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## Forfeiture - Proceedings for Enforcement - An Alleged Owner May Be Required to Show More Than Title and Registration to Establish a Sufficient Property Interest That Will Support Standing to Challenge Forfeiture

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## CASE COMMENTS

### FORFEITURE—PROCEEDINGS FOR ENFORCEMENT—AN ALLEGED OWNER MAY BE REQUIRED TO SHOW MORE THAN TITLE AND REGISTRATION TO ESTABLISH A SUFFICIENT PROPERTY INTEREST THAT WILL SUPPORT STANDING TO CHALLENGE FORFEITURE

Albert Kammerer and appellant J. Michael Stumpff jointly searched for an aircraft to facilitate their drug trafficking activities.<sup>1</sup> They purchased a used Douglas DC-4 aircraft and arranged to have it flown to the Kansas City municipal airport where the aircraft was hangared pending certain repairs.<sup>2</sup> Kammerer supplied the purchase money for the aircraft, but Stumpff completed the sales transaction and placed the aircraft title and registration in his name.<sup>3</sup> Taped conversations established that the aircraft was intended to be used by the two men primarily for the transportation of marijuana into the United States from Mexico.<sup>4</sup> Based on the wiretap evidence, Drug Enforcement Administration (DEA) officers procured a search warrant and seized several thousand pounds of marijuana and hashish from Kammerer's residence.<sup>5</sup> Subsequently, the DEA seized the aircraft and initiated

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1. *United States v. One 1945 Douglas C-54 (DC-4) Aircraft, Serial Number 22186*, 604 F.2d 27 (8th Cir. 1979), *cert. denied*, 102 S. Ct. 1002 (1982).

2. 604 F.2d at 27.

3. *Id.* The United States government first learned of the existence of the aircraft from recorded telephone conversations between Kammerer and Stumpff. *Id.*

4. *Id.* at 27-28. The conversations were recorded pursuant to a court authorized wiretap on Kammerer's telephone. *Id.* at 27.

5. *Id.* Kammerer pleaded guilty to charges relating to possession of the drugs. *Id.* at 28. Apparently no charges were filed against Stumpff.

forfeiture proceedings against it under 21 U.S.C.A. § 881(a)(4).<sup>6</sup> Stumpff was granted leave to intervene on the basis of his status as owner of record.<sup>7</sup> The district court found that the evidence showing the aircraft was "intended to be used" to transport drugs was sufficient to meet the requirements of section 881(a)(4).<sup>8</sup> The district court ordered the aircraft forfeited and Stumpff appealed.<sup>9</sup> On appeal, the United States Court of Appeals for the Eighth Circuit questioned the constitutionality of the federal forfeiture statute as applied by the district court and ruled that the issue whether Stumpff had standing to challenge the forfeiture had to be considered.<sup>10</sup> The case was remanded.<sup>11</sup> On remand the district court found that Kammerer was the true owner even though Stumpff held the title and registration to the aircraft.<sup>12</sup> The district court dismissed Stumpff's intervention and again Stumpff appealed.<sup>13</sup> The Court of Appeals for the Eighth Circuit affirmed the district court decision and *held* that although evidence showed the claimant was the registered legal title holder of the aircraft, other evidence established that the title was placed in the claimant's name merely as a "subterfuge" to conceal the financial affairs and drug dealings of Kammerer.<sup>14</sup> Therefore, the alleged owner, Stumpff, lacked sufficient interest in the aircraft to have standing to

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6. 21 U.S.C.A. § 881(a)(4) (West 1981). The statute provides:

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

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or *are intended for use*, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances].

*Id.* (emphasis added).

7. 604 F.2d at 28. Kammerer chose not to contest the forfeiture. *Id.* at 29.

8. *Id.* The court rejected Stumpff's claim that such an application of the statute was unconstitutional because there was no overt act linking the aircraft to a specific illegal transaction. *Id.* at 28. The Government, on the other hand, suggested that although Stumpff was the owner of record, he was not the true owner and therefore lacked standing to challenge the forfeiture. *Id.* at 29.

9. *Id.* at 27. The district court ruled that since the application of the statute was constitutional, it was unnecessary to address the question of standing because no party had a valid defense to the forfeiture. *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 461 F. Supp. 324, 326 (W.D. Mo. 1978), *aff'd*, 647 F.2d 864 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

10. 604 F.2d at 29. The court of appeals noted that it is the owner or owners of a res who have standing to challenge a forfeiture. The court stated that possession of bare legal title to the res, however, may be insufficient to establish ownership. *Id.* at 28.

11. *Id.* at 29. The court of appeals remanded the case without vacating the district court's order of forfeiture because the court of appeals doubted Stumpff's standing to challenge that order. *Id.*

12. *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, Serial Number 22186, 647 F.2d 864, 865 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982). The district court found that since Kammerer was the true owner, Stumpff had no interest in the aircraft and therefore lacked standing to challenge the forfeiture. 647 F.2d at 865.

13. 647 F.2d at 865. The district court dismissed Stumpff's intervention based on its decision that Stumpff lacked standing. *Id.* at 866.

14. *Id.* The Court of Appeals for the Eighth Circuit found that evidence presented to the district court was consistent with Kammerer's dominion and control over the aircraft. The evidence suggested that Stumpff was merely Kammerer's front-man and, therefore, Stumpff was not the true owner of the aircraft. *Id.* at 867.

challenge the forfeiture.<sup>15</sup> *United States v. One 1945 Douglas C-54 (DC-4) Aircraft, Serial Number 22186*, 647 F.2d 864 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

English common law required that a personal chattel that was responsible for the death of any reasonable creature be forfeited to the Crown as a deodand.<sup>16</sup> The King then would provide money for masses<sup>17</sup> or other pious uses.<sup>18</sup> When its religious application ceased, the deodand became a source of revenue for the Crown.<sup>19</sup> The forfeiture of the deodand was justified as a penalty for carelessness.<sup>20</sup> Other forfeitures also resulted at common law from felony or treason convictions.<sup>21</sup> Because such conduct was a breach of the King's peace, denial of the right to own property was deemed to be justifiable punishment; therefore the convicted felon's property was forfeited to the Crown.<sup>22</sup>

In addition to common law forfeiture, English law also provided for statutory forfeiture of offending objects used in violation of customs and revenue laws.<sup>23</sup> Such forfeitures were enforced under in rem proceedings<sup>24</sup> against the objects themselves rather than under in personam proceedings<sup>25</sup> against the object's owner.<sup>26</sup>

The deodand did not become part of the common law of the

15. *Id.* at 865. The court of appeals found that the district court's conclusion that Stumpff was not the true owner was supported by the evidence and not clearly erroneous. *Id.* at 866.

16. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974). Deodand is derived from the Latin term *Deo dandum*, meaning a thing to be given to God. If a man's death was caused by a harmful chattel, the value of the chattel was forfeited to the King in the belief that the King would provide money for masses to be said for the good of the dead man's soul. *Id.* at 681.

17. *Id.* The origins of the deodand are traceable to ancient Biblical practices, which held that the instrument of death was the accused and religious atonement was required. *See Exodus 21:28* ("If an ox gore a man or woman, and they die, then the ox shall be surely stoned, and his flesh shall not be eaten.").

18. 416 U.S. at 681 (citing 1 W. BLACKSTONE, COMMENTARIES \*300). In addition to money for masses, other deodand proceeds were distributed in alms by the high almoner as charitable donations to the poor. BLACK'S LAW DICTIONARY 392 (5th ed. 1979).

19. 416 U.S. at 681. The deodand institution was abolished in England in 1846. *Id.* n. 19.

20. *Id.* The abolition of the deodand in England was linked to the passage of Lord Campbell's Act which created a cause of action for wrongful death. *Id.*

21. *Id.* at 682. A convicted felon forfeited his personal property to the King and his land escheated to his lord. A convicted traitor forfeited all his property, real and personal, to the King. *Id.*

22. *Id.* In 1870, England abolished most forfeitures of real and personal property from those convicted of felonies or treason. *Id.* n. 20.

23. 416 U.S. at 682. The United States Supreme Court suggests that statutory forfeitures were probably caused by a merger of the deodand tradition and the belief that the right to own property could be denied a wrongdoer. *Id.*

24. In rem is a technical term used to designate proceedings or actions instituted against a thing as opposed to an action against a person. In the strict sense of the term, a proceeding in rem is an action taken directly against property or is one brought to enforce a right in the property itself. BLACK'S LAW DICTIONARY 713 (5th ed. 1979). *See United States v. One 1940 Packard Coupe*, 36 F. Supp. 788 (D. Mass. 1941) (in an in rem proceeding against an automobile the law ascribes to the object the power of complicity and guilt in the offense).

25. An in personam proceeding is an action seeking judgment against a person involving his personal rights and is based on jurisdiction over the person himself rather than on jurisdiction over his property. BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

26. 416 U.S. at 682. The English Court of Exchequer used in rem proceedings to enforce both statutory forfeitures and common law felony forfeitures. *Id.*

United States.<sup>27</sup> Both English and local forfeiture statutes, however, were enforced by colonial common law courts and later, by state courts during the period of Confederation.<sup>28</sup> Today forfeiture statutes exist in the United States on both the state and federal levels.<sup>29</sup> The purpose of criminal forfeiture statutes is both to prevent further illicit use of the property and to impose an economic penalty, thereby making such illegal behavior unprofitable.<sup>30</sup> Forfeiture statutes also help compensate the government for its enforcement efforts and provide a method of obtaining security for subsequently imposed penalties and fines.<sup>31</sup> The modern statutes are designed to reach almost any property that may be used in a criminal enterprise.<sup>32</sup>

Forfeiture proceedings are technically in rem actions and therefore civil in nature.<sup>33</sup> The effect of a forfeiture, however, is punitive and therefore criminal in fact.<sup>34</sup> The United States Supreme Court held in *Boyd v. United States*<sup>35</sup> that forfeitures are quasi-criminal.<sup>36</sup> Forfeiture proceedings initiated against property may occur under one of a number of federal statutes, depending on

27. *Id.* The doctrine of the deodand was considered so repugnant to American ideas of justice that it was not included as part of the common law of the United States. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, \_\_\_, 188 S.W. 54, 55 (1916). See *King v. United States*, 364 F.2d 235 (5th Cir. 1966) (court rejects the United States' theory that the rifle used to assassinate President Kennedy should be forfeited as a deodand).

28. *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1943).

29. 416 U.S. at 683.

30. *Id.* at 686-87. When forfeiture provisions are applied to lessors and other parties who are innocent of any wrongdoing, confiscation may have the desirable effect of causing those parties to exercise greater care when transferring possession of their property. *Id.* at 688.

31. *E.g.*, *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (forfeiture not barred by claimant's acquittal).

32. 416 U.S. at 683. *But see* *United States v. Smith*, 497 F. Supp. 459 (N.D. Iowa 1980) (criminal defendant entitled to return of \$25,000 he paid in an attempted drug purchase because forfeiture statute had not yet been amended to include such money); *United States v. Ortega*, 450 F. Supp. 211 (S.D.N.Y. 1978) (drug purchase money returned to convicted defendant because forfeiture statute did not include purchase money).

33. *Boyd v. United States*, 116 U.S. 616, 633-34 (1886). In criminal proceedings, rule 41(e) of the Federal Rules of Criminal Procedure provides a remedy for a defendant aggrieved by an illegal seizure. Rule 41(e) states in part:

A person aggrieved by an unlawful search and seizure may move . . . for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

FED. R. CRIM. P. 41(e). See *United States v. One Residence and Attached Garage of Anthony J. Accordo*, 603 F.2d 1231 (7th Cir. 1979) (seized money returned under rule 41(e) motion because government failed to show any connection between it and any alleged criminal act of the defendant); *United States v. United States Currency Amounting to the Sum of \$20,294.00 More or Less*, 495 F. Supp. 147 (E.D.N.Y. 1980) (essential differences exist between civil forfeiture and rule 41(e) proceedings).

34. 116 U.S. at 633-34. The United States Supreme Court in *Boyd* addressed the issue whether the compulsory production of a man's private papers in a forfeiture proceeding against him constituted an unreasonable search and seizure under the fourth amendment. *Id.* at 622.

35. 116 U.S. 616 (1886).

36. *Id.* at 633-34. See also *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (forfeiture proceedings are quasi-criminal in character and, therefore, the exclusionary rule relating to illegal search and seizure applies).

the specific violation involved.<sup>37</sup> The general procedure is that once the property is seized, the seizing officer submits a report, which includes an appraised value of the property, to the United States attorney for the district in which the property is seized.<sup>38</sup> If the value of the property is \$10,000 or less, notice of the intent to forfeit is published.<sup>39</sup> If no claim to the property is filed within twenty days, the property is forfeited and sold without further proceedings.<sup>40</sup> If, however, the property is valued at more than \$10,000, then a full condemnation hearing is required.<sup>41</sup> It is at this condemnation hearing that a claimant may intervene and raise all claims and defenses.<sup>42</sup> From the outset the burden of proof is on the

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37. See, e.g., 8 U.S.C.A. § 1324 (West Supp. 1982) (illegal aliens); 18 U.S.C.A. § 1955(d) (West Supp. 1982) (violation of gambling laws); 19 U.S.C.A. § 1581 (West 1980) (customs violations); 26 U.S.C.A. § 5872 (West 1980) (firearms violations); 26 U.S.C.A. § 7302 (West 1967) (property used in violation of the Internal Revenue Code). Commonly used forfeiture statutes are 21 U.S.C.A. § 881 (West 1981) (controlled substances) and 49 U.S.C.A. § 781 (West 1963 & Supp. 1982) (contraband). Each forfeiture statute has a provision stating that customs laws relating to forfeiture proceedings are to be applied. For example, 21 U.S.C.A. § 881(d) provides that the "law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the custom laws . . . shall apply to seizures and forfeitures incurred . . . under the provisions of this subchapter." 21 U.S.C.A. § 881(d) (West 1981). 26 U.S.C.A. § 7327 states that "[t]he provisions of law applicable to the remission or mitigation by the Secretary or his delegate of forfeitures under the customs laws shall apply to forfeitures incurred or alleged to have been incurred under the internal revenue laws." 26 U.S.C.A. § 7327 (West 1967).

38. 19 U.S.C.A. § 1603 (West 1980). Section 1603 states:

[I]t shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred . . . and to include in such a report a statement of all facts and circumstances . . . and a citation to the statute . . . believed to have been violated. . . .

*Id.*

19 U.S.C.A. § 1606 states that "[t]he appropriate customs officer shall determine the domestic value, at the time and place of appraisement, of any vessel, vehicle, merchandise, or baggage seized under the customs laws." 19 U.S.C.A. § 1606 (West 1980).

39. 19 U.S.C.A. § 1607 (West 1980). Section 1607 provides:

[T]he appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct.

*Id.*

40. 19 U.S.C.A. § 1609 (West 1980). This section provides for an administrative forfeiture proceeding and states that if no claim is filed within 20 days, then:

The appropriate customs officer shall declare the vessel, vehicle, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold . . . and shall deposit the proceeds of sale, after deducting the actual expenses of seizure, publication, and sale in the Treasury of the United States.

*Id.*

41. 19 U.S.C.A. § 1610 (West 1980). The statute requires that the appropriate customs officer transmit a report of the case to the local United States district attorney for the institution of proper proceedings for the condemnation of the property. *Id.*

42. *Id.* See *United States v. One 1975 Lincoln Continental*, 72 F.R.D. 535 (S.D.N.Y. 1976) (forfeiture proper because claimant offered no proof "absolving the vehicle from culpability"). It has been consistently held that innocence of the owner is not a valid defense to the forfeiture of property used in a criminal enterprise. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

claimant to show why the property should not be forfeited.<sup>43</sup> As a general procedure, enough facts are admitted or stipulated at the hearing to support a motion for summary judgment.<sup>44</sup>

Innocent parties and lienholders with an interest in the seized property may petition for remission<sup>45</sup> or mitigation<sup>46</sup> rather than challenge the forfeiture itself.<sup>47</sup> Under this procedure, the petitioner must aver that he had no knowledge or reason to believe that the property was being used in violation of the law.<sup>48</sup> The decision whether to grant the petition is within the sole discretion of the administrative officer<sup>49</sup> involved in the forfeiture proceedings and is generally not reviewable by the courts.<sup>50</sup> Under a petition for remission or mitigation the administrative officer is not required to return the forfeited property to the petitioner.<sup>51</sup> Rather, if the petition is approved, the administrative officer may, at his discretion, order the forfeited property sold and the proceeds

43. 19 U.S.C.A. § 1615 (West 1980). The statute provides that in all suits or actions brought for the forfeiture of property seized for violation of any custom law, the burden of proof shall rest on the claimant. If suit is brought for return of the seized goods, the burden of proof will be on the government until it has shown probable cause for seizure. Thereafter, the burden will shift to the plaintiff. *Id.*

44. Since forfeiture cases generally involve only issues of law and not issues of fact, a summary judgment serves to condense the proceedings yet preserves the parties' right to appeal. *See* FED. R. CIV. P. 56 (a summary judgment shall be rendered when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law).

45. At common law remission was the act by which a forfeiture or penalty was forgiven. BLACK'S LAW DICTIONARY 1163 (5th ed. 1979). The purpose of remission statutes is to permit the executive power to relieve the harshness of forfeiture. *United States v. One 1961 Cadillac*, 337 F.2d 730, 733 (6th Cir. 1964). This power is discretionary so that the executive officer may "temper justice with mercy and leniency." *Id.*

46. Mitigation is the reduction, abatement, or diminution of a penalty imposed by law. BLACK'S LAW DICTIONARY 904 (5th ed. 1979).

47. 19 U.S.C.A. § 1618 (West 1980). The statute provides that the Secretary of the Treasury may remit or mitigate any penalty or forfeiture if he finds that such penalty or forfeiture was incurred without willful negligence or without any intention on the part of the claimant to violate the law. The Secretary may remit or mitigate the forfeiture on such terms and conditions as he deems reasonable and just, including the discontinuance of any related prosecution. *Id.*

48. 28 C.F.R. § 9.5(c) (1981). The section requires that a determining official shall not remit or mitigate a forfeiture unless the petitioner establishes a valid, good faith interest in the property and establishes that he at no time had knowledge or reason to know that the property was being used in violation of the law. If the petitioner is a lienholder, he must also establish that he had no knowledge that the owner had a reputation for violating the law. *Id.*

The petitioner may not, however, challenge the forfeiture statute's constitutionality. 28 C.F.R. § 9.5(b) (1981). The section states that "[t]he Determining Official shall not consider whether the evidence is sufficient to support the forfeiture since the filing of a petition presumes a valid forfeiture." *Id.*

49. If a petition is filed under 19 U.S.C.A. § 1618, the administrative officer is the Secretary of the Treasury. 19 U.S.C.A. § 1618 (West 1980). If a petition is filed under 28 C.F.R. § 9.3, the United States Attorney General is the administrative officer. 28 C.F.R. § 9.3 (1981).

50. *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233 (9th Cir. 1976) (United States Attorney General's denial of a petition for remission is unreviewable); *United States v. One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), *cert. denied*, 409 U.S. 980 (1972) (judicial review of mitigation or remission decisions is restricted to whether there is statutory authority for such decisions and not to whether the administrative officer correctly decided the merits of the petition).

51. 28 C.F.R. § 9.7(h) (1981). This section states that when the owner of seized property elects not to comply with the conditions imposed by the administrative officer for release of the property, the custodian of the property may sell it. After deducting all costs incurred by the government incident to the seizure, forfeiture, and sale of the property, the custodian pays the owner the balance, if any. *Id.*

distributed to the innocent party or lienholder, less any costs incurred by the government.<sup>52</sup> Courts have made a distinction between property that is contraband per se and derivative contraband.<sup>53</sup> Contraband per se, or its value, probably will not be returned under a petition for remission or mitigation since mere possession of such property is illegal.<sup>54</sup>

Neither Kammerer nor Stumpff petitioned for remission or mitigation in *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*,<sup>55</sup> nor did Kammerer choose to become a party to the forfeiture proceedings.<sup>56</sup> The record before the circuit court in the first appeal consisted of a Federal Aviation Administration (FAA) registration certificate issued in Stumpff's name, testimony by Kammerer that he considered himself the true owner of the aircraft, and a blank bill of sale given to Kammerer by Stumpff, which Kammerer used as collateral for bail bond money.<sup>57</sup> Based on this evidence the court questioned whether Stumpff had standing to challenge the forfeiture, and the court remanded the case for further proceedings.<sup>58</sup>

On remand the district court was presented with additional evidence and stipulations.<sup>59</sup> The new evidence consisted of receipts showing that Stumpff had purchased de-icer boots for the aircraft, that Stumpff had paid fifty dollars for two months storage and maintenance, and that Stumpff had rented equipment to use in repairing the aircraft.<sup>60</sup> Based on this evidence, the district court ruled that Stumpff lacked standing to challenge the forfeiture.<sup>61</sup>

The court of appeals affirmed the district court's ruling

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52. *Id.* § 9.7(i) (1981). This section provides that although a person holds sufficient interest in the seized property so that he is eligible to have the property released to him, the property may nevertheless be retained by the government for official use. The agency which retains the property must, however, pay the eligible person an amount equal to his net equity, less the government's costs incident to seizure and forfeiture. *Id.*

53. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). Contraband per se is property or objects of which mere possession is illegal. Derivative contraband is property that, though not illegal to possess, is put to an illegal use. *Id.* at 699.

54. *Id.* The return of contraband per se would frustrate the express public policy against possession of such property. *Id.*

55. 647 F.2d 864 (8th Cir. 1981). Because both Kammerer and Stumpff intended to use the aircraft for an illegal purpose, neither would qualify for remission or mitigation. See 28 C.F.R. § 9.5(c), *supra* note 48.

56. 647 F.2d at 865. Kammerer did not contest the aircraft's forfeiture. *Id.*

57. *Id.* at 865-66 (citing 604 F.2d 27). Other evidence included a statement of expenses incurred by Stumpff for maintenance and storage, the aircraft's bill of sale listing Stumpff as the purchaser, a receipt given to Stumpff in exchange for a \$10,000 deposit he made on the purchase price of the aircraft, wiretapped conversations between Stumpff and Kammerer in which Kammerer agreed to supply the purchase money for the aircraft, and statements by Kammerer's wife that she discussed with Stumpff the possibility of her husband purchasing an airplane. 647 F.2d at 865-66.

58. 604 F.2d at 29.

59. 647 F.2d at 866.

60. *Id.* There was also evidence that Stumpff failed to pay monthly maintenance costs on the aircraft as prescribed by an agreement between Stumpff and the government. *Id.*

61. *Id.* The district court expressly found that title to the aircraft was placed in Stumpff's name merely as a subterfuge to conceal the financial affairs and drug dealings of Kammerer. *Id.*

because Kammerer put up all the money for the purchase of the aircraft and considered himself the true owner.<sup>62</sup> Also of importance to the court was Stumpff's tender of a blank bill of sale for the aircraft to Kammerer following Kammerer's arrest.<sup>63</sup> The court found that Kammerer's use of the bill of sale as collateral for bond money was evidence that Kammerer had dominion and control over the aircraft, and therefore Kammerer, not Stumpff, was the true owner of the aircraft.<sup>64</sup> Citing 49 U.S.C.A. § 1401<sup>65</sup> the court dismissed the appearance of Stumpff's name on both the FAA registration certificate and the aircraft's bill of sale as not determinative of the rights of ownership between Kammerer and Stumpff. The court concluded that those documents were not documents of title.<sup>66</sup> Since Kammerer was the true owner of the aircraft, the court of appeals concurred with the district court and ruled that the aircraft was placed in Stumpff's name merely as a "subterfuge" to conceal the drug dealings of Kammerer.<sup>67</sup>

62. *Id.* at 867. Kammerer first testified that the aircraft was put in Stumpff's name because he, Kammerer, did not particularly want to own an airplane. Further questioning revealed that Kammerer lacked the financial capacity to be listed as the aircraft's owner on public records. 604 F.2d at 29. The court, however, does not explain in what way Kammerer lacked this capacity.

63. 604 F.2d at 29. On January 1, 1978, Stumpff, at Kammerer's request, tendered a blank bill of sale for the aircraft to Kammerer. However, Kammerer did not complete the document nor register it with the FAA. Rather, he used the bill of sale as collateral to obtain bail bond money. *Id.*

64. 647 F.2d at 867. The Eighth Circuit in the first appeal suggested that bare legal title of an object may be insufficient to establish ownership. 604 F.2d at 28. See *United States v. One 1971 Porsche Coupe*, 364 F. Supp. 745 (E.D. Pa. 1973). In *Porsche* the court determined that the owner of record of the forfeited vehicle was only a "nominal owner" without standing to challenge the forfeiture since he had made a gift of the car to his son, who had sole possession, dominion, and control over it. *Id.* at 748.

The Court of Appeals for the Eighth Circuit also broadly defined ownership as a possessory interest in a res with its attendant characteristics of dominion and control. 604 F.2d at 28. See *United States v. Fifteen Thousand Five Hundred Dollars*, 558 F.2d 1359 (9th Cir. 1977). In *Fifteen Thousand* the court ruled the claimant lacked standing because she claimed an interest in the safe-deposit box in which the forfeited money was found rather than an interest in the money itself. *Id.* at 1361.

65. 49 U.S.C.A. § 1401 (West 1976) (registration of aircraft nationality). The statute states in pertinent part that "[r]egistration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue." *Id.*

66. 647 F.2d at 866 (citing 604 F.2d at 29). *Bul see* 49 U.S.C.A. §§ 1403, 1406 (West 1976). Section 1403 provides in part:

(a) The Secretary of Transportation shall establish. . . a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States. . . .

(c) No conveyance. . . shall be valid in respect of such aircraft. . . against any person other than the person by whom the conveyance or other instrument is made or given. . . until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation. . . .

(d) Each conveyance. . . recorded. . . under the system provided for in subsection

(a). . . of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordations. . . .

*Id.* § 1403 (a), (c), (d) (emphasis added).

Section 1406 provides that "[t]he validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered." *Id.* § 1406. (emphasis added).

67. 647 F.2d at 866.

Therefore, the court of appeals found that Stumpff held an insufficient interest in the aircraft on which to base standing to challenge the forfeiture,<sup>68</sup> and hence, the district court had properly dismissed Stumpff's intervention.<sup>69</sup>

Because Stumpff lacked standing to challenge the forfeiture, the court did not address the constitutionality of the district court's application of the forfeiture statute.<sup>70</sup> In the first appeal, however, the court commented that the district court's decision raised serious questions concerning the proper construction of the forfeiture statute involved in this case and the constitutionality of its application.<sup>71</sup> The government admitted that it had no evidence to show that either Kammerer or Stumpff actually used the aircraft to transport marijuana.<sup>72</sup> Also, the government was not able to link the aircraft to any specific drug transaction, either past or future.<sup>73</sup> The court agreed with Stumpff that something more than bare "intended for use" was required to uphold forfeiture in this case.<sup>74</sup> However, since it was doubtful that Stumpff had standing to challenge the forfeiture, the court did not rule on the constitutional issue.<sup>75</sup> Further, since Stumpff's second appeal did not reach the

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68. *Id.* at 867. *Accord* United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars (\$364,960.00) in United States Currency, 661 F.2d 319 (5th Cir. 1981) (party challenging forfeiture must first establish an interest in the property sufficient to justify standing). In *United States Currency* two attorneys claimed to have a valid assignment of the seized money from their defendant clients. *Id.* at 322. The Fifth Circuit remanded the case for a determination whether there was a valid assignment and, therefore, a property interest in the attorneys sufficient to support standing to challenge the forfeiture. *Id.* at 328.

69. 647 F.2d 866. The court admits that in some circumstances a bill of sale and registration certificate may be sufficient to establish an ownership interest. *See also* United States v. One (1) Douglas A-26B Aircraft, 436 F. Supp. 1292, 1295-96 (S.D. Ga. 1977) (claimant had standing to challenge forfeiture when the government dealt with the claimant as sole owner, no other party claimed an interest, and the aircraft was registered with the FAA in the claimant corporation's name prior to incorporation). *Cf.* Henry v. Castagnaro, 434 N.Y.S.2d 592 (1980) (claim of equitable ownership is insufficient to uphold standing of a claimant when the motor vehicle is registered in her husband's name); Commonwealth of Pennsylvania v. One 1976 Ford Station Wagon, 395 A.2d 595 (Pa. 1978) (when a wife is not the registered owner, she cannot claim a motor vehicle that has been ordered returned to its registered owner).

70. 647 F.2d at 867.

71. 604 F.2d at 28. The court cites the following cases as general background: United States v. United States Coin & Currency, 401 U.S. 715 (1971); United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2d Cir. 1977); United States v. One 1972 Datsun, 378 F. Supp. 1200 (D.N.H. 1974); United States v. One 1970 Buick Riviera, 374 F. Supp. 277 (D. Minn. 1973). 604 F.2d at 28.

72. 604 F.2d at 28. The wiretap conversations and Kammerer's testimony established only that the men intended to use the aircraft to transport drugs. The men did, however, undertake to have the aircraft repaired and to hire a competent pilot. *Id.*

73. *Id.* The repairs to the aircraft had not even been completed at the time of seizure, nor had a qualified pilot been engaged by either of the two men to fly the aircraft. *Id.*

74. *Id.* *See* United States v. One 1972 Chevrolet Corvette, 625 F.2d 1026 (1st Cir. 1980) (car intended to transport the proceeds of an illegal narcotics sale not subject to forfeiture); United States v. One 1972 Datsun, 378 F. Supp. 1200 (D.N.H. 1974) (forfeiture not justified when the vehicle's only connection to the crime was to lead narcotics agents to the place of sale). *But see* United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2d Cir. 1977) (that the motor vehicle was used to transport drug peddlers to scene of sale or to meeting where sale was proposed was sufficient to justify forfeiture).

75. 604 F.2d at 28. The court stated that the mere fact that the aircraft was registered in Stumpff's name did not determine the right of ownership between Stumpff and Kammerer. Further,

merits of the case, the constitutional issue was never decided.<sup>76</sup>

Based on the Eighth Circuit decision in *One 1945 Douglas DC-4 Aircraft*,<sup>77</sup> it seems unlikely that federal courts will extend forfeitures to include property merely "intended for use" in criminal enterprises unless that property can be linked to a specific illegal transaction.<sup>78</sup> Something more than mere intent will be necessary to keep statutes that include the "intended for use" language within the bounds of constitutionality.<sup>79</sup>

The decision in *One 1945 Douglas DC-4 Aircraft* requires more than bare legal title to establish ownership sufficient to challenge forfeiture.<sup>80</sup> However, the court of appeals did not discuss the effect of 49 U.S.C.A. §§ 1403<sup>81</sup> and 1406<sup>82</sup> on the legal instruments naming Stumpff the owner of the aircraft.<sup>83</sup> Sections 1403 and 1406 would tend to rebut the court's conclusion that the aircraft documents were not documents of title.<sup>84</sup> Because section 1406 requires that state law govern the validity of aircraft title instruments, Missouri law relating to the effect of documents of

the court believed that FAA certificates were issued for registration purposes only and were not certificates of title. *Id.* at 29.

76. The United States Supreme Court has recognized the difficulty of reconciling broad forfeiture statutes with the fifth amendment due process and just compensation clauses. *United States v. United States Coin & Currency*, 401 U.S. at 721. The Court has taken the position that, viewed in their entirety, forfeiture statutes are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise. *Id.* at 721-22.

77. 604 F.2d 27 (remanded to district court); 647 F.2d 864 (8th Cir. 1981) (affirmed unpublished district court's judgment on remand), *cert. denied*, 102 S. Ct. 1002 (1982).

78. *See* *Howard v. Federal Crop Ins. Corp.*, 540 F.2d 695 (4th Cir. 1976) (general legal policy opposed to forfeiture); *United States v. One 1970 Buick Riviera*, 374 F. Supp. 277 (D. Minn. 1973) (forfeiture subject to careful scrutiny by the courts); *United States v. One 1961 Oldsmobile, 4-Door Sedan*, 250 F. Supp. 969 (D.S.C. 1966) (forfeiture enforced only when consistent with both the letter and spirit of the law).

79. *See* *United States v. United States Coin & Currency*, 401 U.S. 715 (1971) (forfeiture statutes are intended to penalize only those significantly involved in a criminal enterprise); *United States v. One 1970 Buick Riviera*, 374 F. Supp. 277 (D. Minn. 1973) (mere use of an automobile to transport a would-be drug buyer to Mexico is not facilitation). Courts are construing the United States Supreme Court's "significant participation" language in *Coin & Currency*, 401 U.S. at 721-22, as intending to restrict the use and application of forfeiture statutes. *See, e.g.*, *United States v. One 1972 Datsun*, 378 F. Supp. 1200, 1204 (D.N.H. 1974) (derivative contraband must be substantially and instrumentally connected with illegal behavior before it is subject to forfeiture).

80. 604 F.2d at 28; *see also* *United States v. One 1975 Pontiac Lemans*, 621 F.2d 444 (1st Cir. 1980) (registration of vehicle in innocent wife's name is not alone sufficient basis on which to challenge forfeiture); *United States v. One 1971 Porsche Coupe*, 364 F. Supp. 745 (E.D. Pa. 1973) (registered owner was only a "nominal owner" who had made a gift of the car to his son, the son had complete dominion and control over the vehicle).

81. 49 U.S.C.A. § 1403 (West 1976).

82. *Id.* § 1406.

83. Most courts hold that § 1401 has preempted the field by enacting a system of aircraft title registration and recordation. Therefore, state recording statutes are inapplicable to instruments of title in aircraft. *State Securities Co. v. Aviation Enterprises, Inc.*, 355 F.2d 225, 229 (10th Cir. 1966) (construing 49 U.S.C.A. § 1401 (West 1976)). However, most courts also hold that Congress did not intend § 1401 to preempt state law that would otherwise govern priorities of lien and title interests in aircraft. *E.g.*, *Haynes v. General Electric Credit Corp.*, 432 F. Supp. 763, 765 (W.D. Va. 1977), *aff'd per curiam*, 582 F.2d 869 (4th Cir. 1978) (construing 49 U.S.C.A. § 1401 (West 1976)).

84. Section 1401 appears to apply only to certificates of registration and therefore would not include a bill of sale. 49 U.S.C.A. § 1401 (West 1976). An aircraft bill of sale would be recorded under § 1403(a), which provides that the Secretary of Transportation shall establish a system for recording any conveyance which affects the title to any civil aircraft. *Id.* § 1403(a).

title should have been applied to determine whether Stumpff or Kammerer had ownership rights in the aircraft.<sup>85</sup>

The North Dakota criminal forfeiture statute is chapter 29-31 of the North Dakota Century Code.<sup>86</sup> Like the federal statutes, section 29-31-06 allows for a procedure similar to a petition for remission or mitigation.<sup>87</sup> However, under the North Dakota statute the petition is presented to a district court rather than to an administrative officer.<sup>88</sup> Therefore, the result is reviewable on the merits by the courts.<sup>89</sup> Further, under the North Dakota statute innocence of the owner of seized property is a defense to forfeiture.<sup>90</sup> Therefore, it appears that the North Dakota forfeiture statute is less harsh than the federal statutes.<sup>91</sup>

In *State v. Simpson*,<sup>92</sup> which was not decided under the North Dakota forfeiture statute, the North Dakota Supreme Court held that there must be a judicial determination, complete with notice to the owner, finding that the seized property was used in a criminal enterprise before personal property could be forfeited.<sup>93</sup> Therefore,

85. See, e.g., *Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust Co.*, 82 Ill. App. 3d 1, 401 N.E.2d 1340 (App. Ct. 1980) (underlying validity of aircraft title instruments is resolved under state law); *J. C. Equipment, Inc. v. Sky Aviation, Inc.*, 498 S.W.2d 73 (Mo. Ct. App. 1973) (questions of validity of title documents are resolved under state law).

86. N.D. CENT. CODE ch. 29-31 (1974) (confiscation of equipment used in commission of crime).

87. *Id.* § 29-31-06 (1974). The statute provides in part:

If . . . any claimant shall prove to the satisfaction of the court that he is the owner of such property or has a valid and bona fide lien thereon duly filed and recorded prior to the time such vehicle was seized and that he had no knowledge of the use of such vehicle or conveyance for such unlawful purpose, the court shall order such property to be surrendered to him, if the owner. If the claimant is a lien holder, the lien shall be foreclosed and the property sold, and the proceeds from such sale shall be applied in payment of the costs of the sale and the satisfaction of the lien or liens.

*Id.*

88. *Id.* Section 29-31-06 also states that "[i]f an answer is filed or a claim made, the district court shall proceed to hear and determine the claim according to law." *Id.* Cf. 28 C.F.R. § 9.3(a) (1981) (a petition for remission or mitigation shall be addressed to the Attorney General).

89. N.D. CENT. CODE § 29-31-06. When a federal petition for remission or mitigation is filed with either the Secretary of the Treasury under 19 U.S.C.A. § 1618 or the United States Attorney General under 28 C.F.R. § 9.3, the administrative officer's decision is not reviewable unless abuse of discretion can be shown. 19 U.S.C.A. § 1618 (West 1980); 28 C.F.R. § 9.3 (1981); see *United States v. One 1973 Buick Riviera*, 560 F.2d 897 (8th Cir. 1977) (overwhelming weight of authority holds that a denial of a petition for remission is not reviewable); *United States v. One 1971 Porsche Coupe*, 364 F. Supp. 745 (E.D. Pa. 1973) (by long-standing, judge-made rule the United States Attorney General's decision is unreviewable).

90. N.D. CENT. CODE § 29-31-02 (1974). If the owner is found innocent of all connection with the felony on which the forfeiture is based, the vehicle is returned to him. *Id.*

91. There are no reported North Dakota cases in which chapter 29-31 of the North Dakota Century Code has been applied.

92. 78 N.D. 440, 49 N.W.2d 790 (1951) (the only North Dakota case dealing with forfeiture of property based on a criminal enterprise, *Simpson* involved the destruction of personal property seized following a raid on a bawdy house).

93. *State v. Simpson*, 78 N.D. 440, 449, 49 N.W.2d 790, 796 (1951). The North Dakota Supreme Court adopts the position that harmless property cannot be summarily forfeited by the exercise of police power. When the taking of property does not involve protecting the public welfare, but rather is intended as punishment for criminal behavior, judicial proceedings are required. *Id.*

it appears that neither North Dakota statutory law nor North Dakota case law allows administrative forfeiture proceedings such as those found in the federal statutes.<sup>94</sup> Hence, all criminal forfeitures in North Dakota will be judicially determined.

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94. N.D. CENT. CODE § 29-31-03 provides that the district court shall order the confiscated property forfeited. N.D. CENT. CODE § 29-31-03 (1974). *Cf.* 19 U.S.C.A. § 1609 (West 1980) (the appropriate customs officer shall declare the property forfeited).