F. Supp. 549 (W.D. Pa. 1980) (finding that where the government has proven probable cause, the burden of proof shifts to the claimants); United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383 (W.D. Pa. 1979) (finding that once the government shows probable cause, forfeiture is automatic unless claimant can prove the forfeiture is not within the statute); United States v. One (1) Douglas A-26B Aircraft, 436 F. Supp. 1292 (S.D. Ga. 1977) (finding that probable cause must first be shown, then the burden shifts to the claimant to show why the property is not subject to forfeiture).
182 Smith, supra note 7, at 677.
183 Id. See United States v. One 1979 Mercury Cougar XR-7, 666 F.2d 228 (5th Cir. 1982); United States v. One 1975 Mercedes 280S, 590 F.2d 196 (6th Cir. 1978).
out a warrant.\textsuperscript{184} Courts rationalize such warrantless seizure by finding that the property belongs to the government at the moment of its illegal use.\textsuperscript{185} Furthermore, since forfeiture is a proceeding in rem,\textsuperscript{186} the property has no rights under the fourth amendment.\textsuperscript{187}

\section{B. Illegal Search and Seizure}

Analogous to the defense of no probable cause is the defense of illegal search and seizure of relevant evidence.\textsuperscript{188} The innocent owner may be unable to assert this defense in all jurisdictions, however,\textsuperscript{189} as some courts believe that the reason for protection against unreasonable searches and seizures is an individual's legitimate expectation of privacy.\textsuperscript{190} The fourth amendment's protection against unreasonable searches and seizures can only be raised by the person whose rights were violated, not by one who will also be incidentally aggrieved by the illegally obtained evidence.\textsuperscript{191} Thus, some courts have held that because the forfeited property was in another's possession, the owner has given up his right of privacy.\textsuperscript{192}

\section{C. The Scope of the Forfeiture Statutes}

The innocent owner or security interest holder may be able to prevent forfeiture by showing that the illegal use of the

\textsuperscript{184} Comment, \textit{An Analysis of Federal Drug-Related Civil Forfeiture}, 34 Me. L. Rev. 435, 450 (1982).
\textsuperscript{185} Id. The rationale is that at the time of a violation of a forfeiture statute, the property is forfeited. A trial is held only to perfect title in the government. \textit{Id.}
\textsuperscript{186} See \textit{supra} note 25 for the definition of a proceeding in rem.
\textsuperscript{187} Comment, \textit{supra} note 184, at 450.
\textsuperscript{191} Alderman v. United States, 394 U.S. 165, 171-72 (1969); United States v. One 1977 Mercedes Benz, 450SEL, 708 F.2d 444, 448 (9th Cir. 1983).
\textsuperscript{192} See United States v. Dall, 608 F.2d 910 (1st Cir. 1979); \textit{cert. denied}, 445 U.S. 918 (1980); United States v. Dyar, 574 F.2d 1385 (5th Cir.); \textit{cert. denied} 439 U.S. 982 (1978).
property was not within the scope of the forfeiture statute. The defense hinges on the statute's construction as applied to the role of the property in the crime. The use of this defense is illustrated by United States v. One Dodge Coupe and Platt v. United States, which provide the general tests. In One Dodge Coupe the vehicle's only connection to the crime was that it transported the offender to the scene of the illegal activity. The vehicle was nevertheless subject to forfeiture. The court reasoned that the vehicle was used to facilitate the illegal activity because it "[brought the owner] part of the distance over which the contraband would otherwise have to travel in order to reach him, it made the task less difficult and lessened the labor thereof."

The Platt test, more favorable from the owner's point of view, requires more than merely making the "task less difficult" or "lessening the labor thereof." In Platt the owner of the vehicle loaned it to her daughter. The daughter drove to a drugstore where she purchased morphine with a false prescription. The Tenth Circuit defined "facilitate" as used in the statutes with its "ordinary and accepted meaning." Under this definition, the court held that a vehicle was subject to forfeiture if "it is used to assist in the commission of the crime." The court concluded that the vehicle was not subject to forfeiture in this case, stating: "The means employed by [the daughter] in going to the store had nothing to do with the purchase. The ease or difficulty of the purchase would have been the same no matter how she got

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193 See Smith, supra note 7, at 683-86.
194 Id.
196 173 F.2d 165 (10th Cir. 1947).
197 Smith, supra note 7, at 683-84.
198 43 F. Supp. at 60.
199 Id. at 62.
200 Id.
201 Smith, supra note 7, at 684; 163 F.2d at 167.
202 163 F.2d at 166.
203 Id.
204 Id. at 167.
205 Id.
there. Thus, this test requires that the vehicle have a more active role in the illegal activity.

D. Prompt Adjudication

The government’s failure to promptly bring a forfeiture action after seizure of the property may also prevent a forfeiture. The basis of this defense is that a claimant has a constitutional right to prompt adjudication of his property interests. No general rule exists defining unreasonable time, and courts apply varying standards, depending on the circumstances of each case. The courts generally look to the consequences of delay in considering whether forfeiture is unreasonable under the circumstances.

E. The Petition for Remission or Mitigation

If the innocent owner or security interest holder does not wish to risk losing his property in a judicial proceeding, he may file a petition for remission or mitigation of the forfeiture. If the remission or mitigation approach is chosen, however, no other challenges are allowed thereafter, as filing the petition presumes the validity of the forfeiture. The
petition for remission or mitigation is, therefore, a last resort and should be used only in the absence of other defenses.\textsuperscript{214}

The petition for remission or mitigation is considered a "matter of executive grace" and is unreviewable by the courts.\textsuperscript{215} The requirements for a remission or mitigation resemble those under the Calero-Toledo defense,\textsuperscript{216} as the claimant must prove the forfeiture was not due to any negligence or intent to violate the law on his part.\textsuperscript{217} If a complete remission of the forfeiture is not obtained, some relief may nevertheless be available in the form of a mitigation of the forfeiture.\textsuperscript{218} Such mitigation is applicable where, although

\textsuperscript{214} Smith, supra note 1, at 19.

\textsuperscript{215} Id. See Smith, supra note 7, at 672; see also United States v. One 1976 Porsche 911S, 670 F.2d 810 (9th Cir. 1979) (holding that Attorney General may in his discretion return property); Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978) (holding that remission is a matter of legislative grace not reviewable by the courts); Devito v. United States Dep't of Justice, Drug Enforcement Admin., 520 F. Supp 127 (E.D. Pa. 1981) (finding that a court cannot review the discretion of the Attorney General who denied a petition for remission); United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383 (W.D. Pa. 1979) (finding no right to a remission of forfeiture because it is a matter of grace); Walker v. United States, 438 F. Supp. 251 (S.D. Ga. 1977) (finding that denial of a petition of remission is not reviewable by the courts).

\textsuperscript{216} See supra text accompanying note 107 for the Calero-Toledo exceptions to forfeiture.

\textsuperscript{217} Smith, supra note 1, at 19. See also 19 U.S.C. § 1618 (1970) which provides:
Whenever any person interested in any vessel, 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.


\textsuperscript{218} See, e.g., 28 C.F.R. § 9.6 (1982). That regulation provides:
Section 9.6 Provisions applicable to particular situations.
(a) Mitigation: In addition to his discretionary authority to grant relief by way of complete remission of forfeiture, the determining official may, in the exercise of his discretion, mitigate forfeitures of seized property. This authority may be exercised in those cases where the petitioner has not met the minimum conditions precedent of remission but where there
the conditions of remission are not met, extreme hardship would result from forfeiture.219

IV. SUMMARY

The decisions of the Supreme Court established a harsh doctrine of forfeiture towards the innocent owner. The basis for forfeiture started with The Palmyra's220 consideration of the thing as the offender, without regard to the owner's wrongdoing.221 Dobbin's Distillery222 adopted The Palmyra's harsh theory and added the additional theory that an owner leases his property subject to the consequences of its illegal use.223 Additional justification for forfeiture of an innocent owner's property was enunciated in Goldsmith-Grant.224 In that case, the Court held that governmental interest in enforcing laws outweighed the consequences of forfeiture to the innocent owner or security interest holder.225 The Supreme Court drew both from the history of forfeiture and previous decisions to uphold forfeiture in the case of Van Oster.226 Although the Supreme Court seemed to retreat from this harsh stance for a brief period,227 it reaffirmed its harsh position in Calero-Toledo.228 Calero-Toledo introduced the test requiring the owner or security interest holder to have taken all reason-

Id.

219 Smith, supra note 7, at 672. See, e.g., 28 C.F.R. § 9.6 (1982).
220 25 U.S. 1 (1827).
221 See supra note 32 and accompanying text.
222 See supra notes 36-45 and accompanying text.
223 See supra text accompanying note 44.
224 See supra notes 46-60 and accompanying text.
225 See supra text accompanying note 56.
226 See supra notes 61-72 and accompanying text.
227 See supra notes 73-94 and accompanying text.
228 See supra notes 96-108 and accompanying text.
ably possible steps to prevent the illegal use of his property.\textsuperscript{229}

The lower federal courts are divided as to whether the innocent owner's or security interest holder's property is subject to forfeiture. The common element seen in the cases is a determination of whether the owner or security interest holder was able to fit within the above-mentioned exception of \textit{Calero-Toledo}.\textsuperscript{230} Some actions do exist to protect the innocent owner or security interest holder's interest.\textsuperscript{231}

The key question is whether the owner did all he could reasonably do to prevent the illegal use of his property. The cases are in agreement, however, that innocence is not enough,\textsuperscript{232} thereby requiring an affirmative duty to protect the property from an illegal use.\textsuperscript{233} The owner must affirmatively try to prevent his property from being used by one known to have engaged in illegal activities.\textsuperscript{234} Where there is no knowledge of past illegal activities, the owner still may need to investigate the person to whom he intends to give possession of the property.\textsuperscript{235} Furthermore, the owner must not negligently, or through inattentiveness, fail to protect his property from illegal use.\textsuperscript{236}

\section*{V. Conclusion}

In owning aircraft, and in dealings involving them, there is

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\textsuperscript{229} See supra text accompanying note 107 for the \textit{Calero-Toledo} standard.

\textsuperscript{230} The cases discussed in this comment which were held to be without the \textit{Calero-Toledo} exceptions are: United States v. One 1957 Rockwell Aero Commander 680 Aircraft, 671 F.2d 414 (10th Cir. 1982); United States v. One 1951 Douglas DC-6 Aircraft, 667 F.2d 502 (6th Cir. 1981); United States v. Six Thousand Seven Hundred Dollars ($6,700.00) in United States Currency, 615 F.2d 1 (1st Cir. 1980); United States v. One 1973 Buick Riviera Automobile, 560 F.2d 897 (8th Cir. 1977); United States v. Four (4) Pinball Machines, 429 F. Supp. 1002 (D. Hawaii 1977); United States v. One 1971 Chevrolet Corvette, 393 F. Supp. 344 (E.D. Pa. 1975). Cases discussed where forfeiture was not ordered are: United States v. One 1972 Chevrolet Blazer Vehicle, 563 F.2d 1386 (9th Cir. 1977); United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383 (W.D. Pa. 1979); United States v. One 1974 Cougar XR-7, 397 F. Supp. 1325 (C.D. Cal. 1975).

\textsuperscript{231} See supra notes 179-219 and accompanying text.

\textsuperscript{232} See supra note 101 and accompanying text.

\textsuperscript{233} See supra note 176 and accompanying text.

\textsuperscript{234} See supra text accompanying notes 117-119 and 164.

\textsuperscript{235} See supra text accompanying note 169.

\textsuperscript{236} See supra text accompanying note 159.
\end{flushleft}
a reasonable chance that the owner or security interest holder will be seeking advice from an attorney. The attorney should advise such clients of the possibility that the aircraft could be forfeited if used illegally even though the innocent owner or security interest holder can claim complete innocence.\textsuperscript{237} The client should be told why the property may be forfeited and a forfeiture prevention plan explained to the client.\textsuperscript{238} The client should be advised to not place his property in the possession of someone who he knows has a record of past criminal activity and, considering the value of an aircraft, should make an investigation of the potential users of the aircraft.\textsuperscript{239} Care should be taken that the property is not neglected for any appreciable time and deals involving the aircraft should be carefully thought out in advance. Other factors should also be considered depending on the circumstances of the particular owner or security agreement. Some type of affirmative action that shows the owner's concern with preventing the illegal use of his property may tend to sway an otherwise hostile court.

\textsuperscript{237} Smith, supra note 1, at 14.
\textsuperscript{238} \textit{Id.}
\textsuperscript{239} \textit{Id.}
Casenotes and Statute Notes