Notre Dame Law Review

Volume 27 | Issue 3 Article 5

5-1-1952

Notes

William J. Hurley

Thomas Meaney

Joseph H. Harrison

Robert F. McCoy

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation

William J. Hurley, Thomas Meaney, Joseph H. Harrison & Robert F. McCoy, *Notes*, 27 Notre Dame L. Rev. 423 (1952).
Available at: http://scholarship.law.nd.edu/ndlr/vol27/iss3/5

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTES

Eminent Domain

Procedure Under The Declaration of Taking Act

> No person shall . . . 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.

In condemnation proceedings this clause has served only as an acknowledgment of a limitation upon the right of the sovereign, and not as the constitutional basis for recognizing the right of eminent domain. In 1876, Justice Strong, speaking for the United States Supreme Court in *Kohl v. United States,*[1] referred to eminent domain as "the offspring of political necessity" and thereafter courts have repeatedly declared the right of eminent domain to be an incident of sovereignty, requiring no constitutional recognition.[2] Although the payment of just compensation is essential, the right of the sovereign to take possession is not denied merely because the payment and the taking are not simultaneous.[3] Similarly, with reference to the vesting of title prior to compensation, early Supreme Court authority [4] doubting the constitutionality of this procedure has been effectively repudiated where the amount of the ultimate award has been allocated.[5]

I.

The Declaration of Taking Act [6] is the statutory scheme which enables the Federal Government to take immediate title to and possession of land, while safeguarding the private landowner's right to just compensation. Passed in the early depression environment of 1931, the direct purpose of the law was to expedite the taking of title to and possession of lands to be used as sites for public works. Immediate taking, accomplished by filing the declaration and deposit-

1 91 U.S. 367, 23 L. Ed. 449, 451 (1876).

2 *E.g.,* Hanson Lumber Co. v. United States, 261 U.S. 581, 43 S. Ct. 442, 444, 67 L. Ed. 809 (1923); City of Oakland v. United States, 124 F. (2d) 959, 963 (9th Cir. 1942), *cert. denied,* 316 U.S. 679, 62 S. Ct. 1106, 86 L. Ed. 1753 (1942); Hessel v. A. Smith & Co., 15 F. Supp. 953, 957 (E.D. Ill. 1936).

3 Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641, 659, 10 S. Ct. 965, 34 L. Ed. 295 (1890).

4 Garrison v. City of New York, 21 Wall. 196, 204, 22 L. Ed. 612 (U.S. 1875).

5 Sweet v. Rechel, 159 U.S. 380, 16 S. Ct. 43, 40 L. Ed. 188 (1895). And only one state constitution containing a provision similar to the Fifth Amendment has been construed to require actual payment of compensation before any taking. Department of Public Works and Buildings v. Gorbe, 409 Ill. 211, 98 N.E. (2d) 730 (1951), discussed in Note, 30 Chi-Kent Rev. 142 (1952).

6 46 Stat. 1421 (1931), 40 U.S.C. §§ 258a-258e (1946).

ing the estimated compensation with the court, eliminated the delay usually connected with litigation on the just compensation question. The acceleration of public construction programs was aimed at relieving the unemployment problem conspicuously pressing at that time.[7] The Act allowed the executive department to irrevocably bind the Government to payment of the final award. The resulting vested right to just compensation was viewed as a complete compliance with constitutional requirements.[8] Prior to the Act, condemnation proceedings in federal courts were generally ruled by state procedure. Only recently, after much debate, was this heterogeneous usage changed.[9] Many states permitted immediate taking where compensation was pledged; thus the Act was the codification of existent but previously unused procedure.[10] Section 4 of the Act proclaims the law to be supplementary to existing governmental powers in condemnation actions. While eminent domain is generally referred to as a concomitant of sovereignty, in practical operation the efficient use of the power depends greatly on the 1931 Act.[11] Efficacious Government action for the common good becomes a clear necessity in national emergencies. That this Act is an important efficiency device is demonstrated by the recent amendments to the Defense Production Act of 1950 which added the declaration of taking procedure.[12]

Although the right to eminent domain is an inherent power of the sovereign, this power lies dormant until specific statutes set out the occasions and conditions for its exercise.[13] In this light the Declaration of Taking Act operates only as an auxiliary statute. In itself it affords no authority to initiate condemnation proceedings; it is a companionate or subsequent procedural device. To illustrate: the Atomic Energy Commission as a federal agency has the power of condemnation under the Atomic Energy Act of 1946.[14] In a condemnation proceeding by the Commission's officers, the Atomic Energy Act would

---

7 H.R. REP. No. 2086, 71st Cong., 3d Sess. 1-2 (1930); SEN. REP. No. 1325, 71st Cong., 3d Sess. 1-2 (1931); 74 CONG. REC. 777 (1930). The reports on a similar bill pertaining to the District of Columbia also contain pertinent references to the *raison d'etre* of this type legislation. H.R. REP. No. 1693, 70th Cong., 1st Sess. 1-4 (1928); SEN. REP. No. 1431, 70th Cong., 2d Sess. 1-5 (1929).

8 Sweet v. Rechel, 159 U.S. 380, 16 S. Ct. 43, 51, 40 L. Ed. 188 (1895).

9 FED. R. CIV. P. 71(a) (effective Aug. 1, 1951). See the collection of materials in 11 F.R.D. 213 (1951), and in Clark, *The Proposed Condemnation Rule,* 10 OHIO ST. L. J. 1 (1949).

10 H.R. REP. No. 2086, 71st Cong., 3d Sess. 1-2 (1930); SEN. REP. No. 1325, 71st Cong., 3d Sess. 1-2 (1931).

11 Clark, *supra* note 9, at 2-3. Judge Clark notes the importance of this Act as a background to any discussion of condemnation procedure.

12 The Amendments were enacted July 31, 1951. Pub. L. No. 96, 82d Cong., 1st Sess. § 101 *et seq.* (July 31, 1951).

13 Secombe v. Milwaukee & St. Paul Ry., 23 Wall. 108, 23 L. Ed. 67 (U.S. 1874); United States v. Parcel of Land, 100 F. Supp. 498, 504 (D. D.C. 1951).

14 60 STAT. 771-2, 42 U.S.C. § 1812(a)(5), § 1813(b) (1946).

vest the Commission with the requisite authority for filing the petition. Then, depending upon the discretion of the Commission, a declaration of taking could be filed pursuant to the Declaration of Taking Act. Of course, both petitions could be filed simultaneously, but the latter would derive its operative effect from the former.

The Act provides that the declaration of taking shall contain or have annexed thereto: [15]

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

After the petition has been filed and the estimated compensation deposited into court, the interest in the land, whether it be a fee simple absolute or a lesser estate, immediately vests in the United States, and upon application to the court the petitioning federal agency may also have immediate possession.[16] As a corollary, upon the filing of the petition the right to just compensation vests in the landowner.[17]

II.

Notwithstanding early Supreme Court decisions [18] upholding statutes which allowed the sovereign possession and title prior to final judgment, the constitutionality of the Act was judicially challenged in *Hessel v. A. Smith & Co.*[19] There the Government, after initiation of condemnation proceedings but prior to final judgment, awarded the defendant the contractual right to demolish the improvements on the premises. The contention of the plaintiff-landowner, in his plea for an injunction until the rendition of the ultimate award, was that the Act was violative of the Fifth Amendment. Summary disposition of this argument resulted when the court declared that the provision for just compensation did not require actual payment in advance of

---

15 46 STAT. 1421 (1931), 40 U.S.C. § 258a (1946).

16 *Ibid.* Where the United States makes an absolute taking, it acquires "a clear title to everything as of the date of the taking." United States v. 53 1/4 Acres of Land, 176 F. (2d) 255, 258 (2d Cir. 1949).

17 46 STAT. 1421 (1931), 40 U.S.C. § 258a (1946) provides: "Upon the filing said declaration of taking and of the deposit . . . the right to just compensation for the same [the lands] shall vest in the persons entitled thereto. . . ."

18 Sweet v. Rechel, 159 U.S. 380, 16 S. Ct. 43, 40 L. Ed. 188 (1895) (state statute); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641, 10 S. Ct. 965, 34 L. Ed. 295 (1890) (federal statute).

19 15 F. Supp. 953 (E.D. Ill. 1936).

the occupancy of the land. With respect to the taking of title, the court concluded that the owner's constitutional prerogative remained intact since the Act provided that: (a) an estimated amount of compensation must be deposited in the court; (b) for any deficiency, the Government is assessed interest at six percent; and (c) upon application to the court, the owner may withdraw the compensation deposited there without prejudice to a subsequent jury trial on the issue of just compensation. Only on one other occasion has validity of the Act been seriously challenged; [20] nowhere has the Supreme Court directly passed upon this issue.

A possible corollary of the right to immediate possession has, however, received two distinctly conflicting interpretations by the district courts in recent cases. The situation arises when the statute vesting power in a federal agency to initiate condemnation proceedings does not expressly provide for the right to immediate possession. Must the Government pursuant to or contemporaneously with the main petition file a declaration of taking? Assuming of course that there are provisions for just compensation, has the Declaration of Taking Act abrogated the court's inherent power to grant immediate possession without specific statutory authority? In *United States v. Fisk Building*,[21] the court, admitting that the question was not free from doubt, held that the pre-existing power of the court had not been supplanted by the Act. Since the court could not see a clear legislative intent to change the decisional law [22] on this point, it concluded that immediate possession could be granted without specific statutory authority. A contrary result was attained in *United States v. Parcel of Land* [23] where the Government's motion for an order for the immediate taking of possession was denied. It is interesting to note that this decision was also based on an interpretation of the legislative intent. The Government had asserted that the Act was not intended to abrogate, limit, or modify the court's inherent power to grant possession. Answering this statement, the decision cited *Catlin v. United States* [24] where

---

20 City of Oakland v. United States, 124 F. (2d) 959 (9th Cir. 1942), *cert. denied*, 316 U.S. 679, 62 S. Ct. 1106, 86 L. Ed. 1753 (1942).

21 99 F. Supp. 592, 595 (S.D. N.Y. 1951).

22 Commercial Station Post Office, Inc. v. United States, 48 F. (2d) 183 (8th Cir. 1931); *see* City of Oakland v. United States, 124 F. (2d) 959 (9th Cir. 1942), *cert. denied*, 316 U.S. 679, 62 S. Ct. 1106, 86. L. Ed. 1753 (1942); Hessel v. A. Smith & Co., 15 F. Supp. 953 (E.D. Ill. 1936).

23 100 F. Supp. 498 (D. D.C. 1951). It is important to note that this case does not expressly come under 46 STAT. 1421 (1931), 40 U.S.C. §§ 258a-258e (1946), but rather under 45 STAT. 1415 (1929), 40 U.S.C. §§ 361 *et seq.* (1946), now covered by D.C. CODE § 16-619 to § 16-644 (1940). The Declaration of Taking Act was patterned after the 1929 Act passed in the District of Columbia. The legislative intent on the essential features of both Acts is similar. See in this respect, H.R. REP. No. 2086, 71st Cong., 3d Sess. 1-2 (1930); SEN. REP. No. 1325, 71st Cong., 3d Sess. 1-2 (1931).

24 324 U.S. 229, 239, 65 S. Ct. 631, 89 L. Ed. 911 (1945).

the Supreme Court, with reference to the Act, spoke of it as "the *additional* right conferred 'to take possession and title *in advance of final judgment.*'"

Both district court opinions discussed *Commercial Station Post Office, Inc. v. United States.*[25] While this case directly supports the *Fisk Building* decision, its one distinguishing feature is that the taking of the particular land by condemnation proceedings was specifically authorized by statute.[26] This was not, however, of deciding influence in *United States v. Parcel of Land;* the weight of the Act, supported by the legislative intent, constrained the court to hold that to acquire immediate possession there must be express statutory authority. Perhaps this conflict will be resolved by the courts in due time by declaring that since the Act was designed to provide merely an optional and supplementary proceeding, to require its utilization when not desired by the Government would be startling and temerarious.

III.

When the Federal Government proceeds under a declaration of taking, an attack on the good faith of the Government by the individual landowner is ineffective to vacate the declaration[27] or to alter the estimated award.[28] Mere filing of the declaration carries with it the presumption of a valid public necessity.[29] While the declaration must aver that the agency has authority and that the use of the property will be a public use, the failure to state proper authority does not go to the jurisdiction of the district court, although it can be a defense if pleaded timely.[30] The title taken is as set forth in the declaration. Thus where the Government took an absolute fee, easement servitudes to which it did not take subject were extinguished, and an attempt by the Government to exclude one of the servitudes by amendment of the declaration was unsuccessful.[31] Generally after filing the declaration and paying the estimated amount of compensation into the registry

---

25 48 F. (2d) 183 (8th Cir. 1931).

26 45 STAT. 1661 (1929).

27 United States v. 6.74 Acres of Land, 148 F. (2d) 618, 620 (5th Cir. 1945).

28 United States v. 48,752.77 Acres of Land, 50 F. Supp. 563, 564-5 (D. Neb. 1943).

29 United States v. 40.75 Acres of Land, 76 F. Supp. 239, 245 (N.D. Ill. 1948).

30 United States v. Nudelman, 104 F. (2d) 549, 552 (7th Cir. 1939), *cert. denied,* 308 U.S. 589, 60 S. Ct. 115, 84 L. Ed. 493 (1939).

31 United States v. Sunset Cemetery Co., 132 F. (2d) 163 (7th Cir. 1943). Amendments in the Government's estimate of just compensation have been allowed in accord with the court's inherent power to permit timely amendments of defective pleadings when no violence is done to the landowner's vested right to a fair award. United States v. 1,997.66 Acres of Land, 137 F. (2d) 8 (8th Cir. 1943). Once the declaration is filed and title has vested, the district court is powerless to dismiss the action. United States v. Hayes, 172 F. (2d) 677 (9th Cir. 1949).

of the court, a judgment on the declaration is rendered. This common practice allows the Government to hold the land under a muniment of title.[32] The usual process after judgment on the declaration involves payment of the estimated sum to the landowner followed shortly thereafter by an extended jury trial on the just compensation issue.[33] In *Catlin v. United States*,[34] the Supreme Court ruled that a judgment on the declaration was not a final appealable order since no hearing on the merits had been conducted. When the Government moves by *ex parte* order to expedite taking, Section 2 of the Act prevents delays by prohibiting premature appeals.[35]

When the Government exercises its condemnation powers, the landowner's claim for compensation arises at the time of the taking.[36] Obviously, the determination of the time of taking is important, for the landowner at that instant, rather than at a prior or subsequent time, has the right to assert the claim. Under the Act the problem arises whenever the Government files a declaration of taking after having acquired possession of the property. In *Anderson v. United States*,[37] condemnation proceedings were instituted under the River and Harbor Act of 1918,[38] and on the same day an order of the court granting immediate possession was issued. Several months later, after a marked increase in market value of the property, the Government filed a declaration of taking and deposited an estimated amount of compensation. The court held that by invoking the Act the Government did not abrogate its original suit, but merely took a further step in a suit already begun. Compensation was computed on the value of the property as of the date possession was acquired, rather than as of the date the declaration was filed.

Admittedly this view accords with common sense and follows from the statement that the Declaration of Taking Act operates only as an auxiliary pleading. However, the case might be considered at variance with the rule stated in *United States v. 150.29 Acres of Land*.[39] Procedurally the facts were the same, with one exception. When the court

---

[32] United States v. 72 Acres of Land, 37 F. Supp. 297, 300 (N.D. Cal. 1941), *aff'd sub nom.* City of Oakland v. United States, 124 F. (2d) 959 (9th Cir. 1942), *cert. denied,* 316 U.S. 679, 62 S. Ct. 1106, 86 L. Ed. 1753 (1942). However, such judgments from the standpoint of vesting title are wholly unnecessary. United States v. Sunset Cemetery Co., 132 F. (2d) 163, 164 (7th Cir. 1943).

[33] See Cobo, City Treasurer v. United States, 94 F. (2d) 351 (6th Cir. 1938).

[34] 324 U.S. 229, 243, 65 S. Ct. 631, 89 L. Ed. 911 (1945).

[35] *Id.,* 324 U.S. at 237-8.

[36] Danforth v. United States, 308 U.S. 271, 283, 60 S. Ct. 231, 84 L. Ed. 240 (1939).

[37] 179 F. (2d) 281 (5th Cir. 1950), *cert. denied,* 339 U.S. 965, 70 S. Ct. 1000, 94 L. Ed. 1373 (1950).

[38] 40 STAT. 911 (1918), 33 U.S.C. § 594 (1946).

[39] 135 F. (2d) 878 (7th Cir. 1943), *cert. denied,* 325 U.S. 882, 65 S. Ct. 1576, 89 L. Ed. 1998 (1945).

granted the order for immediate possession, the Government could only occupy part of the land at that time. The question of "taking" was raised when a Wisconsin tax lien was asserted against the property.[40] The court declared that the Act was "clear" upon this point and held that the taking occurred when the declaration of taking was filed. Since the point was made that the Government acquired only partial possession of the property and not the totality, the ruling would suggest only a limitation upon, and not a clash with, the *Anderson* view. Where the Government had obtained the land by contract which stated that the value of the land was to be determined as of the date of the contract, subsequent condemnation proceedings with a declaration of taking did not effect a change in the contract fixing the value of the land.[41] The date of taking was governed by the contract, although prior to condemnation proceedings.

IV.

Conceding that value at the time of taking is the measure of compensation, nevertheless the formula for arriving at such an amount is in nowise algebraic. In its more commercial sense, just compensation has been defined as the "full and perfect equivalent in money of the property taken." [42] But the formula designed to determine this equivalent has been expressed as the "fair market value" of the land, or the amount in cash a willing buyer would pay to a willing seller.[43] Yet, despite the "willingness" between the hypothetical seller and buyer, the scales of justice seem to overlook the "equivalent in money" when the courts state that the guarantee of just compensation is "for the property, and not to the owner." [44] Payment is made only for the property taken; the consequential losses to the owner are not considered.[45]

Where condemnation proceedings, not under the Act, are initiated and the taking of possession precedes the payment to the landowner,

[40] With reference to the United States, the court stated that it was immaterial when the Wisconsin tax lien attached. Due to the express prohibition in the Wisconsin Constitution, Art. II, § 2, and also because of the theory of dual sovereignty, the State of Wisconsin was prevented from taxing the property of the United States Government. The question was whether the lien attached to the fund deposited into the court — thus requiring a ruling as to the taking.

[41] Bank of Edenton v. United States, 152 F. (2d) 251, 254 (4th Cir. 1945).

[42] United States v. Miller, 317 U.S. 369, 374, 63 S. Ct. 276, 87 L. Ed. 336 (1943).

[43] *Ibid.*

[44] Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S. Ct. 622, 626, 37 L. Ed. 463 (1893).

[45] United States v. Powelson, 319 U.S. 266, 282, 63 S. Ct. 1047, 87 L. Ed. 1390 (1943). *Cf.* United States v. Certain Lands in City of Newark, 183 F. (2d) 320, 321 (3d Cir. 1950); Baetjer v. United States, 143 F. (2d) 391, 396 (1st Cir. 1944), *cert. denied,* 323 U.S. 772, 65 S. Ct. 131, 89 L. Ed. 618 (1944).

he is held to be entitled to interest from the date of the taking to the payment of the award.[46] This constitutional right has been expressly stated in the Declaration of Taking Act[47] which provides that just compensation shall include six percent interest per annum, on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment. It also expressly declares that interest shall not be allowed on so much of the award as shall have been paid into court. Where such interest is allowed, it is not allowed "for the purpose of increasing the compensation, but as a part of the compensation as of the time of taking where delay has occurred in judicially arriving at the amount of compensation and the payment thereof."[48]

In *Oliver v. United States*,[49] this question of awarding interest payments was decided against the landowner. Prior to the condemnation proceedings and the filing of a declaration of taking, the Government had contracted for the purchase of the land.[50] The contract allowed the Government to acquire the land by condemnation if the title to the land should be unsatisfactory, but the valuation of the land was to be controlled by the provisions of the contract. When the declaration of taking was filed, the estimated compensation was much lower than stated in the contract. The landowners asserted the validity of the contract and requested the court to grant them interest at the rate of six percent per annum from the date of the acceptance of the contract by the Government until the balance of the compensation had also been deposited. The request for interest was denied,[51] for the court held that by asserting the validity of the land contract, the landowners were bound by the terms of the contract which contained no stipulation as to interest.[52]

Not only was one of the objectives of the Act to absolve the United States from liability for interest payments after depositing the esti-

---

[46] Seaboard Air Line Ry. v. United States, 261 U.S. 299, 306, 43 S. Ct. 354, 67 L. Ed. 664 (1923). It is not truly interest in the commercial sense but is considered the proper additional sum required to give "just compensation" in case of delay in payment — a rather nebulous distinction at best.

[47] 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1946).

[48] United States v. Certain Land in City of St. Louis, 58 F. Supp. 305 (E.D. Mo. 1944).

[49] 155 F. (2d) 73 (8th Cir. 1946).

[50] The validity of these contracts was finally settled in Muschany v. United States, 324 U.S. 49, 65 S. Ct. 442, 89 L. Ed. 744 (1945).

[51] Where a stipulation to pay interest is missing, or in the absence of a statute allowing it, no interest can be recovered against the United States on unpaid contract claims. Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304, 43 S. Ct. 354, 67 L. Ed. 664 (1923); United States v. Certain Land in City of St. Louis, 58 F. Supp. 305, 308 (E.D. Mo. 1944); United States v. 17,280 Acres of Land, 57 F. Supp. 745, 746 (D. Neb. 1944).

[52] This question was presented in Albrecht v. United States, 329 U.S. 599, 67 S. Ct. 606, 91 L. Ed. 532 (1947). There the Court affirmed the *Oliver* case and impliedly overruled United States v. Baugh, 149 F. (2d) 190 (5th Cir. 1945).

mated award in the court, but an equally beneficial objective was to make the compensation readily available to the landowner.[53] Manifestly, the intention of the legislature was that the amount deposited should be immediately paid to the person so entitled, either the entire amount,[54] or his proportionate share, however small.[55] Naturally, every person having either an interest at law or in equity is entitled to share in the award.[56]

A possible defect in the Act, revealing a safeguard for the landowner, is that while it provides for a deficiency judgment against the United States where the final award is *greater* than the estimated deposit, it is conspicuous in its failure to provide for the situation that might arise where the final award is *less* than the deposit. Is the Government's estimation a bar to its claim that the property is worth less than the amount stated in the declaration? [57] At least one case has shown the discretion of the court in utilizing its power of appellate remittitur.[58]

Once the Government has deposited the money into the registry of the court and has taken title, the problem of the distribution of the fund is left with the court.[59] The Government, as condemner, has discharged its obligation and is not immediately or directly concerned with the distribution.[60] However, the functional disposition of the compensation to those legally entitled to it is clearly an objective of the Act; from the initiation of the proceedings to the final distribution, there is to be only one "continuous integrated process of litigation." [61] Although the court has the duty to properly distribute the

---

53 United States v. 17,280 Acres of Land, 57 F. Supp. 745, 746 (D. Neb. 1944).

54 United States v. Certain Lands in the Borough of Brooklyn, 39 F. Supp. 91, 94 (E.D. N.Y. 1941).

55 *Id.* at 99.

56 Swanson v. United States, 156 F. (2d) 442 (9th Cir. 1946), *cert. denied sub nom.* Spokane Portland Cement Co. v. Swanson, 329 U.S. 800, 67 S. Ct. 492, 91 L. Ed. 684 (1947).

57 See United States v. 17,280 Acres of Land, 47 F. Supp. 267 (D. Neb. 1942), for a discussion of this problem.

58 United States v. Certain Parcels of Land, 149 F. (2d) 81, 83 (5th Cir. 1945).

59 United States v. 19,573.39 Acres of Land in Cheyenne County, 70 F. Supp. 610, 612 (D. Neb. 1947), *aff'd sub nom.* State of Nebraska v. United States, 164 F.(2d) 866 (8th Cir. 1947), *cert. denied,* 334 U.S. 815, 68 S. Ct. 1070, 92 L. Ed. 1745 (1948); United States v. Certain Parcels of Land in Prince George's County, 40 F. Supp. 436, 443 (D. Md. 1941).

60 *Ibid.*

61 Hopkins v. McClure, 148 F. (2d) 67, 70 (10th Cir. 1945) (petition to intervene to assert a lien on an alimony judgment allowed); Swanson v. United States, 156 F. (2d) 442 (9th Cir. 1946), *cert. denied sub nom.* Spokane Portland Cement Co. v. Swanson, 329 U.S. 800, 67 S. Ct. 492, 91 L. Ed. 684 (1947) (mortgagee's right to the fund allowed).

funds, the court is not an investigator; the Government must supply the complete list of persons entitled to share in the award. Where this is done, if the court should make a mistake in the distribution, the remedy would be by appeal; no claim against the United States could be asserted.[62]

In resolving claims for liens and other charges out of the deposited fund, the court exercises a general equitable function.[63] When the money is placed in the registry of the court at the time of the declaration, it stands in place of the land and from it claims of lienholders are satisfied. This satisfaction applies only to liens which had vested when the United States took title.[64] All liens must be existent and not mere potentialities.[65] Reasonable attorneys' fees are properly chargeable against the sum deposited.[66] A lienholder with a valid claim cannot be deprived of his day in court to assert his right. Whether he is a necessary party in condemnation proceedings is immaterial as far as his constitutional right to just compensation is concerned, as long as his interest is protected in a practical manner.[67]

Conclusion

Undoubtedly, the Declaration of Taking Act serves as a helpful auxiliary to the federal power of eminent domain. Constitutionally sound, the Act seeks to mollify the friction between Government and landowner. The Government immediately acquires title to the land, provided the compensation therefor is then available, via the court, to the landowner. Provisions regulating interest on deficiency estimates and the distribution of funds are also embraced within the terms of the Act.

Although the need for expeditious acquisition of land during the crises of national emergency and war is obvious, some might question the use of the Act at other times. However, the benefits derived from efficient condemnation for any lawful Government use, in war or peace, should dispel any doubts concerning the perpetual propriety of the Act. The Act affords the Federal Government a uniform, immed-

---

62 United States v. Certain Parcels of Land in Prince George's County, 40 F. Supp. 436, 443 (D. Md. 1941).

63 46 STAT. 1421 (1931), 40 U.S.C. § 258a (1946); United States v. Certain Land in City of St. Louis, 29 F. Supp. 92 (E.D. Mo. 1939).

64 United States v. Certain Parcels of Land in Philadelphia, Pa., 130 F. (2d) 782 (3d Cir. 1942). The court cannot invalidate an entire state tax lien or fix the amount of taxes due — local law governs this. Collector of Revenue v. Ford Motor Co., 158 F. (2d) 354 (8th Cir. 1946).

65 People of Puerto Rico v. United States, 131 F. (2d) 151, 152 (1st Cir. 1942), *cert. denied,* 318 U.S. 775, 63 S. Ct. 832, 87 L. Ed. 1144 (1943).

66 United States v. Moulton & Powell, 188 F. (2d) 865 (9th Cir. 1951).

67 Thibodo v. United States, 187 F. (2d) 249, 256 (9th Cir. 1951).

iate procedure, and the resultant reduction in expense, delay and confusion, so often present in the former condemnation methods, is indeed commendable. Available under this legislation is a procedure which patently allows for, and should result in, Federal Government efficiency.

William J. Hurley

Thomas Meaney, Jr.

Federal Statutes

Operation of Federal Provisions Governing Forfeiture of Vehicles Used in Violating Federal Laws

Of great significance today because of an increasing number of narcotics violations is 49 U.S.C. § 782.[1] This statute provides that any vessel, vehicle or aircraft which is used in violation of the narcotics[2] and counterfeiting laws[3] or the National Firearms Act,[4] or "upon, in, or by means of which" a violation takes place, shall be forfeited. Specifically excepted is a vehicle whose owner can establish that the violation was committed by one who had secured possession of the vehicle in violation of the criminal laws of the United States or any state. The liability of a common carrier is limited, in the case of a railway car or engine, to situations in which the owner was, at the time of the violation, a consenting party or privy. The pilot, master, conductor, driver or any other person in control as well as the owner, can subject the vehicle, vessel, or aircraft to forfeiture.[5]

The discussion here will be concerned primarily with the narcotics phase of Section 782 operations as applied to vehicles, especially those owned by innocent lienors, mortgagees and bailors.

The purpose of 49 U.S.C. § 782, as enunciated by the House Ways and Means Committee, is to strike at the pocketbook of the criminal and to deprive him of the "operating tools" of his "trade."[6] The

---

1 53 Stat. 1291 (1939), 49 U.S.C. § 782 (1946). While the entire Chapter 11 in Title 49, *i.e.*, §§ 781-8, governs forfeiture, Section 782 is the operative provision and the others are merely ancillary to it. Thus only Section 782 will be referred to in this note, except when specific clauses of the other Sections are called into play.

2 Int. Rev. Code §§ 2550-606.

3 35 Stat. 1115 (1909), 18 U.S.C. § 262 (1940), as amended, 18 U.S.C. § 471 *et seq.* (Supp. 1951).

4 48 Stat. 1236 (1934). This Act, still referred to in the text of Section 781, was repealed by 53 Stat. 1 (1939) and is now incorporated in Int. Rev. Code §2720.

5 53 Stat. 1291 (1939), 49 U.S.C. § 782 (1946).

6 H.R. Rep. No. 1054, 76th Cong., 1st Sess. 2 (1939).

Committee urged passage of the Act stating (1) that the existing statute was inadequate; (2) that a new statute was necessary to restrict the availability of transportation used to violate the narcotics laws; and (3) that vehicles thus forfeited would be available to the Federal Government for enforcing the laws.[7] However, the underlying purpose is not always served because often it is not the pocketbook of the criminal that suffers. The only remedy furnished innocent third party lienors, mortgagees, or owner-bailors by the present Act is an appeal to the Secretary of the Treasury.[8]

Discussion of the instant law, particularly its remedial provisions, focuses attention on latent problems, not unique to Section 782, which arose under other statutes of similar harshness.[9] In contrast to these are the mitigating provisions applied since 1935 in dealing with violations of the liquor laws.[10]

Ever since the adoption of the first forfeiture statutes, courts have endeavored to determine the nature of a forfeiture proceeding — is the owner or the object the defendant? Is the proceeding *in personam* or *in rem*? Likewise courts have been faced with constitutional objections to the proceedings. When the user of the vehicle is its owner and he has been acquitted or convicted in a prior criminal action, it has been contended that the former proceeding violated the rule against double jeopardy or that the matter was res judicata.[11] When the person claiming an interest in the automobile is an innocent third party (bailor, lienor, or mortgagee), a question of deprivation of property without due process of law has been raised.[12] Problems peculiar to Section 782 have grown out of the need for judicial definitions of such terms as "vehicle" and "facilitation," since a vehicle used to *facilitate* a violation becomes subject to forfeiture.

Insofar as the forfeiture provisions in 49 U.S.C. § 782 are similar to those in other statutes, the solutions to the problems posed will depend largely upon decisions under prior legislation. Therefore, before discussing Section 782, a foundation should be laid by investigating the cases under analogous statutes.

---

7 *Id.* at 3.

8 53 STAT. 1292 (1939), 49 U.S.C. § 784 (1946) provides that the remedies under Section 782 shall be the same as those provided in the customs law. 46 STAT. 757 (1930), 19 U.S.C. § 1618 (1946).

9 46 STAT. 757 (1930), 19 U.S.C. § 1618 (1946) and REV. STAT. § 3078 (1875), are two other laws which failed to provide remedies in district courts.

10 18 U.S.C. § 646 (1946).

11 See Helvering v. Mitchell, 303 U.S. 391, 397, 398, 58 S. Ct. 630, 82 L. Ed. 917 (1938) (collection of tax deficiency plus 50% thereof after acquittal on charge of wilful evasion); Coffey v. United States, 116 U.S. 436, 6 S. Ct. 437, 440-1, 29 L. Ed. 684 (1886).

12 See, *e.g.*, Van Oster v. Kansas, 272 U.S. 465, 466-7, 47 S. Ct. 133, 71 L. Ed. 354 (1926).

I.

Since early in the history of the United States, the Supreme Court has uniformly held that a libel for forfeiture under similar laws is an *in rem* proceeding.[13] Upon that determination the constitutionality of forfeiture provisions has been recognized. Speaking for the Supreme Court in 1827, Justice Story, in *The Palmyra*,[14] said that the *object* proceeded against was the wrongdoer. He distinguished between common law forfeiture, which was a species of punishment requiring a prior conviction, and the *in rem* forfeiture created by statute.

In a prominent case, *Dobbins v. United States*,[15] the Court surveyed the decisions discussing the nature of the proceedings. In that case a distillery had been used in violation of a liquor law. It was held, with emphasis upon the admiralty origin of this concept, that the distillery was the offender and the proceedings were *in rem*. The effect of this holding cannot be over-emphasized.

In a more recent case, *J. W. Goldsmith, Jr.-Grant Co. v. United States*,[16] also under a liquor law, the Court discussed reasons[17] for declaring the statute in violation of the Constitution, but was constrained by the long-standing rule and the *Dobbins* case to hold it constitutional. It also reasoned that the necessities of the Federal Government required that responsibility be placed upon the owner and that the proceeding be *in rem*. The House Committee Report,[18] advising passage of Section 782, quoted from the *Goldsmith* case where it was said:[19]

> . . . Congress interposes the care and responsibility of their owners 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. In such case there is some analogy to the law of deodand. . . .
>
> But whether the reason for . . . [the statute] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.

---

13 The Palmyra, 12 Wheat. 1, 6 L. Ed. 531, 535 (U.S. 1827); Various Items of Personal Property v. United States, 282 U.S. 577, 580, 51 S. Ct. 282, 75 L. Ed. 558 (1931); J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S. Ct. 189, 191, 65 L. Ed. 376 (1921); Dobbins v. United States, 96 U.S. 395, 24 L. Ed. 637, 638 (1878).

14 12 Wheat. 1, 6 L. Ed. 531, 535 (U.S. 1827).

15 96 U.S. 395, 24 L. Ed. 637, 638-9 (1878).

16 254 U.S. 505, 41 S. Ct. 189, 65 L. Ed. 376 (1921).

17 *Id.*, 41 S. Ct. at 190. It was argued that Congress, having in mind the practices in the business world, intended only to punish the guilty and not to deprive the innocent of their property.

18 H.R. Rep. No. 1054, 76th Cong., 1st Sess. 3 (1939).

19 J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S. Ct. 189, 191, 65 L. Ed. 376 (1921).

In a similar vein it has been held that in a forfeiture action, it is the property which is proceeded against through resort to legal fiction.[20] Accordingly, the property has been deemed guilty and condemned as though conscious, instead of inanimate and insentient. (It is anomalous that guilt of a crime be referred to in a discussion of a civil case, but the terminology is that used by the Court.) The Court in *Goldsmith* concluded that the original criminal prosecution was aimed directly at the wrongdoer, but that the forfeiture proceeding was not part of the punishment for the crime.

Under the forfeiture provisions of the customs laws,[21] it was held, in an action brought by an innocent mortgagee, that the divesting of the interest of third persons was not unconstitutional because the forfeiture was directed against the thing and not against the interest of the possessor in it.[22] Under Section 782, the claim of an intervening chattel mortgagee was likewise denied.[23] The registered owner, the mortgagor, who was arrested possessing narcotics in the car, died before being brought to trial. Again it was held that because the proceeding was *in rem*, the ". . . innocence or want of knowledge of the lienor . . . is no bar to the forfeiture." [24]

II.

Coffey v. United States,[25] an 1886 Supreme Court decision which has been much criticized [26] but never overruled, is the cause of much confusion. There the question was raised whether a civil action for forfeiture could be brought by the Government subsequent to conviction or acquittal in a criminal proceeding involving the same facts. The Court stated: [27]

> . . . where an issue raised, as to the existence of the act or fact denounced, has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue as a cause for the forfeiture of the property prosecuted in such suit *in rem*.

---

20 Various Items of Personal Property v. United States, 282 U.S. 577, 581, 51 S. Ct. 282, 75 L. Ed. 558 (1931).

21 49 STAT. 526 (1935), 19 U.S.C. § 483 (1946).

22 United States v. Pacific Finance Corporation, 110 F. (2d) 732 (2d Cir. 1940).

23 United States v. One 1949 Lincoln Coupe Auto., 93 F. Supp. 666 (W.D. Mich. 1950).

24 *Id.* at 669.

25 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684 (1886).

26 In United States v. One Dodge Sedan, 113 F. (2d) 552, 553 (3d Cir. 1940), the court said that ". . . only the shibboleth of 'stare decisis' has saved it from express repudiation."

27 Coffey v. United States, 116 U.S. 436, 6 S. Ct. 437, 440, 29 L. Ed. 684 (1886).

It was held that when the civil action for forfeiture was brought by the Government, *autrefois acquit* properly applied and the action should be dismissed.[28]

The decision in the above case has been distinguished and its application restricted by *Stone v. United States*.[29] There the Court held that even though the form of the forfeiture action in the *Coffey* case was civil, in reality it was a criminal action, penal in nature, stating: [30]

> The rule established in Coffey's Case can have no application in a civil case not involving any question of criminal intent, or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. . . . In the criminal case his acquittal may have been due to the fact that the government failed to show beyond a reasonable doubt the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a verdict.

The application of the *Coffey* rule was limited to the situation in which a second *criminal* action was brought or personal punishment attempted. The key to the Court's decision was the difference in the degree of proof required in the criminal action and in the subsequent civil action for forfeiture. Acquittal was held not to have decided that the violation had not been committed, but merely that proof thereof had failed. The *Stone* case was favorably noted in *Helvering v. Mitchell*.[31] And in two recent cases,[32] courts have adopted the same restricted application favored in the *Stone* decision, relying heavily upon the contention that the same parties were not present in the two actions.[33]

---

[28] *Accord:* National Surety Co. v. United States, 17 F. (2d) 369 (9th Cir. 1927); United States v. One De Soto Sedan, 1946 Model, 85 F. Supp. 245 (E.D. N.C. 1949). For an explanation and discussion of the quasi-criminal nature of forfeiture as a basis for the decision in the *Coffey* case, see Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 534-5, 29 L. Ed. 746 (1886).

[29] 167 U.S. 178, 17 S. Ct. 778, 42 L. Ed. 127 (1897); *accord,* Murphy v. United States, 272 U.S. 630, 47 S. Ct. 218, 71 L. Ed. 446 (1926).

[30] Stone v. United States, 167 U.S. 178, 17 S. Ct. 778, 782, 42 L. Ed. 127 (1897).

[31] 303 U.S. 391, 397, 58 S. Ct. 630, 82 L. Ed. 917 (1938).

[32] United States v. Gramer, 191 F. (2d) 741, 744 (9th Cir. 1951); United States v. One 1935 Model Pontiac Sedan Automobile, 105 F. (2d) 149, 150 (6th Cir. 1939). The first was brought for violation of the Pure Food and Drug Act, 52 STAT. 1040 (1938), 21 U.S.C. § 301 (1946), and the latter under the liquor laws, 53 STAT. 401 (1939), 26 U.S.C. § 3321 (1946).

[33] This theory was further supported in Mitchell v. Commissioner of Internal Revenue, 89 F. (2d) 873, 878 (2d Cir. 1937): "The only rule necessarily derivable from Coffey v. United States would seem to be that an acquittal in a criminal prosecution is a bar to a civil action to enforce fines or forfeitures *of property which are in their nature criminal penalties.* Though this rule seems hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility, it is implicit in the decision of Coffey v. United States which is binding on us in the absence of a modification by the Supreme Court." [Emphasis supplied.]

The question has been raised whether the fact that the second case was a civil action would permit a second punishment, in the nature of a penalty, on the same set of facts.[34] If the forfeiture is held a punishment, the type of action cannot change that fact. "To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the Government delusive and useless." [35]

III.

It has been held that forfeiture of property for violation of internal revenue and customs laws, regardless of ownership, innocence or guilt, does not deprive an owner of his property without due process of law.[36] In *Logan v. United States,*[37] the court held it to be a settled point of law

> . . . that personal property voluntarily committed by the owner to the possession of a third person, for use by him, becomes subject to forfeiture . . . though the owner has no knowledge of the illegal use to which it is put by the possessor.

In *Van Oster v. Kansas,*[38] as a part of the contract of purchase of an automobile, the vendor retained possession for use in his business. The Supreme Court held that there was no violation of due process when the car was forfeited because one to whom it was loaned by the dealer carried contraband liquor in it. It was found to be long settled that the forfeiture of property entrusted by an innocent owner or lienor to another, who uses it in violation of the law, is not a violation of due process for ". . . certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril." [39]

In an attack on the constitutionality of Section 782, a claimant contended that the law was beyond the scope of congressional power and was a mere police regulation. The court held that the close relationship between this Section and the tax laws caused it to fall under the same constitutional approbation as other provisions of the anti-narcotics laws.[40] Further, the court pointed out that since transportation is an aid to tax evasion, a law aimed at hindering transport has tax collection as its purpose.[41]

---

34 See United States v. Chouteau, 102 U.S. 603, 26 L. Ed. 246, 249 (1881).

35 *Ibid. Accord:* United States v. La Franca, 282 U.S. 568, 574, 51 S. Ct. 278, 75 L. Ed. 551 (1931).

36 *E.g.,* Logan v. United States, 260 Fed. 746, 748-9 (5th Cir. 1919).

37 *Id.,* 260 Fed. at 749.

38 272 U.S. 465, 47 S. Ct. 133, 71 L. Ed. 354 (1926).

39 *Id.,* 272 U.S. at 467. See also United States v. One Ford Coupe Automobile, 272 U.S. 321, 47 S. Ct. 154, 71 L. Ed. 279 (1926); General Finance Co. of Louisiana v. United States, 45 F. (2d) 380 (5th Cir. 1930).

40 United States v. Childs, 43 F. Supp. 776, 777 (N.D. Ga. 1942).

41 *Cf.* United States v. One 1937 Hudson Terraplane Coupé Automobile, 21 F. Supp. 600 (N.D. Ky. 1937). It is not necessary to show that the United

The importance of the decisions holding forfeiture proceedings to be *in rem* [42] is underscored in the attacks upon the constitutionality of Section 782. That the claimant is an innocent owner, lienor, or mortgagee is immaterial under this principle,[43] for the action is brought against the vehicle, not the owner. Furthermore, the acquittal or conviction is no bar because the parties are not the same. In the forfeiture action it is the car that is proceeded against, not its owner. Therefore, there is no readjudication. Since the defense of double jeopardy is proper only when the same individual is placed on trial for a second time in criminal actions for the same offense, the *in rem* nature of the proceeding defeats that contention.[44] The objection, on constitutional grounds, that forfeiture of a vehicle owned by an innocent third party deprives him of property without due process is also weakened by cases ruling that the proceeding is against the vehicle, not its owner. The owner is not deprived of his property, but rather, in theory, the object redresses the Government for the injury it has caused.

The principles discussed previously are well established in forfeiture cases. However, most of the decisions cited concerned statutes other than that presently under consideration. There has been little litigation of such matters under 49 U.S.C. § 782. One of the few cases is *United States v. One 1940 Packard Coupe*,[45] where the district court, in considering a libel for the forfeiture brought for transporting counterfeit coins,[46] said:[47]

> This is a proceeding in rem, against the car, in which the law ascribes to it a power of complicity and guilt in the offense. And in the light of the authorities, it is now too late to attempt a construction of the statutes here involved as exempting from forfeiture the interest of a person in a chattel for the reason that he was guiltless. It is no longer necessary to quote in support of this well established doctrine the common law as to deodands or the Mosaic law as to the punishment inflicted upon an ox which gores a man.

Therefore the claims of an innocent lienor and owner were denied and the claimants were left to the remedy of an appeal to the Secretary of the Treasury for remission or mitigation.

States was actually deprived of revenue. Bush v. United States, 16 F. (2d) 709, 710 (5th Cir. 1927).

42 United States v. One Ford Coupe Automobile, 272 U.S. 321, 47 S. Ct. 154, 71 L. Ed. 279 (1926); also see footnote 13 *supra*.

43 Busic v. United States, 149 F. (2d) 794, 795 (4th Cir. 1945).

44 United States v. One Saxon Automobile, 257 Fed. 251 (4th Cir. 1919); United States v. Plymouth Coupe, 88 F. Supp. 93, 97 (W.D. Pa. 1950).

45 36 F. Supp. 788 (D. Mass. 1941).

46 Defined as contraband in 53 STAT. 1291 (1939), 49 U.S.C. § 781 (3) (1946) and within the provisions of 53 STAT. 1291 (1939), 49 U.S.C. § 782 (1946).

47 United States v. One 1940 Packard Coupe, 36 F. Supp. 788, 790 (D. Mass. 1941).

Another decision under 49 U.S.C. § 782 in dicta declared a prior acquittal or conviction to be irrelevant.[48] The lienor's lack of knowledge, in view of the rule that the proceeding is *in rem*, was no defense. This also has been considered in dicta.[49] Likewise, the fact that the Act is an extension of the deodand doctrine [50] and that a forfeiture under it involves no denial of due process, even though the claimant is innocent, has been similarly noted.[51] The principle of the *Coffey* case was by-passed in *United States v. Physic*.[52] The court held that an acquittal of the owner of the automobile was not res judicata with regard to the issues involved in a forfeiture proceeding since the innocence of the owner would be no defense to the libel.

IV.

Much of the litigation under Section 782 has involved the definitions of some of its terms and a clarification of its remedies. Section 787 [53] provides that the term "vehicle"

> . . . includes every description of carriage or other contrivance used, or capable of being used, as means of transportation on, below, or above the land, but does not include aircraft. . . .

Biasotti v. Clarke [54] held that a house trailer, which served as a residence, being connected to sewer, water and electricity lines, but which had carried narcotics, was a vehicle because it had been used to facilitate transportation.[55] The claimant had argued that the house trailer was a home and not a vehicle.

No little confusion has developed in cases construing the term "facilitate." The courts have agreed [56] with the rule in *Pon Wing Quong v. United States* [57] that to "facilitate" is to make "less difficult" or "easy"; perplexities arise when application of these definitions to specific cases is sought.

---

48 United States v. One 1949 Lincoln Coupe Auto, 93 F. Supp. 666, 669 (W.D. Mich. 1950).

49 *E.g.*, United States v. One (1) Oldsmobile Sedan, 75 F. Supp. 83, 86 (E.D. La. 1948); United States v. One 1946 Plymouth Sedan, 73 F. Supp. 88, 89-90 (E.D. N.Y. 1946).

50 A common law doctrine under which an instrumentality or animal which had caused the death of a human was tried, convicted and destroyed because of its role in the death. See SALMOND, JURISPRUDENCE 431 (7th ed. 1924); SEAGLE, THE HISTORY OF LAW 126 (1946).

51 *E.g.*, United States v. One 1946 Plymouth Sedan, 73 F. Supp. 88, 90 (E.D. N.Y. 1946).

52 175 F. (2d) 338 (2d Cir. 1949).

53 53 STAT. 1292 (1939), 49 U.S.C. § 787 (1946).

54 51 F. Supp. 608 (D. R.I. 1943).

55 Under this definition *anything* capable of containing narcotics and of moving, or being moved, would seem to be a vehicle. The court commented, *ibid.*, on the harshness of the law, but said it must follow the definition Congress had set down.

56 *E.g.*, Platt v. United States, 163 F. (2d) 165, 167 (10th Cir. 1947).

57 111 F. (2d) 751, 756 (9th Cir. 1940).

In *United States v. One Dodge Coupe*,[58] the car was driven to a location where the driver parked it, entered another vehicle and drove away. Later he returned and proceeded toward the parked car. Before re-entering it, he was apprehended and heroin was found in a parcel which he had brought from the second car. The parked automobile was charged with facilitating the violation. Forfeiture was decreed because in carrying the driver a portion of the distance to the narcotics, the car made it less difficult for him to secure them.

Apparently to mitigate the harshness of the above orthodox rule, the court in *Platt v. United States* [59] established a semantic distinction not expressly called for in Section 784. The issue before the court was whether the family car, driven by an addicted daughter to a nearby drugstore where she purchased morphine, was used to "facilitate" the violation of the narcotics laws. The court, in dismissing the Government's forfeiture proceeding, held that the use of the car did not make the actual purchase easier or remove any hindrance from the sale. It reasoned that the car ". . . was merely the means of locomotion by which . . . [the addict] went to the store to make the purchase," [60] and that the consummation of the sale was not affected by the means employed to reach the place of purchase.[61] This decision has been followed in dicta.[62]

In support of *Platt,* perhaps because it recognized *Platt's* equitable result, the court in *United States v. One 1941 Pontiac Sedan* [63] added further rationalization to buttress that decision. This was based on the ground that the automobile in the *Platt* case was used by an addict and not by a narcotics peddler, as it was in the *One Dodge Coupe* case. The rationale offered for this distinction was the value of the auto to the peddler in enabling him to avoid discovery and detection: [64]

> He can travel greater distances, follow less frequented streets or roads, move about at will and alone, and be completely independent of public means of conveyance. . . . It is an operating tool of the dope peddler's trade.

This distinction was likewise followed in *United States v. Ford Coupe Automobile* [65] where the court also emphasized the calculated action of the claimant there — a peddler, as compared to the innocent act

---

[58] 43 F. Supp. 60 (S.D. N.Y. 1942).

[59] 163 F. (2d) 165 (10th Cir. 1947).

[60] *Id.* at 167.

[61] The court commented, *ibid.,* that such construction was necessary to avoid ruling the statute unconstitutional on the grounds of vagueness and uncertainty.

[62] United States v. One 1949 Ford Sedan, 96 F. Supp. 341, 343-4 (W.D. N.C. 1951).

[63] 83 F. Supp. 999 (S.D. N.Y. 1948).

[64] *Id.* at 1002.

[65] 83 F. Supp. 866 (S.D. Cal. 1949).

of the mother in *Platt* who unwittingly provided her daughter with the means for accomplishing a breach of the law.

The distinction serves justice, but there is no basis in the statute for distinguishing between the use of a vehicle by an addict and the use by a peddler. The law provides that a vehicle which facilitates a violation of the narcotics law shall be forfeited [66] and the acts of both addict and peddler are violations of the law. Also, it is difficult to comprehend the foundation for the distinction between "facilitation" and "locomotion"; locomotion is merely a species of facilitation. Apparently the decisive factor in the above cases has been the degree of participation in the violation. However, the statute does not provide for degrees.[67]

The injustice which can arise in forfeiture cases is intimated in *United States v. One 1949 Ford Sedan.*[68] The owner of the auto allowed his brother to use it on a day on which the brother was later proved to have violated the narcotics laws. The brother was seen driving the car. Several days later, the owner traded the car to an innocent third party, in exchange for another car. Forfeiture proceedings were brought against the car in the hands of the third party. The libel was unsuccessful because the evidence failed to positively link the use of the car to the violation, but the case demonstrates possible injustices.

Under the liquor law enacted in 1935,[69] district courts are empowered in forfeiture proceedings to remit or mitigate in favor of an innocent and unknowing owner. A lienor or mortgagee who has made a preliminary investigation of the reputation of the car owner in accord with the requirements of the liquor statute, likewise has a remedy in the district courts.

Section 784 [70] of the Act incorporates the remedies applicable under the customs laws. But, unlike the present liquor laws, remission and mitigation under the customs law are matters of grace, not of right.[71]

66 53 STAT. 1291 (1939), 49 U.S.C. § 781 (1946).

67 The court in the *Platt* case, 163 F. (2d) at 167, limited application of the term "facilitation" to a situation in which *direct aid* to the transfer of the goods is provided by the vehicle. An acceptance of so narrow a definition could logically require courts to decide that a car used in carrying an addict to the situs of the transaction, however distant, was a mere means of locomotion and did not make the purchase less difficult. If this distinction were followed, facilitation would seem to be impossible save in unusual situations where, for example, the headlights of the vehicle are used to illumine the scene of the transaction.

68 96 F. Supp. 341 (W.D. N.C. 1951). As to when forfeiture takes place see The Harpoon II, 71 F. Supp. 1022 (D. Mass. 1947); United States v. One Oldsmobile Sedan, 23 F. Supp. 323 (D. Ore. 1938).

69 18 U.S.C. § 646 (1946).

70 53 STAT. 1292 (1939), 49 U.S.C. § 784 (1946).

71 The Olympia, 58 F. (2d) 638, 641 (D. Conn. 1932).

The district courts under this law have no power to remit or mitigate. The sole authority to do so is vested in the Secretary of the Treasury.[72] Furthermore, the courts have no authority to release the car on bond *pendente lite*.[73] In *United States v. One 1946 Plymouth Sedan*[74] the court said:

> I admit that on the argument of this motion I expressed unwillingness to believe that the forfeiture laws are as harsh as . . . they are. But analysis of the cases demonstrates, at least to me, that the claimant has no remedy in this Court even if he is innocent.

Section 782 provides an exception for a car acquired in violation of the criminal law; in this circumstance forfeiture is denied the Government. Interesting cases have arisen under this provision. In *United States v. One 1941 Chrysler Brougham Sedan*,[75] a car was obtained from an automobile rental service after an agreement was signed that it would not be used in violation of federal laws. It was subsequently used to violate the narcotics laws. The court denied the owner's claim that a car so obtained by the bailee was taken from him in a manner entitling him to benefit from the exception. The court distinguished between false pretenses and larceny, and held the former to be no grounds for dismissal.

In *United States v. One 1938 Chevrolet Coach Automobile*,[76] the owner claimed that her husband, the user of the car, while he was intoxicated and in a stupor, allowed two men to drive it. The strangers were arrested and narcotics found in their possession. The court ruled the husband's condition negatived consent; therefore the car had been taken without consent and in violation of the criminal law.

Conclusion

The necessity of the forfeiture provision, as pointed out by Representative Robertson in the Report of the House Ways and Means Committee,[77] cannot be denied. It is doubtful, however, that the law need be as harsh as it is. The liquor laws make remission a matter of right in the case of innocent third parties and vest power of remission in the district courts. There seems to be no reason why Section 784 cannot be amended to accomplish the same result.

The forfeiture provision under discussion is not here condemned, but only the remedies it provides, or rather fails to provide. An appeal

---

72 See United States v. Andrade, 181 F. (2d) 42 (9th Cir. 1950), and United States v. One Oldsmobile Club Coupe 1939 Model, 33 F. Supp. 848 (D. Conn. 1940), where remission under a statute similar to 53 STAT. 1291 (1939), 49 U.S.C. § 781 (1946) was considered.

73 United States v. Heckinger, 163 F. (2d) 472, 474 (2d Cir. 1947).

74 73 F. Supp. 88, 89 (E.D. N.Y. 1946); *accord*, United States v. One 1940 Packard Coupe, 36 F. Supp. 788 (D. Mass. 1941).

75 74 F. Supp. 970 (E.D. Mich. 1947).

76 78 F. Supp. 676 (W.D. S.C. 1948).

77 H.R. REP. No. 1054, 76th Cong., 1st Sess. 2 (1939).