Recent Developments

Forfeiture of Derivative Contraband Under the Contraband Seizure Act and the Comprehensive Drug Abuse and Control Act of 1970: *United States v. One 1975 Mercedes 280S*

The Mercedes automobile of the claimant was seized in the course of a drug raid on the home of the claimant and her husband. Heroin was discovered during the search and resulted in charges against claimant's husband for possession of heroin. The partial remains of four marihuana cigarette butts, found in the ashtray of the car that was parked in the garage at the time of the search, were the basis of the federal forfeiture action that was the subject of this case.[1] The raid was conducted in execution of a federal warrant for the search of the house. Forfeiture was granted to the government on its unopposed motion for summary judgment. That

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1. United States v. One 1975 Mercedes 280S, 590 F.2d 196 (6th Cir. 1978). 49 U.S.C.A. § 781 (1963 & Supp. 1979) provides:

> (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.
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> (b) As used in this section, the term "contraband article" means—
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> (1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State, Territory, possession, the District of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations; [or]
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> (2) Any firearm, with respect to which there has been committed any violation of any provision of the National Firearms Act or any regulation issued pursuant thereto; or
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> (3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security; or
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> (4) Any cigarette, with respect to which there has been committed any violation of Chapter 114 of Title 18, or any regulation issued pursuant thereto.

49 U.S.C. § 782 (1976) authorizes seizure of vehicles used in violation of 49 U.S.C.A. § 781 (1976):

> 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: *Provided*, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle, or aircraft, the owner or the master of such vessel or the owner or

motion was supported by an affidavit[2] sworn by the special agent of the Drug Enforcement Administration who conducted the search. Claimant made no appearance before the district court, nor did she file a counter-affidavit. On appeal, claimant did not allege lack of notice of the hearing or lack of opportunity to file opposing affidavits or inability to appear at the hearing. The issue on appeal was the sufficiency of the agent's affidavit for the grant of the motion for summary judgment. The court of appeals affirmed the district court's holding.

The historical development of forfeiture actions has been traced back at least as far as Roman law and its desire for revenge against agents of injury or death.[3] The form of vengeance was the giving up of the agent of harm, the deodand, to God, through the Church on behalf of the king, to be offered for the good of the soul of the person harmed.[4] Things-in-motion that caused harm to persons were all eventually considered to be appropriate objects of forfeiture in English common law, whether they be a servant, a cart, a falling tree, or a ship.[5] While some intellectual strain occurred in the rationale that an inanimate object is guilty of an offense, the law of forfeiture nevertheless operated on that premise.[6]

Forfeiture proceedings in the United States have generally been governed by rules of civil procedure and have been wholly statutory in

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conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: *Provided further*, That no vessel, vehicle, or aircraft shall be forfeited under the provision of this chapter 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 vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State.

2. The text of the affidavit in support of the motion for summary judgment was, in part:
I personally searched said vehicle at said location on said date and in the ashtray, located in the area of the vehicle commonly referred to as the "dashboard," I found the partial remains of four (4) cigarette butts, which appeared, in my experience, to be Marihuana. I have been a Special Agent for the Drug Enforcement Administration for approximately eight (8) years (including its predecessor agencies) and I have spent one (1) year as a Criminal Investigator for the United States Bureau of Customs prior to that. I have seen and smelled Marihuana on hundreds of occasions and I am very familiar with its appearance and aroma.
United States v. One 1975 Mercedes 280S, 590 F.2d 196, 197 (6th Cir. 1978).

3. O. HOLMES, THE COMMON LAW (Howe ed. 1963). It was Holmes' view that the vengeance was gradually extended from the person who was the direct cause of the harm, to a master if a slave caused a harm, to the owner of an animal if the animal caused a harm. The generalization also encompassed the owners of those *things* that caused harm if the things moved. Holmes found more to his vengeance theory than he found in the major competing theory of compensation as the basis of the forfeiture. *Id.* at 5-33.

4. *Id.* at 23.

5. *Id.* at 24.

6. Holmes quoted the oft-repeated language of Mr. Chief Justice Marshall:
This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable that the vessel should be affected by this report.
Id. at 27, *citing* United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 234 (1844).

character.[7] Recently, some federal statutes have treated some forfeitures as criminal proceedings.[8] Forfeiture actions were thought to be civil in character since they were proceedings in rem rather than in personam.[9] Yet the specific relationship in forfeiture law between the two types of proceedings, civil and criminal, has been the subject of extensive and long debate.[10] On the basis of the observation that forfeiture did, in fact, penalize the owner even though the proceeding was ostensibly civil, the term "quasi-criminal" was adopted by the United States Supreme Court as early as 1886 in *Boyd v. United States*.[11] In that decision the Court held that because

> suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . .[12]

The appropriate standards for protection of constitutional rights are in a state of uncertainty given the uncertainty regarding the classification of forfeiture proceedings as civil, criminal, or "quasi-criminal."[13]

The object of the forfeiture action is also variously characterized. A major distinction is between derivative contraband and contraband per se.[14] Contraband per se is an object the mere possession of which is prohibited.[15] Derivative contraband is an object that is seizable by virtue of its association with contraband per se.[16] The justification of seizure of derivative contraband has been (1) that the loss of the object makes the illegal activity more expensive and, hence, is a deterrent to that activity; (2) that the unavailability of the object makes the illegal activity difficult if not

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7. Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 769 (1977).

8. Organized Crime Control Act of 1970, § 901 (a), 18 U.S.C. § 1963 (1976); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C. § 848 (a)(2)(1976). Relevant rules include FED. R. CRIM. P. 7(c)(2), 31(e), 32(b)(2), and 54(b)(5).

9. Various Items of Personal Property v. United States, 282 U.S. 577 (1931); Advisory Committee's Comments to the 1972 Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. 143, 180 (1972).

10. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Boyd v. United States, 116 U.S. 616 (1886); Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN L. REV. 379 (1976).

11. 116 U.S. 616 (1886).

12. *Id.* at 634. The Court's holding with respect to the self-incrimination portion of the fifth amendment was related to the compulsory production of the party's private books and papers to be used against him in a forfeiture proceeding.

13. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

14. *Id.*

15. *Id.* at 699. The Court defined contraband per se as "objects the possession of which, without more, constitutes a crime."

16. *Id.* The Court considered derivative contraband to be objects, the possession of which was not even remotely criminal, but which were put to an illegal use.

impossible to continue; or (3) that the costs of investigating and enforcing the law can be recouped by the seizure or unpaid taxes may be collected.[17]

Forfeitures are considered criminal penalties for purposes of triggering the protection of certain constitutional rights. Nevertheless, the statutes are deemed predominantly civil in that it has been held constitutional for the burden of proof to shift to the claimant once the government agency has made a showing of probable cause.[18] "Probable cause" in this context means a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.[19] The libel complaint needs to meet only minimal requirements for the initiation of forfeiture proceedings. Specifically, the complaint must be verified by oath or affirmation, it must describe with reasonable particularity the property in question, and it must state that the property is within the jurisdiction of the court in which the action is brought.[20] Therefore, the filing of the libel complaint, if sufficient to show probable cause for seizure, shifts the burden to the claimant to reply. The claimant has two courses open to him—challenge the adequacy of the forfeiture complaint or seek remission or mitigation of the forfeiture. The latter alternative is open to the claimant for a forfeiture already accomplished and it is said to be a grant of executive discretionary power to relieve the harshness of the forfeiture statutes.[21] The availability of the alternative of a remission petition has been construed as an expression of Congressional intent to have remission be the *sole* mechanism for affording leniency.[22] Judicial review of remission and mitigation decisions is restricted to the matter of whether there is statutory authority for such decisions and not the matter of the merits of the decision.[23] A governmental agency, however, may not rely on the availability of administrative relief as a means of nullifying a claimant's due process right to a speedy and fair forfeiture adjudication.[24]

17. State v. Jeffers, 342 U.S. 48 (1951); Helvering v. Mitchell, 303 U.S. 391 (1938); McKeehan v. United States, 438 F.2d 739 (6th Cir. 1971); United States v. One 1965 Buick, 392 F.2d 672 (6th Cir. 1968), *vacated sub nom.* Dean v. United States, 402 U.S. 937 (1971).

18. United States v. One 1970 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65 (9th Cir. 1976).

19. United States v. (One) (1) 1971 Chevrolet Corvette Automobile, 496 F.2d 210 (5th Cir. 1974).

20. FED. R. CIV. P. Supplemental Rule C(2). The Supplemental Rules apply to admiralty and maritime claims within the meaning of FED. R. CIV. P. 9(h) and to those statutory condemnation proceedings analogous to maritime actions in rem whether within admiralty and maritime jurisdiction or not. FED. R. CIV. P. Supplemental Rule A.

21. United States v. One 1961 Cadillac, 337 F.2d 730, 733 (6th Cir. 1964). This case dealt in particular with the Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (1946), and Pub. L. No. 89-554, 80 Stat. 378 (1966) (current version at 5 U.S.C. §§ 551-59 (1976)), and its tempering effects on the Contraband Seizure Act, 49 U.S.C. §§ 781-89 (1976). Remission is the only remedy available to the owner of forfeited property and it is a remedy that has been available in the United States since 1790. The Tariff Act of 1930, 19 U.S.C. § 1618 (1976), has a provision similar to the Administrative Procedure Act for remission or mitigation of penalties.

22. United States v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1st Cir. 1977).

23. United States v. One 1970 Buick Riviera, 463 F.2d 1168 (5th Cir.), *cert. denied*, 409 U.S. 980 (1972).

24. Boston v. Stephens, 395 F. Supp. 1000 (S.D. Ohio 1975).

In light of the intricacies of forfeiture law, the recent case of *United States v. One 1975 Mercedes 280S*[25] presents a current statement of the position of the Sixth Circuit in this area of the law. The decision appeared in a climate that is tending to temper the severity of the forfeiture of derivative contraband of innocent owners[26] and, thus, it represents a rather harsh position on the part of this court. The harshness is particularly evident since the court had eliminated the "fiction" of a forfeiture being an action against an inanimate object in its fairly recent decision in *McKeehan v. United States*.[27] In other words, while precedents make the decision in *One 1975 Mercedes 280S* a technically correct one, a different outcome is justifiable and probably preferable.

The issue before the court in *One 1975 Mercedes 280S* was whether the affidavit by the government agent concerning the presence of the "partial remains of four Marihuana cigarette butts" in the ashtray of claimant's car constituted a sufficient showing by the government agency to justify a grant of summary judgment in the forfeiture action.[28] Assuming that the affidavit was reasonably particular in describing the object, that unquoted portions of the libel stated that the property was within the jurisdiction of the court, and that the property was of the type that could be seized under the relevant statute, the Contraband Seizure Act, 49 U.S.C. § 782, the government could be considered to have shown probable cause for seizure of the car. The burden had at that point shifted to the claimant either to challenge the libel or to allow the forfeiture to proceed and initiate a remission petition. Claimant could not save her property by silence.

Claimant had two failing arguments and one colorably successful argument on appeal. The failing arguments were first, that the statutory requirements of 49 U.S.C.A. § 781 were not met,[29] and second, that the amount of marihuana discovered was de minimis.[30] Her potentially successful argument was presented as two separate assignments of error: (1) that she had no intent to distribute marihuana and she had not been shown to have knowledge of its presence in her car,[31] and (2) that the affidavit was insufficient to support a grant of summary judgment.[32]

25. United States v. One 1975 Mercedes 280S, 590 F.2d 196 (6th Cir. 1978).

26. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); United States v. United States Coin & Currency, 401 U.S. 715 (1971); United States v. One 1972 Chevrolet Blazer, 563 F.2d 1386 (9th Cir. 1977); United States v. One 1976 Lincoln Mark IV, 462 F.Supp. 1383 (W.D. Pa. 1979).

27. McKeehan v. United States, 438 F.2d 739 (6th Cir. 1971).

28. United States v. One 1975 Mercedes 280S, 590 F.2d 196, 198 (6th Cir. 1978).

29. *Id.* Claimant argued that the government had to show that the marihuana was transported *and* concealed or possessed in the car. The court held that the statutory elements are disjunctive and that the mere presence of a controlled substance in the car brought it within the requirements of the statute. *See* note 1 *supra*.

30. United States v. One 1975 Mercedes 280S, 590 F.2d 196 (6th Cir. 1978). The court maintained, with supporting case law, that the drug laws are violated by any measurable amount of a prohibited narcotic drug. Since "any measurable amount" is sufficient for a criminal conviciton, it was sufficient in this case "to support a civil forfeiture under the less onerous burden of proof."

31. *Id.*

32. *Id.* at 199.

In rejecting the first colorably successful contention, the court relied on *Calero-Toledo v. Pearson Yacht Leasing Co.*[33] and *United States v. One 1961 Cadillac*[34] to the effect that neither intent nor knowledge were necessary for seizure of a vehicle in which controlled substances were found. The second contention was found wanting on the basis that forfeiture actions are quite summary themselves since the burden of proof is on the owner after the preliminary showing of probable cause.[35] While the court would not accept the government's argument that probable cause was adequate for forfeiture no matter what proof was pressed in opposition by the claimant, absent *any response* by the claimant, the showing of probable cause was considered adequate for the granting of the government's motion for summary judgment.[36]

The Sixth Circuit began to disentangle the concepts of "guilt" and "inanimate object" in the course of its decision in *McKeehan v. United States*.[37] The court found no valid purpose in pursuing the object in rem and, hence, determined that the forfeiture was a proceeding in personam once the fiction of the guilty object was lifted.[38] The court stated its postion in that case:

> In so doing, we are not creating a "legal fiction," but destroying one. . . . We are characterizing the facts underlying this action as to their substance. We are following the mandate of the United States Supreme Court when it has repeatedly held that under certain circumstances a possessor of chattels is entitled to the protection of the Fourth and Fifth Amendments when civil forfeiture actions take on a quasi-criminal or penal cast.[39]

If the forfeiture of the property does not accomplish a valid legislative, administrative, or revenue purpose then the proceeding must be seen for what its underlying substance is. The *McKeehan* court viewed that underlying substance as a quasi-criminal or penal proceeding deserving fourth and fifth amendment protections for the property owner.[40]

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33. 416 U.S. 663 (1974).

34. 337 F.2d 730 (6th Cir. 1964).

35. United States v. One 1975 Mercedes 280S, 590 F.2d 196, 199 (6th Cir. 1978).

36. *Id.*

37. 438 F.2d 739, 745 (6th Cir. 1971). In that case the souvenir firearms of the claimant were forfeited because the owner did not register them as required in the National Firearms Act Amendments of 1968, Pub. L.No. 90-618, § 201, 82 Stat. 1227 (current version at 26 U.S.C. § 5841 (1976)). Among the reasons stated by the Sixth Circuit in returning the firearms to the owner was the lack of valid legislative, administrative, or revenue purposes for pursuing the item in rem.

38. 438 F.2d at 745 (6th Cir. 1971).

39. *Id.* (citations omitted); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Boyd v. United States, 116 U.S. 616 (1886).

40. The opinion of the court did not include a discussion of the issue of collateral estoppel given the claimant's acquittal on criminal charges, since that issue was not raised on appeal. McKeehan v. United States, 438 F.2d 739, 745-46 (6th Cir. 1971). However, Judge Weick maintained, in his concurring opinion, that the court could and should consider the matter even though the appellant did not raise it and he concluded that the *Coffey* doctrine (Coffey v. United States, 116 U.S. 436 (1886)) required that the final determination of the criminal charges against McKeehan estopped the subsequent civil forfeiture proceeding. McKeehan v. United States, 438 F.2d 739, 746 (6th Cir. 1971) (Weick, J., concurring). *Contra*: Helvering v. Mitchell, 303 U.S. 391 (1938). *But cf.* One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (dealing with customs regulations, rather than narcotics or firearms).

Derivative contraband is uniquely suited to the suspicion that forfeiture of the property is in essence an in personam proceeding rather than one in rem. It is the *use* of the property in furtherance of illegal activity that brings derivative contraband within the purview of forfeiture statutes.[41] It is the illegal *use* of such property that is intended to be deterred by the penalty of forfeiture of derivative contraband associated with transportation and possession of prohibited drugs.[42]

Scarcely a forfeiture case is decided without at least a mild expression of recognition on the part of the court that the sanction is a severe one.[43] It is a legal homily that forfeitures are not favored.[44] Hence, it is also generally acknowledged that statutes which authorize the forfeiture of derivative contraband must be narrowly construed.[45]

While the court in *One 1975 Mercedes 280S* correctly cited *Calero-Toledo* for the proposition that neither intent nor knowledge of illegally used property must be shown for the granting of forfeiture, it ignored language in the opinion that invited a more lenient posture.[46] In fact, two recent United States Supreme Court decisions, while adhering to the traditional forfeiture doctrines, signal the desire on the part of the Court that lower federal courts scrutinize the facts of forfeiture cases of derivative contraband and innocent owners. The Court stated in *United States v. United States Coin & Currency*[47] that "[w]hen the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."[48] Then in *Pearson*, the Court went to some length to encourage future decisions exempting the innocent owner from forfeiture statutes when the facts justify such a result. The dicta made clear the standards for innocent owner exemption:

> [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.[49]

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41. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

42. [1950] U.S. CODE CONG. & AD. NEWS 2953 (congressional history of 1950 Amendments to 49 U.S.C. §§ 781, 782).

43. *E.g.*, United States v. One 1975 Mercedes 280S, 590 F.2d 196 (6th Cir. 1978).

44. *E.g.*, United States v. One 1936 Model Ford, 307 U.S. 219 (1939).

45. *See, e.g.*, Bigelow v. Forrest, 76 U.S. (9 Wall.) 339 (1869).

46. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974); United States v. One 1961 Cadillac, 337 F.2d 730 (6th Cir. 1964).

47. 401 U.S. 715 (1971). The case dealt with money seized from an individual charged with gambling in order to pay gambling tax and forfeited under I.R.C. § 7302. An issue of retroactive application of criminal statutes complicated the case.

48. United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971) (citation omitted).

49. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974) (emphasis added) (citation omitted).

Thus, the standard for innocent ownership consists of proof of three conditions: the owner (1) was uninvolved in the illegal use; (2) was unaware of the use of his property for illegal activity; and (3) had done all that could be reasonably expected of him to prevent the prohibited use of this property.

Some lower federal courts have applied this three part standard, and, depending on the facts of the case, have granted[50] or denied[51] forfeiture. In attempting to apply the *Coin-Pearson* standard, a Pennsylvania federal district court has interpreted the "no negligence" aspect of the standard as an affirmative duty to prevent illegal use which is only triggered by knowledge or suspicion of potential wrongdoing.[52] Furthermore, the Ninth Circuit has recently reversed a district court's grant of summary judgment motion in a forfeiture action against a vehicle pursuant to 49 U.S.C. § 782 for its use in transporting a contraband firearm.[53] Relying on *Coin* and *Pearson*, the court concluded that the granting of summary judgment on the facts of that case was clearly erroneous.[54]

Forfeiture law at the time *One 1975 Mercedes 280S* was decided was permeated by a clear invitation by the United States Supreme Court for the lower federal courts to critically examine the facts of forfeiture cases involving innocent owners. The standard for the innocent owner exemption was described in broad outline and some courts had begun to fill in the details of that standard. To the extent that courts have moved toward a consideration of forfeiture of derivative contraband from innocent owners as quasi-criminal or penal in nature there is at least a suggestion that a higher level of proof should be required than a mere preponderance standard normally appropriate to most civil proceedings. In that context, the showing of probable cause by the government in *One 1975 Mercedes 280S*, even though it was unmet by a reply or rebuttal by the claimant, slipped dangerously close to the taking of property without compensation and without due process, which is the fifth amendment's antagonism to forfeitures. One's uneasiness with the court's treatment of the case is compounded by the fact that the court has the discretion not to grant Rule 56 summary judgment motions.[55] Summary judgment is

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50. *See, e.g.*, United States v. One 1971 Chevrolet Corvette, 393 F. Supp. 344 (E.D. Pa. 1975).

51. *See, e.g.*, United States v. One 1974 Mercury Cougar XR7, 397 F. Supp. 1325 (C.D. Cal. 1975).

52. United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383 (W.D. Pa. 1979).

53. 49 U.S.C. § 782 (1976). United States v. One 1972 Chevrolet Blazer Vehicle, 563 F.2d 1386 (9th Cir. 1977).

54. *Id.* at 1391. This case was complicated by the ambiguity in the lower court's decision, specifically with respect to whether the forfeiture was contested or whether the remission procedure had not been followed correctly.

55. FED. R. CIV. P. 56; Anthony Grace & Sons, Inc. v. United States, 345 F.2d 808 (Ct. Cl. 1965), *rev'd on other grounds*, 384 U.S. 424 (1966).

especially eschewed when state of mind is an issue[56] or where grave, important, or novel questions of law are involved.[57]

The law is divided now on the relevance of the good faith or innocence of the owner of property that is seized in a forfeiture action. The criteria for justifiable forfeiture are unsettled at this time, but that confusion is a form of relief from the recognized severity of proceedings which would not take the owner's innocence into account. As Judge Wisdom stated in his dissenting opinion in a recent forfeiture case, a rationale that refuses to take cognizance of the innocence of the owner is "barbaric, a vestigial relic of the deodand."[58]

Marsha Rockey Schermer

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56. *See, e.g., In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

57. Zweig v. Hearst Corp., 521 F.2d 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025 (1975).

58. United States v. One 1969 Plymouth Fury Automobile, 509 F.2d 1324, 1325 (5th Cir. 1975) (Wisdom, J., joined by Brown, C. J., and Ainsworth, Dyer, Clark, and Gee, JJ., dissenting), *cert. denied*, 423 U.S. 931 (1975).